CONFLICT OF JURISDICTIONS: A FUNDAMENTAL RIGHTS PERSPECTIVE OF THE QAZALBASH WAQF CASE

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Conflict of Laws.. Bankruptcy
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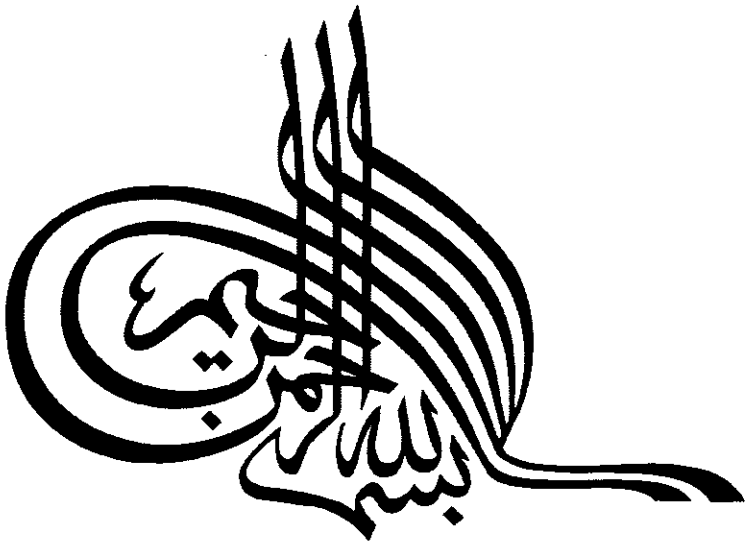

In the name of Allah,
the Most Beneficent,
the Most Merciful

International Islamic University, Islamabad
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FINAL APPROVAL CERTIFICATE

This is to certify that we have evaluated the thesis: "***Conflict of Jurisdictions: A Fundamental Rights Perspective of the Qazalbash Waqf Case***" submitted by Ghufran Ahmed, Registration # 17-SF/PHDLAW/F12, in partial fulfillment of the requirements of the degree of Ph. D Law at the International Islamic University, Islamabad. The thesis fulfills the requirements in its core and quality for the award of the degree of Ph. D Law.

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TABLE OF CONTENTS

Abstract

The Constitution of the Islamic Republic of Pakistan 1973 has various salient features. Among these salient features democratic character of the Constitution as well as its Islamic colour have special importance. The democratic character of the Constitution is recognized by the conferment of certain basic human rights to the people in Pakistan. These rights are available in the Constitution in the form of the fundamental rights while few others in the form of the principles of policy.

Besides, the Supreme Court and the High Courts have been vested with powers under articles 184(3) and 199 of the Constitution respectively to enforce the fundamental rights as well as to declare any law void if the same is inconsistent with the fundamental rights. Likewise, the Federal Shariat Court (FSC) has the jurisdiction under article 203D of the Constitution to declare a law void if the same is repugnant to the injunctions of Islam. Moreover, a Shariat Appellate Bench of the Supreme Court (SAB) has been established and given the power to hear appeals under article 203F of the Constitution against the decisions of the FSC.

It follows that a law to be valid must neither be inconsistent with the fundamental rights nor repugnant to the injunctions of Islam. Any singular declaration that a law is not inconsistent with the fundamental rights is not sufficient for the validity of that law as long as that law does not pass the test of repugnancy with the injunctions of Islam and *vice versa*. These tests have been recognized by the constitutional courts and successfully applied in a number of cases.

Nonetheless, on the basis of article 189 and article 203G read with other provisions of chapter 3A both the Supreme Court as well as the FSC have held that the decision of the either court is binding on the other. Consequently, the Supreme Court has shown reluctance to determine the

fate of a law on the touchstone of the fundamental rights where the FSC has declared that law not repugnant to the injunctions of Islam. In the like manner, the FSC has declined to determine the validity of a law on the touchstone of the injunctions of Islam where the Supreme Court has declared that law not inconsistent with the fundamental rights. In this work, it has been asserted that each provision of law must pass both these tests simultaneously.

One step further, a law declared void hence nonexistent under chapter 3A can still be revived and enforced by the Supreme Court if the jurisdiction has been exercised under chapter 3A with respect to a law that has been excluded from the definition of law for the purposes of chapter 3A, that particular law is essentially required to protect the fundamental rights of a class of people, and any provision of the Constitution is rendered ineffective or inoperative due to such declaration under chapter 3A. On the contrary, a law declared void by the Supreme Court cannot be enforced by any court.

Land reforms laws were promulgated in Pakistan under the specific mandate of article 253 of the Constitution which, *inter alia,* empowers the Parliament to prescribe maximum limits as to the property that can be owned, held or possessed by any individual. These laws were introduced to protect the fundamental rights of the poor rural population associated with land. Moreover, the social evils prevailing in village societies could only be effectively eradicated by suitable legislation under article 253. This would have the effect of promoting social justice and economic well being of these people.

The SAB has declared various significant provisions of these laws repugnant to the injunctions of Islam in the Qazalbash Waqf case. Nevertheless, all the conditions mentioned above for the revival of a law by the interference of the Supreme Court are found in this judgment. Therefore, the Supreme Court while exercising jurisdiction under article 184(3) read with other enabling

provisions of the constitution can set aside the effects of this judgment being per incuriam and revive the land reforms laws.

To the innocent Muslims

of the Indo-Pak sub-continent

who have been fooled more than once

on the pretext of Islam

DECLARATION

INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD
STATEMENT OF UNDERSTANDING

I, Ghufran Ahmed, bearing the university registration number 17-SF/PHDLAW/F12, declare in the name of Allah that my thesis titled,

"Conflict of Jurisdictions:

A Fundamental Rights Perspective of the Qazalbash Waqf case,"

submitted to the Department of Law, Faculty of Shariah and Law, is a genuine work of mine originally conceived and written down by me under the supervision of Prof. Dr. Farkhanda Zia, by Allah's will and approbation.

I do, hereby, understand the consequences that may follow, if the above declaration be found contradicted and/or violated, both in this world and in the hereafter.

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CHAPTER 1

INTRODUCTION

Introduction

There are certain basic and salient features of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution)[1]. These features have been expressed in unequivocal words in the preamble of the Constitution[2]. Moreover, the superior courts of the country have reiterated these features time and again in their judgments. These features include Islamic provisions, democracy, fundamental rights, independence of judiciary, federal character of the State, and so on. However, for the purposes of the present research, the focus will be restricted to only two of these features. These are the Islamic colour of the Constitution and its democratic character. In fact, these two features are the fundamental precepts of the Constitution. The same gets support from the judgment of the Supreme Court of Pakistan which it rendered in Workers' Party Pakistan case recently[3]. In this case, the apex court remarked that the will of the people of Pakistan is represented through its Constitution. The people want to exercise their will through their chosen representatives within the limits prescribed by Allah in this regard. The Court said:

> ...the 1973 constitutional Order is a living manifestation of the will of the people of Pakistan. In this Order, the people have made clear that all authority to govern shall be exercised within the limits prescribed by Allah, and only by or on behalf of the people of

[1] The official title of the Constitution is provided in Article 265(1) and it is, "the Constitution of the Islamic Republic of Pakistan." In the following pages reference will also be made to the previous Constitutions of Pakistan. After independence in 1947, the country was governed under the provisions of the Government of India Act, 1935. Pakistan got its first independent Constitution in 1956 but it was abrogated in 1958. In 1962 Pakistan got another Constitution which lasted till 1969. In 1972 Pakistan adopted an interim Constitution. Finally, the present Constitution was made on 12th April 1973 and it came into force on 14th August 1973.

[2] The Objectives Resolution, 1949 forms the preamble of the Constitution. It is a very important document in the constitutional history of Pakistan. The objectives and goals set out in this Resolution have been made a substantive part of the Constitution vide article 2A. A detailed discussion on the status of the provisions of this Resolution before and after the incorporation of article 2A is made in chapter 3 under heading 3.2.2 below.

[3] Workers' Party Pakistan through General Secretary and 6 others versus Federation of Pakistan and 2 others, PLD 2012 Supreme Court 681.

> Pakistan. This Order, therefore, rests on two fundamental precepts. Firstly, that the exercise of this authority shall be informed and circumscribed by the principles of Islam, and secondly, that the people of Pakistan shall play an integral role in the exercise thereof...[4]

Needless to mention, that the basic human rights conferred by the Constitution in the form of the fundamental rights while some others in the form of the principles of policy form the essence of its democratic character. It is for this reason that the Lahore High Court in D.G. Khan Cement Company Ltd. case remarked, "Fundamental rights and their protection are essential to a modern democracy.[5]" Similarly, the Court said, "Our Constitution with its preamble, fundamental rights and principles of policy hold out our democratic values. The proper purpose behind sub-constitutional legislations is to upload these constitutional values.[6]"

Thus, the preamble after recognizing that the sovereignty over the entire Universe belongs to Almighty Allah alone, goes on to mention that the principles of democracy, equality and social justice as enunciated by Islam will be fully observed in Pakistan. Moreover, the preamble fully guarantees the fundamental rights including the economic, social and political justice. After mentioning certain other goals, the preamble recalls that Pakistan would be a democratic State based on Islamic principles of social justice.

In order to achieve the goals set out in the preamble, the Constitution, *inter alia,* contains extensive provisions for the conferment, realization and enforcement of the fundamental rights. Similarly, there are substantive provisions in the Constitution regarding its Islamic character for enabling the Muslims to order their lives according to the teachings of Islam as set out in the Holy Quran and the Sunnah of the Holy Prophet (PBUH) usually referred to as the injunctions of Islam.

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[4] Ibid. Paragraph 35. Underlining is mine.
[5] D.G. Khan Cement Company Ltd. through Chief Financial Officer versus Federation of Pakistan through Secretary Ministry of Law and 3 others, P L D 2013 Lahore 693, Paragraph 17.
[6] Ibid. Paragraph 22.

As far as the conferment of the fundamental rights is concerned, the Constitution contains a complete chapter titled "Fundamental Rights.[7]" It contains as many as 24 articles starting from article 8 to article 28 with three articles added through the eighteenth constitutional amendment[8]. However, for the purposes of the present research, the discussion will be restricted to few of these articles. Similarly, there are various other provisions contained in the Constitution for the realization of the rights conferred by the Constitution such as articles 2A, 3, 37, 38, 253 and others. But the discussion will be restricted to those only expressly mentioned here. Finally, for the enforcement of these rights the Constitution, on the one hand, restricts the State, more particularly the legislature, from making any law inconsistent with the fundamental rights under article 8, while on the other hand, it establishes the Supreme Court and High Courts. These courts have been vested with jurisdictions not only to enforce these fundamental rights but also to declare void any law inconsistent with the fundamental rights[9]. The relevant part of article 8 states as:

> (1) 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.
>
> (2) The State shall not make any law which takes away or abridges the rights so conferred and any law made in contravention of this clause shall, to the extent of such contravention, be void...[10]

The two Courts i.e. the Supreme Court and the High Courts, of course, have their own scope of jurisdiction for the enforcement of the fundamental rights[11]. For the purposes of this research, the

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[7] It is Chapter 1 of Part II of the Constitution.

[8] Articles 10A, 19A and 25A were inserted by Sections 5, 7 and 9 respectively of the Constitution (Eighteenth Amendment) Act, 2010.

[9] Article 8 restricts the power of the State to make any law inconsistent with any of the Fundamental Rights conferred by the Constitution. Similarly, the Supreme Court is established under article 176 while High Courts are established under article 192 of the Constitution.

[10] See article 8 of the 1973 Constitution.

[11] The Supreme Court exercises jurisdiction for the enforcement of the fundamental rights under article 184(3) while a High Court exercises such jurisdiction under article 199 of the 1973 Constitution.

original jurisdiction of the Supreme Court under article 184(3) will be discussed largely while the jurisdiction of High Courts under article 199 will be discussed only with reference to the jurisdiction of the Supreme Court.

With regard to the Islamic character of the Constitution, it is important to note that article 2A declares the principles and provisions contained in the Objectives Resolution, 1949 to be a substantive part of the Constitution. Similarly, apart from few Islamic provisions contained in the principles of policy, one complete part of the Constitution is dedicated to Islamic Provisions and is named as such. Hence, articles 227 to 231 are contained in Part IX of the Constitution called "Islamic Provisions." It is worth mentioning here that a very significant constitutional body called the Council of Islamic Ideology is formed under this Part. This Council has to perform a number of very important functions regarding the islamization of laws in Pakistan. One of the most significant functions of this Council is to make recommendations to the Parliament and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of the country to order their lives in accordance with the injunctions of Islam[12]. Besides, article 227 requires the State to bring all laws in conformity with the injunctions of Islam and restricts the power of the State to make any law which would be repugnant to such injunctions. Importantly, in Part VII of the Constitution titled "The Judicature" a chapter 3A is found. Under this chapter a Federal Shariat Court (FSC) and a Shariat Appellate Bench of the Supreme Court (SAB), to hear appeals against the decisions of the former Court, have been established. The FSC is vested with the exclusive jurisdiction under article 203D to turn down any law if held repugnant to the injunctions of Islam.

[12] Article 230(1) of the 1973 Constitution enumerates the functions of the Council of Islamic Ideology. A detailed discussion regarding this body is available in chapter 3 under heading 3.4 below.

What has been discussed above clearly establishes that any law which is inconsistent with the fundamental rights or is repugnant to the injunctions of Islam will be ultra vires of the Constitution hence void. Similarly, the Supreme Court can exercise jurisdiction under article 184(3) to enforce the fundamental rights. In other words, the Supreme Court is the guardian of the Constitution generally and that of the fundamental rights in particular. While the FSC can exercise jurisdiction under article 203D to check whether any law is repugnant to the injunctions of Islam, and turn down the same if found so repugnant. However, there are certain laws which have been expressly saved from the jurisdiction of the Supreme Court and a High Court as well as from the jurisdiction of the FSC. It means that such laws will still be valid even if they are inconsistent with the fundamental rights or repugnant to the injunctions of Islam. For instance, clause 3 of article 8 excludes certain laws either conditionally or absolutely from the operation of the first two clauses of this article reproduced above. This provision states as:

> (3) The Provisions of this Article shall not apply to—
> (a) any law relating to members of the Armed Forces, or of the police or of such other forces as are charged with the maintenance of public order, for the purpose of ensuring the proper discharge of their duties or the maintenance of discipline among them; or
> (b) any of the —
> (i) laws specified in the First Schedule as in force immediately before the commencing day or as amended by any of the laws specified in that Schedule;

(ii) other laws specified in Part I of the First Schedule;

and no such law nor any provision thereof shall be void on the ground that such law or provision is inconsistent with, or repugnant to, any provision of this Chapter[13].

Likewise, article 203B(c) excludes Constitution, Muslim Personal law and few others from the definition of law for the purposes of chapter 3A. The effect of this provision is that the FSC lacks jurisdiction to declare the excluded laws or any provision thereof void even if the same are, in fact, repugnant to the injunctions of Islam.

In this background if the State following the principles of policy and acting upon the same, makes a law under the specific mandate of a constitutional provision for the promotion and realization of the fundamental rights thus serving the purposes of the Constitution and democracy, can the FSC hold that law repugnant to the injunctions of Islam, hence void? Likewise, can the Supreme Court, as the guardian of the Constitution and the fundamental rights, while exercising jurisdiction under article 184(3) enforce the provisions of that law since it promotes the realization of the fundamental rights, hence a Constitutional and democratic requirement? In other words, what will be the fate of a law which if seen from one perspective appears to be repugnant to the injunctions of Islam while seen from another perspective appears to be essential for the promotion and realization of the fundamental rights?

The above stated questions get even more complex when the doctrine of *stare decisis* as provided in the Constitution comes into play. According to a general exposition of this doctrine, the decision of the Supreme Court in the interpretation of a constitutional or legal provision is binding on all courts in Pakistan including the FSC[14]. In the like manner, the decision of the FSC

[13] See article 8 of the 1973 Constitution.

[14] See article 189 of the Constitution generally.

holding a law repugnant to the injunctions of Islam under article 203D is also binding on all courts in Pakistan including the Supreme Court[15].

It, therefore, poses a conflict of jurisdictions. The present research attempts to settle these issues by analyzing the fundamental rights perspective and various other aspects of a very important case decided by the SAB which has been reported as Qazalbash Waqf and others versus Chief Land Commissioner, Punjab, Lahore and others[16]. It is clarified that this case revolves around the issue of land reforms. It should further be noted that the land reforms are a subject of agro-economics more than a legal issue.

The most desired objectives behind such reforms are to increase the productivity of land, make agricultural a more economic and profitable business, improve the economic and social status of those involved in this vocation and so on. In 1970s many rulers and governments were inspired by socialism. Therefore, a very important aspect of such reforms introduced in Pakistan was redistributive reforms i.e. taking land from big landlords and redistributing the same among the tenants. Nonetheless, the basic principle on which land reforms are carried out is that the benefits from land should go to the actual tillers of the soil.

With the advancement in technology the concept of corporate farming has also emerged. This would mean, that a corporation or a company owns the land and engages the tillers of the soil for the profit of the corporation or the company. One might think that it frustrates the very idea of land reforms in the present era. However, it is not so. If the rights of the actual tillers of the soil are protected by taking suitable measures, the advancement in technology may be very useful for the peasants as well as the corporate industry. This would ensure that tillers get a handsome

[15] See article 203GG of the Constitution generally. It should be noted however, that article 203GG mentions the words High Court and courts subordinate to a High Court. Nonetheless, the Supreme Court is also bound by the decisions of the FSC. This issue has been discussed and analysed in detail in chapter 3 & 5 below.

[16] Qazalbash Waqf and others versus Chief Land Commissioner, Punjab, Lahore and others, PLD 1990 Supreme Court 99 [Shariat Appellate Bench] (hereinafter referred to as Qazalbash Waqf, PLD 1990 SC 99)

share in the profits of the corporation or the company which is sufficient to raise their economic and social status. In almost all regimes of land reforms the fixation of a ceiling on land holding has been recommended[17].

Consequently, the legal aspects of these reforms and legal obstacles, if any, in introducing comprehensive land reforms including the fixation of a ceiling on land holding in Pakistan are analysed in this work. The thesis, "Rendering articles 24(3)(f) and 253 of the Constitution redundant, the Shariat Appellate Bench, in the Qazalbash Waqf case, held fixing of a ceiling on land-holding repugnant to the injunctions of Islam; however, enjoyment and enforcement of the fundamental rights require such fixing and the issue is of public importance, therefore, the Supreme Court can set aside the effects of this judgment to make the said articles effective while exercising its original jurisdiction" is under review.

There are various theories of constitutional interpretation and a number of principles in this regard have been developed. Generally, these theories and principles have been evolved while interpreting different constitutional provisions by the judges of the superior courts of various jurisdictions. A detailed study of all these theories and principles is not desired here. However, the following theories of constitutional interpretation will be followed in this work.

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[17] In this regard, "Agrarian Reforms Impact on the Agriculture Production in the World" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3535170 (last accessed 02.06.2020). "*Economics of Agriculture in the World*" available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3603274 (last accessed 02.06.2020). "Corporate Farming and Rural poverty in Pakistan" available at http://sujo-old.usindh.edu.pk/index.php/Grassroots/article/view/4342 (last accessed 02.06.2020). "Critical Review on past Literature of Rural Development Programs in Pakistan" http://www.ijarp.org/published-research-papers/feb2018/Critical-Review-On-Past-Literature-Of-Rural-Development-Programs-In-Pakistan.pdf (last accessed 02.02.2020). "Key Challenges Facing Pakistan Agriculture: How Best Can Policy Makers Respond? A Note" available at https://www.pide.org.pk/pdf/foodsecurity/research/FS1.pdf (last accessed 02.12.2018). "Land Reforms in Pakistan: A Reconsideration" available at https://www.tandfonline.com/doi/abs/10.1080/14672715.1984.10409782 (last accessed 07.07.2019). "Corporate Farming Comes to Pakistan The Harvest of Globalization & Business Influence" available at https://search.proquest.com/openview/d362dfb64ef02f83d6214f435d8776ca/1?pq-origsite=gscholar&cbl=48578 (last accessed 07.05.2019). "Bypassing poor farmers: Market-based approaches to agriculture in rural Pakistan" available at https://search.informit.com.au/documentSummary;dn=299553462552689;res=IELHSS (last accessed 02.02.2019) are good studies on the subject.

I. The Constitution is not a static document whose meaning is fixed for all times to come by the framers of the Constitution.

Mr. Justice William J. Brennan, a judge of the Supreme Court of the United States while deciding Marsh vs. Chambers upheld the above theory[18]. Since, a constitution is a rigid and a fundamental law which validates all other laws, it is not easy to have frequent constitutional amendments. The interpreters, therefore, have developed the above theory. This follows that the courts should have a progressive approach particularly in interpreting the rights conferred by the Constitution to the people. Resultantly, the courts usually take into account the social-economic conditions of the people while adjudicating upon such matters.

II. The provisions of a constitution should be read as a harmonious whole and every effort should be made to reconcile the apparently conflicting provisions.

A further elaboration of this theory gives us the rule against surplus. Therefore, it is desired that every constitutional provision should be given effect and no clause of a constitution should be rendered redundant or ineffective. Consequently, any interpretation which gives effect to all the constitutional provisions is to be preferred over any other interpretation that results in surplus.

It should be noted that the judgments analysed in this work especially those interpreting the fundamental rights and the principles of policy and those determining the scope of non-obstante clause in chapter 3A adhere to the theories of constitutional interpretation mentioned above.

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[18] Marsh versus Chambers, 463 U.S. 783 (1983). See also Arlin M. Adams, "Justice Brennan And The Religion Clauses: The Concept Of A "Living Constitution"" available at https://core.ac.uk/reader/194049630 (last accessed 02.02.2019). Robert C. Post, "Theories of Constitutional Interpretation" available at http://pgil.pk/wp-content/uploads/2014/12/Theories-of-Constitutional-Interpretation1.pdf (last accessed 02.02.2019), Brandon J. Murrill, "Modes of Constitutional Interpretation" available at https://fas.org/sgp/crs/misc/R45129.pdf (last accessed 02.02.2019). Kenneth R. Thomas, "Selected Theories of Constitutional Interpretation" available at http://pgil.pk/wp-content/uploads/2014/12/R41637.pdf (last accessed 13.12.2018). Michael Moore, "Originalist Theories of Constitutional Interpretation" *Cornell Law Review*, Vol. 73, No. 2 (January 1988), 364-370 available at https://core.ac.uk/download/pdf/216738692.pdf (last accessed 12.12.2018)

1.1 Background of the Study

It is interesting to note that a constitutional petition No. 97/2011 titled Workers Party Pakistan etc. versus Federation of Pakistan etc. filed under article 184(3) of the Constitution invoking the original jurisdiction of the Supreme Court is pending adjudication. In this petition, the petitioners have prayed for setting aside the judgment of the SAB in Qazalbash Waqf case and a direction to the Federation of Pakistan for taking appropriate steps to implement and complete the land reforms. In this petition, the petitioners have also pointed out to another petition filed by them under the same constitutional provision calling in question the permissible electoral practices in Pakistan. By making a reference to the last mentioned petition, they submit that the instant petition be viewed not only in its own right as one that raises immensely important question of feudalism and land reforms in Pakistan but also that it be viewed in the context of electoral practices[19].

On the other hand, the respondents have raised many objections on the maintainability of this petition. One of these objections concerns the jurisdiction of the Supreme Court under article 184(3). According to the respondents the Supreme Court cannot exercise such jurisdiction to set aside the judgment of the SAB in Qazalbash Waqf case. Therefore, the Supreme Court has to determine the maintainability of this petition before it can go any further. This petition was last heard by an eleven member bench of the Supreme Court headed by Iftikhar Muhammad Chaudhry, the Chief Justice of Pakistan on 16.01.2014. Since then the Supreme Court has witnessed the tenure of four chief justices and the fifth is likely to complete his term but the said petition has not been fixed for hearing so far.

[19] The present research is restricted to the analysis of the exercise of jurisdiction by the SAB in Qazalbash Waqf case and the possibility of exercise of jurisdiction by the Supreme Court under article 184(3) to set aside the effects of the said judgment. The analysis of electoral practices in Pakistan does not form a part of this research. However, while analyzing the exercise of the right of association by the depressed classes of the society a reference has been made to the practice of casting votes.

Importantly, there are few reported cases in which the same law has been challenged under different jurisdictions on different perspectives[20]. Moreover, the observations made by the SAB in Capt. (Retd.) Abdul Wajid case are worth quoting here. The SAB observed as follows:

> ...the appellants challenged the impugned law before the Federal Shariat Court on the touch stone of "Islamic Injunctions". It has the jurisdiction under Article 203-D of the Constitution to declare it as repugnant to them, as distinguished from the jurisdiction possessed by the other superior Courts to annul a law on ground of its repugnancy to a fundamental right, as guaranteed in the Constitution[21]."

The above observations of the SAB clarify in no unclear terms that a law may have different perspectives and separate forums have been vested with relevant powers to determine its fate.

In this regard, Syed Shabbir Hussain Kazmi case is discussed here briefly[22]. In this case, the petitioners had filed various Shariat petitions under article 203D in the FSC. Through these petitions certain definitions provided in the Bonded Labour System (Abolition) Act, 1992 such as bonded debt, bonded labour, bonded labourer and bonded labour system were challenged. Besides, few other provisions of this Act such as sections 5, 6, 7, 8 and 11 were also challenged. This challenge was limited only to the extent of repugnancy with the injunctions of Islam. The impugned provisions were not challenged being inconsistent with the fundamental rights. Nonetheless, this case is discussed here because the Bonded Labour System (Abolition) Act, 1992 had been enacted in the light of the proceedings taken and judgments passed by the Supreme Court in the matter of enforcement of fundamental rights Re: Bonded Labour in Brick

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[20] See. for example, Syed Shabbir Hussain Kazmi and others versus Government of Pakistan and others. 2006PLC (C.S.) 49 [Federal Shariat Court], Zaheeruddin and others versus the State and others, 1993 SCMR 1718 [Supreme Court of Pakistan]. The former case is discussed above while the latter is analysed in chapter 5 below because it also involves issues of *stare decisis.*

[21] Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan, PLD 1988 Supreme Court 167 [Shariat Appellate Bench], 170-71; this case has been analysed in detail in chapter 5 below. In fact, in this case the provisions of the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984 (Ordinance No. XX of 1984) were challenged. The same law was also challenged being inconsistent with the fundamental rights as has been analysed in chapter 5.

[22] Syed Shabbir Hussain Kazmi and others versus Government of Pakistan and others, 2006PLC (C.S.) 49 [Federal Shariat Court]

Kiln Industry, 1989 SCMR 139 as well as in Darshan Masih alias Rehmatay and others versus the State, PLD 1990 Supreme Court 513. Since the provisions of this Act protected the fundamental rights of the brick kiln labourers, it fully justified its existence from the fundamental rights perspective. However, its challenge from the perspective of the repugnancy with the injunctions of Islam justifies its discussion at this point. According to section 5 of this Act if a person or any member of his/her family is required to do any work or render any service as a bonded labourer, such custom, practice, instrument, agreement or contract is declared void and inoperative[23]. Similarly, section 11 of this Act is a penal provision. According to this section it is a punishable offence to compel any person to render bonded labour of any kind. The punishment has been prescribed as imprisonment from two to five years or a fine of fifty thousand rupees or both[24]. These provisions from the fundamental rights perspective abolished the bonded labour. On the contrary, from the Islamic perspective it was argued that Islam provides freedom of contract. Therefore, any law that declares a lawful contract inoperative while the same has been made with free will though it be a contract of bonded labour should be declared void being repugnant to the injunctions of Islam. This argument therefore, insisted on the subsistence of bonded labour. This posed a conflict of jurisdictions between the Supreme Court on the one hand and the FSC on the other.

The FSC making a reference to the above mentioned two judgment of the Supreme Court which resulted in the legislation of the Bonded Labour System (Abolition) Act, 1992 said, "...what the petitioners really seek is the effacement of the binding effect of the two judgments, which is not

[23] Section 5 states as, "Any custom or tradition or practice or any contract, agreement or other instrument, whether entered into or executed before or after the commencement of this Act, by virtue of which any person, or any member of his family, is required to do any work or render any service as a bonded labourer, shall be void and inoperative."

[24] Section 11 states as, "Whoever, after the commencement of this Act compels any person to render any bonded labour shall be punishable with imprisonment for a terms which shall not be less than two years nor more than five years, or with fine which shall not be less than fifty thousand rupees, or with both."

permissible in law[25]." Nonetheless, the Shariat petitions were dismissed not only on this ground alone but also on merits. It was held that Islam forcefully prohibits from extracting bonded labour from any person. Therefore, the law that abolishes this practice cannot be declared repugnant to the injunctions of Islam. Rather, the same is very much in conformity with such injunctions.

The above referred constitutional petition No. 97/2011 also poses a conflict of jurisdictions. However, the said petition is almost a reverse of Syed Shabbir Hussain case discussed above. In this case, the petitioners prayed for the revival of the bonded labour system which had been declared void being inconsistent with the fundamental rights. On the other hand, in the said petition, the petitioners have prayed for the revival of the land reform laws which have been declared void being repugnant to the injunctions of Islam by the SAB.

A very important aspect of land reform laws is the fixation of ceiling on land-holding. Ceiling is fixed on land-holding to liquidate and abolish the exploitative institution of landlordism and feudalism. In order to elaborate the social evils and violations of the fundamental rights caused by this institution, we have to study land tenure in its historical and social perspective.

1.2 Land Tenure and Institution of Landlordism

Land tenure generally refers to the rights in the land or the nature of these rights[26]. According to the Oxford Advanced Learner's dictionary "tenure" means the legal right to...use a piece of land[27]. Similarly, the Black's law dictionary defines it as a right, term, or mode of holding lands or tenements in subordination to some superior; or a particular feudal mode of holding lands...[28]

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[25] Syed Shabbir Hussain Kazmi and others versus Government of Pakistan and others, 2006 PLC (C.S.) 49 [Federal Shariat Court], Paragraph 8

[26] B. H. Baden Powell, *Land Revenue and Tenure in British India* (New York: Macmillan & Co., 1894)

[27] https://www.oxfordlearnersdictionaries.com/definition/english/tenure?q=tenure (last accessed 01.12.2018)

[28] Black's Law Dictionary, 9th Edition. 2009

So, land tenure can be described as a system which "indicates the way in which a cultivator retains land. In case of tenants, it reflects the occupancy of land, security of tenure, inheritance and transferability of tenancy rights, etc.[29]" The Food and Agriculture Organization of the United Nations comprehensively describes land tenure as a system that determines who can use what resources of land for how long, and under what conditions. Therefore, it plays a very significant role in the determination of social, political and economic structures in the rural and village communities. It is so because if the rights and liabilities are not well defined, it is open to exploitation of the weaker by the stronger[30].

Particularly in Pakistan the status of a person on land and his/her rights to use it, determine his/her social status in the village community. Thus, there is an urge to hold land with maximum rights. The report of the Land Reforms Commission for West Pakistan, 1959 has made very interesting observations in this regard[31]. The report reads:

> The status of a man on land and his right to the use of land also defines his social status in the society. The ownership of land has accordingly come to be regarded as a symbol of prestige, its management as an instrument of power and its possession as a security against want...Those who do not own land are relegated to a socially inferior position with all the disabilities of that position[32].

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[29] Dr. Hareet Kumar Meena. "Land Tenure Systems in the late 18th and 19th century in Colonial India." *American International Journal of Research in Humanities. Arts and Social Sciences* 9(1), December 2014-February 2015, 66. (Hereinafter referred as Hareet Meena, Land Tenure Systems in India.) See also: Government of Pakistan. National Planning Board. *The First Five Year Plan: 1955-1960.* Karachi, December 1957. "Land Reforms" in *Land Reforms in Pakistan: A Historical Perspective*, ed. Syed Nawab Haider Naqvi, Mahmood Hassan Khan and M. Ghaffar Chaudhry (Islamabad: Pakistan Institute of Development Economics, 2000), 137. (Hereinafter referred as First Five Year Plan, *Land Reforms in Pakistan*, ed. Nawab Haider et al.)

[30] http://www.fao.org/docrep/005/y4307e/y4307e05.htm (last accessed 01.12.2018)

[31] On October 31, 1958 the Chief Martial Law Administrator appointed a seven member Pakistan Land Reforms Commission. The report of this Commission was submitted with the title "*Report of the Land Reforms Commission for West Pakistan*, Lahore, 1959."

[32] Report of the Land Reforms Commission for West Pakistan, Lahore, 1959, "The Land Tenure Problem" in *Land Reforms in Pakistan: A Historical Perspective*, ed. Syed Nawab Haider Naqvi, Mahmood Hassan Khan and M. Ghaffar Chaudhry (Islamabad: Pakistan Institute of Development Economics, 2000), 167-68. (Hereinafter referred as Land Reforms Commission, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE))

The rulers of every age have been conscious about the land tenure since the revenue collected from the agriculturalists has always been one of the major sources of State revenue[33]. When there was plenty of land available due to limited number of cultivators, it was believed that the king was the sole owner of the land but for all practical purposes the real ownership of the land vested in the actual tiller of the soil and the king had only the power to increase or decrease the land tax. This form of land tenure continued for ages in the sub-continent with some small modifications here and there. The same tenure known as the peasant proprietorship was prevalent in the sub-continent when the English East India Company landed here in the decaying years of the Mughal Empire[34]. However, the rulers also awarded different areas of land to different persons in recognition of their services to the State, loyalty to the king or some other extra ordinary achievements. These areas of land were called as *jagirs* or *inams* in the local language[35]. With the Mughals losing power in the central government, the local rulers and *jagirdars* started imposing illegal exactions on the cultivators on different pretexts.

In 1765, the East India Company was granted the *Diwani* rights of Bengal, Bihar and Orissa by the Emperor Shah Alam vide the Treaty of Allahabad. This empowered the Company to collect taxes from these regions on behalf of the Emperor. After 1818 the British controlled the major parts of India and by 1860 a large part of the modern day India, Pakistan and Bangladesh had

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[33] It is because of this reason that most studies about the land tenure have been carried out in the perspective of the assessment and collection of the land revenue; however, the present research aims to highlight the social evils inherent in some forms of land tenure and suggest remedial actions to cure these social evils. See generally Sulekh Chandra Gupta, *Agrarian Relations and Early British Rule in India: A Case Study of Ceded and Conquered Provinces (Uttar Pradesh. 1801-1833)* (London: Asia Publishing House, 1963) (Hereinafter referred as S. C. Gupta, *Agrarian Relations in India*)

[34] Pakistan Muslim League. "*Report of the Agrarian Committee appointed by the Working Committee of the Pakistan Muslim League.* Karachi, June 1949. "Land Tenure System in West Pakistan" in *Land Reforms in Pakistan: A Historical Perspective*, ed. Syed Nawab Haider Naqvi, Mahmood Hassan Khan and M. Ghaffar Chaudhry (Islamabad: Pakistan Institute of Development Economics, 2000), 101. (Hereinafter referred as Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE))

[35] *Jagirs* and *inams* were usually declared either as rent free or were assessed at a nominal rate. The awardees of these *jagirs* are called *jagirdars* and those of *inams* are called *inam-khores.*

become an integral part of the British territories. By the second half of the nineteenth century, the British controlled the Indian land revenue administration[36].

Right from the beginning, the British had issues concerning the collection of land revenue. With the passage of time and after experiencing different options, they found it profitable to auction the right of revenue collection to the highest bidder. The highest bidder, the intermediary for the tax collection, was known in the latter history as *zamindar* in the local language[37]. Thus, the English Lord Cornwallis settled with the *zamindars* on permanent basis to make fixed revenue payments to the Company and this tax scheme was known as *Zamindari* or Permanent Settlement, 1793. Under this scheme, the *zamindars* or the feudal lords were declared as the owners of the land on the English pattern and the cultivators were given the status of their tenants[38]. In this regard, M. Masud has to say, "The Permanent Settlement of Lord Cornwallis in 1793 converted the original cultivators to the position of tenants and the rent-collectors into *zamindars*."[39]

The Permanent Settlement of the 1793 not only secured the revenue collection for the Company on permanent basis but also protected it from any sort of peasantry agitation since it was the domain of the landlords to collect revenue from the peasants. More importantly, it created a class in the form of landlords who would remain loyal to the British imperialism. The same was acknowledged by Governor-General William Bentinck when he said, "I should say that the Permanent settlement, though a failure in many respects, have created a vast body of rich landed

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[36] Hareet Meena, Land Tenure Systems in India, 67.

[37] Ibid. It is interesting to note that the studies on land tenure give another concept of *zamindar* as well. According to that concept *zamindars* were the persons who first habituated a village by cultivating waste lands. They had superior rights in land than those who later formed the part of that village community. See S. C. Gupta, *Agrarian Relations in India*, 20.

[38] Minute or Note of Dissent authored by M. Masud, a member of the *Hari* Enquiry Committee is available at: https://www.masudkhaddarposhtrust.org/books-and-articles-by-m-masud/HARI-REPORT-REPRINT-Final-June-2007-pdf, 60 (last accessed: 23.07.2017) (Hereinafter referred as Hari Report Reprint, June 2007)

[39] Ibid.

proprietors deeply interested in the continuous of the British domination.[40]" This class proved its loyalty to the foreign power in 1857 by playing a crucial role in defeating the indigenous population in the war of independence. This fact has been endorsed by the agrarian committee in the following words, "...the truth of this is forcefully borne out in Western Pakistan by the fact that almost no large land-owning family of this region can trace their proprietorship to beyond the mutiny, and only a few can claim it otherwise than through British benefactions.[41]"

1.3 The Institution of Landlordism and Social Evils

The exploitation of the cultivator is a dominant basis of the landlordism and feudalism. Therefore, the Muslim League has always considered it as a social evil though its leadership itself mainly consisted of the feudal lords at the time of the independence movement[42]. The ideology of the Pakistan Muslim League is based on "the democratic and equalitarian principles of Islam in which there was no room for the oppression, exploitation and enslavement...[43]" This ideology could only be implemented by "a liquidation of feudalism, an establishment of the dignity, independence, prosperity and importance of the cultivator who directly tills the soil and produces wealth of the nation...[44]"

In this regard, soon after the independence the Council of the Pakistan Muslim League brought a resolution in February 1949 to determine and protect the rights of the cultivators and remove their grievances. Pursuant to this resolution, a five member agrarian committee was formed on

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[40] Hareet Meena, Land Tenure Systems in India, 69.
[41] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 102.
[42] It refers to the ideology of the All India Muslim League. However, after independence, it became Pakistan Muslim League (PML). It should be noted that various political parties in contemporary politics with the name PML (Q), PML (Z), PML (N) and so on, have nothing to do with the political ideologies of the PML. At the time of the independence movement, All India Muslim League represented the majority of the Indian Muslims. It was under the leadership of this party that Pakistan came into being.
[43] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 95-96.
[44] Ibid

12 April 1949[45]. This committee gave its recommendations in the form of a report submitted to the working committee of the League in July 1949. However, this report was signed by only four members as it did not bear the signature of Haji Ali Akbar Shah, one of the members of the committee.

The major recommendations of the committee stressed the abolition of the undesired institution of landlordism and feudalism. Consequently, the land should belong to the actual tillers of the soil. Moreover, it recommended the fixation of a ceiling on land-holding beyond which it would be illegal for anyone to own or hold any interest in the land. The report said:

> In our considered opinion a just and balanced agrarian economy can only be based on the unreserved acceptance of the principles that any interest in land can derive its justification solely from the direct contribution it makes to the cultivation of the soil and the production of national wealth. We therefore, believe that an equitable and prosperous land system for Western Pakistan must be founded on a state regulated ownership of holdings by self-cultivating peasant farmers...this must involve the gradual elimination from our economy of landlordism and all superior but idle interests in land above the actual cultivator[46].

The report of the agrarian committee making a reference to West Pakistan pointed out that land is mainly owned by two classes there, peasant proprietors and landlords[47]. The former class owns small or medium pieces of land and cultivates the same directly while the latter class owns quite big areas of land and usually leases it out to tenants without having the skills and tendency to directly cultivate the same. They are, therefore, not considered the producers of the national growth. It is threatening that more than half of the cultivable area is owned by this class[48].

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[45] The Agrarian Committee of the Pakistan Muslim League, 1949 consisted of Mian Mumtaz Mohammad Doulatana who was the convener of the Committee. Other members included Begum Shah Nawaz, Khan Abdul Qayyum Khan, Qazi Mohammad Isa and Haji Ali Akbar Shah.

[46] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 110.

[47] Ibid, 97. At the time of writing the report in 1949 Pakistan comprised of two wings i.e. East Pakistan and West Pakistan. In 1971, Pakistan lost its Eastern wing. Now any reference to West Pakistan means a reference to the existing Pakistan.

[48] Ibid, 103

The tenants cultivating the lands of the feudal lords are of different classes and their relationship with the landlord is regulated by the provincial tenancy laws. However, one class of tenants, tenants-at-will, is common and found in all the provinces[49]. Apart from these classes another significant class of village community is that of agricultural labourers and village artisans commonly known as *kammis* in the local language[50].

The two classes of the village community mentioned above are the most suffering classes at the hands of the landlords and there have been noticed continuous violations of their fundamental rights and the emergence of various social evils. This has been pointed out by almost every author who has penned upon the institution of the landlordism[51]. Thus, many historians who have studied land tenure of the British India bitterly criticized this institution[52]. However, only a few such documents are discussed here[53]. The dissenting note written by M. Masud, a member of the Sindh *Hari* Enquiry Committee, is one of these documents and is discussed here in a bit detail[54]. Moreover, the observations made by the Agrarian Committee of the Pakistan Muslim League with respect to the plight of the tenants-at-will and *kammis* in other parts of the country are also referred[55].

As mentioned above, the leadership of the Pakistan Muslim League at the time of the independence movement chiefly consisted of the feudal lords. Contrarily, the majority of the

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[49] In Punjab this class of the tenants is called tenant from year to year. In Khyber Pakhtunkhwa they are included in the class of other tenants. Besides, a tenant-at-will in Sindh is called a *hari*.

[50] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 107

[51] See, for example, B. H. Baden Powell, *Land Revenue and Tenure in British India* (New York: Macmillan & Co., 1894), Dr. Hareet Kumar Meena. "Land Tenure Systems in the late 18th and 19th century in Colonial India." *American International Journal of Research in Humanities, Arts and Social Sciences* 9(1), December 2014-February 2015, Sulekh Chandra Gupta, *Agrarian Relations and Early British Rule in India: A Case Study of Ceded and Conquered Provinces (Uttar Pradesh, 1801-1833)* (London: Asia Publishing House, 1963)

[52] Ibid

[53] These documents include *Hari* Enquiry Committee: Minute of Dissent by M. Masud, Report of the Agrarian Committee of the Pakistan Muslim League, The First Five Year Plan (1955-60) and Report of the Land Reforms Commission for West Pakistan.

[54] Hari Report Reprint, June 2007

[55] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE)

population in Sindh was comprised of *haris* who did not like these lords mainly because of their slave like treatment with the *haris*. This created some serious concerns amongst the members of the League. They were afraid that the *haris,* though Muslims, would not vote for them in the crucial elections of 1946[56].

In order to redress the grievances of the *haris* and to win their hearts, the president of the All India Muslim League, the Quaid-e-Azam, instructed the formation of a committee. Accordingly, a Sindh *Hari* Enquiry Committee was set up in March 1946. Ironically, the committee was dominated by the landlords and even chaired by a feudal lord, Sir Roger Thomas while Mr. Agha Shahi, an Indian Civil Servant, was appointed its secretary. Beside other members, Mr. M. Masud Khaddarposh, the collector of Nawabshah, was also appointed as a member of the committee. Being collector himself, he had first hand information of the substantial issues.

Owing to the simplicity of the *haris,* this played the trick and the League won the elections of 1946 from the Sindh as majority of the *haris* voted for the League. However, the newly formed government of the Muslim League dominated by the feudal lords had little good to do for the *haris* of the Sindh. Though the committee was established some six months prior to the elections, it was not in a position to submit its report before February 1948.

The committee had various sessions and examined a number of witnesses before it finally submitted its report. The report, however, was not unanimous and a very powerful dissenting note was written by the collector of Nawabshah. Since the feudal lords had formed the government in Sindh, only the majority report got published and that too with some deviations from the generally agreed recommendations[57].

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[56] Hari Report Reprint, June 2007, 14-15

[57] Ibid, 99

Besides, some *haris* were arrested and sent to prison by the government. This oppression stimulated the demands of the *haris* for the proprietary rights in the land to the actual tillers of the soil and the abolition of the landlordism. Simultaneously, there was very strong agitation by the public and in the press for the publication of the dissenting note. Thus, the government was forced to publish the dissenting note in June 1949. The dissenting note impressed the public and the young workers of the League to such an extent that pursuant to their demands the Muslim League Council passed a Land Reform Resolution in 1950.

Nonetheless, the feudal lords of the western wing used this resolution just to calm the emotions of the *haris* without taking any meaningful action for their betterment. On the contrary, in the eastern wing where there were no influential landlords in the government, a law aiming at the abolition of landlordism, the East Bengal Estates Acquisition and Tenancy Act, 1950 was passed on 16 May 1951. According to this law, no family could own land more than 30 acres. Similarly, it also prohibited absentee landlordism and the leasing of the land.

M. Masud considered that an appropriate solution to the miseries of the *haris* of Sindh lies in a similar action in the West Pakistan as was taken in the East Bengal. Therefore, in his note of dissent, Masud recommended the abolition of the feudalism and landlordism in very strong terms. He firmly believed that to achieve social justice and self sufficiency in food, land reforms must be carried out. Therefore, he recommended a complete prohibition on the leasing of the land. He was of the considered view that a person should own land only so long as he occupied that personally, hence, land from non-cultivating owners should be expropriated. Importantly, he recommended the fixation of a ceiling on the holdings exceeding which none could own the land[58].

[58] Hari Report Reprint, June 2007

The above recommendations have been made given the miserable condition of the *haris* and the social evils and the violations of the fundamental rights caused by the institution of landlordism and feudalism. Since the *haris* do not have any security of tenure in the land they have been cultivating for generations, they are at the mercy of the landlords for their food and living. Consequently, the landlords fully exploit the *haris*. The majority report generally while the note of dissent in particular fully takes the notice of this exploitation. Thus, it points out that the *haris* are harassed by the landlords and their agents to an extent that they voluntarily abandon their rights. The majority view in this regard though expressed euphemistically is worth quoting here:

> There is a small minority of *zamindars* who treat the *haris* as serfs to obey all their commands however unjust. The threat of eviction if dissident is generally sufficient to make them conform to the *zamindar*'s wishes...a *hari* in these circumstances having permanent rights of tenure in the land he cultivates could easily be harassed by impunity by such landlords to an extent which may lead him to the voluntary abandonment of his right[59].

The exploitation of the *haris* by the feudal lords has taken its worst from because they are treated like serfs by the latter. They cannot even greet the landlords in an ordinary manner nor can they sit at the same level on which the landlords sit. Usually they bow before the landlords and touch their feet not out of respect but because of their complete dependence on the land held by the latter. In this regard, Masud has the following to say:

> The *hari* behaves like a helpless slave when he has to face the *zamindar*...I have not seen a single *hari* who will stand before the *zamindar* and greet him with dignity. What man has done to man never wore a more tragic look than when helpless *hari* men and children touch the feet of the *zamindar*...No *hari* can dare sit side by side, with or even in front of a *zamindar*, or even as high as the *zamindar's* level of seat, even if it be a stump of a tree or a pile of bricks or a heap of sand. He must sit at a lower level on the bare ground, and

[59] Ibid, 63

> if he dares to sit on a level equal to the *zamindar's*, he is impertinent, insolent and unfit to live on the land on which his forefathers worked for generations[60].

It is a common practice to observe that the *haris* toil the soil the whole season and when the crop is ready for harvesting, the agents of the landlords require the *haris* to carry the harvested crop to the threshold of the landlords. Here the *haris* cannot even touch the crop for which they sweat throughout the season. Customarily, this crop is to be shared equally between the *haris* and the landlords. But actually the *haris* get only a minor share since their share bears charges and encumbrances imposed by the landlords on the name of *abwabs*. This minor share does not even fulfill their food needs. The author of the note draws the picture of the *hari* in these words, "...He is thus like a hungry man who, having secured food after long toil and suffering, has to surrender it to his cruel master who takes away a large part of it, leaving the hungry man only a small portion which does not suffice for his empty stomach.[61]"

Similarly, in other parts of Pakistan the observations of the agrarian committee concerning the same exploitation are worth mentioning here. The report reads:

> ...the nominal division of share between the landlord and the tenant very rarely represents the real share which falls to the tenant. For apart from the legal dues of the landlord, there are in most cases...of the West Punjab and Bahawalpur a variety of legally unjustified dues and services which are sanctioned by custom and enforced by the superior bargaining power of the landlord. These dues and services are extremely oppressive...[62]

In this regard, the further observations of the committee are frightening. It mentions, "an investigation recently carried out by the Punjab Board of Economic Enquiry, found that in the net income accruing from a plot of land, the landlord's share is often as high as 75% and sometimes as preposterous as 90%.[63]"

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[60] Ibid, 31
[61] Ibid, 33
[62] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 105-106
[63] Ibid, 106

Not only the tenants are deprived of their due share in the crops but they also have to indulge themselves in unpaid labour against their free will. For their survival they are available to any call by the *zamindar* day in and day out. This form of forced labour has been described in the following words:

> The *zamindar* might at any time send for the *hari* for *begar* (forced labour) for the construction of his house or the sinking of a well, or some other minor work. He might be called to come with his plough and bullocks to cultivate the private fields of the *zamindar* or to spend a few days on a shoot with him, or to render some domestic service. He is thus always at the beck and call of the *zamindar*, and dare not refuse him as that could spell his doom[64].

The above mentioned treatment of the tenants by the landlords has not only caused damage to the tenants and their families only but also the whole nation. The tenants because of their cruel treatment work half heartedly; this directly affects the production of the land. The State cannot afford to observe this all as an idle observer. The Sindh *Hari* Enquiry Committee unanimously is of the view that in countries like Pakistan, State should intervene to improve the condition of agricultural workers. It has the following to say in this regard:

> In all countries, and especially those where the standard of education is low, it is only by State intervention and by State control over the management of lands and the development of its agricultural resources that a country can be expected to reach its full potential in agricultural productivity. Hence the standards of living of the agricultural workers can be substantially improved[65].

Another violation of the fundamental rights of *haris* is concerned with the right of association. They cannot vote with their free will. Rather, they are forced to vote only for the candidate supported by the landlord under whom the *haris* cultivate the land. The *haris* are under so much pressure from the landlord during the elections that they do not even hesitate to take the Holy Quran in their hands to assure the latter of their allegiance. But it does not end here. If the

[64] Hari Report Reprint, June 2007, 29
[65] Ibid, 90

opposite candidate wins, a new trouble starts for the *haris*. Now they cannot get their lawful quota of cloth or sugar from the control shops as these shops get into the control of the newly elected candidate who they have opposed[66].

As has been referred above that the harassment caused to the *haris* results in the voluntary surrender of their rights, no amount of legislation can redress their grievances save the abolition of the landlordism. This has been empirically proved. In this regard, Masud refers to the Agricultural Loans Act, 1884, the Land Improvement Loans Act, 1883, and the Deccan Agricultural Relief Act, 1875.

Under the Agricultural Loans Act, a peasant or a *hari* is entitled to a loan for agricultural purposes. Nonetheless, no such loan has ever come into the notice of M. Masud while the landlords have excessively benefitted from this law. Similarly, under the Act of 1883, to charge interest on agricultural loan for productive purposes is a penal offence. However, charging such interest has been a common practice and this offence has gone unchecked[67].

Likewise, according to the Deccan Act, it is the absolute duty of a money lender to issue a written receipt to an agriculturalist when he makes the payment of the debt. The breach of this duty has been penalized with a fine of Rs. 100. However, thousands of *haris* make payments of their debts without any such receipt issued to them and hardly ever a case has been registered for this breach[68].

Similarly, the agrarian committee makes reference to the provisions of the Punjab Tenancy Act, 1887 emphasizing the need of protection to be provided to the tenants. The report reads as follows:

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[66] Ibid, 30-31
[67] Ibid, 47-50
[68] Ibid

> ...at the same time, the tenant has no legal security of tenure afforded to him and such provisions as are made in his favour in respect of the procedure of ejectment (e.g. Section 42 to section 49 of the Punjab Tenancy Act, 1887) or compensation for improvements (e.g. Section 64 and following section of the Punjab Tenancy Act, 1887) are in effect inoperative due to the weakness of the tenant's power of bargaining and resistance. This has the effect of reducing the tenant-at-will to a person without claims, rights or recognition[69].

The miseries of the *kammis* are even greater than those of the tenants-at-will. They are attached to the village community but only work as seasonal labour. Their usual professions are more of a kind of daily artisans. They do not have a permanent place to live in. Likewise, they do not have the protection of labour laws. They are treated as the menial of the landlord and the protection of basic human and moral rights is denied to them in most of the cases[70].

Therefore, one can conclude that the remedy lies in the abolition of the exploitative institution of landlordism and giving proprietary rights in land to the tenants. The report of the agrarian committee recommends the total transformation of agricultural economy from landlordism to peasant proprietorship. The report of the committee has the following to say in this regard:

> no real relief can be afforded to...our population unless the whole basis of our agricultural economy is shifted from feudalism and landlordism to peasant-proprietorship and co-operative village communities as is suggested...it is only when every agricultural labourer has acquired a direct interest in land, and every village artisan is a dignified and prosperous member of emancipated village community regulated by the State, that agrarian economy will be released from its present degradations and the lowest strata of our population will be freed from their servitude[71].

It is worth mentioning that after the sad incident of the disintegration of the East Pakistan from the western wing in 1971, Masud got his note of dissent republished with the hope that the remaining Pakistan suffers no further loss. He recalls the abolition of the institution of the

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[69] Report of the Agrarian Committee, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 107
[70] Ibid
[71] Ibid, 122

landlordism in the East Pakistan years ago. This abolition marked a clear disparity in the land ownership pattern in the two wings of Pakistan, east and west. According to Masud, the presence of the feudal lords in the government of the West Pakistan and absence of any such class in the government of the East Pakistan coupled with the disparity in the land ownership pattern in the two wings was one of the major reasons for the disintegration of Pakistan[72]. So, it is high time that the institution of landlordism was abolished and suitable land reforms were carried out in the country.

One should not be mistaken that the exploitation of the agricultural tenants and other depressed classes of the village community at the hands of land-lords and feudal lords was a past history. The social evils and the violations of the fundamental rights prevalent due to the institution of landlordism and feudalism are witnessed even recently. In this regard, the observations of the FSC in Syed Shabbir Hussain Kazmi case are worth mentioning here. The FSC first observes that the Bonded Labour System (Abolition) Act, 1992 is a beneficial legislation aimed at providing relief against the forced and bonded labour to all the workers belonging to the depressed classes of the society. In this regard, the FSC makes an express reference to *haris* and tenants-at-will and other such people. The FSC observed as follows:

> In our view "the Act", as a whole, is a beneficial statutory dispensation of vital importance as it is intended to curb and put to irreversible end the reprehensible institution of bonded labour not only in the brick kiln industry but also in other sectors in the country like haris, tenants-at-will, labourers in mining industry, glass bangle industry, tanneries etc[73].

After making the above observations, the FSC at the end of the judgment expresses its concern that the object for which the above mentioned Act was enacted could not be effectively achieved.

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[72] Hari Report Reprint, June 2007, 8-9

[73] Syed Shabbir Hussain Kazmi and others versus Government of Pakistan and others, 2006 PLC (C.S.) 49, Paragraph 9

In this regard, the FSC points out different news published in the national news papers telling about the unlawful detention of the labourers for extracting forced labour from them throughout the country. The FSC remarked as follows:

> Before parting with the judgment, we are constrained to observe with concern that the object for which "the Act" was passed could not be achieved so far. Almost every day reports about unlawful detention of labourers...along with their family members, for extracting forced labour from them, appear in the National press.
> In Daily "Nawa-e-Waqt" Lahore...dated 10th September, 2005 there was...report about twenty six brick kiln workers, who were recovered from a brick kiln near Gujranwala Bypass, through bailiff of the Court and set at liberty by the Lahore High Court. Similar news about release of 17 bonded brick kiln labourers under the order of Sessions Judge, Peshawar appeared in daily "Dawn" dated 8th October, 2005[74].

1.4 Land Reforms

The following lines throw light on land reforms. The dictionary meaning of land reform is best described by the Collins English dictionary. It mentions, "Land reform is a change in the system of land ownership, especially when it involves giving land to the people who actually farm it and taking it away from people who own large areas for profit[75]."

However, it only describes only one aspect of land reforms usually termed as redistributive land reforms. A more comprehensive description is given as, "a purposive change in the way in which agricultural land is held or owned, the methods of cultivation that are employed, or the relation of agriculture to the rest of the economy[76]."

Generally, land reforms or sometimes called agrarian reforms refer to the steps taken with respect to land including its tenure regularization aiming at the greater agricultural production and providing economic, social and political rights and guarantees to all the persons attached to

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[74] Ibid, Paragraph 31
[75] https://www.collinsdictionary.com/dictionary/english/land-reform (last accessed 03.12.2018)
[76] Elias H. Tuma, *Encyclopedia Britannica*, s.v. *"Land Reform."* https://www.britannica.com/topic/land-reform (last accessed 03.12.2018)

land[77]. The aims of land reforms are, therefore, not only economic but also social and political[78]. It is believed that the structure of rights in land is not only a major factor in growth of the national economy which ultimately results in economic well-being of people but also a *sine qua non* for the promotion of social justice and eradication of social evils.

The need for meaningful land reforms in the country was soon realized after the independence of Pakistan in 1947. Various committees and commissions have been formed to formulate policies and suggest measures to be taken to alleviate the hardships faced by the vast majority of Pakistan's rural population given the institution of landlordism prevalent in the country. Apart from the formation of the Sindh *Hari* Enquiry Committee and the Agrarian Committee of the Pakistan Muslim League, a Land Reforms Commission for West Pakistan was formed on 31 October 1958 "to recommend measures to ensure better production and social justice as well as security of tenure for those engaged in cultivation.[79]" As is known, General Muhammad Ayub Khan imposed first Martial Law in Pakistan on 7 October 1958. The first steps usually taken by Martial Law Administrators concern the issues of public importance to get the public sympathy and validate their coup. The formation of the Land Reforms Commission by him soon after his coup clearly indicates the importance of this issue. Similarly, the First Five-Year Plan (1955-60) of Pakistan devoted a complete chapter to this issue. The importance of land reforms was emphatically stressed in Chapter 17 of this plan in the following words:

> For under-developed countries land poses the most perplexing problem in view of its scarcity combined with its major role in the achievement of a richer and higher life for the majority of the people. However, the pattern of agrarian structure which will best

[77] First Five Year Plan, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 137
[78] Ibid
[79] Land Reforms Commission, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 161

subserve the needs of a developing society has come clearly into view and reforms can only be delayed but not prevented[80].

In view of the reports submitted by the committees and the commission, Ayub Khan's government passed the first major piece of legislation concerning land reforms in Pakistan. This legislation was the West Pakistan Land Reforms Regulation, 1959. The salient features of this regulation included a ceiling on individual holdings. No one individual could own more than 500 acres of irrigated and 1,000 acres of unirrigated land or a maximum of 36,000 Produce Index Units (PIU), whichever was greater[81]. It further allowed that land be redistributed amongst tenants and others[82]. In addition, the regulation contained provisions which provided for security of tenants as well as for preventing the subdivision of land holdings[83]. However, Zulfiqar Ali Bhutto, considering these land reforms inadequate, got the credit for two major land reform regimes. The first was by way of a martial law regulation, the Land Reforms Regulation, 1972 by which the West Pakistan Land Reforms Regulation, 1959 was repealed.

As per paragraph 8(1) of the 1972 Regulation no individual holdings were to be in excess of 150 acres of irrigated land or 300 acres of unirrigated land, or irrigated and unirrigated land the aggregate area of which exceeded 150 acres of irrigated land (one acre of irrigated land being reckoned as the equivalent of two acres of unirrigated land), or an area equivalent to 15,000 PIU of land, whichever was greater[84]. Paragraph 18(1) also provided for excess land to be surrendered and utilized for the benefit of the tenants shown to be in the process of cultivating it.

By 1977, the country had an elected parliament. There was felt further need for land reforms hence the Land Reforms Act, 1977 (Act II of 1977) was enacted. It did not repeal the 1972

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[80] First Five Year Plan, *Land Reforms in Pakistan*, ed. Nawab Haider et al. (PIDE), 141 (Underlining is mine.)
[81] The West Pakistan Land Reforms Regulation, 1959 (M.L.R. 64 of 1959)
[82] Ibid
[83] Ibid
[84] Barrister Afan Khan. "Land Reforms in Pakistan." *The Dawn*. 11 October 2010, p. 6. Available at: http://dawn.com/news/570487/land-reforms-in-pakistan-by-afan-khan (last accessed 01.12.2010)

Regulation, but was designed to operate concurrently with the same. The most important and relevant change it made was that it reduced ceiling on individual holdings, including shares in *shamilat*, if any, to 100 acres of irrigated land or 200 acres of unirrigated land, or irrigated and unirrigated land the aggregate of which was 100 acres of irrigated land (again one acre of irrigated land being reckoned as equivalent to two acres of unirrigated land). Furthermore, notwithstanding the above, no land holding could be greater than an area equivalent to 8,000 PIU of land calculated on the basis of classification of soil as entered in the revenue records for kharif 1976[85].

However, the Shariat Appellate Bench of the Supreme Court (SAB) while exercising jurisdiction under Article 203F declared the fixation of a ceiling on land-holdings repugnant to the injunctions of Islam. In order to give a clear picture of the Qazalbash Waqf case to the reader, a brief description of this case is given here, though it will be analyzed in detail in a separate chapter[86]. The SAB in Qazalbash Waqf versus Chief Land Commissioner Punjab[87] reversed the judgment of the FSC which it had rendered in Hafiz Muhammad Ameen versus Islamic Republic of Pakistan[88]. Before discussing the Qazalbash Waqf case, the judgment of the FSC is discussed briefly.

In Hafiz Muhammad Amin case[89], *inter alia,* various provisions of the Land Reforms Regulation, 1972 (Martial Law Regulation No. 115) and the Land Reforms Act, 1977 (Federal Act II of 1977) pertaining to fixation of a ceiling on individual land-holdings including Waqfs, resumption of excessive land in favour of government with or without compensation and grant of

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[85] Ibid

[86] Chapter 4 is dedicated to the analysis of this case.

[87] Qazalbash Waqf, PLD 1990 SC 99

[88] Hafiz Muhammad Ameen etc. versus Islamic Republic of Pakistan and others, PLD 1981 FSC 23 (hereinafter referred to as Hafiz Ameen, PLD 1981 FSC 23)

[89] Ibid.

resumed land to tenants were challenged being repugnant to the injunctions of Islam under article 203D of the Constitution[90]. It should be noted that article 203B(c) excludes the Constitution from the definition of law. Since these laws had been promulgated under the specific mandate of article 253 of the Constitution, the most important question for the FSC was whether it had jurisdiction to decide the fate of these laws on the touch stone of repugnancy with the injunctions of Islam. The relevant part of article 253 of the Constitution states as:

> (1)*Majlis-e-Shoora* (Parliament) may by law:
> (a) Prescribe the maximum limits as to property or any class thereof which may be owned, held, possessed or controlled by any person...
> (2) Any law which permits a person to own beneficially or possess beneficially an area of land greater than that which, immediately before the commencing day, he could have lawfully owned beneficially or possessed beneficially shall be invalid[91].

On the basis of the above, the FSC held that it did not have jurisdiction to declare the 1972 Regulation and the 1977 Act repugnant to the injunctions of Islam as they were excluded from the definition of law as provided in article 203B(c).

However, the Court notwithstanding that it did not have jurisdiction, went on to decide the cases on merits. After analyzing various verses from the Holy Quran regarding ownership of the property and its dispossession, incidents from the Sunnah of the Holy Prophet (PBUH), practice of the Companions (May Allah be pleased with them all) and scholarly opinions of several jurists, the Court held that the law made by the 1972 Regulation and the 1977 Act was not repugnant to the injunctions of Islam.

This judgment was challenged before the SAB under article 203F of the Constitution by the Qazalbash Waqf and others. The main question before the SAB, *inter alia,* was related to the interpretation of article 203B(c) on which the issue of jurisdiction would ultimately rest. Another

[90] These provisions included paragraphs 7-10, 13-14 and 18 of the 1972 Regulation, and sections 3-6, 7(5), 8-10 and 11-17 of the 1977 Act.
[91] See article 253 of the 1973 Constitution.

important question was whether fixing of a ceiling on individual land-holding was repugnant to the injunctions of Islam.

The SAB held that article 203B(c) excluded the Constitution from the definition of law and it was limited to the provisions of the Constitution only. Thus, any other law though made under the mandate of a specific constitutional provision would not be immune from the jurisdiction of the FSC or the SAB under chapter 3A of the Constitution. On merits, it was held that the provisions of the 1972 Regulation and the 1977 Act pertaining to a fixation of ceiling on individual land-holdings were repugnant to the injunctions of Islam.

It should be noted that, by the above referred judgments, the issue of fixation of ceiling on individual land-holding is determined only to the extent of repugnancy with the injunctions of Islam. Nonetheless, this issue is not confined to the injunctions of Islam only. In fact, it has a direct bearing on the fundamental rights, promotion of social justice, economic well being of people and eradication of social evils. It is argued that various constitutional provisions regarding the enjoyment and enforcement of the fundamental rights, apart from articles 253 and 24 (3)(f), cannot be given effect if large scale land reforms including fixation of ceiling on individual land-holdings are not carried out in the country. For this, of course, the effects of the judgment in the Qazalbash Waqf case require to be set aside. The above referred judgment of the SAB declaring various provisions of the 1972 Regulation and the 1977 Act repugnant to the injunctions of Islam has driven the country in backward direction at least with regard to the land reforms.

1.5 Literature Review

A substantive portion of this research aims at the study of the scope of various constitutional articles and their combined effects on the exercise of jurisdiction under article 184(3) by the Supreme Court and under articles 203D and 203F by the FSC and the SAB respectively. This is done keeping in view the doctrine of precedent as provided by various provisions of the

Constitution. These constitutional articles and provisions are mainly related to the fundamental rights, principles of policy, jurisdiction of the Supreme Court including article 189, and chapter 3A of the Constitution. Besides, the history of land reforms including fixation of a ceiling on individual land-holding and their repugnancy, if any, with the Islamic injunctions is also under consideration.

The research mainly focuses on the critical analysis of a number of constitutional cases regarding the above mentioned issues. As far as other literature is concerned, it is submitted that there is not even a single study that encompasses all the issues intended to be explored in this research. Nonetheless, a constitutional petition, Workers Party Pakistan etc. versus Federation of Pakistan etc. No. 97/2011, as mentioned above, is pending adjudication in the Supreme Court. The maintainability of this petition is yet to be adjudged. In any case, the scope of judicial adjudication and that of academic research is widely different.

It is expected that after the disposal of this petition, a lot will be written on this subject. However, there are hardly any chances of the disposal of the said petition in near future given the priorities of the Supreme Court. Besides, it is important to note that the petitioner No. 1 in the above mentioned constitutional petition is a socialist political party and aims at introducing Marxism in Pakistan. On the other hand, the present research aims at settling, *inter alia*, the constitutional issues with an objective approach neither favouring capitalism nor socialism.

Discounting the above petition, one aspect of this research or the other has been penned upon by few authors. The literature reviewed focuses on the application of the doctrine of precedent in Pakistan and the history of land reforms including their Islamic or otherwise character. It should be noted that the Islamic character of land reforms was lighted upon mainly after the decision of the SAB in the Qazalbash Waqf case.

As far as the doctrine of precedent is concerned, Dr. Muhammad Munir has the credit of being a pioneer to pen upon this subject in Pakistan. His unprecedented research on this issue came in the form of a doctorate thesis which has now been published in the form of a book[92]. It is indeed a remarkable piece of intellectual research. The doctor traced the origin and evolution of the precedent; how it came into the legal system of the sub-continent and its place in all the constitutional documents of Pakistan starting from Section 212 of the Government of India Act, 1935 to the present Constitution in the form of articles 189, 201 and 203-GG. Other than the constitutional provisions, the work also elaborates the established judicial norms of the superior courts regarding precedent.

For the purpose of the present research, the relevant portion of this master piece is in the form of chapter 7, The Operation of Precedent in Pakistan: The Practice of the Supreme Court, and chapter 10, Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan. The former, as the name indicates, discusses in detail the complete jurisprudence of precedent with respect to the Supreme Court. The author terms this chapter as the crux of his research. It, *inter alia*, presents a critical analysis of article 189. According to this analysis, the precedent created or declared by the Supreme Court is binding on all other courts in Pakistan which, of course, includes the FSC[93].

Similarly, chapter 10 raises some very important and critical issues regarding the doctrine of precedent in Islamic law and discusses the application of this doctrine with respect to the FSC. The author asserts in this chapter that under article 203-G a bar is created even on the Supreme Court and the High Courts to exercise jurisdiction if a matter is in the exclusive jurisdiction of

[92] Muhammad Munir, *Precedent in Pakistani Law* (Karachi: Oxford University Press, 2013)

[93] According to the established judicial norms of precedent (as the author calls it) the decision of a larger Bench of the Supreme Court is binding on an equal or smaller Bench of the same Court. It follows that a decision of a five member Bench of the Supreme Court is binding on the Shariat Appellate Bench since the maximum strength of the latter may be five and not more.

the FSC i.e. whether a certain law is repugnant to the injunctions of Islam or not. Therefore, as far as the repugnancy test is concerned, it is in the exclusive jurisdiction of the latter court. The author calls it "exclusive but limited jurisdiction[94]."

In this regard, the research also brings attention to an important case, Zaheeruddin versus the State[95]. In this case, the Supreme Court held that the decision of the FSC if either not challenged or maintained by the SAB will be binding even on the Supreme Court. Nonetheless, it should be noted that it is a decision of a five member bench of the Supreme Court which widely interpreted article 203-GG. This interpretation is called wide interpretation because the text of this article makes the decisions of the FSC binding only on a High Court and on courts subordinate to a High Court. It is needless to mention that the Supreme Court is neither a High Court nor a court subordinate to a High Court. Moreover, according to the established judicial norms, a larger bench of the Supreme Court consisting of more than five members can overrule the interpretation of article 203-GG as has been done in Zaheeruddin case.

The author, with respect to other aspects of a law, clarifies that in all other matters all courts including the FSC and the SAB are bound to follow the interpretation of a legal or constitutional provision as interpreted by the Supreme Court because of article 189.

Although the book gives an elaborate picture of the precedent in Pakistani legal system, it does not discuss the rules of precedent where a law may have different perspectives. In such a case, one aspect of the law may be within the jurisdiction of the FSC while the other outside its jurisdiction since it has a limited jurisdiction. The present research, *inter alia*, aims to investigate the fundamental rights perspective of land reforms which so far remains unsettled and is beyond the jurisdiction of the FSC.

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[94] Underlining is mine.

[95] Zaheeruddin versus the State, 1993 SCMR 1718 [Supreme Court of Pakistan]; this case has been analysed in detail in chapter 5 below.

Done with the doctrine of precedent, it is considered expedient to review the literature related to land reforms. Importantly, land reforms have been a subject of concern for many nations. Therefore, many articles have been written on this subject keeping in view the socioeconomic conditions and political considerations of each country by the native authors. It should further be noted that most studies done on this topic are from the perspective of agro-economics. Nevertheless, the present research aims at exploring the different issues raised in the Qazalbash Waqf case. Land reforms were discussed in this case as only one of such issues. Therefore, the literature reviewed on this subject is limited to such reforms in the context of Pakistan. In this regard, some basic documents have already been referred and discussed above.

The first document desired to be reviewed here is a very important journal article. "Land Reforms & Absentee Landlordism" authored by Dr. Tanzilur-Rehman, former Chief Justice of the FSC and former Chairman of the Council of Islamic Ideology[96]. In this article, the author mentions that land reforms are a soaring subject in Pakistan and there have been only few efforts by governments in this regard. He then mentions the steps taken by General Muhammad Ayub Khan and Zulfiqar Ali Bhutto in this regard. The response of the judiciary with respect to the reforms introduced by the latter is also discussed in this article. While commenting on the judgment of the SAB, the author refers to the limitations of the SAB. He stresses that the manner in which the landlords got these lands in the first place is an important question to be explored. However, the FSC or the SAB could not legally go into the factual inquiry of this issue.

In this regard, he suggests the formation of a National Commission for Lands with a view to ascertain this issue. Moreover, he suggests that the terms of reference of the Commission may include the determination, in the light of the injunctions of Islam, whether land can be given on

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[96] Justice (Retd.) Dr. Tanzilur-Rehman. "Land Reforms & Absentee Landlordism." *The Qur'anic Horizons*, Vol. 4, No. 1 (January-March, 1999), 50-59

lease for a fixed share of produce or a specified amount of rent. The government may consider the findings and recommendations of the Commission to go for land reforms by a constitutional amendment or other suitable legislation.

This article suggests that the author is of the view that land reforms are not repugnant to the injunctions of Islam. However, he considers that the effects of the judgment of the SAB in Qazalbash Waqf case can be suitably set aside by the Parliament and not the judiciary. It is important to note that this article has only pointed out a serious evil of landlordism i.e. absentee landlordism which is a big cause of food deficiency and less production. The author has not analysed the exercise of jurisdiction by the SAB. Similarly, he has not considered the possibility of exercise of jurisdiction by the Supreme Court. Contrarily, the present research focuses on the conflict of jurisdictions by these forums.

"Land Reforms in Pakistan," by Shaikh Muhammad Rashid, Ex-Minister for Land Reforms and Chairman, Federal Land Commission of Pakistan is also a worth mentioning article on the subject[97]. In this article the author mentions the hurdles in bringing and executing land reforms. Moreover, he appreciates the government of the Pakistan People's Party for taking bold steps in this regard. According to his view and experience, the machinery responsible for carrying out such reforms itself consists of feudal lords or the like-minded persons. He expresses his concerns in these words, "While the control of the capitalists is confined to the economy in the cities, the feudal lords hold sway in both economic field and political arena in the country side... They make and unmake the governments[98]." Faced with these circumstances, he makes a comparison of the two land reform regimes i.e. one made by Ayub Khan in the form of M.L.R. 64 of 1959 and the other made by Zulfiqar Ali Bhutto in the form of M.L.R. 115 of 1972 and the Federal

[97] Shaikh Muhammad Rashid, "Land Reforms in Pakistan," *Social Scientist*, Vol. 13, No. 9 (September, 1985), 44-52. Available at: http://www.jstor.org/stable/3517492 (last accessed: 04.03.2015)
[98] Ibid, 44

Act II of 1977. He insists that the latter regime is far better and beneficial to the poor landless tenants in every aspect. Throwing light upon the objectives of these reforms, he remarks, "The Land Reforms are designed to break up concentration of landed wealth, narrow down inequalities of opportunities and at the same time encourage more intensive land use[99]."

Another article "Land Reforms in Pakistan" by Mushtaq Ahmad is worth mentioning[100]. It must be a very loud voice of its time. In this article the author stresses the need and importance of land reforms in the country in very strong terms. He remarked, "The policy of laissez faire in agriculture, whatever be its advantages in industry, proved a serious deterrent to production[101]." Interestingly, he makes a reference to the Report of the Agrarian Committee of the Pakistan Muslim League, 1949, Report of the Land Reforms Commission for West Pakistan, 1959 and the first Five Year plan (1955-60). He criticizes the government for not implementing on these reports and plans in letter and spirit. He is of the view that the feudal lords sitting in power corridors were a major hindrance in such implementation.

"Land Reform in Pakistan: A Critical Issue for Future Development" by Salman Aziz and Thomas Gray is a good paper that reviews the impacts of the land reforms of 1959 and 1972[102]. The authors briefly throw light upon the inherited and existing land tenure system in Pakistan. It follows a discussion on the salient features of the two Land Reforms regulations i.e. M.L.R. 64 of 1959 and M.L.R. 115 of 1972. The primary goal of these reforms is socio-economic uplift of rural masses.

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[99] Ibid, 50

[100] Mushtaq Ahmad, "Land Reforms in Pakistan." *Pakistan Horizon*, Vol. 12, No. 1 (March, 1959), 30-36. Available at: http://www.jstor.org/stable/41392253 (last accessed: 04.03.2015)

[101] Ibid, 32

[102] Salman Aziz and Thomas Gray, "Land Reform in Pakistan: A Critical Issue for Future Development." *South Asia Bulletin*, Vol. 1, No. 2 (Summer 1981), 36-52

They argue that in spite of these reforms land ownership remains highly concentrated. That is why these reforms have not reduced rural poverty. Similarly, the problems of income inequalities, unemployment and agricultural production remain unresolved. The cause of this failure, according to the authors, is that there was little good faith and no political will behind these reforms. Rather, these reforms were introduced to settle the political unrest that had emerged erstwhile. To solve the above mentioned problems, radical reforms which grant land to the tillers must be introduced backed full political force.

Next is "Land Reform in India and Pakistan" by P. C. Joshi[103]. The Institute of Economic Growth, Asian research Center, Delhi conducted a study on "Land Reforms and Agrarian Change in India and Pakistan" in 1970. The above titled paper by Joshi forms a part of this study. This paper evaluates not only the economic implications of land reforms but also their political implications. In this paper the author has expressed his observations on the basis of a general survey of land reform policy and programmes in the two countries since independence. The author points out that in these countries, there are five classes of people associated with land. These are feudal lords, semi-feudal lords, medium land owners, superior tenants and the rural poor. Among these classes, the agrarian policy was motivated by the conflicting interests of the semi-feudal lords on the one hand and the medium land owners and the superior tenants on the other. The rural poor have no voice and no political influence to affect the land reforms policy in their favour at any stage. The policies in two decades since independence have not benefited the rural poor to a considerable extent. This has made them discontent and intolerant. Therefore, land reform policies will have to be made to redress the grievances of this class.

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[103] P. C. Joshi. "Land Reform in India and Pakistan." *Economic and Political Weekly*, Vol. 5, No. 52 (December 26, 1970), A145, A147-A149, A151-A152, Available at: http://www.jstor.org/stable/4360876 (last accessed: 04.03.2015)

The next article is "Welfare and Production Efficiency: Two Objectives of Land Reform in Pakistan[104]." This article talks about the Land Reforms Regulation, 1959. It studies the benefits desired to be provided to the tenants and the impact of these reforms on their economic well being. This article traces the land tenure system in the sub-continent very briefly to point out that *zamindars* emerged as private owners of land only after the advent of the English East India Company. The author analyses the size of holdings and the fragmentation of big tracts in certain districts of N.W.F.P. to evaluate the agricultural production from such holdings.

Interestingly, the author points out that no systematic studies or research data are available regarding the success of land reforms in Pakistan. Even in 1962, at the time of writing this article, the author considers that it might be too early to assess the impacts of the 1959 Regulation. Nonetheless, the title of the article in very clear terms suggests that among the basic aims of the land reforms is the eradication of social evils and promotion of social justice and economic well being of the depressed classes associated with agriculture.

The next document is also a journal article, "The 1972 Land Reforms in Pakistan and their Economic Implications: A Preliminary Analysis" by Ronald Herring and Muhammad Ghaffar Chaudhry[105]. The Ministry of Food, Agriculture and Rural Development of Pakistan made a statement that the 1972 reforms uplifted the life of the common man much more significantly than any other measure taken by the government. Similarly, it was stated that the objectives of these reforms included elimination of the exploitative institution of landlordism by breaking up concentration of landed wealth, reducing income disparities, increasing production, and re-

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[104] Christoph Beringer, "Welfare and Production Efficiency: Two Objectives of Land Reform in Pakistan," *The Pakistan Development Review*, Vol. 2, No. 2 (Summer 1962), 173-188. Available at: http://www.jstor.org/stable/41258068 (last accessed: 04.03.2015)

[105] Ronald Herring and M. Ghaffar Chaudhry, "The 1972 Land Reforms in Pakistan and their Economic Implications: A Preliminary Analysis," *The Pakistan Development Review*, Vol. 13, No. 3 (Autumn 1974), 245-279. Available at: http://www.jstor.org/stable/41258246 (last accessed: 04.03.2015)

ordering the tenant landlord relationship on the basis of mutual respect and trust as well as increasing employment and generally providing for the socio-economic uplift of rural masses[106]. This article analyses these reforms in the light of these objectives. Since this article is limited to the analysis of the land reforms in 1972, it only talks about the Land Reforms Regulation, 1972. In the first section of this article the authors calculate the additional area of land that could be resumed by the government as this Regulation reduced the ceiling already fixed by the Land Reforms Regulation, 1959. The next section discusses the impacts of the redistribution of resumed land on the eradication of social evils and promotion of economic well being of rural population associated with agriculture. Finally, the authors conclude that the 1972 land reforms have been quite successful in achieving their objectives. Nonetheless, fraudulent declarations filed by the land-lords and poor administrative machinery in carrying out these reforms have lessened the desired results. Moreover, the authors also criticize the high ceiling fixed by the 1972 Regulation. They are of the view that it should be reduced further.

It should be noted that this article was written in 1974. At that time the Land Reforms Act, 1977 had not been enacted. Besides, the Islamic character of the land reforms was not an issue then.

Next is a newspaper article by Barrister Afan Khan, Land Reforms in Pakistan[107]. The author mentions the relevant paragraphs and sections of the land reforms legislation done by Ayub Khan and Zulfiqar Ali Bhutto. The author takes the view that reforms introduced by the latter were better than those introduced by the former. The author then mentions the judicial pronouncements regarding these reforms by the Federal Shariat Court and the Shariat Appellate Bench. He goes on to say that effective land reforms are essential for progress but these cannot be carried out because of the finding of the SAB. The author suggests that a constitutional

[106] Ibid, 245

[107] Barrister Afan Khan, "Land Reforms in Pakistan," *The Dawn*, 11 October 2010, p. 6. Available at: http://dawn.com/news/570487/land-reforms-in-pakistan-by-afan-khan (last accessed 01.12.2010)

amendment is required for having such reforms. As an alternative he suggests that "their lordships would have to overrule the judgment in the Qazalbash Waqf v Chief Land Commissioner in another case[108]."

Another magazine article, in this regard, is by Zain M. Khan, "The Forgotten Land Reforms[109]." This article discusses the importance of land reforms mainly from an agrarian point of view. Though the author gives the descriptive reference of the land reforms legislation in Pakistan, the article does not find mention of judicial pronouncements. From an agrarian view point the author mentions the benefits which may be achieved in the development and improvement of the agricultural economy of Pakistan. In this regard the author suggests the formation of a national land use policy and proper legislation for the enforcement of the same.

The next is a twenty page on-line article by Shahid Saeed Khan[110]. In this article, the author asserts that land reforms are a political subject and a popular slogan of middle-class political parties. He is of the view that this is not the biggest problem in Pakistan. With respect to history of land reforms in Pakistan, the author mainly discusses the 1959 Regulation, the 1972 Regulation and the 1977 Act. Apart from these legislations, findings of the Federal Shariat Court in the Hafiz Muhammad Amin case and those of the Shariat Appellate Bench in the Qazalbash Waqf case are also mentioned. The purpose of drawing attention to these findings is to assert author's view that in the presence of these decisions effective land reforms cannot be carried out in the country; therefore, the slogan carries no weight. Since the author does not consider the land reforms a big issue, he does not present any legal or political solution for it. The style of the author is merely descriptive and the article hardly justifies its title.

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[108] Ibid

[109] Zain M. Khan, "The Forgotten Land Reforms," *Money Matters, The News International*, 11 November, 2013, p.14.

[110] Available at: http://secularpakistan.wordpress.com/2010/09/23/land-reforms-history-legal-challenges-and-how-shariat-courts-abolished-them/ (last accessed 22.10. 2013)

"Judicial Islamisation of Land Reforms Laws in Pakistan: Triumph of Legal Realism" by Muhammad Zubair Abbassi is also an important article desired to be reviewed here[111]. In this article the author discusses the Qazalbash Waqf case to find out "Who has the legal authority to determine the binding interpretation of Islamic law in the legal system of Pakistan?"

In this article a very brief and descriptive history of land reforms is mentioned. Interestingly, it is pointed out that the major land owning families were the British beneficiaries. However, after the creation of Pakistan the land reforms was one of the chief concerns. Thus, a ceiling was fixed on individual land holding by the Land Reforms Regulation, 1959, the Land Reforms Regulation, 1972 and the Land Reforms Act, 1977. There is, however, no reference in this article to the eradication of social evils, social justice and the promotion of social and economic well-being of people which are ultimate goals of land reforms. Since the author takes the judgment in Qazalbash Waqf case as a case study, he traces the history of this waqf. Thus, it is pointed out that the colonial masters had rewarded huge areas of land to this waqf in reward to their "distinguished services" for their masters.

Next, the author throws sufficient light on the Islamisation of laws in Pakistan. In this regard, he points out that after the fall of Muslim rule in the sub-continent, the main concern of the Muslims was to regulate their personal affairs according to Islamic law. Therefore, various laws such as Kazis Act, 1880, the Mussalman Waqf Validating Act, 1913, Muslim Personal Law (Sahriat) Application Act, 1937 and the Dissolution of Muslim Marriages Act, 1939 were promulgated. After, 1947 Islamisation of laws continued in one way or the other. In 1970s Zulfiqar Ali Bhutto raised the slogan of Islamic Socialism. However, it was in 1979 only that the judiciary was given a vital role to play in the Islamisation of laws. In all High Courts Shariat Benches were

[111] Dr. Muhammad Zubair Abbassi, "Judicial Islamisation of Land Reforms Laws in Pakistan: Triumph of Legal Realism", *Islamic Studies*, 57:3-4 (2018) 211–232

established by Zia-ul-Haq. These Benches were vested with the jurisdiction to declare a law void being inconsistent with the Injunctions of Islam. The Federal Shariat Court is a successor forum of these Benches. The author is of the view, that all these steps were politically motivated to a large extent.

While discussing the jurisprudential issues of the Qazalbash Waqf case, the author highlights that there was a clear division among the judges of the FSC and those of the appellate Bench regarding the interpretation of the Islamic injunctions. That is why, he raised the above question that who has the authority to give a binding interpretation of these injunctions. The author has written the above article in altogether a different context as compared to the present research. Nonetheless, it supports the claims made in this work that the majority of the large land owning persons got these lands as rewards of their allegiance to the colonial masters. Moreover, the Islamisation of laws is politically motivated.

"Marxism, Marxian Theories of Law and Pakistan's Experience with Socialism" is another article worth reviewing here[112]. In this article, the author, Dr. Muhammad Munir, first analyses critically three basic assumptions in the Marxist theories of law. He then goes on to analyse the "Islamic Socialist" slogan of Zulfiqar Ali Bhutto. Interestingly, a reference to the constitutional petition No. 97/2011 is also made in the above article.

The first assumption of the Marxist theories is that the law is the product of economic forces. Second, that law is considered a tool of the ruling class to maintain its power over the ruled ones. Finally, the force of law will get weaker and weaker as the communist society develops. According to the author, these assumptions did not prove true in the socialist states. He makes a

[112] Muhammad Munir. "Marxism. Marxian Theories of Law and Pakistan's Experience with Socialism", *Kardan Journal of Social Sciences and Humanities.* Vol. 1. Issue 2 (2018), 28-38

reference to the former USSR to point out that the law did not vanish there rather it grew in its own way. He asserts that the idea of "socialist legality" has no origin in Marxism.

As far as the "Islamic Socialism" of Bhutto is concerned, the author holds the view that it was neither Islamic nor socialist. However, inspired by socialism some constitutional provisions such as article 3, 23 and 253 were inserted in the 1973 Constitution by Bhutto. Nonetheless, the author fails to justify the presence of article 217 of the 1962 Constitution. The last mentioned provision is very similar to article 253 of the present Constitution with the only difference that it was not inserted by Bhutto being inspired by socialism.

According to the author, land reforms laws were also introduced as a socialist move. This, however, depicts the biased view of the author. The formation of Sindh *Hari* Enquiry Committee by the Quaid-e-Azam, the recommendations of the Land Reforms Commission, the report of the Agrarian Committee of the Pakistan Muslim League and other such documents strongly suggest otherwise. The land reform laws were promulgated to redress the grievances of the poor attached to earth in the village community. Likewise, the views of the author that land reform laws have been held illegal by the SAB are not justified. Many provisions of these laws were held valid by the SAB. Even according to the SAB, the provisions fixing a ceiling on individual holdings could be lawfully made if the same were to be enforced prospectively without affecting the property obtained by the operation of law.

Finally, a reference to the constitutional petition No. 97/2011 and calling it a review petition relying upon a newspaper clipping shows the lack of proper factual information of the author. The author without analysing the judgments of the FSC and the SAB regarding land reform laws and other relevant constitutional and legal provision jumps to conclude that the exercise of jurisdiction by the Supreme Court to set aside the effects of the judgment of the SAB in

Qazalbash Waqf case is not possible. It appears that like any other layman, the author has presumed that there are uncross able legal obstacles in carrying out land reforms in Pakistan. Therefore, the depressed and downtrodden poor attached to the earth in the village community should be left at their plight without giving effect to the inoperative constitutional provisions. This, of course, is not acceptable to any person believing in the democratic values and human rights.

Apart from the above articles, the literature available on land reforms is in the form of compilations of different legislative instruments. For example. Inam-ul-Haq Mian compiled *Manual of Land Reforms* containing West Pakistan Land Reforms Regulations, 1964, the Land Reforms Regulation, 1972 and Land Reforms Act, 1977[113]. Similarly. S. B. Ahmed compiled *Manual of Land Reforms with Rules* containing the last mentioned Regulations and the Act along with all relevant Notifications and amendments of the Punjab, Sindh, Baluchistan and N.W.F.P (KPK)[114].

Constitutional and Political History of Pakistan[115], *Proportionality: Constitutional Rights and their Limitations,*[116] *The Right to Development in International Law: The Case of Pakistan,*[117] are good books for understanding constitutional cases and human rights jurisprudence. Similarly, *Principles of Economics*[118] throws sufficient light on the evils of absentee landlordism. Besides, *A History of India,*[119] *Landlord and Peasant in Early Islam,*[120] *The Economic History of India,*[121]

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[113] Inam-ul-Haq Mian, *Manual of Land Reforms* (Lahore: Mansoor Book House, 1979)
[114] S. B. Ahmed, *Manual of Land Reforms with Rules: Containing all Relevant Notifications and Amendments of the Punjab, Sindh, Baluchistan and N.W.F.P.* (Lahore: The All Pakistan Legal Decisions, 1980)
[115] Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi: Oxford University Press, 2006)
[116] Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge University Press, 2012)
[117] Khurshid Iqbal, *The Right to Development in International Law: The Case of Pakistan* (New York: Routledge Taylor and Francis Group, 2010)
[118] Alfred Marshall, *Principles of Economics* (London: Macmillan and Co. Ltd., 1920)
[119] John Keay, *A History of India* (New Delhi: Punjab Publishers, 2001)
[120] Zia-ul-Haq, *Landlord and Peasant in Early Islam* (Lahore: Muhammadi Publishers, 2012)

Jagirdari aur Jagirdarana Culture,[122] *The Economic History of India under Early British Rule 1757-1858,* [123] *An Agrarian History of South Asia,*[124] are good books on the agrarian relations between landlords and tenants. Good information about land tenure system prevalent in the sub-continent is provided in these books.

The scope of the present work is different from the areas covered in the above reviewed literature as is indicated in the introduction above. Barrister Afan Khan, of course, suggests that the judgment in the Qazalbash Waqf case can be overruled by their lordships in another case. However, this article suggests nothing about the complex issue of jurisdiction and *stare decisis*. It does not even talk about the review case which was filed by the Government of Pakistan in the Supreme Court under article 188 of the Constitution against the judgment of the SAB in the Qazalbash Waqf case. Moreover, the scope of the legal issues intended to be explored in this research are entirely different and do not even find a mention in this article.

1.6 Outlines of Chapters

Chapter 2 of this research work gives a detailed analysis of the rights and protections available to the citizens of Pakistan under the Constitution. In this chapter, the scope of various constitutional provisions pertaining to the fundamental rights and others working within the framework of these rights is analyzed in the light of the judgments of the superior courts. Moreover, the intentions of the framers of the Constitution with regard to the promotion of social justice and eradication of social evils are thoroughly analyzed. The responsibilities of a welfare State to promote social and economic well being of its citizens are also made part of this chapter. The

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[121] Thairthankar Roy, *The Economic History of India* (New Delhi: Punjab Publishers, 2001)
[122] Dr. Ali Mubarak, *Jagirdari aur Jagirdarana Culture* (Lahore: Ashraf Publishers, 1990)
[123] Romesh Dutt, *The Economic History of India under Early British Rule 1757-1858* (London: Butter Worths, 1902)
[124] David Luden, *An Agrarian History of South Asia* (Cambridge: Cambridge University Press, 1999)

legislation made by the State in the discharge of its responsibilities mentioned above is also analysed in the same chapter.

Chapter 3 discusses and analyzes the Islamic character of the Constitution. In this chapter a thorough discussion regarding the establishment of the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court is made. Similarly, the functions, powers and various jurisdictions of the Bench and the Court are analysed. This chapter also evaluates some important judgments given by these forums exercising their jurisdiction under chapter 3A. Issues related to the constitutional interpretation are also discussed in this chapter. The mechanism of islamization of laws before the incorporation of chapter 3A in the Constitution is also analysed in this chapter.

Chapter 4 is dedicated to analyze the judgment of the Federal Shariat Court and that of the Shariat Appellate Bench in Hafiz Muhammad Amin and Qazalbash Waqf cases respectively.

Chapter 5 deals with the original jurisdiction of the Supreme Court under article 184(3) and other relevant provisions of the Constitution. The doctrine of *stare decisis* with reference to the Supreme Court and the FSC is also analyzed in this chapter. Finally, a conclusion is drawn.

CHAPTER 2

CONSTITUTIONAL RIGHTS AND PROTECTIONS

2. Introduction

This chapter points out that the miserable conditions of the tenants and other agricultural labourers at the hands of the landlords pointed out in the previous chapter do not conform to the fundamental rights, freedoms and liberties and the principles of policy provided in the Constitution. It is argued that the exploitation of the tenants, the forced labour which the tenants have to bear, their undignified treatment, waste of natural resources, violation of rights and freedoms of assembly, speech and association which are inherent in the institution of landlordism are a total negation of the egalitarian society which the people of Pakistan want to create. This chapter, therefore, presents a detailed analysis of the rights and protections available to the citizens of Pakistan under the Constitution.

In this chapter, the scope of various constitutional articles pertaining to the elimination of exploitation, abolition of slavery and forced labour, dignity of man, freedom of movement, freedom of association, protection of natural resources, and protection of property rights is analyzed in the light of the judgments of the superior courts. Moreover, the constitutional mechanism for the promotion of social justice and eradication of social evils is thoroughly analyzed. The responsibility of the State to promote social and economic well being of its citizens is also discussed. The legal steps taken by the State in the discharge of its responsibilities mentioned above are also evaluated.

2.1 Fundamental Rights and the Constitutional Courts

The fundamental rights jurisprudence is very rich in Pakistan. It is discussed and analysed with reference to the behavior and remarks of the constitutional courts of Pakistan while adjudicating the fundamental rights issues. Thus, the apex court of the country in Abdul Wahab case

emphasized the significance and importance which the Constitution has granted to the fundamental rights in very strong words[125]. According to the Court, the fundamental rights have no parallel and the State with all its institutions is bound to protect and enforce these rights at every level. The Court held:

> Fundamental rights enshrined in our Constitution have a very significant and pivotal position and are the most sacred of the rights conferred upon the citizens/persons of the country and thus the regard, security and the enforcement of these rights is one of the primary duties of the State and its institutions at all the levels[126].

With respect to the interpretation and scope of the fundamental rights, the apex court in Mian Muhammad Nawaz Sharif case held that the scope of the fundamental rights is ever changing[127]. It broadens and widens with the progress of the society. The fundamental rights provided by the constitutions of the modern world have a long history and can be traced to have their origin in natural law. Since a lot of development has been made in political, social and economic fields, these rights need to be interpreted widely. In fact, the courts are under a duty to protect and enforce these rights keeping in view the changed social needs having a progressive and futuristic approach. The Chief Justice of Pakistan heading an eleven member bench of the Supreme Court said:

> ...Basic or Fundamental Rights of individuals which presently stand formally incorporated in the modern Constitutional documents derive their lineage from and are traceable to the ancient Natural Law. With the passage of time and the evolution of civil society great changes occur in the political, social and economic conditions of society. There is, therefore, the corresponding need to re-evaluate the essence and soul of the fundamental rights as originally provided in the Constitution. They require to be construed in consonance with the changed conditions of the society and must be viewed and interpreted with a vision to the future...[128]

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[125] Abdul Wahab and others versus HBL and others, 2013 SCMR 1383
[126] Ibid, Paragraph 8.
[127] Mian Muhammad Nawaz Sharif versus President of Pakistan and others, PLD 1993 Supreme Court 473
[128] Ibid, 565

Similarly, the Lahore High Court in Shaheen Cotton Mills case explained a very useful rule of interpretation of the constitutional provisions[129]. The Court remarked that the Constitution is a living document. Therefore, the social and economic needs of people and the emerging developments in the society must be borne in mind while interpreting its provisions. Consequently, the interpretation by the courts of law should be such as to embrace all these aspects. The Court said:

> While interpreting the Constitution and its provisions it must be born (*sic.*) in mind that it...is a living document catering for the progress peace, welfare and amity amongst the citizens. The social and economic needs of the country, growing requirements of the society and the ever changing and complex issues faced by the people cannot be ignored. Therefore, the judicial interpretation must necessarily be dynamic rather than strategic, elastic rather than rigid[130].

2.2 Importance of the Principles of Policy and their Relation with the Fundamental Rights

The constitutional courts of Pakistan have given great importance to the principles of policy while interpreting and enforcing the fundamental rights. The Supreme Court, therefore, in Miss Benazir Bhutto case elucidated the significance of these principles authoritatively[131]. The placement of these principles next to the fundamental rights in the same part of the Constitution suggests that the former are supposed to operate within the framework of the latter. The Court terms the fundamental rights and the principles of policy collectively as the "conscience of the Constitution[132]". The Court said:

> The intention of the framers of the Constitution...is to implement the principles of social and economic justice enshrined in the Principles of Policy within the framework of Fundamental Rights. Chapters 1 & 2 of Part II of the Constitution which incorporate Fundamental Rights and directive principles of State policy, respectively occupy a place

[129] Messrs Shaheen Cotton Mills, Lahore and another versus Federation of Pakistan, Ministry of Commerce through Secretary and another, P L D 2011 Lahore 120
[130] Ibid, Paragraph 17
[131] Miss Benazir Bhutto versus Federation of Pakistan and another, PLD 1988 Supreme Court 416
[132] Ibid.

of pride in the scheme of the Constitution...these are the conscience of the Constitution, as they constitute the main thrust of the commitment to socio-economic justice...[133]

The apex court in this case also interpreted the intention of the makers of the Constitution with respect to the practical relation of the fundamental rights and the principles of policy. The goal of the egalitarian society which the people of Pakistan want to achieve can only be attained when the provisions contained in the two chapters of the Part II are woven in the same net. The Court clarified that, "...the authors of the Constitution, by enumerating the Fundamental Rights and the Principles of Policy, apparently did so in the belief that the proper and rational synthesis of the provisions of the two parts would lead to the establishment of an egalitarian society under the rule of law...[134]"

Similarly, a Division Bench of the Sindh High Court in Shah Murad Sugar Mills case emphasized the importance of the principles of policy provided in Part II of the Constitution[135]. The Court held that these principles can always be called in aid for the interpretation of the rest of the constitutional provisions. Moreover, the Court determined that the interpretation which promotes the objectives stated in these principles is to be adhered to. The Court observed as follows:

> ...by now it stands settled that the provisions contained in other chapters of the Constitution are to be interpreted in such a way that they are in consonance with the principles of policy contained in Chapter 2 of the Constitution. The directive principles are but an amplification of the preamble to the Constitution which basis the authority of the Constitution on the solemn resolve of the people to secure to all its citizens justice in the social, economic and political fields. The principles of State Policy can always be called in aid for interpretation of any legal provision or instrument. Interpretation which

[133] Ibid, 509-510
[134] Ibid, 510
[135] Messers Shah Murad Sugar Mills Ltd. through Deputy General Manager and others versus Government of Sindh through Secretary Agriculture and Food Department, Sindh Secretariat, Karachi and others, 2003CLC 1078 [Karachi]

seeks to comply or advance principles of State Policy is always to be adopted as against interpretation which goes against such principles[136].

That is why the Peshawar High Court in Mst. Margrate case disapproved the act of the education department of refusing the payment of salary to the employee in spite of her rendering services to the department[137]. The Court held that the act of stopping the salary of the employee is against the principles of policy. Emphasizing the importance of the principles of policy the Court observed that it is the duty of every department of the State to act in accordance with the principles of policy so far as they relate to that department. The Court further observed that the act of the department amounted to forced labour which is prohibited under article 11 of the Constitution. The relevant part of this article states as, "All forms of forced labour and traffic in human beings are prohibited.[138]" The Court explaining the duty of the education department also referred to article 29 which enjoins upon all the institutions of the State to act in conformity with the principles of policy. The Court said:

> Under Article 29 of the Constitution of Islamic Republic of Pakistan, the respondents are duty bound to act in accordance with Principles of Policy set out in Chapter 2 Part II of the Constitution in so far as they relate to their functions...The act of...stopping the salary of petitioner since her appointment is contrary to the Principles of Policy...[139]

Likewise, a Division Bench of the Lahore High Court in Qazi Akhtar Ali case ordered the payment of salary to the petitioner[140]. In fact, in this case fifteen days' salary was refused to a secretary of the Market Committee, a corporate body established under the Punjab Agriculture Produce Markets Ordinance, 1978. The Court while ordering the payment of salary held that services without pay not only amount to forced labour which is prohibited under article 11 but it

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[136] Ibid, Paragraph 56 (Underlining is mine)
[137] Mst. Margrate versus Executive District Officer Schools and Literacy Department, District Charsadda and 4 others 2005 PLC (C.S.) 886
[138] See article 11(2) of the 1973 Constitution.
[139] Mst. Margrate versus Executive District Officer Schools and Literacy Department, District Charsadda and 4 others 2005 PLC (C.S.) 886, Paragraph 9
[140] Qazi Akhtar Ali versus Director of Agriculture (Economics and Marketing) Punjab Agriculture House, Lahore and another, 2000 PLC (C.S.) 784 [Lahore High Court]

also amounts to the violation of the principles of Islam and social justice as contained in the principles of policy provided in chapter 2 of Part II of the Constitution. Thus, the Court held that the violation of the principles of policy is deplorable. The Court had the following to say in this regard:

> In these circumstances the petitioner was clearly entitled to receive the salary from the Market Committee and refusal of pay would amount to forced labour which is violative of the Constitution as also the principles of Islam and Social Justice...This act would also be violative of the principles of policy contained in Chapter 2 Part II of the Constitution...[141]

2.3 Other Constitutional Provisions that Work within the Framework of the Fundamental Rights

Besides the fundamental rights and the principles of policy, there are some other constitutional provisions which operate within the framework of these rights and principles. The most notable among these provisions, for the purposes of the present research, are articles 2A and 3 of the Constitution. The former has made the principles and provisions contained in the Objectives Resolution a substantive part of the Constitution while the latter enjoins upon the State to eliminate all forms of exploitation. It also requires the State to strive for "the fundamental principle, from each according to his ability to each according to his work[142]". Thus, it will be observed in the following lines that the superior courts while interpreting the fundamental rights and the principles of policy make a frequent reference to these articles.

Apart from the cases discussed above where the courts have disapproved the act of getting services without payment of wages relying on the prevention of forced labour and the principles of policy, the courts have also disapproved the same referring to the elimination of exploitation, right to life and dignity of man. Thus, in Zahid Ahmed case a Division Bench of the Sindh High Court held that the services of a person without paying him his due salary is not only forbidden

[141] Ibid, Paragraph 9
[142] See article 3 of the 1973 Constitution.

as forced labour but it also amounts to exploitation which is forbidden under article 3 of the Constitution[143]. The Court even called it a violation of right to life. Though the Court termed it the violation of the above mentioned fundamental rights, there is no reason why it should not be declared against the dignity of man, hence a violation of article 14 as well. Thus, the Court held:

> ...taking work from someone and not paying him for it amounts to exploitation, which is forbidden by Article 3 of the Constitution, denial of right to life which is forbidden by Article 9 of the Constitution and slavery and forced labour which is forbidden by Article 11 of the Constitution. Therefore, as long as the petitioner is working in the school, he is entitled to be paid his salaries. There cannot be any two opinions about it[144].

Similarly, the Lahore High Court in Abdul Qadir case ordered the payment of salary to a class IV employee of the education department who had rendered services for three years though his appointment had not been verified by the chairman[145]. The Court held that services without the payment of salary or wages amount to slavery which is prohibited by the Constitution. Moreover, services without legal consideration were pointed as the practice of the primitive ages when "the rulers used to treat their subjects as their slaves or the wealthy used to-treat the weak cruelly.[146]" Widening the scope of exploitation to include uncertainty in it, the Sindh High Court in Ayaz Ahmed Memon case observed that it is against the requirements of article 3 that a person should work in a state of uncertainty[147]. The fear that he can lose his livelihood at any time is the worst form of exploitation. The Court said:

> It is one of the most nefarious kinds of exploitation that a person is recruited on contract for a post of permanent nature and is continued as such from year to year keeping that person on the tenterhooks of uncertainty with the sword of termination of contract

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[143] Zahid Ahmed versus Province of Sindh through Secretary to the Government of Sindh Education and Literacy Department, Karachi and 4 others, 2012 PLC (C.S.) 124 [Karachi]
[144] Ibid, 126
[145] Abdul Qadir versus District Education Officer (EE & M), District Rahimyar Khan and other, 2001 PLC (C.S.) 1073 [Lahore High Court]
[146] Ibid, Paragraph 7
[147] Ayaz Ahmed Memon versus Pakistan Railways, Ministry of Railway, Islamabad through Chairman and another, 2011 PLC (C.S.) 281 [Karachi]

permanently hanging over his head by nothing but the most fragile thread of one knotted eyebrow of a superior. Such a situation cannot be, and indeed should not be allowed to be continued[148].

2.4 Special Protection for Backward and Depressed Classes

The courts have hardly tolerated any violation of the rights of the underdeveloped people like the tenants and *haris* and other agricultural labourers. Thus, the Supreme Court in the Human Rights Commission of Pakistan case reversed the judgment of the Sindh High Court and ordered the release of the tenants who had been detained by the landlords and were compelled to engage themselves in forced labour[149]. The facts of this case demonstrate how the institution of landlordism is violating the fundamental rights of the tenants and other agricultural labourers even recently.

The *zamindars* restricted the free movement of the tenants and subjected them to forced labour on the pretext of the loans the former had advanced to the latter. This constituted a clear violation of not only the Bonded Labour System (Abolition) Act, 1992 but also the fundamental law of the land i.e. the Constitution. The restriction of free movement by the landlords constituted a clear violation of article 15 which states as, "Every citizen shall have the right to remain in, and, 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[150]."

With respect to the application of the Bonded Labour System (Abolition) Act, 1992 to the tenants and other agricultural labourers, the Court held that the relationship of tenants and landlords is governed by the provisions of the Sindh Tenancy Act, 1950 as long as this relationship continues. However, once this relation comes to an end, the provisions of the

[148] Ibid, Paragraph 9
[149] Human Rights Commission of Pakistan and 2 others versus Government of Pakistan and others, PLD 2009 Supreme Court 507
[150] See article 15 of the 1973 Constitution.

Bonded Labour System (Abolition) Act, 1992 come into play even with respect to those transactions which were made in the previous relationship of landlord and tenant. While with respect to other agricultural labourers, the provisions of the 1992 Act apply absolutely and the provisions of the 1950 Act are not applicable[151].

The Court feels no hesitation in acknowledging the evils of the institution of the landlordism but is constrained to express its views on this issue due to the technicalities of the judicial system. Paragraph No. 5 of the judgment is a clear evidence of this fact. This paragraph reads as follows:

> ...miseries of tenants arose out of non-implementation of land reforms stipulating maximum limit on the holdings of agricultural land and not from issues raised in this appeal but unfortunately NGOs were not raising real problems and were only supporting insignificant controversies. While we have great respect for the views of the learned counsel particularly in view of his long-standing experience and his struggle for the cause of the downtrodden but we reminded him that this Court was only concerned with the lis before it and he was appearing as a law officer of the Provincial Government...[152]

Moreover, the superior courts have also taken the notice of the disparity between the bargaining strength of the parties and have always sided with the depressed and disadvantageous classes more particularly when the matter involves the protection and enforcement of the fundamental rights. This is evident from the judgment of the Supreme Court in Ikram Bari case[153]. One of the issues before the Court for determination in this case was the regularization of the bank employees, particular the minor staff. The Court declared that a society free from exploitation and providing social and economic justice to its inhabitants is required to be set up in an Islamic welfare State. Similarly, article 2A which makes the provisions of the Objectives Resolution a substantive part of the Constitution require that guarantees provided by Islam with respect to

[151] Human Rights Commission of Pakistan and 2 others versus Government of Pakistan and others, PLD 2009 Supreme Court 507

[152] Ibid, Paragraph 5

[153] Ikram Bari and others versus National Bank of Pakistan through President and others, 2005 PLC (C.S.) 915

equality, social and economic justice will be available to the people of Pakistan.

> There was no equilibrium of bargaining strength between the employer and the employee...By Article 2-A...it is unequivocally enjoined that in the State of Pakistan principle of equality, social and economic justice as enunciated by Islam shall be fully observed which shall be guaranteed as fundamental right[154].

On the basis of the above observations, the Court held that the disparity between the employer and the employee and disequilibrium between their bargaining strength will not be allowed to play any role in transactions and dealings between them. In this regard, the Court also made an express reference to article 38 which provides for the social and economic well being of the people and requires the State to formulate policies, *inter alia,* for the "equitable adjustment of rights between employers and employees, and landlords and tenants.[155]" The Court said:

> The principle of policy contained in Article 38 of the Constitution also provide, inter alia, that the State shall secure the well-being of the people by raising their standards of living...and reduce disparity in income and earnings of individuals...It is difficult to countenance the approach of the Bank that the temporary Godown staff and the daily wages employees should be continued to be governed on disgraceful terms and conditions of service...An employee being jobless and in fear of being shown the door had no option but to accept and continue with the appointment on whatever conditions it was offered by the Bank[156].

Similarly, the Lahore High Court in Umer Rathore case while exercising jurisdiction under Article 199 of the Constitution held section 15 of the Financial Institutions (Recovery of Finances) Ordinance 2001 ultra vires of the Constitution on a number of grounds[157]. However, for the purposes of the present discussion, the most relevant ground was the obvious difference between the positions of the litigants, the financial institution and the borrower. The Court held

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[154] Ibid, Paragraph 15

[155] See article 38 of the 1973 Constitution.

[156]Ikram Bari and others versus National Bank of Pakistan through President and others, 2005 PLC (C.S.) 915, Paragraph 15

[157]Muhammad Umer Rathore versus Federation of Pakistan, 2009 CLD 257

that where parties are not equally placed and one of the parties has advantageous position over the other their dealings may violate articles 2A, 3, 4, 9, 18, 23, 24 and 25 of the Constitution.

> The Constitution being the supreme law has guaranteed fundamental rights of the citizens. Can these rights be compromised...when the provision of law, is clearly in conflict with the fundamental rights...It is observed, once again that the impugned provision is against the principles of equity and treats one of the parties in a disadvantageous position where the parties are not treated alike...this discrimination is not only against the principles of equity but also offends the provisions of supreme law i.e. Articles 2-A, 3, 4, 9, 18, 23, 24 and 25[158].

Similarly, a seven member bench of the Supreme Court in Arshad Mehmood case disapproved the exploitation of the weaker classes of the society in all forms[159]. In this case Section 69-A of the Punjab Motor Vehicles Ordinance, 1965 was declared ultra vires of the Constitution being exploitative, imposing unreasonable restrictions on lawful occupation of transport and against the mandate of article 38 which requires the State to form policies and take actions for the promotion of social and economic well being of the people.

In fact, Section 69-A was inserted in the said Ordinance through an amendment in 1999. This section, *inter alia*, provided the right of franchise on specified routes to certain transport owners whereby certain large buses only could engage in the public transport services on the said routes to the exclusion of other public transport. It was challenged being inconsistent with the fundamental rights provided by the Constitution.

One of the points for determination before the Supreme Court was whether "the imposing of unreasonable restrictions on the free trade and business is not a social and economic exploitation as provided in article 3 of the Constitution of Islamic Republic of Pakistan, 1973[160]." The Court held that such restrictions amounted not only to the exploitation of the owners of the other

[158] Ibid, Paragraph 24
[159] Arshad Mehmood others versus Government of Punjab through Secretary Transport, Civil Secretariat, Lahore and others, PLD 2005 Supreme Court 193
[160] Ibid, Paragraph 6

transport but also a violation of article 38 of the Constitution which, as mentioned above, requires the State to formulate policies, *inter alia*, "to secure the well being of the people by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest[161]." The Court held:

> ...keeping in view other provisions of the Constitution, including Articles 3, 9, 18 as well as Article 38 of the Constitution, which deals with the principles of State policy, we are inclined to hold that...if restrictions are to be imposed to regulate...trade or business, those should not be arbitrary or excessive in nature...In the instant case, as per the requirement of Section 69-A of the Ordinance, the appellants, who are the owners of the stage carriages...would not be in a position to run the business on the specified routes...because it has been inferred from the facts of the case...that for one route they have to arrange a fleet of stage carriages. Obviously the appellants are not in a position to arrange such fleet, on account of their financial position or being un-influential persons...Consequently, such conditions would appear to be not only arbitrary but also oppressive in nature...[162]

In another case, the Lahore High Court observed that the weak bargaining position of a particular group of people must not operate as a tool for the compromise of their fundamental rights and protections provided to them by the Constitution[163]. The Court criticised the unbridled laissez faire while determining the issue of regularization of service of an employee. The Court said that it is against the constitutional protections provided to the citizens that the employer may exploit the employees due to the weak bargaining position of the latter. Since the Constitution prohibits the exploitation and provides for the dignity of man, the rule of hire and fire as practiced by the colonial masters in the pre-independence era cannot be allowed to continue. The Court said:

> The question of regularisation in service is required to be examined keeping in mind the historical as well as the Constitutional perspective during the pre-partition colonial rule...The relationship between the employer and the employee was governed by the rule of hire and fire. Those were the days of laissez faire when the contractual rights were

[161]See article 38 of the 1973 Constitution.
[162]Arshad Mehmood others versus Government of Punjab through Secretary Transport, Civil Secretariat, Lahore and others, PLD 2005 Supreme Court 193, Paragraph 27
[163]Muhammad Asim and others versus Telecommunication and others, 1997 PLC (C.S.) 1131

placed above the human rights. The concepts of dignity of labour and just remuneration for work for workers were wholly alien...But under our Constitution which specifically...guarantees the social and economic justice and fundamental freedoms and rights to the citizens the employer is not allowed to dictate his terms of appointment taking advantage of the absence of the bargaining power in the employees and to force an employee to accept employment on take it or leave it terms offered by the employer...[164]

2.5 Constitutional Mechanism for Social Justice and Economic Well Being

The Constitution contains a number of provisions for providing social justice and economic well being of the people. The principles of social and economic justice referred above are mainly contained in articles 37 and 38 of the Constitution. Article 37 provides for the promotion of social justice and eradication of social evils. It talks about the responsibility of the State with respect to the promotion of educational and economic interests particularly of the backward and depressed classes, removal of illiteracy and to provide educational facilities, availability of justice and others. Importantly, this article enjoins upon the State a duty to make the work conditions friendly and help the people through agricultural development and other methods to play their role in the national life. The relevant part of this article states as:

The State shall:

(a) Promote, with special care, the educational and economic interests of backward classes or areas;

(b) Remove illiteracy and provide free and compulsory secondary education within minimum possible period:

(c) Make technical and professional education generally available and higher education equally accessible to all on the basis of merit;

(d) Ensure inexpensive and expeditious justice;

(e) Make provision for securing just and humane conditions of work, ensuring that children and women are not employed in vocations unsuited to their age or sex, and for maternity benefits for women in employment;

[164]Ibid, Paragraph 5

(f) Enable the people of different areas, through education, training, agricultural and industrial development and other methods, to participate fully in all forms of national activities, including employment in the service of Pakistan...[165]

As far as article 38 is concerned, it provides for the promotion of social and economic well being of the people as mentioned above. It talks about the responsibility of the State to shield the well being of every class of the society. The State will discharge this responsibility, *inter alia*, by improving the living standards, equitable distribution of wealth and adjustment of rights between land-lords and tenants etc. In fact, this article contains a complete set of social rights. Its relevant part states as:

The State shall:

(a) Secure the wellbeing of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;

(b) Provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure;

(c) Provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means;

(d) Provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;

(e) Reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan...[166]

The apex court in Miss Benazir Bhutto case remarked that the principles of social and economic justice as provided by the above discussed principles of policy though have not been made directly justice able, the same are the basis and guidelines of all the legislative and executive

[165]See article 37 of the 1973 Constitution.
[166]See article 38 of the 1973 Constitution.

actions of the State institutions[167]. The Court made a specific reference to articles 3, 37 and 38 to note that these provisions are indirectly enforceable and the enforcement of the same is essential for the democratic momentum of the State. The Court said:

> ...Articles 3, 37 and 38 of the Constitution juxtapose to advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of democracy. These provisions become in an indirect sense enforceable by law and thus, bring about a phenomenal change in the idea of correlation of Fundamental Rights and directive principles of State policy...[168]

Likewise, the Sindh High Court in the Shah Murad case referred above specifically explained the law contained in article 38in the following words[169]:

> Article 38 of the Constitution contains one of the basic principles of policy to the effect that the State shall secure the well-being of the people by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlord and tenants. It further places an onerous obligation on the State to provide for all citizens within the available resources of the country facilities for work and adequate livelihood and further reduce disparity in the income and earnings of individuals[170].

The Court acknowledged that though the principles of policy are not directly justice able, the superior courts of the country have very often sought help from these principles while enforcing the fundamental rights. The Court explained the role of the principles of policy in the enforcement of the fundamental rights in the following words:

> Although the Principles of Policy are not to be enforced through the Courts of law but while considering if any provision of law is in consonance with the Fundamental Rights guaranteed in the Constitution or is violative of the Fundamental Rights, the Courts are always required to keep in view the Principles of Policy enshrined in the Constitution.

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[167]Miss Benazir Bhutto versus Federation of Pakistan and another, PLD 1988 Supreme Court 416

[168]Ibid, 510

[169]Messers Shah Murad Sugar Mills Ltd. through Deputy General Manager and others versus Government of Sindh through Secretary Agriculture and Food Department, Sindh Secretariat, Karachi and others, 2003CLC 1078 [Karachi]

[170] Ibid, Paragraph 61

> While considering the validity of a law on the touchstone of Fundamental Rights, it is required to be examined whether the impugned law is in consonance with the purposes sought to be achieved by pursuing the principles of policy[171].

In fact, in this case the Sindh High Court held section 16(v) of the Sugar Factories Control Act, 1950 as intra vires of the Constitution. This section was inserted as an incentive for the growers of the sugar cane in Sindh so that they produce better quality of sugar cane. As it provided for the payment of quality premium to the growers by the sugar mills if the sugar cane produced by the growers yielded sucrose above the base level determined by the provincial government. Consequently, this provision benefited the growers. The Court not only held this provision a valid piece of legislation but also declared it in consonance with article 38 of the Constitution aiming at the promotion of social and economic well being of the people. Thus, the Court in this regard observed as follows:

> ...It is further aimed at improving the lot of the deprived class of growers and to provide them due share of their hard labour and work and to ensure the improvement of their standard of living by providing a profit sharing formula when the recovery of sucrose is in, excess of the bench mark determined by the Provincial Government...[172]

The Court validating section 16(v) of the 1950 Act as it promotes the social and economic well-being of the growers further held:

> On the contrary it is in consonance with the principles of social and economic justice as enunciated by Islam and is aimed at the reduction of disparity in the income and earnings of individuals and to improve the standard of living of the growers. It is aimed at preventing the concentration of wealth in the hands of few. It is directed towards the elimination of a form of exploitation and is meant to fulfill the fundamental principle- from each according to his ability, to each according to his work[173].

In order to emphasize the importance of social justice and economic well being of the citizens, the Court also relied upon some excerpts from the speech of Mr. Liaqat Ali khan which he had

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[171] Ibid.
[172] Ibid, Paragraph 70
[173] Ibid, Paragraph 62

delivered while presenting the Objectives Resolution which now forms not only the preamble of the Constitution but also its substantive part as per article 2A. The Court referred:

> ...Islamic social justice is based upon fundamental laws and concepts, which guarantee to man a life free from want and rich in freedom. It is for this reason that the principles of democracy, freedom, equality, tolerance and social justice have been further defined by giving to them a meaning which, in our view, is deeper and wider than the usual connotation of these words...It is our firm belief and we have said this from many a platform that Pakistan does not stand for vested interests or the wealthy classes. It is our intention to build up an economy on the basic principles of Islam which seeks a better distribution of wealth and the removal of want, poverty and backwardness...We must raise their standards of life, and free them from the shackles of poverty and ignorance...[174]

Apart from the above discussed provisions, it is considered expedient to analyse article 24 (3) (f) in the following lines. Clause 3 (f), in fact, saves the operation of law which has been or could be made to fix a ceiling on landholding from the general protection provided to property rights under the article 24. So, this provision puts a reasonable restriction on the general scope of the article. It is interesting to note that the parliament is competent to make such a law under article 253 of the Constitution. The objective of the law made under the last mentioned article is to achieve social justice in the society and promote the economic well being of the people[175].

So, it can be observed that article 24 (3) (f) has been made a part of the Constitution on the basis of the well established principle that the community rights have supremacy over individual rights. In this regard, the Supreme Court very elaborately held in Pakistan Muslim League (N) case that the fundamental rights have their own importance nonetheless these rights are subject to the community interests[176]. Therefore, whenever a general interest is to be achieved by putting

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[174] Ibid.

[175] This issue has been further discussed and analysed under heading 2.8 below.

[176] Pakistan Muslim League (N) through Khawaja Muhammad Asif M.N.A. and others versus Federation of Pakistan through Ministry of Interior and others, PLD 2007 Supreme Court 642

some restrictions on the exercise of any constitutional right, such restrictions will be deemed reasonable. The Court said:

> The fundamental rights can neither be treated lightly nor interpreted in a casual or cursory manner but while interpreting Fundamental Rights guaranteed by the Constitution, a cardinal principle has always to be borne in mind that these guarantees to individuals are subject to the overriding necessity or interest of community. A balance has to be struck between these rights of individuals and the interests of the community. If in serving the interests of the community, an individual or number of individuals, have to be put to some inconvenience and loss by placing restrictions on some of their rights guaranteed by the Constitution, the restrictions can never be considered to be unreasonable[177].

Similarly, the Lahore High Court in D.G. Khan Cement Company Ltd. case explained the scope of the terms "law" and "reasonable restrictions" used in articles 23 and 24[178]. The Court said that they will be considered proper only if they "uphold the constitutional themes of democracy, freedom, equality, tolerance, social justice and advance the principles of policy under the Constitution.[179]" It is evident from these lines and above discussion that the restrictions put by clause 3 (f) of Article 24 are intended to achieve social justice and promote economic well being of people.

Finally with reference to achieve the social justice and the economic well being constitutionally; the Shaheen Cotton Mills case is discussed here[180]. In this case, the Lahore High Court made a reference to articles 3 and 38 to hold a notification issued under section 3(1) of the Import and Export (Control) Act, 1950 constitutionally valid. This notification imposed a ceiling on the export of the cotton yarn beyond which the export of the said yarn was prohibited. The fixation of ceiling was challenged by the exporters of the cotton yarn being inconsistent with their

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[177] Ibid, 651

[178] D.G. Khan Cement Company Ltd. through Chief Financial Officer versus Federation of Pakistan through Secretary Ministry of Law and 3 others, P L D 2013 Lahore 693

[179] Ibid, Paragraph 19

[180] Messrs Shaheen Cotton Mills, Lahore and another versus Federation of Pakistan, Ministry of Commerce through Secretary and another, P L D 2011 Lahore 120

fundamental right to have freedom of trade as provided by article 18. The Court declined their view and held that the general interest of the community to achieve social justice and promote economic well being has preference over the individual interest of the exporters. The Court said:

> ...Article 18 and the right guaranteed thereby cannot be interpreted by excluding or ignoring other provisions of the Constitution including Article 38 which casts responsibility upon the State to secure the wellbeing of the people and to promote and protect employment. In this behalf, categorical command of Article 3 of the Constitution can also not be ignored...The interest of the State and the community cannot be ignored or sacrificed for the profits sought to be made by the individual at the cost of great hardship to a significant segment of the population..."[181]

2.6 Protection and Preservation of Natural and National Resources

The constitutional courts have been very cautious about their response with respect to the protection and preservation of natural resources and the national wealth of the State. The Supreme Court in the Alleged Corruption in the Rental Power Plants case, in the very opening paragraph of its judgment made a reference to article 2A and observed that Pakistan is to be governed by the chosen representatives of the people under the Constitution [182]. Such representatives are, therefore, required to govern the State being faithful to the people of Pakistan, honestly and to the best of their abilities which definitely includes taking all steps for the well being and the prosperity of the people of Pakistan.

The well being of the people referred above is none other than the social and economic well being. In this regard, the Court made reference to the principles of policy and the Objectives Resolution to clarify that the government is bound to take steps for the welfare of the people. The Court said, "It is to be clarified that the Government of the day under Article 29 read with Article 2A of the Constitution is bound to formulate policies for the promotion of social and economic

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[181] Ibid, Paragraph 44

[182] Alleged Corruption in Rental Power Plants etc. Human Rights Cases No. 7734-G/2009, 1003-G/2010 and 56712/2010, 2012 SCMR 773

well being of the people...[183]"

Land is one of the most important natural resources available to a State to fulfill the living needs of its population. Thus, its proper distribution and utilization can play a pivotal role in the well being and prosperity of the people. The Supreme Court in the above mentioned case took particular note of the preservation of the natural resources for the well being and prosperity of the people. The Court emphasizing the obligations of the elected government with respect to the preservation and protection of the natural resources held the same one of the constitutional duties of the government towards its citizens. The Court determined that these resources fall within the definition of property and made an express reference to article 24 which provides for the protection of property rights. The following was said by the Court:

> The Government/Executive being the custodian of the national resources on behalf of the nation is bound to preserve and protect the same by strictly adhering to the relevant laws, conventions, experiences and have no authority to compromise with the resources, which fall within the definition of property in terms of constitutional provisions, belonging to general masses falling within the ambit of Article 24 of the Constitution[184].

Likewise, the Supreme Court in Muhammad Yasin case while holding the appointment of the chairman OGRA null and void ruled that "the Constitution envisages a political dispensation where good economic governance is a right of the people of Pakistan which they cannot be deprived of.[185]" The Court explained that the Constitution is to be interpreted as an integrated whole and if the Constitution is looked in this manner, it becomes absolutely clear that the Constitution fully protects the economic well being of the people.

It requires the State and the government to be vigilant about the resources of the State. Any negligence on the part of the government with respect to the protection of the State's

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[183] Ibid. Paragraph 15

[184] Ibid. Paragraph 10

[185] Muhammad Yasin versus Federation of Pakistan through Secretary Establishment Division, Islamabad and others, PLD 2012 Supreme Court 132, Paragraph 13

resources will be considered a violation of the fundamental rights of the people. The Court said:

> ...it is a part of the fundamental rights of the people of Pakistan that they be governed by a State which provides effective safeguards for their economic well-being; a State which protects *inter alia*, the belongings and assets of the State and its citizens from waste and malversation...our Constitution is not silent on issues which affect the economic life of the nation and its citizens. It contains a whole range of Articles which have a direct nexus with good economic governance and fundamental rights...[186]

Moreover, the Supreme Court held the same view about the national wealth/resources in another case where it had to determine the scope of the powers of a caretaker government[187]. In this case, the Court made a reference to article 9 of the Constitution which says, "No person shall be deprived of life or liberty save in accordance with law[188]." The protection of national wealth/resources in the context of security of person under article 9 suggests the wider scope of the right to life that has been given by the superior courts of Pakistan to this provision. The Court said, "It is a fundamental right of the citizens of Pakistan under Article 9 of the Constitution that the national wealth/resources must remain fully protected whether they are under the control of the banks or the autonomous and semi-autonomous bodies..."[189]

Similarly, the scope of article 9 was discussed by the Supreme Court in Shehla Zia case while determining the alleged violations of the fundamental rights due to the installation of a grid station close to the residential area[190]. The Court held that the right to life cannot be restricted to mere vegetative life rather it covers all facets of life. Thus, the word life as used in article 9 is not to be construed narrowly but it includes the right to enjoy life as well. Moreover, the Court also

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[186] Ibid.
[187] Khawaja Muhammad Asif versus Federation of Pakistan and others, 2013 SCMR 1205
[188] See article 9 of the 1973 Constitution.
[189] Ibid, Paragraph 23
[190] Ms. Shehla Zia and others versus Wapda, PLD 1994 Supreme Court 693

made a reference to article 14 which talks about the dignity of man and its relevant part states as, "The dignity of man and, subject to law, the privacy of home, shall be inviolable...[191]" The Court raised a very vital question which emerges by the combined reading of both these articles. The Court interrogated whether the fundamental rights provided by these articles can be said to be fully enjoyed if the people live miserable lives without having even bare necessities such as food, clothing etc. The Court observed as follows:

> Under our Constitution, Article 14 provides that the dignity of man and subject to law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to life under Article 9 and if both are read together, question will, arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment...[192]

2.7 Protection and Promotion of Democratic Values

The right to vote and form a government of the representatives is the essence of democracy and fully protected under the various constitutional provisions. The constitutional courts have reiterated this principle time and again in their judgments. However, the institution of landlordism, as noted in the previous chapter, has been responsible for the violation of this fundamental right of the tenants and other agricultural labourers working under them.

The Supreme Court has been very watchful in enforcing every aspect of this fundamental right. Thus the apex court in Mian Muhammad Nawaz Sharif case emphasized the protection given to it by the Constitution[193]. It was said, "...In a democratic just order every citizen has right to equal participation in the political process as required by the Constitution. Every citizen without any discrimination within the frontiers of the Constitution can profess, practise, exercise and

[191] See article 14 of the 1973 Constitution.
[192] Ms. Shehla Zia and others versus Wapda, PLD 1994 Supreme Court 693, Paragraph 24
[193] Mian Muhammad Nawaz Sharif versus President of Pakistan and others, PLD 1993 Supreme Court 473

operate his right to participate in the governance of the country...[194]" Saad Saood Jan J. agreeing with the majority opinion further explained, "...There seems little doubt that the paramount consideration before the Constitution makers was that no section of the citizenry no matter how small it might be should be deprived of equal participation in the national life and no one should feel that he has not had a fair deal...[195]"

In this regard, the apex court in Workers' Party Pakistan case had to adjudicate, *inter alia*, whether "the prevailing electioneering practices involving wealth, power and influence are against the mandate of the Constitution regarding free, fair, just and honest elections on a level playing field.[196]" The Court in order to answer this question explained the scope of article 17 of the Constitution which generally provides for the freedom of association. The Court held that under this provision it is a fundamental right of the citizens "to partake in the political governance of the State[197]." The freedom of association as provided by this article includes freedom of assembly as well as freedom of speech as provided by articles 16 and 19 respectively. The Court with respect to the scope of article 17 held as under:

> The freedom of association, as enunciated by Article 17 of the Constitution, confers a Fundamental right on every individual to partake in the political governance of the State, whilst concurrently reinforcing the constitutional mandate to protect and advance this right through a democratic system. The freedom of assembly (Article 16) and freedom of speech (Article 19) also serve to realize this constitutional imperative...[198]

Democracy is a salient feature of the Constitution and the same is realized through elections. The constitutional mandate for holding/conducting elections is that the same should be free, fair and transparent. Therefore, a voter should be facilitated "to exercise his right of franchise

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[194] Ibid, 824
[195] Ibid, 675
[196] Workers' Party Pakistan through General Secretary and 6 others versus Federation of Pakistan and 2 others PLD 2012 Supreme Court 681
[197] Ibid, Paragraph 37
[198] Ibid, Paragraph 80(1)

independently with full application of mind and without influence from the candidate or his supporters[199]."

The Court answered the above referred question in affirmative and held that the election campaign should be in reach of a common man. Regarding the election campaign the Court said, "Only such election campaign activities ought to be permitted, which on the one hand fulfill the purpose of the election campaign, and on the other are within the reach of the common man...[200]"

Similarly, the Supreme Court in its judgment in Imran Khan case ordered the preparation of correct and complete electoral rolls and explained that such preparation was a sine qua non for the free, fair and transparent elections which is a mandatory constitutional mandate[201]. However, the miserable conditions of the depressed classes under the institution of landlordism and their status does not allow them to exercise their fundamental right as provided under article 17 of the Constitution. The Court expressed the need for preparation of the electoral rolls in the following words:

> Accurate electoral rolls was a sine qua non for the holding of a free, fair and transparent election, which was not only the command of the Constitution but also a Fundamental Right of the citizens, which appeared to have been compromised qua the residents of Karachi...the Election Commission has to carry out proper and complete door-to-door verification in Karachi so as to ensure that no voter was disenfranchised or dislocated and all other discrepancies were rectified as early as possible, and that in view of the peculiar security situation in Karachi such verification must be carried out by the Election Commission with the help and assistance of Army and Frontier Constabulary[202].

Given the importance of this right, the amendments made in the Political Parties Act, 1962 and the Freedom of Association Order, 1978 were challenged in Benazir Bhutto case before the

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[199] Ibid, Paragraph 52
[200] Ibid, Paragraph 80(1)(g)
[201] Imran Khan and others versus Election Commission of Pakistan and others, PLD 2013 Supreme Court 120
[202] Ibid, Paragraph 28

Supreme Court being inconsistent with the fundamental rights particularly the one provided by article 17[203]. The Court termed the freedom of association as one of the pillars of democracy. This freedom is not limited to the initial formation of the association but also its continued existence. Moreover, it is through the exercise of this right that the citizens elect their representatives to from the government of the State. Therefore, the proper exercise of this right ultimately determines their fate which obviously has direct bearing on the society as a whole.

2.8 Legal Steps Taken by the State for Providing Social Justice and Economic Well Being

The discussion with respect to the above heading will be restricted to the steps taken by the State for the fixation of ceiling on land-holdings and thus the abolition of the institution of landlordism and feudalism. As noted in the previous chapter, the formation of the Sindh *Hari* Enquiry Committee, the Agrarian Committee of the Pakistan Muslim League, the Land Reforms Commission for West Pakistan, and Chapter 17 of the First Five-Year Plan (1955-60) were all aimed at providing social justice and economic well being. The reports submitted by these committees and the commission recommended fixation of ceiling on the land-holding. Moreover, the Land Reform Resolution of 1950 was passed by the Muslim League Council. Pursuant to this resolution, the East Bengal Estates Acquisition and Tenancy Act, 1950 aiming at the abolition of landlordism was also passed. Consequently, landlordism was abolished in the East Pakistan. Similarly, the West Pakistan Land Reforms Regulation 1959 (Regulation 64 of 1959) was made by Ayub Khan to provide social justice and economic well being. After the disintegration of Pakistan, land reforms were carried out by Zulfiqar Ali Bhutto who first became the first Civil Martial Law Administrator of Pakistan and then the elected Prime Minister. To avoid repetition,

[203] Miss Benazir Bhutto versus Federation of Pakistan and another, PLD 1988 Supreme Court 416

only the relevant parts of the Land Reforms Regulation, 1972 and the Land Reforms Act, 1977 will be analysed in detail here.

It is quite interesting to note that Nasim Hassan Shah J., a member of the SAB in Qazalbash Waqf case[204], generally throwing light on the importance of land reforms acknowledged that the same are necessary for providing social justice to the people. Moreover, he admitted that if such reforms are not carried out, a number of social evils may take place in the society. He is of the view that these reforms are purely Islamic in their character. He said:

> In order to ensure that the needy and the deprived mount up the scale of social hierarchy it is necessary to undertake land reforms, confer rights of ownership upon the tenants and to reduce the family holdings.
>
> It should not be forgotten that landed property if not equitably distributed becomes not only the most important source of economic injustice but also leads social tensions and moral degeneration in the society. It is, therefore, in furtherance of the objects of the Islamic system to regulate and mould this institution in a manner which conforms to the Islamic concept of trusteeship. Thus while every effort should be made to encourage the altruistic instinct in man, the State must intervene where private initiative fails. And in view of man's instinctive greed, to which the Holy Quran testifies, the role of the State may have to be quite large to effectuate a substantial transfer of privately held property to "the needy and the deprived". All such steps will be in accord with the Divine principles Al-Adal Wal Ehsan[205].

2.8.1 The Land Reforms Regulation, 1972[206]

This Regulation consists of IX parts and 32 Paragraphs, and it repealed the Land Reforms Regulation, 1959. The 1972 Regulation has an overriding effect and its provisions are to be given effect even if contradictory provisions are contained in any other law. The preamble of the Regulation describes two purposes of its issuance. The first one is the equitable distribution of wealth and economic powers while the other is to improve the economic well being of peasantry

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[204] Qazalbash Waqf, PLD 1990 Supreme Court 99

[205] Ibid, 130

[206] The Land Reforms Regulation, 1972 (M.L.R 115 0f 1972)

and to make it a profitable vocation. The former is the requirement of Islam since Islam discourages the concentration of wealth in a few hands while the latter is in the supreme national interest. The relevant part of the preamble reads as, "Whereas Islam enjoins equitable distribution of wealth and economic powers and abhors their concentration in a few hands;

And whereas it is in the supreme national interest to improve the economic well-being of the peasantry, by making agriculture a profitable vocation...[207]"

Paragraph 2 of the Regulation gives the definitions of various expressions used in the Regulation. For the purposes of the present research, the definitions of the land, orchard, person, economic holding, subsistence holding, produce index unit and tenant will be analysed. Some of these expressions have been defined with reference to their particular agricultural use in the Regulation. Therefore, it is considered expedient to give their general description as well to familiarize them to the general reader.

Land is defined in Paragraph 2(4) of the Regulation. According to this provision land means only that land which can be used for agricultural purposes or for purposes related to agriculture. It also includes the buildings and other structures on such land. Similarly, orchard is defined as a particular type of land. If twenty five fruit trees are grown or maintained on per acre of land by human efforts, it is called orchard under Paragraph 2(5) of the Regulation.

The definition of person is relevant because the same has been declared void in the Qazalbash Waqf case to the extent it includes religious, charitable and educational institutions and trusts in it. The definition is provided in Paragraph 2(7) of the Regulation. It is a very interesting definition as it includes certain entities and excludes certain others. The followings are included in the definition of person.

i. religious institution

[207] See the preamble of the Land Reforms Regulation, 1972 (M.L.R. 115 of 1972).

ii. educational institution

iii. charitable institution

iv. every trust, whether public or private

v. a Hindu undivided family

vi. a company or association or body of individuals

vii. a co–operative or other society

The followings are excluded from the definition person.

i. a local authority

ii. a university established by law

iii. a body incorporated by a central or provincial law

iv. a co-operative farming society registered under the Co-operative Farming Ordinance. 1976

v. a livestock farm exempted by the Government from the operation of this Regulation

vi. an educational institution exempted by the Government from the operation of this Regulation

The next definition desired to be discussed here is that of economic holding. It is defined in Paragraph 2(2) while subsistence holding is defined in Paragraph 2(12) of the Regulation. It should be noted that both the definitions comprise different areas of land for the provinces of Baluchistan and Sindh and for elsewhere. But before discussing the definitions of these terms as provided by the Regulation, a general meaning of the holding with respect to its agricultural use is discussed.

Holding is the analytical unit used in agricultural statistics which defines an establishment used for agricultural, livestock or silvicultural production. So, an agricultural holding is defined as,

"an economic unit of agricultural production under single management comprising all livestock kept and all land used wholly or partly for agricultural production purposes without regard to title, legal form or size.[208]"

As per Paragraph 2(2) of the Regulation an economic holding is defined as area sixty-four acres of land for the provinces of Baluchistan and Sindh. While for areas other than Baluchistan and Sindh an economic holding means two squares, two rectangles or fifty acres whichever is greater. As far as subsistence holding is concerned, it is generally meant for the personal and family use of the cultivator. Under the Regulation, it consists of an area of thirty-two acres of land in Baluchistan, sixteen acres in Sindh and half a square or half a rectangle or twelve and half acres of land elsewhere. It does not matter whether an economic holding or a subsistence holding is situated within one estate or different estates. However, for the purposes of the Paragraphs 22 and 24 of the Regulation both an economic holding as well as a subsistence holding must be situated within one estate.

Next is the definition of produce index unit (PIU). It generally refers to the fertility of land or its growing capacity. It was established in 1947 after the partition of the sub-continent to grant claims of the refugees under the schemes relating to their rehabilitation. Paragraph 2(10) defines PIU as "the measure in terms of which the comparative productivity of an area of land of a particular kind in a particular assessment circle or area is computed and expressed for the purposes of the schemes relating to the resettlement of displaced persons on land.[209]" However, in areas where no such scheme was present, the Commission has the authority to determine the PIU[210].

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[208] FAO Statistical Development Series 14. "2000 World Census of Agriculture Methodological Review (1996-2005)" (Rome: 2013), 7.

[209] See Paragraph 2(10) of the Land Reforms Regulation, 1972 (M.L.R. 115 of 1972)

[210] Commission refers to a Land Commission established under Paragraph 4 of the 1972 Regulation.

Paragraph 2(13) defines tenant. According to this definition a tenant is a person who holds land under another person and pays rent for such holding. The predecessors and successors in interest of the tenant are included in the definition of the tenant but certain persons have been excluded from the definition of tenant such as the one who holds land under the Government or any statutory body of the Government etc.

Part II of the Regulation has the implementation mechanism of the various provisions of the Regulation. The most important provision of this part is in the form of Paragraph 4. It talks about the constitution of a Provincial Land Commission to carry out the purposes of the Regulation. In fact, one of the members of the Commission known as the Chief Land Commissioner has been made responsible for the above mentioned task.

Part III of the Regulation fixes a ceiling on land-holding and is considered its most important part for the purposes of the present research. It consists of five paragraphs i.e. from Paragraph 7 to Paragraph 11. It should be noted that the SAB in the Qazalbash Waqf case has declared these entire paragraphs void being repugnant to the injunctions of Islam save Paragraph 11[211].

Paragraph 7(a) is a general provision and it applies to all transfers. This paragraph declares all transfers of land made and encumbrances incurred on land on or after 20.12.1971 by any person holding an area more than one hundred and fifty acres of irrigated land or three hundred acres of unirrigated land or an area equivalent to fifteen thousand PIU whichever is greater void. The PIU was to be calculated on the basis of classification of soil as entered into the revenue records of Kharif 1969 and Rabi 1969-1970. The effect of this provision is that the person owning or possessing the land immediately before the said date will be considered so owning or possessing the same.

[211]The analysis of Qazalbash Waqf case is given in chapter 4 below.

Paragraph 7(b) applies only to those transfers which are not bona fide. According to this paragraph all transfers of land by any person holding an area equivalent to fifteen thousand PIU or more on 01.03.1967 will be void. The PIU was to be calculated on the basis of classification of soil as entered into the revenue records of Kharif 1966 and Rabi 1966-1967. This provision will have the same effect as that of the above provision. It is interesting to note that any transfer of land or any right in land by way of gift has been excluded from the scope of bona fide transfer. In some cases, though such transfer can be considered bona fide such as a gift to widowed or unmarried sister who has not received her share of inheritance etc.

Paragraph 8(1) fixes a ceiling on landholding with respect to persons who did not own an agricultural tractor or who did not have at least a ten horse-power tube-well installed on their lands. The ceiling fixed by this paragraph is one hundred and fifty acres of irrigated land or three hundred acres of unirrigated land or irrigated and unirrigated land the aggregate of which exceeds one hundred and fifty acres of irrigated land or an area equivalent to fifteen thousand PIU whichever is greater. One acre of irrigated land has been held equivalent to two acres of unirrigated land. The PIU was to be calculated on the same basis as mentioned in Paragraph 7(a) above. As far as the persons who on 20.12.1971 owned an agricultural tractor or who had installed a tube-well of the above mentioned specifications are concerned, they could own or possess land up to eighteen thousand PIU as provided in Paragraph 8(2).

Under Paragraph 9 if a person owns or possesses land which touches the ceiling provided in Paragraph 8, he will not be allowed to have any share in the *shamilat.* However, if a person has land less than the ceiling, he can have a share in the *shamilat* to the extent that he does not violate the ceiling.

Paragraph 10 applies to those persons who have been in the civil service of Pakistan as defined in this paragraph between 01.01.1959 and two years after their service. According to this paragraph the ceiling on landholding for such persons is one hundred acres. However, this limit can exceed in case any such person inherits but in any case it should not exceed the ceiling provided in Paragraph 8 above.

Paragraph 11 is about the choice and exchange of areas of land. It says if a person owns or possesses land exceeding the ceiling, he has the option to retain the land of his choice and surrender the rest. However, in making his choice he is required to select compact blocks of not less than the size of an economic holding. Similarly Paragraph 11(2) allows interchange of land with the family members for consolidation. This provision is, in fact, made to get the maximum production out of land at an economic cost.

Part IV of the Regulation is its operative part. It consists of six paragraphs i.e. from Paragraph 12 to Paragraph 17. It should be noted that the Paragraphs 13 and 14 have been entirely declared repugnant to the injunctions of Islam while Paragraphs 15, 16 and 17 have been so declared to a certain extent only.

Paragraph 12 requires certain persons who own or possess land above the ceiling to submit declarations as required by the Commission. It should be noted that if a person required under this paragraph to file a declaration omits to do so or files an incomplete or false declaration, he commits an offence punishable with rigorous imprisonment which may extend to seven years and forfeiture of his entire immovable property as provided under Paragraph 30 of the Regulation.

Paragraphs 13, 14, 15 and 16 of the Regulation require certain lands to be surrendered to the Government and such lands vest in the Government absolutely free form any encumbrance or

charge and without compensation. Therefore, Paragraph 13 states that the land exceeding the ceiling fixed by Paragraphs 8 and 10 shall vest in the Government. Since the excess land vests in the Government absolutely free form any encumbrance or charge, it goes on to mention that if there is any encumbrance or charge on the land vested in the Government, such encumbrance or charge will revert to the land retained by the person surrendering the surplus area to the Government. The relevant part of this paragraph states as:

> (1) Land in excess of the area permissible for retention under Part III shall vest absolutely in Government free from any encumbrance or charge and without payment of any compensation.
>
> (2) Any encumbrance or charge existing on land surrendered by a person, which vests in Government under sub–paragraph (1) shall be deemed to have been transferred to the land retained by such person under Part III...[212]

Paragraph 14 of the Regulation talks about the persons who have been granted land under the West Pakistan Border Area Regulation, 1959. It says that if any such person has exchanged land with other land situated outside the border area, the land so obtained in exchange vests in the Government.

Paragraph 15 talks about the resumption of all areas under stud or livestock farms that had been allowed to be retained by the persons under Paragraph 9 of the Land Reforms Regulation, 1959. It says that all such area vests in the Government whether held by the persons actually retaining such area or by other persons to whom such area has been transferred by the latter. With respect to the payment of compensation this Paragraph creates an exception. Thus, in cases where compensation has already been calculated under the provisions of Paragraph 17 of the 1959 Regulation, the owners are held entitled to such compensation. Similarly, Paragraph 16 declares that all areas under *shikargahs* vest in the Government.

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[212] See Paragraph 13 of the Land Reforms Regulation, 1972 (M.L.R. 115 of 1972).

Although Paragraph 2(7) includes a religious, charitable or educational institution and every trust in the definition of person, Paragraph 17 again declares that the provisions of Paragraph 8 are applicable to all such institutions and trusts etc.

Part V of the Regulation provides for the grant of the surrendered and the resumed land to the tenants and its other utilization. It consists of four paragraphs. Paragraph 18 has been entirely declared repugnant to the injunctions of Islam while Paragraphs 19, 20 and 21 have been so declared only to a certain extent. Paragraph 18 grants the land to the tenants shown in the revenue record in the actual cultivating possession of the land which vested in the Government pursuant to Paragraphs 13 and 15 other than the orchards. Such land is granted to the tenants free of charge. However, if a cultivating tenant already owns some land, he will be entitled to only such area of land as makes the total land held by him equal to a subsistence holding. Moreover, if a person is not shown as a cultivating tenant in the revenue record with respect to the surrendered or resumed land, the Government has the power to grant such land to other tenants or persons to the extent of a subsistence holding.

Paragraphs 19, 20 and 21 provide for the utilization of land resumed by the Government under Paragraphs 15, 16 and 17 respectively. The Government is empowered to utilize such land as it deems fit. However, under Paragraph 19(1) if the Government considers that orchards, studs or live stock farms should be leased, the first right of getting such lease is that of the person from whom such land was resumed. Nonetheless, if the performance of such person was not satisfactory when he held such land, he is not entitled to get the lease. This provision demonstrates that the Government desires to get the maximum benefit out of such land which is a *sine non qua* for social and economic well being of the people.

Similarly, Paragraphs 22 to 24 of Part VI of the Regulation which restrict the partition and alienation of holdings in certain cases are aimed at getting the same result. It should be noted that the fate of these paragraphs was left undetermined by the SAB though Shafiur Rehman J., a member of the SAB in Qazalbash Waqf case, held that these paragraphs are not repugnant to the injunctions of Islam. He explained that the purpose of restrictions imposed on the partition and alienation of subsistence and economic holdings in certain cases is to achieve the economic welfare and uplift of the agriculture. These provisions cannot, therefore, be declared void. He said:

> Paragraphs 22 to 24 identify the subsistence and the economic holding; make better provision for their management, utilization and alienation. These provisions do not destroy or confiscate the property but only restrict and regulate the right to manage, utilize, and alienate such property. As it satisfies the requirements of welfare and reasonableness it cannot be declared repugnant[213].

Moreover, the FSC in Hafiz Muhammad Ameen case with majority held that these restrictions are necessary for stimulating rural economy which is based on agriculture. Aftab Hussain J. in his leading judgment says, "These restrictions have been placed to put a stop to further fragmentation of holding and to retain them as viable units for cultivation. It cannot be doubted that such a step was necessary for boosting agricultural economy[214]."

Finally, for the purposes of the present work Paragraph 25 of the Regulation is discussed below. It is aimed at providing maximum protection to the rights of tenants. Therefore, sub-paragraph 1 provides that a tenant can only be ejected from the tenancy on the grounds provided by this Regulation and proved against the tenant in a revenue court. However, it is interesting to note that this provision has been declared repugnant to the injunctions of Islam by the SAB. This provision provides only four grounds of ejectment. These are as follows:

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[213] Qazalbash Waqf, PLD 1990 Supreme Court 99, 149
[214] Hafiz Ameen, PLD 1981 FSC 23, 67

i. default in the payment of rent

ii. use of land in a manner which makes it unfit for the purpose for which it was obtained

iii. non-cultivation of the land

iv. sub-let of the tenancy

Similarly, Paragraph 25(3) is also aimed at providing social justice and economic well being to the tenants. So, it provides that from kharif 1972 onwards the land revenue and other taxes and levies on land etc. will be paid by the land owner and not by the tenant. Similarly, the tenant will not be liable for the payment of water-rate or providing the seed. While the cost of fertilizers and pesticides will be borne equally by the tenant and the land owner. It is interesting to note that these provisions have been held valid by the SAB. Even the FSC after analyzing these provisions on the touch stone of the injunctions of Islam has held the same valid. Aftab Hussain J. holds that these provisions are in conformity with the Islamic injunctions. He says:

> The conditions of further investment by the landlord in the form of seed, fertilizer and water are not new. In fact lands were given to tenants on condition of such further investment during the period of the Prophet (P.B.U.H.) too. Hassan Basri who was opposed to the system of sharing of crops by the landlord and the tenant said that there could be no objection to this system if the landlord shared in the expenses of cultivation. This was also the view of Ibn-e-Sireen. According to him all the expenses of cultivation should be borne by the owner of the land[215].

As far as the tenants were given the first right of pre-emption under Paragraph 25 (3) (d) with respect to lands forming the subject matter of tenancy, the same has been declared repugnant to the injunctions of Islam in another case by the SAB[216]. Paragraph 25(4) is aimed at providing a real relief to the down-trodden and oppressed tenant. It restricts the owner and the person in possession of land to impose any kind of *abwabs* on the tenants or to extract any kind of free

[215] Hafiz Ameen, PLD 1981 FSC 23, 71-72

[216] Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah, PLD 1986 Supreme Court 360 [Shariat Appellate Bench] (Hereinafter referred as Malik Said Kamal Shah PLD 1986 Supreme Court 360)

labour from the latter. It reads as, "No owner or person in possession of any land shall levy any cess on or take any free labour from any of his tenants[217]."

2.8.2 The Land Reforms Act, 1977[218]

The Government had promised in 1971 to bring reforms in two phases. In the first phase, the Land Reforms Regulation, 1972 was issued while in the second phase further land reforms were carried out by an ordinance issued by the President exercising his powers under Article 89 of the Constitution to be known as the Land Reforms Ordinance, 1977. This Ordinance was tabled as a bill before the National Assembly for debate on Friday 7 January 1977 along with some other proposed legislation. It is interesting to note that this bill was tabled by the Minister for Food and Agriculture, Cooperatives, under-developed Areas and Land Reforms[219]. The opposition having admitted that the bill related to an issue of national interest decided to oppose the bill on two grounds.

First, that the Ordinance was issued after a session of the assembly had been called. It, therefore, in the eyes of the opposition, amounted to distrust the opposition that they would oppose a law proposed in the national interest. The other objection related to the violation of the Rules of Procedure and the Conduct of Business in the National Assembly, 1973. The opposition objected that under rule 91 of the above mentioned rules, a bill was required to be sent to the standing committee before it could be debated on the floor of the assembly.

To the first objection the Government responded that the nature of the proposed law demanded that it be first made by an Ordinance. It was so because the proposed law was to reduce the already fixed ceiling on land-holding. It was anticipated that the people could, in order to avoid the clutches of law, make fake and pre-dated transfers of land before the law could actually come

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[217] See Paragraph 25(4) of the Land Reforms Regulation, 1972 (M.L.R. 115 of 1972).
[218] The Land Reforms Act, 1977 (Act II of 1977)
[219] Underlining is mine. The existence of a separate Minister for land reforms suggests the importance of this issue.

into force. As far as the violation of rule 91 was concerned, the Government explained that the said rule was not mandatory and could be waived. Therefore, both these objections were turned down by the Speaker. Consequently, a very useful debate held regarding the above mentioned law and other proposed legislation. In this debate, some very important speeches were made throwing light upon different aspects of the proposed law.

Amongst the notable speakers, one was Mr. P. K. Shahani. He clarified the importance of the second phase of the reforms and said, "Now these land reforms are no doubt much more comprehensive than the previous ones and we have all along acknowledged that land reforms are a necessary pre-condition for economic and social progress[220]." Moreover, he explained that the surrendered land would be distributed among the tenants and thus "it will go a long way to meet the wide spread desire of the vast masses of our population to own land, the hunger for land, the earning for land that continues[221]." He also pointed out that 18% of people owned 42% of area. By introducing further reforms these inequities would be removed to a major extent. However, he raised another very important point about the conflict which would emerge by fixing a very small ceiling as it would not be suitable to induct technology in such small farms. Thus, he remarked, "From the consideration and the compulsions of social-justice, it is imperative to reduce holdings: from the considerations of technology and of inducting technology in agriculture, it is necessary to have sufficiently large farms of operating sizes. Now here a compromise has to be struck[222]."

Another speaker, Mr. Ali Hassan Manghi, explained that further land reforms, with a more reasonable ceiling, was the need of the hour. He mentioned that land reforms had been carried

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[220] The National Assembly of Pakistan Debates, *Official Report*, Friday the 7th January 1977, 1st Session of 1977, Vol. 1, 51 (Hereinafter referred as NA Debates, 7th Jan. 1977)
[221] Ibid
[222] Ibid

out in almost every part of the world particularly the neighbouring countries like India, Iran and Russia. According to Manghi, the reforms would eliminate absentee landlordism and the rate of agricultural produce would dramatically increase. In this regard, he had the following to say:

> I know many cases even at present where the land-owners did not cultivate the entire land and that land is lying barren and un-cultivated. Now it will be handed to the real cultivators, resulting in more production of food crops on which the country mostly depends...The main feature of this Act will be that small land holders will be exempted from the income-tax. This will encourage them to produce more and more food and will give cause for a poor man to become richer on account of introduction of these reforms[223].

Perhaps, the greatest of all the speeches was made by Sahibzada Ahmad Raza Khan Qasuri. He elaborated the real purpose of the land reforms. He said these reforms were long awaited by the depressed and the down trodden classes of the village community. By introducing these reforms a history was being created. He said, "It is a memorable occasion and the *Haris* and the toiling teeming millions of this country were waiting for this day to dawn in the history of this country and it has dawned[224]."

Talking about the social and economic impacts of the land reforms, Qasuri remarked that it would not only boost up agriculture but also bring social and political reforms. Referring to the colonial period, he said that the assemblies had been occupied with a particular class of people who could not be called the true representatives of the common man. Rather, they had their own vested interests which contradicted the interests of the poor people who they represented. Qasuri said:

> This law will boost up agriculture and at the same time will bulldoze the decadent system which we inherited from our colonial past...We saw in the assemblies, representatives of a particular class and certain constituencies in Provinces like the Punjab and Sind, which

[223] NA Debates, 7th Jan. 1977, 56
[224] Ibid, 66

> were dominated by feudal aristocracy...There were family's constituencies and no person howsoever brilliant, howsoever dedicated, howsoever, devoted to the cause of the country could afford and contest elections from those families constituencies because those families had their tremendous feudal hold in that particular areas...we could not see in our rural areas as well as urban areas a new light, a light of civilization, a light of progress, because these people thought that if light were to dawn in the body-politic, it will be doomsday for their vested interests[225].

These feudal lords were so powerful that nobody would dare to confront them. That is why it was called a Herculean task by the speaker. Nonetheless, this system had to be replaced to make progress and prosperity. Only then the dream of an egalitarian society could come true. It was expressed in the following words by Qasuri:

> To break up their cartels was a Herculean job and the Prime Minister with his wisdom has performed that Herculean job destroying that decadent system, that system which created hurdles in the way of progress, in the way of prosperity and Prime Minister by introducing these agricultural reforms, has ushered in an egalitarian society, a society which we promised through our manifesto to the people of Pakistan. In our basic document we promised an egalitarian society free of exploitation, free of injustice...[226]

After the coming into force of the proposed law and its successful implementation, the institution of landlordism and feudalism would be abolished. Thus "...the *Haris* and tenants of Punjab will have a heave of freedom; they can live in a free and rejuvenated society to work collectively for the progress, prosperity and the well-being of this country[227]."

The speech of the Prime Minister, Mr. Zulfiqar Ali Bhutto, is also worth mentioning here. He acknowledges that the socio-economic structure of the country requires drastic changes. The proposed legislation was a step forward in that direction. The reforms would make the tenants stake-holders. Therefore, these will help in bringing social justice and increasing the agricultural

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[225] Ibid
[226] Ibid
[227] Ibid

production. It would be a big incentive for the tenants to work even harder and contribute in the national wealth and progress. Mr. Bhutto said:

> Social justice will give the people a bigger stake in the socio-economic system, a larger share in the benefits of increased production. This will motivate them to work with more dedication. Production cannot be increased by imperialistic of colonial or exploitative systems. Production has to be increased by incentives that are voluntary and ensure distributive justice...[228]

Having thrown some light on the objectives and purposes of the enactment of the Land Reforms Act, 1977, an analysis of its various provisions is given below. It should be noted that the provisions of this Act have an overriding effect and are to be enforced concurrently with those of the Land Reforms Regulation, 1972. This Act consists of IX chapters and 35 sections. The preamble describes the purpose of the enactment of this law. Accordingly, it is mentioned that the supreme national interest desires a more equitable distribution of wealth by carrying out further land reforms. Besides, an express reference is made to article 253 of the Constitution which empowers the Parliament to fix ceiling on land-holding.

Section 2 of chapter I contains definitions of various terms and expressions. The definitions of land, orchard, person, produce index unit and tenant are almost similar to those provided by the 1972 Regulation so they need not be discussed here. However, two new terms "irrigated land" and "unirrigated land" are defined in Section 2(3) and 2(13) respectively. The former means land irrigated by any artificial means while the latter means land other than irrigated land. Thus, Section 2(3) enumerates a canal, tube-well, well, lift, spring, tank as artificial means of irrigation. Similarly, 2(13) includes land fed by rains, floods, hill torrents, and uncultivable or waste land in the definition of unirrigated land.

[228] NA Debates, 7th Jan. 1977, 88

Section 3 of the Act is comparable to Paragraph 8 of the 1972 Regulation. However, it reduces the ceiling on land-holding to hundred acres of irrigated land or two hundred acres of unirrigated land or irrigated and unirrigated land the aggregate of which exceeds hundred acres of irrigated land or an area equivalent to eight thousand PIU whichever is greater. It should be noted that one acre of irrigated land has been held equivalent to two acres of unirrigated land. Similarly, PIU was to be calculated on the basis of the classification of soil as entered into the revenue records of kharif 1976.

Section 4 of the Act is comparable to Paragraph 11 of the Regulation and need not be discussed again. Section 5 restricts the partition of a joint holding and undivided *shamilat.* However, the partition is allowed where a person elects to surrender the whole or part of his share in such land. Section 6 is comparable to Paragraph 7 of the Regulation. Thus, this section declares void all transfers of land made or encumbrances incurred on land on or after the commencement of this Act by any person holding an area more than the ceiling fixed by Section 3. The effect of this provision is that the person owning or possessing the land immediately before the said commencement will be considered so owning or possessing the same. However, the transfer of land or an encumbrance thereon will not be void to the extent the person is allowed to own or possess the land. It should be noted that the entire chapter 2 i.e. Sections 4 to 6 have been declared repugnant to the injunctions of Islam[229].

Section 7 of the Act is comparable to Paragraph 12 of the Regulation. This section has been partly declared repugnant to the injunctions of Islam. It requires certain persons to submit declarations as required and prescribed by the Commission. It should be noted that if a person required under this section to file a declaration omits to do so or files an incomplete or false declaration, he commits an offence under Section 33 of the Act.

[229] See Qazalbash Waqf, PLD 1990 Supreme Court 99

The punishment provided by this section is similar to that provided by Paragraph 30 of the Regulation i.e. rigorous imprisonment which may extend to seven years or forfeiture of the immovable property or both. However, the consequences of conviction under Section 33 are much more severe. A convict is disqualified for five years from being chosen or elected as a member of the Parliament or a Provincial Assembly or any local elective body. Similarly, such a convict is also disqualified from being appointed as public servant or holding any other office for which a person guilty of any offence involving moral turpitude is disqualified.

Section 9 is desired to be discussed before Section 8 while Sections 8 and 10 will discussed jointly. All these sections have been entirely declared repugnant to the injunctions of Islam. Section 9 is comparable to Paragraphs 13 to 16 of the 1972 Regulation in so far as it declares that the land above the ceiling is to be surrendered to the Government and such excess land vests in the Government free of any encumbrance or charge provided that the standing crops on such land do not vest in the Government. However, unlike the 1972 Regulation the Land Reforms Act, 1977 provides compensation to the concerned persons for surrendering the land to the Government.

Section 8 restricts a person from cutting or removing any tree, or dismantling, demolishing, damaging or removing any permanent installation or structure such as buildings and tube-wells etc. from all the land held by him. Similarly, no other person can remove such trees or installations on behalf of the holder of the land. While under Section 10, these trees and installations vest in the Government free of any charge or encumbrance along with the land surrendered under Section 9. It should be noted that the compensation of the surrendered land is paid under Section 11 of the Act while the compensation for the trees and installations left unremoved is payable under Section 12 of the Act. It should further be noted that the whole of

chapter IV i.e. Sections 11 to 14 and chapter V i.e. Sections 15 to 17, analysed below, have been declared repugnant to the injunctions of Islam.

Section 15 is comparable to Paragraph 18 of the Regulation in so far as both these provisions grant the land vested in the Government to the tenants free of charge. However, the tenants entitled for the grant of land under Section 15 of the Act are those who are shown in the cultivating possession of the surrendered land in the revenue records of Kharif 1976 and Rabi 1975-1976. However, if such a tenant already owns some land, he will be entitled only to such grant as makes the total land owned by him twelve acres. Besides, the Government has the power to grant land to other landless tenants though not shown in the cultivating possession of the surrendered land. Moreover, Section 16 prohibits the grantees of the land or their heirs to alienate or transfer the granted land or any part thereof in any manner whatsoever for a period of twenty years from the date of the grant. However, in order to obtain a loan to develop the granted land, this provision allows the mortgage in favour of Government, or a Government sponsored institution or a cooperative society,

The last provision of the Land Reforms Act, 1977 desired to be analysed here is in the form of Section 17. This provision is comparable to Paragraphs 19, 20 and 21 of the Regulation. It provides for the utilization of land comprising of orchards and *shikargahs*, studs or live stock farms. Similarly, the utilization of land surrendered by any religious, charitable, or educational institution or by any trust or waqf is also provided in this section. According to this provision, a Provincial Government may with the approval of the Federal Government utilize such land for a public purpose as it deems fit. However, if the Provincial Government keeping in view the public interest considers that such land should be leased, the first right to the grant will be of the person who surrendered the same.

Having discussed and analysed the social evils of landlordism and feudalism and the fundamental rights jurisprudence with respect to the depressed classes of the society, the discussion is made on the Islamic character of the Constitution in the next chapter.

CHAPTER 3

ISLAMIC CHARACTER OF THE CONSTITUTION

3. Introduction

This chapter discusses and analyzes the Islamic character of the Constitution. Whenever the Islamic character of the Pakistani Constitution is analysed, the discussion usually starts with the Objectives Resolution, 1949. However, in this chapter first a complete 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. This chapter also analyzes some important judgments rendered by the FSC and the SAB exercising jurisdiction under chapter 3A of the Constitution. Many significant questions regarding constitutional interpretation are also discussed in this chapter. Moreover, the Objectives Resolution is discussed with reference to the settled principles of the constitutional interpretation. The mechanism of islamization of laws before the incorporation of chapter 3A in the Constitution also forms part of this chapter.

3.1 The Constitution (Amendment) Order, 1980[230]

The Federal Shariat Court (FSC) was established by the Constitution (Amendment) Order, 1980 President's Order (P.O.) No. 1 of 1980 by substituting chapter 3A in Part VII, titled "The Judicature", of the Constitution. It is well known, that the Constitution may only be amended by an Act of the Parliament as provided in article 238 of the Constitution. Moreover, under article 239, such an Act must be passed with two-thirds majority of both the houses before it gets the assent of the President. But, the 1980 Constitution Amendment Order was a President's Order issued under the Proclamation of the fifth day of July 1977 read with the Laws (Continuance in

[230] Constitution (Amendment) Order, 1980. (President's Order No. 1 of 1980 dated 26th May 1980), Gazette of Pakistan, Extraordinary, Part 1, 27th May 1980. (Hereinafter referred as P.O. No. 1 of 1980)

Force) Order, 1977[231]. So, this cannot be termed as an Act of the Parliament neither it was passed with two-thirds majority of both the houses. How then it could amend the Constitution is analysed below.

3.1.1 The Proclamation of Martial Law

Articles 238 and 239 were held in abeyance by the Proclamation of Martial Law. In fact, 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 in accordance with 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. Furthermore, it barred the jurisdiction of any court to call in question the Proclamation of Martial Law of the fifth day of July 1977 or any other Martial Law Regulation or Martial Law Order. In these circumstances, the Constitution became a toy in the hands of the CMLA and the President since both offices were occupied by the same person.

3.1.2 Begum Nusrat Bhutto Case

The CMLA Order 1 of 1977 had barred the jurisdiction of all the courts including the Supreme Court to question the validity of the said Order or the Proclamation of Martial Law. Nonetheless, it was an extra constitutional step taken by General Muhammad Zia-Ul-Haq misusing his position as the Chief of the Army Staff on the pretext of the so called welfare of the people. Consequently, a Constitutional Petition No. 1 of 1977 titled Begum Nusrat Bhutto versus Chief

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[231] Proclamation of Martial Law, Gazette of Pakistan, Extraordinary, Part 1, 5th July 1977, The Laws (Continuous in Force) Order, 1977, C.M.L.A. Order 1 of 1977, 5th July 1977

of Army Staff and Federation of Pakistan under Article 184(3) of the Constitution was filed before the Supreme Court mainly challenging the detention of the top leadership of the Pakistan People's Party under the Martial Law Order No. 12 of 1977[232]. This petition also questioned the validity of the Proclamation of Martial Law of the fifth day of July 1977 and the Laws (Continuance in Force) Order, 1977. This petition was heard by a full court consisting of nine judges who unanimously dismissed the petition being not maintainable.

It is interesting to note that clause 3 of Article 2 of the Laws (Continuance in Force) Order, 1977 suspended the fundamental rights conferred by chapter 2 of the Constitution. This provision was held a valid legal provision comparing it with Article 233(2) of the Constitution. As the President could suspend these rights under the last mentioned provision if the emergency had been proclaimed in the country, the CMLA was empowered to do the same under the above referred provision. The Court also validated the Proclamation of Martial Law of the fifth day of July 1977 and authorized the CMLA to amend the Constitution and issue Martial Law Regulations and Martial Law Orders. The decision of the Court was largely based on the doctrine of necessity and the welfare of the people.

One of the main questions for determination before the Court, in this case, concerned the legal character of Zia's regime. The Court rejected the arguments of the respondents that a successful or effectual seize of power constitutes a revolution. Thus, the Court followed the ratio laid down in Asma Jillani case with respect to Kelsen's pure theory of law[233]. The various criticisms made on this theory were also pointed out. It was held that in an ideological state like Pakistan where ethics, morality and justice are prime considerations, a theory about law which does not

[232] Begum Nusrat Bhutto versus Chief of Army Staff and Federation of Pakistan, PLD 1977 Supreme Court 657
[233] Miss Asma Jilani versus The Government of the Punjab and another, PLD 1972 Supreme Court 139

encompass such considerations cannot be made the binding rule of decision. The Court emphasizing the moral values held:

> These considerations assume special importance in an ideological State like Pakistan which was brought into being as a result of the demand of the Muslims of the Indo-Pakistan sub-continent for the establishment of a homeland in which they could order their lives in accordance with the teachings of the Holy Quran and Sunnah. When the demand was accepted, it was given effect to by means of a Constitution passed by the British Parliament, which held sovereignty over India in 1947. In other words, the birth of Pakistan is grounded both in ideology and legality. Accordingly, a theory about law which seeks to exclude these considerations cannot be made the binding rule of decision in the Courts of this country.[234]

The correct determination of the above posed question i.e. the legal character of Zia's regime, according to the Court, depended upon the consideration of a number of factors such as the political situation prevailing at the time of the imposition of the Martial Law, the motivations behind its imposition, the scope of the new legal order and so on. Tracing the events that started happening soon after the election results of March 1977 and continued till 4 July 1977, the Court validated the imposition of the Martial Law declaring it "an extra constitutional step but obviously dictated by the highest considerations of State necessity and welfare of the people[235]." Moreover, the CMLA was authorized to do all in the legislative and executive fields that had been allowed by the Pakistani courts in previous such cases. This obviously included the power to amend the Constitution. It was clarified that these powers can be used by issuing Martial Law Regulations, President's Orders and Ordinances, and so on. The Court held:

> That the Chief Martial Law Administrator, having validly assumed power by means of an extra Constitutional step, in the interest of the State and for the welfare of the people, is

[234] Begum Nusrat Bhutto versus Chief of Army Staff and Federation of Pakistan, PLD 1977 Supreme Court 657, 689. The demand of a separate country for the Muslims of the sub-continent was not given effect by means of a constitution passed by British Parliament as mentioned in the above quotation. Rather, it was given effect by an Act of British Parliament known as the Independence Act, 1947

[235] Ibid, 698

entitled to perform all such acts and promulgate all legislative measures which have been consistently recognized by judicial authorities as falling within the scope of the law of necessity, namely:

...All acts or legislative measures which are in accordance with, or could have been made under the 1973 Constitution, including the power to amend it...these acts, or any of them, may be performed or carried out by means of Presidential Orders, Ordinances, Martial Law Regulations, or Orders, as the occasion may require...[236]

Moreover, 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 a number of amendments in the Constitution mainly through various President's Orders. That is how chapter 3A was substituted by the Constitution (Amendment) Order, 1980. For the purposes of the present research only those Orders which amended one or the other provision of chapter 3A will be analysed.

3.2 The Insertion of Chapter 3A

It should be noted that chapter 3A in the Constitution was first inserted by the President's Order No. 3 of 1979[237]. Even before the insertion of a new chapter, Shariat Benches of Superior Courts were established by another Order in 1978. This Order was called Shariat Benches of Superior Courts Oder, 1978. It was made on 22 December 1978. It 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 the President's Order 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

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[236] Ibid, 709

[237] Constitution (Amendment) Order, 1979, (President's Order No. 3 of 1979 dated 7th February 1979), Gazette of Pakistan, Extraordinary, Part 1, 7th February 1979. (Hereinafter referred as P.O. No. 3 of 1979)

Hijri. It is quite interesting to note that according to article 262 of the Constitution periods of time 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. This chapter was substituted by President's Order No. 1 of 1980 after almost fifteen months with a new chapter namely Federal Shariat Court.

The present chapter 3A has undergone various amendments since its substitution in 1980 by the P.O. No. 1 of 1980. Finally, some provisions of this chapter were amended by the Constitution (Eighteenth Amendment) Act, 2010. In the following lines, a detailed analysis of the FSC tracing the history since 1978 is provided. However, only those provisions will be analyzed which have relevance with respect to the injunctions of Islam.

3.2.1 Non-Obstante Clause and the Constitutional Interpretation

Chapter 3A starts with article 203A. According to this article the provisions of chapter 3A have an overriding effect over anything contained in the Constitution. This article contains a non-obstante clause. This provision is the verbatim copy of the substituted article 203A contained in the P.O. No. 3 of 1979. Similarly, article 3 of the P.O. No. 22 of 1978 declared that Order to have an overriding effect not only over the Constitution but also over any other law for the time being in force. However, whether there can be conflicting provisions in a constitution is an important issue to be discussed. This issue came before the Supreme Court in the famous case of Hakim Khan[238]. Rather, the Supreme Court had already made important observations in this regard in Zia-ur-Rehman case[239]. However, before discussing these cases, it is mentioned that there is a settled rule of harmonizing conflicting constitutional provisions. This has been pointed out by Hamid Khan as well. Thus, he says, "It is quite unusual in the annals of constitutional law

[238] Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others, PLD 1992 Supreme Court 595

[239] The State versus Zia-ur-Rehman and others, PLD 1973 Supreme Court 49

for one provision of the Constitution to have superceded (*sic*) another. It is also unusual that a provision of the Constitution is held to be inoperative and ineffective.[240]"

Besides, the phrase "notwithstanding anything contained in the Constitution" has been used at eighteen different places apart from article 203A in the Constitution. It is interesting to note that at all eighteen places the use of this phrase helps in harmonizing the Constitution as an organic whole. But its use in article 203A creates a conflict between the provisions of the Constitution contained in chapter 3A and the rest of the Constitution.

Amongst the other provisions which use the phrase "notwithstanding anything contained in the Constitution" the first is in the form of article 47(1) which talks about the removal or impeachment of the President. In fact, this article contains this phrase because article 44 starts with subject to the Constitution, the President shall hold the office for a term of five years. Therefore, article 47(1) provides that notwithstanding anything contained in the Constitution, the President may be removed or impeached in accordance with the provisions of article 47 even before the completion of five years.

Similarly, the next three articles containing this phrase are found in Part V of the Constitution namely, Relations between Federation and Provinces. First two out of these three articles are found in chapter 2 namely, Administrative Relations between Federation and Provinces. These are articles 146(1) and 147. Since Pakistan is a federal republic, article 146(1) starts with the phrase notwithstanding anything contained in the Constitution as it empowers the Federal Government to entrust to the Provincial Government with the consent of the latter any of the functions to which the executive authority of the Federation extends. Likewise, under article 147 the Provincial Government is empowered to entrust any of the functions to which the executive authority of the Province extends to the Federal Government with the consent of the latter, it

[240] Hamid Khan, *Constitutional and Political History of Pakistan*, (Karachi: Oxford University Press, 2006), 414

starts with the same phrase. The last article of this Part, article 159(2), is found in chapter 3 namely, Special Provisions. According to clause 1 of this article, the Provincial Government is entitled to take certain necessary actions with respect to broadcasting and telecasting within the Province. While clause 2 says that the actions taken by the Provincial Government are subject to the conditions imposed by the Federal Government which may include any conditions with respect to finance though Provinces are autonomous in financial matters. So, to clarify this point, clause 2 uses the phrase notwithstanding anything contained in the Constitution.

The next two articles in which this phrase has been used are found in Part X namely, Emergency Provisions. These are articles 232(2) and 236(2). The former, *inter alia*, provides the power of the Parliament to make laws for a Province with respect to any matter not enumerated in the Federal Legislative list in time of grave emergency due to war, external aggression or internal disturbance in a Province. While under ordinary circumstances, the authority of the Parliament to legislate for a Province is limited to the matters enumerated in the Federal Legislative list. Therefore, article 232(2) starts with this phrase. Similarly, in case of financial emergency in a Province, the executive authority of the Federation extends to issue directions to the Province in financial matters while under ordinary circumstances it falls within the provincial domain. Therefore, article 236(2) starts with this phrase.

The next article in which this phrase is contained is in chapter 4 namely, General of Part XII, Miscellaneous. It is in the form of article 252(1). It talks about the power of the President with respect to the application or otherwise of a specified law whether federal or provincial for a particular time to a major port or major aerodrome. Ordinarily, it is the domain of legislature to determine the area to which a particular law extends while this provision empowers the President to do so. Therefore, the article starts with the phrase notwithstanding.

The remaining articles in which this phrase has been used are found in chapter 7, Transitional of Part XII. These are articles 270A, 270AA (3), (7), 270B, 270BB, 271(1), 272, 273(1), 275(3), 276 and 279. Since these provisions are of transitional nature and provide for one thing or the other in a manner which is provided otherwise by the Constitution, they use the phrase notwithstanding anything contained in Constitution.

3.2.2 Constitutional Interpretation in the Light of the Supreme Court Judgments

Having analysed the use of "notwithstanding" in different provisions of the Constitution, it is now considered expedient to analyse the views of the Supreme Court in case of conflicting constitutional provisions. The first such case desired to be discussed here is the State versus Zia-ur-Rehman[241].

In Zia-ur-Rehman case the State appealed to the Supreme Court against a majority judgment of the Lahore High Court given in various writ petitions. In these writ petitions several convictions and sentences passed by the Special Military Courts established by the Martial Law Regime of General Yahya Khan were set aside being *mala fide* and passed by coram non judice.

The Supreme Court in this case dealt, *inter alia*, with the important issue of constitutional interpretation. The Court was asked to strike down the constitutional provisions which were in derogation of the principles and norms recognized in the Objectives Resolution of 1949. This issue rose because of the observations that had been made by the Supreme Court with respect to the grundnorm of Pakistani Constitution in the landmark decision in Asma Jillani case[242].

In the last mentioned case the Supreme Court invalidated the Martial Law of 1969 imposed by General Muhammad Yahya Khan, held the Legal Framework Order, 1970 unconstitutional and declared the General as usurper. However, relying upon the doctrine of necessity certain acts of

[241] The State versus Zia-ur-Rehman and others, PLD 1973 Supreme Court 49
[242] Miss Asma Jilani versus The Government of the Punjab and another, PLD 1972 Supreme Court 139

the usurper were condoned to fill the vacuum which might occur owing to the decision of the Court. The observations made by the Court with respect to the grundnorm are discussed below.

The Supreme Court rejected Kelsen's pure theory of law and thus overruled its earlier judgment given in State versus Dosso[243]. The Court said it did not have to look to the western theorists to find a grundnorm for Pakistan. The grundnorm for Pakistan is available in the doctrine that the sovereignty over the entire universe belongs to Almighty Allah alone and the authority exercisable by the people of Pakistan within the limits prescribed by Him is a sacred trust. This doctrine has been provided by the Holy Quran and recognized by the Objectives Resolution, 1949. This Resolution has formed the preamble of all the Constitutions of Pakistan. The comments made by Sajjad Ahmad J. are very important and worth quoting here:

> Our grundnorms are derived from our Islamic faith, which is not merely a religion but is a way of life. These grundnorms are unchangeable and are inseparable from our polity. These are epitomised in the Objectives Resolution passed by Constituent Assembly of Pakistan on 7.3.1949, and were incorporated in the first Constitution of the Islamic Republic of Pakistan of 1956 and repeated again in the Constitution of 1962. Its basic postulates are that sovereignty belongs to Allah Almighty which is delegated to the people of Pakistan who have to exercise the State powers and authority through their chosen representatives on the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam wherein the fundamental human rights are to be respected and the independence of the judiciary is to be fully secured[244].

The Court after insisting that the grundnorm for Pakistan lies in the Objectives Resolution questioned whether the State will allow any usurper to turn down this entire scheme and introduce a new legal order. The Court itself went on to reply this question in negative. It was held that it might be possible only if the State in its present form vanishes and a new state with a new grundnorm is established. The Court remarked as follows:

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[243] The State versus Dosso and another, PLD 1958 Supreme Court 533

[244] Miss Asma Jilani versus The Government of the Punjab and another, PLD 1972 Supreme Court 139, 231

> Can it be argued that any adventurer, who may usurp control of the State power in Pakistan, can violate all these norms and create a new norm of his own in derogation of the same? The State of Pakistan was created in perpetuity based on Islamic Ideology and has to be run and governed on all the basic norms of that ideology, unless the body politic of Pakistan as a whole, God forbid, is re-constituted on an un-Islamic pattern, which will, of course, mean total destruction of its original concept. The Objectives Resolution is not just a conventional preface. It embodies the spirit and the fundamental norms of the constitutional concept of Pakistan[245].

These comments and other similar observations made by other members of the Court conveyed a message to some legal experts that the Objectives Resolution is a supra-constitutional document. The constitutional provisions must be in consonance with the principles and norms provided in this Resolution. Therefore, any provision of the Constitution repugnant to these principles and norms must be struck down by the Courts.

It should be noted that the judgment of the Supreme Court in Asma Jillani case had the effect of declaring all the laws made by the Martial Law Regime to have been made without lawful authority. In order to give protection to such laws and proceedings taken in pursuance to such laws and give indemnity to authorities exercising powers under such laws, a comprehensive provision in the form of Article 281 was made part of the Interim Constitution, 1972. This article states as:

> (1) All Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders, and all other laws made as from the twenty fifth day of March 1969, are hereby declared, notwithstanding any judgment of any Court, to have been validly made by competent authority, and shall not be called in question in any Court.
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> (2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, on or after the twenty fifth day of March 1969, in exercise of the powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notification, rules, orders or bye-laws, or in execution of any orders made or sentences

[245] Ibid

passed by any authority in the exercise or purported exercise of powers as aforesaid, shall be deemed to be and always to have been validly made, taken or done.

(3) No suit or other legal proceedings shall lie in any Court against any authority or any person for or on account of or in respect of any order made, proceedings taken or act done, whether in the exercise or purported exercise of powers referred to in clause (2), or in execution of or in compliance with orders made or sentences passed in exercise or purported exercise of such powers[246].

One of the contentions of the petitioners in Zia-ur-Rehman case before the High Court was that the Interim Constitution has not been made by a competent National Assembly because the said body came into existence as a result of the elections held under the Martial Law regime. Alternatively, it was contended that such of the provisions of the Interim Constitution as are repugnant to the principles and norms recognized by the Objectives Resolution be struck down. The above stated article 281 was considered one such provision by the petitioners. It is interesting to note that two out of five judges of the Lahore High Court did acknowledge that the Objectives Resolution is a supra constitutional document and the provisions of the Constitution should not be in violation of this document. However, article 281 was not found in such violation on merits by any of the judges.

The Supreme Court, on the other hand, clarified that no such status had been given to the Objectives Resolution in Asma Jillani case. The Court emphasized this point in the following words:

> It is incorrect, therefore, to say that it was held by this Court that the Objectives Resolution of the 7th of March 1949, stands on a higher pedestal than the Constitution itself. The views of the minority of the learned Judges in the High Court, in so far as they have sought to read into the judgments of this Court something which is not there, cannot, therefore, be supported[247].

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[246] See article 281 of the Interim Constitution, 1972

[247] The State versus Zia-ur-Rehman and others, PLD 1973 Supreme Court 49, 78

The Court explained that the Objectives Resolution was a very important document and it had never been repealed or renounced by any regime civil or military but it was not a substantive part of the Constitution and its provisions were not enforceable as such. Rather, it was made only a preamble and it served the same purpose as that of any other preamble. Thus, it could be consulted to ascertain the true intention of the constitution givers in case of doubt. However, it could not control the operative and substantive part of the Constitution. The Court said:

> ...the Objectives Resolution of 1949 even though it is a document which has been generally accepted and has never been repealed or renounced, will not have the same status or authority as the Constitution itself until it is incorporated within it or made part of it. If it appears only as a preamble to the Constitution, then it will serve the same purpose as any other preamble serves, namely, that in the case of any doubt as to the intent of the law-maker, it may be looked at to ascertain the true intent, but it cannot control the substantive provisions thereof[248].

Pursuance to this decision of the Court, a new provision in the form of article 2A was added in the 1973 Constitution. This article was inserted to make the Objectives Resolution a substantive part of the Constitution. Therefore, the principles and norms provided in this Resolution now stand on the same footing as any other substantive provision of the Constitution. It is interesting to note that the issue of conflicting constitutional provisions having the same force was decided by the Supreme Court in Hakim Khan case[249].

In December 1988 the President of Pakistan acting on the advice of the Prime Minister, Benazir Bhutto, issued an order which, *inter alia*, had the effect of commuting all death sentences to life imprisonments. This order was issued purportedly exercising the powers under article 45 of the Constitution which states as, "The President shall have power to grant pardon, reprieve and respite, and to remit, suspend or commute any sentence passed by any court, tribunal or other

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[248] Ibid, 75

[249] Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others, PLD 1992 Supreme Court 595

authority[250]." This commutation order applied to all death sentences that had been awarded by the Military or other Courts of Zia's regime up to 6 December 1988.

In pursuance to this order of the President, several convicts of murder cases who had been awarded death sentence were released from death cells to undergo life imprisonments. This obviously created a grievance for the heirs of the victims. Some of them filed writ petitions challenging the commutation order in the Lahore High Court. Since by this time the provisions of the Objectives Resolution had been made a substantive part of the Constitution, one of the grounds of attack on the commutation order by the petitioners was the repugnancy of article 45 with the provisions of the said Resolution. It was argued that the death sentences awarded as qisas could only be waived or commuted by the heirs of the victims under the Islamic law and the President as head of the State could not exercise any such powers.

It is interesting to note that this argument was accepted in the majority judgment delivered by the High Court. The Court followed the view that the Objectives Resolution has been elevated from the status of a preamble to the substantive part of the Constitution and its provisions are enforceable as such. So, this Resolution has now become a supra constitutional document. All other provisions of the Constitution are in control of this Resolution. The Court reached this conclusion on the basis of the observations made in Zia-ur-Rehman case with respect to the status of a preamble and the substantive provisions discussed above. The Court went on to say that the FSC would be competent to strike down any law repugnant to the injunctions of Islam under article 203D other than those excluded from the definition of law as provided in article 203B(c). Constitution being one of the laws so excluded, the High Court would be competent to exercise jurisdiction to strike down any of its provisions if found repugnant to the injunctions of Islam.

[250] See article 45 of the Constitution.

This judgment of the Lahore High Court was challenged before the Supreme Court. The appeals were heard by a full bench consisting of five judges. The Court accepted the appeals and reversed the judgment of the High Court to the extent of striking down the constitutional provisions while the matters which remained untouched in the judgment of the High Court were remanded. The Supreme Court held that the courts being the creature of the Constitution itself were not competent to annul any of its provisions. Rather, there should be made every effort to harmonize the provisions of the Constitution. The Court recalled the observations made in Zia-ur-Rehman case in this regard. Hamood-ur-Rehman CJ. had emphasized this principle of constitutional interpretation while discussing the validity of the Interim Constitution, 1972 in the following words:

> If the Interim Constitution is a valid Constitutional document enacted by a competent body, then, as I have held, it has, like any other Constitution, the same force and validity. All organs of the State owe their origin to it, derive their powers there from and function under it subject to the limitations imposed by it. There can be no question therefore, of any organ or functionary under the Constitution questioning the authority of the Constitution under which it is functioning or striking down any provision of the Constitution on the basis that it is repugnant to some other document, however important or sacred it might be, unless it also is a part of the Constitution itself. Even then, if there is conflict between two provisions of the Constitution, every endeavour must be made to give a harmonious interpretation so that both the provisions may be given their due place in the Constitutional framework[251].

The Court held that if the view taken by the High Court is adopted, it will pave the way for the eventual destruction of the Constitution or at least the Constitution would not remain in its present form. It is the total negation of the established norms of constitutional interpretation. Abdul Shakurul Salam J. agreeing with the other members endorsed the view that the courts lack jurisdiction to strike down any provision of the Constitution. He said, "A Constitution is an

[251] The State versus Zia-ur-Rehman and others, PLD 1973 Supreme Court 49, 80

organic whole. All its Articles have to be interpreted in a manner that its soul or spirit is given effect to by harmonizing various provisions[252]." If, however, there could not be any possibility of harmonizing the apparently conflicting provisions, the appropriate forum to remove the contradiction will be the legislature and not the courts.

The same view was endorsed by the Supreme Court in Al-Jehad Trust case popularly known as the appointment of the judges' case[253]. In this case, the Supreme Court gave its judgment, *inter alia,* on the irreconcilable conflict between two constitutional provisions i.e. articles 203C and 209. The former when it was originally inserted by P.O No. 1 of 1980 under clause 4 provided that a judge of a High Court can be appointed as a member of the FSC for a period of one year without his consent. Besides, clause 5 provided that any such judge who refuses the appointment as a member of the FSC shall cease to hold the position as such judge and will be deemed to have retired from his office. The latter, on the other hand, provided, *inter alia,* that a judge of the Supreme Court or a High Court shall not be removed from his office except as provided by article 209. It is interesting to note that article 209 did not contain any such ground for the removal of a judge of a High Court as provided in article 203C(5). Rather, the protection of tenure provided by article 209(7) secured the independence of judiciary.

The Court took notice of the fact that the provisions contained in chapter 3A have been given an overriding effect over the other provisions of the Constitution. Nonetheless, it went on to observe that article 209 has been provided by the forefathers and framers of the Constitution while article 203C has been made part of the Constitution by a Martial Law regime. Moreover, the former protected the independence of judiciary and benefitted the judges as compared to the latter. In

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[252] Hakim Khan and 3 others versus Government of Pakistan through Secretary Interior and others, PLD 1992 Supreme Court 595, 647

[253] Al-Jehad Trust through Raees-ul-Mujahidin Habib-ul-Wahab-ul-Khairi, Advocate Supreme Court and another versus Federation of Pakistan and others, PLD 1997 Supreme Court 84

these circumstances, where reconciliation between two conflicting provisions was not possible the provision inserted in the original scheme of the Constitution and intended to protect a vital feature of the Constitution as compared to the one inserted by a Martial Law regime was preferred. However, the Court restrained itself from striking down article 203C. The Court considered it appropriate to follow the ratio laid down in Hakim Khan case to refer the matter to the Parliament for removing conflicts between the constitutional provisions.

The above discussed cases strongly suggest that every effort should be made to reconcile between the conflicting provisions of the Constitution to give it a harmonious interpretation. If, however, there is no possibility of any such reconciliation, following the ratio laid down in Al-Jehad Trust case, the provisions which have been made part of the Constitution by the makers thereof and protect its one or the other salient feature should prevail over provisions which have been inserted in the Constitution extra constitutionally. In any case the courts should abstain from striking down any constitutional provision. It is worth mentioning that striking down a constitutional provision includes rendering it ineffective or redundant because what cannot be done directly cannot be done indirectly. "Notwithstanding" as contained in article 203A will be further elaborated in the next chapter while analyzing the judgment of the SAB in Qazalbash Waqf case. Suffice here is to say that non-obstante clause in article 203A does not make chapter 3A over and above the other provisions of the Constitution.

3.2.3 Definitions in Chapter 3A

The next provision of chapter 3A is in the form of article 203B. This provision contains four definitions. The most important of these is the definition of law as contained in 203B(c) and it is the only definition desired to be discussed here. According to this definition, custom or usage having the force of law is included in the definition of law but certain laws such as Constitution, Muslim personal law and 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 a period of 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.

As far as the exclusion of Muslim personal law is concerned, it should be noted that in spite of this exclusion, the FSC has exercised jurisdiction to declare few provisions of the Muslim Family Laws Ordinance, 1961 (MFLO) repugnant to the injunctions of Islam[254]. It is considered expedient to analyse how the FSC could exercise jurisdiction with respect to Muslim personal law before discussing the enlargement of period of ten years with respect to fiscal laws etc. Besides, the exclusion of Constitution from the definition of law under article 203B(c) is analysed in the next chapter.

3.2.3.1 Muslim Personal Law

The Shariat Bench of the Peshawar High Court was the first to exercise jurisdiction to declare section 4 of the MFLO repugnant to the injunctions of Islam[255]. This jurisdiction was exercised under article 203B inserted by P.O. No. 3 of 1979. In this case although the Explanation attached to article 203B (1) excluded Muslim personal law from the definition of law, the Court held that the provisions of MFLO were not included in this expression. Rather, the expression Muslim personal law was equivalent to Shariat and did not mean the state legislation. Therefore, any legislation which affected Muslim personal law in one way or the other was not immune from the jurisdiction of the court because it did not amount to Shariat. In this regard, the Court gave various illustrations. For example, the Court mentioned that if the State allows by legislation marriages between same sexes and provides for the succession, marriages and divorce of such spouses, will such legislation be immune from the jurisdiction of the court as it would be claimed

[254] See Allah Rakha and others versus Federation of Pakistan and others. PLD 2000 Federal Shariat Court 1

[255] See Mst. Farishta versus the Federation of Pakistan through Ministry of Law, Islamabad, PLD 1980 Peshawar 47

to be covered under the expression Muslim personal law. The Court, therefore, held that the expression Muslim personal law did not cover the provisions of MFLO.

This interpretation of the expression Muslim personal law, however, was not confirmed by the Shariat Appellate Bench of the Supreme Court. Thus, this judgment was reversed in appeal and the appellate court held that the provisions of MFLO were included in Muslim personal law[256]. According to the appellate court Muslim personal law could mean both religious and divine law of Muslims i.e. Shariat as well as the statutory laws restricted in their application to Muslims only as distinguished from other statutory laws having application to general masses. The latter meaning, however, was preferred by the Court following the contextual interpretation rule. The Court held that the Muslim personal law as used in Explanation of article 203B (1) could not mean Shariat because the Shariat was the touchstone for the validity of other laws. The injunctions of Islam were held to mean the Shariat. According to this interpretation, the provisions of MFLO were immune from the jurisdiction under chapter 3A. This interpretation was followed for a long time.

In another case[257], the provisions of Zakat and Ushr Ordinance, 1980 were challenged before the FSC which had substituted the Shariat Benches of High Courts by this time. The provisions of this Ordinance not only related to fiscal matters but also applied to Muslims only. Therefore, following the interpretation of Muslim personal law as was done by the SAB in the above discussed case, the FSC dismissed the Shariat petitions[258].

However, an appeal was filed by the petitioner against the said judgment of the FSC. This time the SAB had a different interpretation of the expression Muslim personal law than the one it had

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[256] See Federation of Pakistan versus Mst. Farishta, PLD 1981 Supreme Court 120

[257] See Dr. Mahmood-ur-Rehman Faisal versus Secretary, Ministry of Justice, Law and Parliamentary Affairs and others, PLD 1991 FSC 35

[258] Ibid

given in Mst. Farishta case. According to the new interpretation, a codified law applicable exclusively to Muslim subjects does not fall within the scope of Muslim personal law unless it is shown further that the particular law applies to a sect of Muslims based on the interpretation of Islamic injunctions by that particular sect[259]. In other words, a codified law applicable to general Muslim population is not covered in the expression Muslim personal law. Therefore, the provisions of the Zakat and Ushr Ordinance, 1980 did not fall under the Muslim personal law as provided in article 203B (c). Consequently, the FSC could exercise jurisdiction under chapter 3A.

It should be noted that according to the existing interpretation of Muslim personal law the provisions of the MFLO are not immune from the jurisdiction of the FSC. Hence, the FSC in Allah Rakha case has declared Section 4 completely and Section 7 partly of the MFLO repugnant to the injunctions of Islam though an appeal is pending in the Shariat Appellate Bench of the Supreme Court against the said judgment of the FSC[260].

3.2.3.2 Fiscal Laws etc.

In the following lines, the enlargement of time for the exclusion of fiscal laws etc. from the definition of law is discussed. It seems that the Zia regime wanted to exclude these laws from the definition of law as given in article 203B permanently. That is why the period for such exclusion was constantly kept being enlarged until the President Zia-ul-Haq passed away in an air accident. Initially, the P.O. No. 22 of 1978 had excluded fiscal laws etc. from the definition of law absolutely without any limitation of time. However, limitation of time was first imposed by P.O. No. 3 of 1979. Initially, it was provided by Explanation contained in article 203B(1) of the P.O. No. 3 of 1979 that fiscal laws were excluded from the definition of law for a period of three years from the date of commencement of chapter 3A which was to expire on 09.02.1982.

[259] See Dr. Mahmood-ur-Rehman Faisal versus Government of Pakistan PLD 1994 Supreme Court 607

[260] Allah Rakha and others versus Federation of Pakistan and others, PLD 2000 Federal Shariat Court 1

However, after the substitution of chapter 3A by P.O. No. 1 of 1980 almost fifteen months time was enlarged to the previous three years as the time would now was to expire on 25.05.1983. But when this time approached near, the time was further enlarged by one year by P.O. No. 7 of 1983 dated 19.05.1983. Now, the fiscal laws etc. would be included in the definition of law after 18.05.1984 instead of 25.05.1983. Again when this time drew near, by P.O. No. 2 of 1984 dated 26.04.1984 four years time was substituted by five years, hence the time was now to expire on 25.04.1985. Finally, on 02.03.1985 P.O. No. 14 of 1985 enlarged the time from five years to ten years which finally elapsed on 09.02.1989. This time is calculated from the date when chapter 3A was first inserted in the Constitution on 07.02.1979 by P.O. No. 3 of 1979. If however, the time is calculated from the date of substitution of chapter 3A by P.O. No. 1 of 1980, the period of ten years was to elapse on 25.05.1990 since the provisions of the substituted chapter were given effect from 26.05.1980. Nonetheless, the FSC in its judgment given in riba case mentions that its jurisdiction to examine the fiscal laws was restored on 26.06.1990[261]. This does not seem correct.

3.2.4 The Establishment of the Federal Shariat Court

The next article, 203C describes the establishment of the Federal Shariat Court. The purpose of the establishment of the FSC has been described as the enforcement of the provisions of chapter 3A. According to clause 2 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 a High Court 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

[261] Dr. Mahmood-ur-Rehman Faisal and others versus Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad and others, PLD 1992 FSC 1

judges have different qualification. Their qualification has been provided by clause 3A which is at least fifteen years experience in Islamic law, research or instruction. This qualification has been provided by a recent amendment[262]. Previously, it was simply required that an aalim judge must be well versed in Islamic law.

The total number of traditional judges is five as compared to three ulema judges. This composition is very significant as the decisions of the FSC are taken in terms of the majority of the judges constituting the bench. Theoretically it is quite possible that the traditional judges collectively disagree with the ulema judges on the interpretation of an Islamic injunction, and in this case the interpretation given by the traditional judges to an Islamic injunction will prevail.

It should be recalled that before the establishment of the FSC, Shariat Benches were established in all the High Courts under article 4 of the P.O. No. 22 of 1978 and article 203B (10) of the P.O. No. 3 of 1979 to exercise the same jurisdiction as conferred on the FSC with respect to the repugnancy of any law to the injunctions of Islam. These Benches consisted of three Muslim Judges of the High Court. It should be noted that neither of the two P.Os referred above provided for an aalim judge. The need for an aalim judge was felt after the decision of the FSC in Hazoor Baksh case[263]. In this case, the FSC declared that the punishment of rajam in case of zina by married persons is repugnant to the injunctions of Islam[264]. This decision of the FSC was widely and bitterly criticized by the religious circles. Moreover, it became abundantly clear that the traditional judges are not well versed in Islamic law.

Consequently, a need was felt to include ulema in the bench for decisions in respect of Islamic law. To neutralize this criticism an amendment was made to include ulema judges in the FSC.

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[262] See Section 74 of the Constitution (Eighteenth Amendment) Act, 2010 (Act 10 of 2010)

[263] Hazoor Baksh versus the State, PLD 1981 FSC 145

[264] Islam prescribes punishment of rajam for the offence of zina by a *muhsan*. It is generally described that a married person is a *muhsan*. However, marriage is only one of the conditions of being a *muhsan*.

Similarly, the FSC was also conferred jurisdiction to review its own judgments. Thus, a review petition was filed to correct the erroneous view given by the FSC in the above referred case. This time with ulema judges sitting in the bench, it was held that rajam is not repugnant to the injunctions of Islam rather the same is enforceable as a hadd punishment[265].

It should be noted that article 203C (2) of P.O. No. 1 of 1980 provided that the FSC will consist of five members including the Chairman; at that time judges were called members and the Chief Justice was called Chairman but after amendment by P.O. No. 5 of 1982 member was substituted by judge and Chairman was substituted by Chief Justice. The requirement of being Muslim was also not there. It was added later by article 2(a) of the Constitution (Second Amendment) Order, 1980[266]. Similarly, the strength of the judges was increased from five to eight by article 2 of the Constitution (Second Amendment) Order, 1981[267].

As far as the term of the office of a judge including the Chief Justice is concerned, it is provided as three years but the President may extend the term of the office. However, a judge of a High Court cannot be appointed as a judge of the FSC except with his consent and after consultation by the President with the Chief Justice of the High Court save where the Chief Justice is himself to be appointed as a judge of the FSC.

It should be recalled that article 203C (4) of P.O. No. 1 of 1980 originally provided that a Judge of a High Court can be appointed as a Judge of the FSC without his consent and his consent is required only when he is to be so appointed for a period exceeding one year. It did not end here. The next clause of this article provided that a Judge of a High Court who did not accept his appointment as a Judge of the FSC would be deemed to have retired from his office. So there

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[265] State versus Hazoor Baksh, PLD 1983 FSC 255

[266] The Constitution (Second Amendment) Order, 1980. President's Order No. 4 of 1980 dated 21st June 1980, Gazette of Pakistan, Extraordinary, Part I, 21st June, 1980.

[267] The Constitution (Second Amendment) Order, 1981. President's Order No. 7 of 1981 dated 27th May 1981, Gazette of Pakistan, Extraordinary, Part I, 27th May, 1981.

was no other choice but to accept the appointment or go home. This was challenged before the Supreme Court being against the independence of judiciary and conflicting with article 209 as discussed above in Al-Jehad trust case[268]. Following the verdict of the Court, this clause has been omitted. Besides, clause 4B has been added which provides that a judge of the FSC will not be removed except on the same grounds and following the same procedure as required for removing a judge of the Supreme Court. The remaining provisions of article 203C provide for the place of sitting of the Court, oath of judges and their resignation etc. and need not be discussed here.

3.2.5 Original Jurisdiction of the FSC

The next provision desired to be analysed here is in the form of article 203D. It is the most important provision as it 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 (PBUH). The FSC can exercise this jurisdiction in either of the following ways:

i. On its own motion

ii. On the petition of a citizen

iii. On the petition of the Federal Government

iv. On the petition of a Provincial Government

The suo moto jurisdiction to examine a law and decide its fate was vested upon the FSC in 1982 by the Constitution (Second Amendment) Order, 1982. However, the power of the Federal or a Provincial government to invoke the jurisdiction of the FSC under this provision is very meaningful as well as surprising. Who will be joined as respondent in such proceedings has to be

[268] Al-Jehad Trust through Raees-ul-Mujahidin Habib-ul-Wahab-ul-Khairi, Advocate Supreme Court and another versus Federation of Pakistan and others, PLD 1997 Supreme Court 84

found out. The government, Federal or Provincial, is itself the law making authority[269]. Under the Constitution, the government is restricted to make any law which is repugnant to the injunctions of Islam. Moreover, the government can seek the advice of the Council of Islamic Ideology to bring a law in conformity with the injunctions of Islam. If the government is of the opinion 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 having the need of any other institution. In case, the matter is doubtful whether a particular provision is or is not so repugnant, the more suitable option is to seek the advice of the Council 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 Council will be quite liberal.

When the Court exercises this jurisdiction on its own motion or on the petition of a citizen and the law prima facie appears to be so repugnant, the Court will join as party the Federal government if the law is with respect to a matter in the Federal Legislative list or the Provincial government if the case is otherwise. Initially, the Federal government or the Provincial government had not to be formed as respondents. This provision was added by the Constitution (Amendment) Order, 1984. If having examined the law and hearing the point of view of the petitioner and the concerned government, the FSC finally decides a law to be repugnant to the injunctions of Islam, the Court shall do the following:

i. Give reasons of its opinion

ii. State the extent to which the law is so repugnant

iii. Mention the date on which the decision is to take effect

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

This last point is very important because until the decision takes effect, the law having been declared repugnant to the injunctions of Islam will still 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 be stayed 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. Obviously, the case can be remanded to the FSC for decision afresh. So the wheel shall start revolving again from the same point where it had started earlier.

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 actually happened many a times. In this regard, the following cases are worth mentioning here. The first case desired to be discussed is the decision of the FSC with respect to the pre-emption laws. It is only but one indicator of the intention of the Martial Law regime to bring laws in conformity with the injunctions of Islam.

3.2.5.1 The Fate of the Pre-emption Laws

As far as the proceedings under chapter 3A and article 188 with respect to the pre-emption laws are concerned, the point to be made here is that the decision of the FSC under article 203D is appealable in the SAB under article 203F. Yet the decision of the SAB under article 203F is reviewable under article 188 of the Constitution. The issues and findings of the FSC and the

SAB are only discussed to an unavoidable necessary extent. These are discussed in a bit detail below under another heading.

The FSC dismissed the Shariat Petitions challenging, *inter alia,* certain provisions of different laws adding to the categories of the pre-emptors and excluding certain properties from being the subject of pre-emption[270]. According to the decision of the FSC, some of these provisions were immune from the jurisdiction of the FSC under article 203D while the others were held not repugnant to the injunctions of Islam. This decision of the FSC was challenged in appeal under article 203F before the SAB[271]. The SAB reversed the decision of the FSC and held that no such provision was immune from the jurisdiction under article 203D. Besides, the impugned provisions were held to be repugnant to the injunctions of Islam. It was provided in the judgment of the SAB that the impugned provisions will cease to have effect after 31.07.1986. It was further desired in the judgment of the SAB that a consolidated pre-emption law be enacted in the light of the judgment given by the SAB. However, no such pre-emption law could be enacted before 01.08.1986. Meanwhile, the impugned provisions of law ceased to have effect in accordance with 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. After issuing notices to all the concerned parties and providing the interested parties 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,

[270] See Hafiz Ameen, PLD 1981 FSC 23

[271] Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah, PLD 1986 Supreme Court 360

clarify, review its own orders[272]." 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[273].

Similarly, in Mst. Aziz Begum case the Supreme Court refuted the argument of the petitioners/appellants that the SAB cannot exercise review jurisdiction under article 188 of the Constitution[274]. The argument was built on the scheme of the provisions of chapter 3A. It was contended that the FSC has been expressly provided review jurisdiction under article 203E (9) while no clause of article 203F provides such jurisdiction to the SAB. Hence, in the absence of any express provision the SAB cannot exercise such jurisdiction as the establishment of the SAB is for a limited purpose as provided in article 203F[275].

The Supreme Court, on the other hand, explained that SAB is an integral part of the Supreme Court and is one of its benches. Therefore, the power under article 188 of the Constitution to review its judgment is available to the SAB as to any other bench of the Supreme Court. An express provision for such jurisdiction by the FSC is required because the FSC is an independent Court and owes completely for its establishment to the provisions of chapter 3A[276].

3.2.5.2 The Riba Case

In another case famously known as 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

[272] In Re: Said Kamal Shah, PLD 1990 Supreme Court 865
[273] Ibid
[274] Mst. Aziz Begum and others versus Federation of Pakistan and others, PLD 1990 Supreme Court 899
[275] Ibid
[276] Ibid

one hundred petitioners before the FSC being repugnant to the injunctions of Islam[277]. First of these petitions was admitted for regular hearing on 11.12.1990 while the hearing of last of these petitions was concluded on 24.10.1991. In order 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 personal hearing on this issue before the FSC. Likewise, a number of 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 (PBUH). 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 to wage a war against the Almighty and His Prophet (PBUH).

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 its practice was prohibited by Islam. It also analysed the current modes of interest from all angles. After a very long proceeding which 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. However, the Federal and the Provincial governments were provided more than six months time to bring these provisions

[277] Dr. Mahmood-ur-Rehman Faisal and others versus Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad and others, PLD 1992 FSC 1

in conformity with the injunctions of Islam. Thus, it was provided that the decision of the FSC will take effect on 30.06.1992[278].

This decision of the FSC was widely celebrated and it was expected that the riba will be eliminated from Pakistani economy as under article 38(f) of the principles of policy, the State is bound to eliminate riba as early as possible. However, a number of appeals were filed against this judgment in the Shariat Appellate Bench of the Supreme Court. 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 to eliminate riba. These appeals were filed in 1992 but were disposed of in December 1999. The SAB affirmed the findings of the FSC[279]. However, the date on which the impugned laws were to be removed from the statute book was extended. In fact, different dates were fixed for different laws according to their nature. With regard to some of the laws, the decision of the SAB was 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 SAB not only affirmed the judgment of the FSC, it also made certain recommendations to islamize 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 praying for the setting aside of the above judgments. Moreover, by two miscellaneous applications filed before the review court it was prayed that the date of the enforcement of the decision of the SAB be

[278] Ibid

[279] Dr. M. Aslam Khaki versus Syed Muhammad Hashim and 2 others, PLD 2000 Supreme Court 225 [Shariat Appellate Jurisdiction]

extended pending the decision of the review 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 SAB 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[280]. Interestingly, it was held by the review court that the parties are free to raise any other relevant grounds before the FSC in rehearing of the case. Likewise, the FSC would be free to take notice of any other relevant fact which could have remained unnoticed in the earlier hearing. It was held:

> Resultantly, Civil Shariat Review Petition No. 1 of 2000 filed by the United Bank Ltd. is allowed, the judgment, dated 23rd December, 1999 passed by the Shariat Appellate Bench of this Court in Shariat Appeals Nos. 11 to 19 of 1992 and the judgment, dated 14th November, 1991 of the Federal Shariat Court passed in Shariat Petitions...are set aside and the cases are remanded to the Federal Shariat Court for determination afresh in the light of the contentions of the parties noted above and the observations made which are germane to the controversy. Besides the points raised before this Court, the parties would be at liberty to raise any other issue relevant to these cases and the Federal Shariat Court may also, on its own motion, take into consideration any other aspect which may arise or may be found relevant for determination of the issues involved herein[281].

Thus, the practice of interest which amounts to waging war against Allah and His apostle (PBUH) having been declared repugnant to the injunctions of Islam by the FSC in 1991 still holds the field and is likely to continue for a number of years owing to the procedure provided for islamization of laws through judiciary.

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[280] United Bank Ltd. versus Messers Farooq Brothers and others, PLD 2002 Supreme Court 800 [Shariat Review Jurisdiction]

[281] Ibid, Paragraph 19

In P.O. No. 22 of 1978, P.O. No. 3 of 1979 and P.O. No. 1 of 1980 it was provided that the decision of the FSC will be published in the Official Gazette but this has been omitted by P.O. No. 4 of 1980. Eventually, if a law is declared repugnant to the injunctions of Islam, the President in case of a federal law or the Governor in case of a provincial law is required to take steps to bring that law in conformity with the injunctions of Islam.

Now three expressions used in this article are very important. These are injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet (PBUH), repugnant to the injunctions of Islam, and in conformity with the injunctions of Islam. The same are analysed below.

3.2.5.3 Injunctions of Islam

As far as the phrase "injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet (PBUH)" is concerned, 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 Saleem Ahmad case are worth quoting here[282]. In this case, Section 10(4) 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 favour 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 held that the scope of its jurisdiction under Article 203D is limited to the Holy Quran and the Sunnah of the Holy Prophet (PBUH). The Court cannot exercise such jurisdiction on the basis of view, verdicts and *fatawa* issued by scholars. Fida Muhammad Khan J. speaking for the full Court said:

[282] Saleem Ahmad versus Government of Pakistan, PLD 2014 FSC 43

> ...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 touch stone of Injunctions of Islam, as contained only in the Holy Quran and Sunnah of the Holy Prophet (PBUH). As such its scope and jurisdiction is limited to the Holy Qur'an and Sunnah of the Holy Prophet (PBUH) only...this Court cannot declare any law or provision of law merely on the basis of views, verdicts and Fatawa issued by the honourable scholars whosoever they might be. We believe that the honourable scholars of recognized schools of Islamic Fiqh must have, after thorough considerations, based their opinions on the Holy Quran and Sunnah of the Holy Prophet (PBUH) and Sunnah of his companions. However, unless there is a clear specific "Nass" of the Holy Quran and Sunnah of the Holy Prophet (PBUH) 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[283].

However, if various judgments rendered under this jurisdiction are analysed, it becomes 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 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 (PBUH) but also to the spirits of these texts, the practice of

[283] Ibid, Paragraph 7

companions, the juristic opinions of the early as well as the contemporary jurists, contemporary practices of the Muslim world and so on[284].

3.2.5.4 The scope of "Repugnant"

The word repugnant literally is synonymous to 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. The word inconsistent has been used in this provision in its literal sense. 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. 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.

The next provision is in the form of article 143 which talks about 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 use the word repugnant in the above discussed sense. This indicates that jurisdiction under article 203D can be

[284] See Shahbaz Ahmad Cheema. "The Federal Shariat Court's Role to Determine the Scope of 'injunctions of Islam' and its Implications." Available at https://heinonline.org/HOL/LandingPage?handle=hein.journals/jispil9&div=21&id=&page= (last accessed 02.02.2020)

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 whether the law is repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet. A law may not be in conformity with the juristic opinion of one or the other of the Schools but that would not render the same repugnant for the purposes of Article 203-D unless the repugnancy is clearly brought out as against some specific Injunction either in the Quran or the Sunnah. In order 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...[285]

The above quotation clearly indicates that it is not essential that a law which is not repugnant to the inunctions 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 this article 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 a law with respect to a matter in the Federal Legislative List or the Governor in the case of a law with respect to a matter not enumerated in said List shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam[286].

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[285] Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah, PLD 1986 Supreme Court 360, 474

[286] See article 203D (3)(a) of the 1973 Constitution.

3.2.5.5 In Conformity with the Injunctions of Islam

The expression "in conformity with the Injunctions of Islam" has not been defined in the Constitution. However, a law is said to be in conformity 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 are discussed here. The point to be made is that the FSC declares only those laws void which are repugnant to the injunctions of Islam as explained above. But once any such law is so declared void, steps are taken not to remove the repugnancy but to bring the law in conformity with the injunctions of Islam.

The Shariat Appellate Bench of the Supreme Court in Malik Said Kamal Shah case held that the Islamic law of pre-emption creates an exception to the freedom of contract and purchase[287]. 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 with respect to 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.

The above issue rose because the North-West Frontier Province Pre-emption Act, 1950 under Section 5 (a), (c) and (d) exempted certain properties from 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

[287] Government of N.W.F.P. through Secretary Law Department versus Malik Said Kamal Shah, PLD 1986 Supreme Court 360

Regulation, 1972 conferred the first right of pre-emption on the tenant in respect to 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.

These provisions were challenged 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 inserted by the P.O. No. 3 of 1979. 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 a period of three months from the date of the judgment was given to bring the said provisions in conformity with the injunctions of Islam[288]. The Court held that the right of pre-emption has only been conferred in Islam on the persons who fall under the following categories:

i. Co-owners of immovable property

ii. Participators in amenities and appendages in immovable property

iii. 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 being not maintainable as well as on merits. With respect to 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-

[288] Haji Naimatullah khan and another versus Government of Pakistan through Ministry of Law, PLD 1979 Peshawar 104 [Shariat Bench]

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. These appeals were disposed of in the above mentioned terms that the law of pre-emption cannot be curtailed property-wise or increased person-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.

In pursuance to this judgment of the SAB, 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, so as to bring it in conformity with the injunctions of Islam as set out in the Holy Quran and Sunnah...[289]" Similarly, in 1987 the pre-emption law for the province of Khyber Pakhtunkhwa was brought in conformity with the injunctions of Islam.

3.2.6 Representation before the Federal Shariat Court

The next important provision for the purposes of the present research is article 203E and particularly its clauses 4 to 7 & 9. According to clause 4, if the FSC is exercising jurisdiction under article 203D (1), the parties can be represented by a Muslim legal practitioner who has been enrolled as an advocate High Court for five years or who is an advocate of the Supreme Court or by a jurisconsult of his choice out of a panel of jurisconsults maintained by the FSC. An Aalim who is well-versed in Shariat can be a jurisconsult.

Clause 6 is very interesting as it says that the legal practitioner or the jurisconsult will not plead for the party but submit his interpretation of injunctions of Islam relevant to the proceedings in the form of a written statement. In Pakistan where there are different education systems modern/English medium and traditional, it becomes very interesting what interpretation of the injunctions of Islam would be presented by a legal practitioner. Apart, from the panel of

[289] See the preamble of the Punjab Pre-emption Act, 1991 (Act IX of 1991)

jurisconsults, the FSC under clause 7 can call any person from or beyond Pakistan who is well-versed in Islamic law to assist the FSC. So the law which has been made by Pakistani legislature considering its socio-economic conditions may be declared repugnant to the injunctions of Islam as interpreted by a foreigner. Finally, clause 9 gives the FSC review jurisdiction which was originally not there. It was added through Constitution (Amendment) Order, 1981, P.O. No. 5 of 1981. As analysed above, the need for this jurisdiction was felt after the decision of the FSC in Hazoor Baksh case where the punishment of rajam was initially declared repugnant to the injunctions of Islam.

3.2.7 Appeal to the Shariat Appellate Bench

Reference has already been made to the Shariat Appellate Bench (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. 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. It reads as:

> For the purpose of the exercise of the jurisdiction conferred by this Article, there shall be constituted in the Supreme Court a Bench to be called the Shariat Appellate Bench and consisting of—
>
> (a) three Muslim Judges of the Supreme Court; and
>
> (b) not more than 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 of *Ulema* to be drawn up by the President in consultation with the Chief Justice[290].

A question arises here 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 reference to the Chief justice of the FSC and not the Chief Justice of Pakistan. It is interesting to note that the Chief

[290] See article 203F (3) of the 1973 Constitution.

Justice of the FSC can be a permanent judge of a High Court. So a junior judge is a consultee for a senior post. On the other hand, if consultation is for drawing up 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 Council of Islamic Ideology as a consultee.

This special Bench of five judges is called the Shariat Appellate Bench. Originally, clause 3 of article 203F provided for only three Muslim Judges to be members of the SAB. Two ulema judges were added by substituting the original clause by a new clause through the Constitution (Third Amendment) Order, 1982, P.O. No. 12 of 1982.

The purpose of the constitution of the SAB, *inter alia*, is to hear appeals against the decisions of the FSC exercising jurisdiction under article 203 D. Under original article 203 F i.e. as contained in P.O. No. 1 of 1980 limitation for appeal was sixty days for any party aggrieved by the decision of the FSC; however, the limitation for the Federal government or a Provincial government was enhanced from sixty days to six months by adding a proviso to article 203F (2) through the Constitution (Third Amendment) Order, 1983, P.O. No. 9 of 1983.

It is worth mentioning that the Supreme Court has held in a number of cases that the reference to the SAB is actually a reference to the Supreme Court itself. It is not appropriate to consider the SAB a court distinct and separate from the Supreme Court. In this regard, reference has already been made to Mst. Aziz Begum case discussed above[291]. Besides, a similar view was taken by the Supreme Court in Abdul Waheed case[292]. In this case it was contended that the SAB exercising appellate jurisdiction under article 203F (2B) has a status independent from the Supreme Court and hence cannot rely upon the rules framed by the Supreme Court under Article

[291] Mst. Aziz Begum and others versus Federation of Pakistan and others, PLD 1990 Supreme Court 899

[292] Hafiz Abdul Waheed versus Mrs. Asma Jehangir and another, PLD 2004 Supreme Court 219

191 of the Constitution. In this regard, reference was made to clauses 3 to 6 of article 203F which use the expression Shariat Appellate Bench instead of the Supreme Court.

The Supreme Court, on the other hand, rejected this contention. By making reference to clauses 1, 2A and 2B of article 203F, the Supreme Court explained that the appeal against the decision of the FSC is preferred to the Supreme Court as provided in these clauses. Therefore, there is no doubt that the appellate forum under article 293F i.e. the Shariat Appellate Bench is and remains a Bench of the Supreme Court.

3.2.8 Bar to Jurisdiction

Next article 203G gives the FSC exclusive jurisdiction under chapter 3A as it creates a bar on all courts and tribunals including the Supreme Court and a High Court to entertain any proceedings in respect of any matter within the jurisdiction of the FSC. That is why it is called exclusive jurisdiction. A similar bar of jurisdiction was imposed by article 9 of P.O. No. 22 of 1978. There are various kinds of jurisdictions vested upon the FSC under chapter 3A. These are as follows:

i. Original jurisdiction under Article 203D

ii. Revision jurisdiction under Article 203 DD in Hudood cases

iii. Appellate jurisdiction in case of Hudood laws

iv. Review jurisdiction under article 203E(9)

It means the FSC can review its decision given in original, revision, as well as appellate jurisdiction just like the Supreme Court can review its judgment under article 188. However, it should be noted that courts exercising criminal jurisdiction usually do not have power to review their decisions. Supreme Court can be an exception since it is the apex court of the country and there is no other forum available to challenge the decisions of the Supreme Court. Moreover, the scope of review jurisdiction of the Supreme Court under article 188 of the Constitution is

different in civil and criminal matters as provided in the rules framed under article 191 of the Constitution.

Since the present research with respect to the analysis of chapter 3A focuses on the original jurisdiction of the FSC, it is clarified that the bar to exercise jurisdiction imposed by article 203G is limited to the Islamic perspective of a law. However, as mentioned earlier a law may have different perspectives. In this regard, it is reiterated that there are few reported cases in which the same law has been made the subject of attack being inconsistent with the fundamental rights under article 199 and 184(3) on the one hand, and being repugnant to the injunctions of Islam under Article 203D on the other[293]. Article 203G, *inter alia,* clarifies that the test of repugnancy of a law with respect to the injunctions of Islam is the exclusive domain of the FSC. So the FSC enjoys not only exclusive jurisdiction but also limited jurisdiction. This limitation, of course, does not create any bar on the exercise of the jurisdiction expressly vested on the Supreme Court or a High Court[294].

3.2.9 Precedent and the FSC

Article 203GG was added by the Constitution (Second Amendment) Order, 1982, P.O. No. 5 of 1982. It says that the decision of the FSC under chapter 3A will be binding on a High Court and on all courts subordinate to a High Court. It is interesting to note that the title of this article is similar to that of articles 189 and 201 which make the decisions of the Supreme Court and High Courts respectively binding on all courts within their territorial jurisdiction but the language of this article is quite different. Article 189 provides as, "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[295]," Similarly, article 201 uses almost same wording when

[293] One such case has already been analysed in chapter 1 above while others are analysed in chapter 5 below.
[294] This issue has been further analysed in chapter 5 below.
[295] See article 189 of the 1973 Constitution.

it says, "Subject to Article 189, any decision of a High 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 courts subordinate to it[296]." On the other hand article 203GG provides, "Subject to Articles 203D and 203F, any decision of the Court in the exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all courts subordinate to a High Court[297]."

High Courts and courts subordinate to High Courts are bound by the decisions of FSC whether given in original, revision, review or appellate jurisdiction. Moreover, the Supreme Court has held on the basis of the combined reading of this article with the above discussed article that the decision of the FSC if remains unchallenged or challenged but maintained by the SAB is binding even on the Supreme Court[298]. In other words, a law declared repugnant to the injunctions of Islam hence void cannot be enforced even by the Supreme Court. On the other hand, the decision of the Supreme Court is binding on the FSC and a larger bench of the Supreme Court binds an equal or a smaller bench of the Supreme Court. As stated earlier the doctrine of precedent has a direct bearing on the exercise of jurisdiction under article 184(3) by the Supreme Court to set aside the effects of the judgment rendered in Qazalbash Waqf case, this issue is analysed in detail in chapter 5 below.

3.3 Restrictions on Legislative Powers

The final part of this chapter analyses Part IX, Islamic Provisions, of the Constitution. The analysis is made with reference to similar provisions in the Constitutions of 1956 and 1962. Part IX of the Constitution consists of five articles i.e. from article 227 to article 231. Article 227(1) commands two important tasks with respect to the Islamic character of the Constitution. It requires that all the existing laws shall be brought in conformity with the injunctions of Islam.

[296] See article 199 of the 1973 Constitution.
[297] See article 203GG of the 1973 Constitution.
[298] Zaheeruddin and others versus the State, 1993 SMR 1718 [Supreme Court of Pakistan]

Besides, no new law will be made in contravention of such injunctions. Article 227(1) reads as. "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[299]."

It is interesting to note that injunctions of Islam have been given the same meaning as in chapter 3A .i.e. as laid down in the Holy Quran and the Sunnah of the Holy Prophet (PBUH). However, there is no restriction on the definition of law as imposed by article 203B(c) in article 227. Consequently, Constitution, Muslim Personal Law and procedural laws are included in the definition of law as used in this provision. Nonetheless, two restrictions are imposed by article 227 with regard to the islamization of laws. The first restriction is imposed by the Explanation attached to clause 1 and is specific to Muslim Personal Law. It requires that the interpretation of the Holy Quran and the Sunnah in respect of the personal law of any Muslim sect shall be made according to that particular sect.

The second restriction is imposed by clause 2 and is general which says that the laws shall be islamized only in the manner provided in Part IX of the Constitution. Thus, clause 2 of article 227 reads as, "Effect shall be given to the provisions of clause (1) only in the manner provided in this Part[300]." Clause 3 saves non-Muslim citizens from the operation of Islamic Provisions of the Constitution. It is worth mentioning that similar provisions were contained in the 1956 Constitution in the form of article 198 clauses 1, 2 and 4. Similarly, the task of bringing the existing laws in conformity with the teachings and requirements of Islam was provided, *inter alia*, in article 204 (1) (a) of the 1962 Constitution.

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[299] See article 227(1) of the 1973 Constitution.
[300] See article 227(2) of the 1973 Constitution.

One should not escape noticing the conflict between article 203D (3) (a) analysed above and article 227 of the Constitution. The former requires the President or the Governor of a province to bring a law in conformity with the injunctions of Islam if the same has been declared repugnant to the injunctions of Islam under article 203D while the latter requires that the laws shall be brought in conformity with such injunctions only in the manner provided by Part IX of the Constitution. It should also be kept in mind that like article 198 of the 1956 Constitution and article 204 of the 1962 Constitution, article 227 of the present Constitution is found in its original scheme as made by the makers and framers of the present Constitution. Article 203D, rather the entire chapter 3A, on the other hand, has been inserted by a Martial Law regime.

3.4 The Council of Islamic Ideology

In order to make recommendations for bringing the existing laws in conformity with the injunctions of Islam and to perform other prescribed functions, a Council of Islamic Ideology has been established under article 228 of the Constitution (hereinafter called the Islamic Council). It should be noted that first such body was established under article 198 of the 1956 Constitution. It was called a Commission. Besides this Commission, an organization for Islamic research and instruction in advanced studies was also established under article 197 of the same Constitution (hereinafter called the Islamic research organization). Similarly, under article 199 of the 1962 Constitution an Advisory Council of Islamic Ideology was formed for the same purpose (hereinafter called the Advisory Council).

The members of the Islamic Council including the Chairman range from eight to twenty with at least one woman member. The maximum number of the members was previously fifteen. It was raised to twenty by the Constitution (Fourth Amendment) Order, 1980, P.O. No. 16 0f 1980. The general qualification prescribed for a member is the knowledge of the principles and philosophy of Islam as provided in its primary sources. Alternatively, a member should have understanding

of economic, political, legal or administrative problems of Pakistan. However, at least one third of the members should be persons who have been engaged in Islamic research or instruction for at least fifteen years. The strength of one third of such members has been provided by a recent amendment[301]. Previously, this strength was one fourth.

Similarly, at least two members should be sitting or retired judges of the Supreme Court or a High Court. Moreover, the representation of various schools of thought should be ensured in the Islamic Council. A member of the Islamic Council is appointed by the President for a term of three years. Nonetheless, before this term expires, a member can be removed by passing a resolution in this regard with simple majority of the membership or he/she may himself/herself resign at any time.

The 1956 Constitution is silent about the composition of the Commission or the Islamic research organization. While according to the 1962 Constitution, the Advisory Council was to consist of five to twelve members. Interestingly, the provisions providing for the general qualification of the members of the Advisory Council, their appointing authority, term of office, procedure of removal and resignation are similar to those contained in the present Constitution discussed above.

3.4.1 Advice of the Islamic Council

Article 229 provides that the advice of the Islamic Council can be sought with respect to the repugnancy of a proposed law on the touch stone of the Islamic injunctions by making a reference to it. Such a reference can be made at the discretion of the President or the Governor of a province. However, such a reference is mandatory by a House of the Parliament or a Provincial Assembly if required by two-fifths of the total membership of the House or the Provincial Assembly. The Islamic Council is required to communicate to the concerned authority within

[301] See Section 85 of the Constitution (Eighteenth Amendment) Act, 2010, (Act No. 10 of 2010)

fifteen days of the receipt of such reference the time required to give a comprehensive advice on such reference. If, however, the concerned authority on communication of the time required by the Islamic Council for furnishing its advice considers that duration lengthy, the proposed law may be promulgated without the advice of the Islamic Council if the public interest so demands. Nonetheless, if the advice of the Islamic Council is received that the promulgated law is repugnant to the injunctions of Islam, the concerned authority is required to reconsider that law. No such provision is found in the 1956 Constitution. However, article 8 of the 1962 Constitution empowered the President, the Governor of a province, the National Assembly or a Provincial Assembly to make such a reference to the Advisory Council for a similar opinion as provided in article 229 of the present Constitution. The Advisory Council was competent to provide its opinion under article 204 of the 1962 Constitution. Seven days time from the receipt of the reference under article 8 was provided for communication to the concerned authority of the actual time the Advisory Council required for rendering a proper advice to the concerned authority. Similarly, the concerned authority was competent to promulgate the proposed law without waiting for the advice of the Advisory Council on the same ground as provided in the present Constitution. It is interesting to note that the 1962 Constitution is silent if the Advisory Council opines that the proposed law is repugnant to the injunctions of Islam.

3.4.2 Recommendations of the Islamic Council

Article 230, *inter alia*, requires the Islamic Council to recommend to the Parliament and the Provincial Assemblies the ways and means by which the Muslims of Pakistan would be able to practice Islamic teachings individually and collectively in all walks of life. Recommendations of measures to be taken to bring the existing laws in conformity with the injunctions of Islam and the stages by which such measures should be adopted is one of the most important purposes of the Islamic Council. Moreover, the functions of the Islamic Council also include the compilation

of the injunctions of Islam in a suitable form which may be given legislative effect by the Parliament or the Provincial Assemblies.

Similar tasks were to be performed by the Advisory Council under the 1962 Constitution. Besides, the task of the reconstruction of Muslim society in accordance with the true spirit of Islam was assigned to the Islamic Research Institute formed article 207 of the 1962 Constitution. Exactly similar task was assigned to the Islamic research organization formed under article 197 of the 1956 Constitution. While the task of recommending measures to bring the existing laws in conformity with the Islamic injunctions, and that of the compilation of such injunctions to give the same a legislative effect was assigned to the Commission formed under article 198 of the 1956 Constitution.

Further, the Islamic Council, the Advisory Council and the Commission were all required to submit reports both final as well as interim to be laid before the Parliament and the Provincial Assemblies so that laws may be enacted in the light of these reports. However, the period within which such reports are to be submitted vary in different Constitutions. Finally, the Islamic Council is competent to make rules for regulating its procedure with the approval of the President under article 231 of the Constitution. In fact, the Council of Islamic Ideology (Procedure Rules) 1974 have been formed by exercising this power. Likewise, the Advisory Council was competent to make its procedure rules while articles 197 and 198 of the 1956 Constitution are silent about such rules with respect to the Islamic research organization or the Commission.

After analyzing the Islamic character of the Constitution, the next chapter is dedicated to the analysis of the judicial determination of the land reforms by the FSC and the SAB.

CHAPTER 4

LEGAL OBSTACLES IN LAND REFORMS

4. Introduction

This chapter analyses the legal obstacles in carrying out large scale land reforms including the fixation of a ceiling on individual land-holdings in Pakistan. As pointed out in chapter 1 and chapter 2 above, that the Shariat Appellate Bench of the Supreme Court (SAB) in Qazalbash Waqf case held certain provisions of the Land Reforms Regulation, 1972 and the Land Reforms Act, 1977, *inter alia,* pertaining to the fixation of a ceiling on individual land-holdings repugnant to the injunctions of Islam. Since then, it has been presumed, though wrongly, that the land reforms are unislamic. Islam is a very emotional and sensitive issue in Pakistan. This is one of the reasons that no regime has made any serious efforts to carry out such reforms and hence put an end to the miseries and sufferings of various large classes of the village community even within the parameters of this judgment. For instance, the judgment of the SAB, *inter alia,* allows prospective fixation of ceiling on voluntary acquisition of property. On the other hand, if there are really some legal and Islamic obstacles in achieving this long desired change, the legislature and the Islamic constitutional bodies are supposed to remove, harmonize and overcome the same in the light of the established legal and Islamic principles.

In this chapter, it has been argued that the SAB did not have the jurisdiction in the first place, to declare the provisions of the 1972 Regulation and the 1977 Act imposing ceiling on land-holdings repugnant to the injunctions of Islam. This argument is built by analyzing the judgments of the FSC and the SAB in Hafiz Muhammad Ameen and Qazalbash Waqf cases

respectively[302]. The issue of the fixation of ceiling in the light of the injunctions of Islam is analysed only to an unavoidable extent. A proper determination whether this issue is, in fact, repugnant to the Islamic injunctions is beyond the scope of this research.

Apart from the issue of jurisdiction and fixation of ceiling, some other important issues analysed in this chapter include whether the State can acquire property from the citizens without paying compensation to them or whether the courts are competent to exercise jurisdiction in this regard, whether a ceiling can be imposed on the property held by a waqf or more particularly an Islamic waqf, whether the Sate can intervene to limit the grounds of eviction in spite of the existence of a tenancy agreement between the landlord and a tenant, and so on. As mentioned in the last chapter, a final decision of the SAB is open to review under article 188 of the Constitution. Therefore, in order to analyse the legal obstacles in carrying out land reforms comprehensively, the review judgment rendered by the SAB in Qazalbash Waqf case is also discussed in this chapter.

The restrictions imposed by the State with respect to the fragmentation and the alienation of the holdings, the liabilities imposed on the landlord with respect to the payment of taxes, cesses, surcharge, levies on land, the payment of water-rate and providing the seed for the cultivation and the equal contribution by the landlord and the tenant in fertilizers and pesticides have not been formed part of this chapter. These provisions have been sufficiently analysed in chapter 2 above. Another very important issue which formed the part of a considerable debate in Hafiz Muhammad Ameen case is whether the FSC is bound by the decisions of the Shariat Benches of the High Courts. This issue is related to the doctrine of precedent as envisaged in the Constitution. Therefore, it is analysed in chapter 5.

[302] Hafiz Ameen, PLD 1980 FSC 23. Qazalbash Waqf, PLD 1990 Supreme Court 99

4.1 General Introduction to Hafiz Muhammad Ameen and Qazalbash Waqf Cases

In Hafiz Muhammad Ameen case, the FSC disposed of sixty seven Shariat Petitions by a single judgment since common legal issues were involved in these petitions. Some of these petitions had been filed in the Shariat Benches of different High Courts under article 203B (1) of the Constitution in the year 1979 even before the establishment of the FSC. After the establishment of the FSC on 26 May 1980, all such petitions were transferred to the FSC under article 203H (2) of the Constitution. Similarly, some Shariat Petitions were filed directly in the FSC after its establishment. Article 203H (2) provides as, "All proceedings under clause (1) of Article 203B of the Constitution that may be pending before any High Court immediately before the commencement of this Chapter shall stand transferred to the Court and shall be dealt with by the Court from the stage from which they are so transferred[303]."

The petitioners had invoked the original jurisdiction of the FSC under article 203D of the Constitution by challenging certain provisions of different laws being repugnant to the injunctions of Islam. These laws included the Land Reforms Regulation, 1972, the Land Reforms Act, 1977, the Punjab Pre-emption Act, 1913, the N.W.F.P. Pre-emption Act, 1950, the Punjab Acquisition of Land (Housing) Act, 1973, the Development of Cities Act, 1976 and the Capital Development Ordinance, 1960. In the last three laws, provisions providing for compulsory acquisition of land by the State without compensation or with inadequate compensation were challenged. These provisions are comparable to Paragraph 13 of the 1972 Regulation and Section 9 and chapter IV of the 1977 Act. Therefore, while analyzing Hafiz Muhammad Ameen case, the discussion is restricted to the provisions of the land reforms laws and the provisions of these laws are not separately analysed.

[303] See article 203H (2) of the 1973 Constitution.

Similarly, Paragraph 25 (3) (d) of the 1972 Regulation providing the first right of pre-emption to a tenant in respect of land comprising his tenancy has already been analysed in the previous chapter. Therefore, the issue of pre-emption is not analysed below. However, this issue is taken up while analyzing whether the FSC being a successor Court of the Shariat Benches of the High Courts is bound by their decisions in the next chapter.

The above mentioned Shariat Petitions were heard and disposed of by a full Court consisting of five judges. Salahuddin Ahmed J. headed the Bench while other members included Agha Ali Hyder, Aftab Hussain, Zakaullah Lodhi and Karimullah Durrani JJ. It should be noted that all these judges were the sitting judges of different High Courts or the so called traditional judges since by this time there was no constitutional requirement of including ulema judges in the FSC. All the judges wrote their separate notes while the main judgment was authored by Aftab Hussain J. Following the majority view all the petitions were dismissed though the reasons for such dismissal were different for different members as will be analysed below.

This dismissal order passed by the FSC was challenged by several petitioners invoking the appellate jurisdiction of the SAB under article 203F. The SAB disposed of these different appeals in 1989 by a single judgment reported as Qazalbash Waqf and others versus Chief Land Commissioner, Punjab, Lahore and others[304]. In order to decide these appeals, 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, only Muhammad Afzal Zullah J. referred to these questions and the opinions thereon while giving his verdict. These appeals were heard by five judges of the Supreme Court. The Bench was headed by Muhammad Afzal Zullah J. Other members included Nasim Hassan Shah, Shafiur Rehman, Pir Muhammad Karam

[304] Qazalbash Waqf, PLD 1990 Supreme Court 99

Shah and Moulana Muhammad Taqi Usmani JJ. It should be noted that the last two mentioned judges were ulema members since by this time the Constitution had been amended to require the presence of ulema judges in the Bench.

The appeals were accepted by a majority of three to two members. Both the ulema members were unanimous in their findings though each wrote his own separate judgment. Muhammad Afzal Zullah J. concurred with the ulema to give them a majority. Nasim Hassan Shah and Shafiur Rahman JJ. wrote separate dissenting notes. One may raise here a preliminary point that since the judgment rendered by the FSC did not include any aalim judge while the judgment of the SAB was rendered by a Bench including two ulema members, the latter should be considered more weighty and more appropriate. This point may get further strength from the observations made in the previous chapter while discussing Hazoor Baksh case[305]. However, it is not so. Legally each member of the Bench has an equal say. Moreover, the issues to be analysed in this chapter are legal and constitutional and hardly involve any interpretation of the injunctions of Islam.

4.2 Article 253, Fixation of Ceiling, Compensation for Surrendered Land and the Issue of Jurisdiction

Article 253 of the Constitution, the relevant part of which has already been reproduced in chapter 1 above, on the one hand, stamps the authority of the Parliament to legislate a law that may fix a ceiling on property to be owned, held, possessed or controlled by an individual. On the other hand, it declares void any law that may allow an individual to hold property in excess of the ceiling fixed by the law. Thus, it restricts the authority of the Parliament to legislate such a law. It is worth mentioning that a similar provision was also contained in the form of articles 217 and 269 in the Constitution of 1962 and the Interim Constitution of 1972 respectively. Such a power

[305] Hazoor Baksh versus the State, PLD 1981 FSC 45. It has been observed in chapter 3 that the declaration of the punishment of rajam repugnant to the injunctions of Islam exposed the knowledge of the traditional judges with respect to the injunctions of Islam.

specifically given to the Parliament in spite of its general competence to legislate suggests very strongly the firm determination of the makers of the Constitution to eradicate social evils and promote social justice and economic well being of people by abolishing the institution of landlordism.

Paragraphs 8 and 10 of the 1972 Regulation and Section 3 the 1977 Act which impose a ceiling on individual land-holdings were made under the specific mandate of article 253 of the Constitution and other similar provisions in the earlier Constitutions. The FSC with a majority of four to one held that it did not have the jurisdiction to declare the said provisions repugnant to the injunctions of Islam. Aftab Hussain J. elaborately explained the grounds which had made the said provisions immune from the jurisdiction of the FSC under article 203D.

The provisions of the 1972 Regulation were enforced on 11 March 1972. At this time the country was governed under the Martial Law which had been imposed since 25 March 1969. The Constitution of 1962 had been abrogated while the Interim Constitution of 1972 had yet to be enforced on 21 April 1972. Meanwhile, the Lahore High Court on 17 April 1972 declared the imposition of Martial Law of 1969 null and void in Zia-ur-Rehman case[306]. The Martial Law regime was declared usurper and all laws including the 1972 Regulation having been made without lawful authority. Similarly, the Supreme Court on 20 April 1972 had taken the same view with respect to the imposition of 1969 Martial Law in Asma Jillani case[307]. However, to avoid a vacuum which may have occurred due to the absence of lawful authority of making laws, both the High Court as well as the Supreme Court condoned, *inter alia,* all acts and legislative measures which could have been lawfully done or taken under the Constitution of

[306] Zia-ur-Rehman versus The State, PLD 1972 Lahore 382. It should be noted that Zia-ur-Rehman case discussed in chapter 3 was an appeal by the State against the judgment delivered by the High Court.
[307] Miss Asma Jilani versus The Government of the Punjab and another, PLD 1972 Supreme Court 139

1962. Similarly, all acts done for the advancement and promotion of the good of the people were also condoned. These judgments had made the legitimacy of the 1972 Regulation doubtful.

In order to provide sanctity to the 1972 Regulation, various provisions were added in the Interim Constitution, 1972. Thus, article 280(3), *inter alia,* provided protection to this Regulation by declaring the same to be an existing law. Furthermore, it restricted the authority of the legislature to amend or repeal the said Regulation. Hence, no such action could be taken by the Parliament with respect to this Regulation without the previous sanction of the President in this regard. Besides, as mentioned above article 269 of the Interim Constitution curtailed the authority of the Parliament to legislate any law that would have the effect of increasing the ceiling imposed on the holding of property by this Regulation. Any such law had been declared void by the said article. Apart from the protection provided to the 1972 Regulation by the provisions of the Interim Constitution, the present Constitution also provides it sufficient protection. In this regard, articles 268(2) and 269 are worth mentioning here. The former was very similar to article 280(3) of the Interim Constitution of 1972 discussed above. This article curtailed the authority of the Parliament to repeal or amend any law provided in the 6th Schedule without the previous sanction of the President. The Land Reforms Regulation, 1972 was mentioned at Serial No. 13. However, this provision along with the 6th Schedule has been omitted by the 18th constitutional amendment. The latter article i.e. 269 provides a blanket protection, *inter alia,* to all Martial Law Regulations made between 20 December 1971 and 20 April 1972. The Land Reforms Regulation 1972 is one of such Martial Law Regulations. This provision declares that notwithstanding any judgment of any court all Martial Law Regulations and other instruments having the force of law made between the said dates have been validly made by the competent authority. These laws cannot be challenged in any court on any ground whatsoever. Similarly, the orders made,

proceedings taken and acts done between the said dates by any authority or any person deriving powers from any law made between the said dates are deemed valid and unquestionable in any court. The relevant part of article 269 states as:

> (1) All Proclamations, President's Orders, Martial Law Regulations, Martial Law Orders and all other laws made between the twentieth day of December, one thousand nine hundred and seventy-one and the twentieth day of April, one thousand nine hundred and seventy-two (both days inclusive), are hereby declared notwithstanding any judgment of any court, to have been validly made by competent authority and shall not be called in question in any court on any ground whatsoever.
>
> (2) All orders made, proceedings taken and acts done by any authority, or by any person, which were made, taken or done, or purported to have been made, taken or done, between the twentieth day of December, one thousand nine hundred and seventy-one, and the twentieth day of April, one thousand nine hundred and seventy-two (both days inclusive), in exercise of the powers derived from any President's Orders, Martial Law Regulations, Martial Law Orders, enactments, notifications, rules, orders or bye-laws, or in execution of any orders made or sentences passed by any authority in the exercise or purported exercise of powers as aforesaid, shall, notwithstanding any judgment of any court, be deemed to be and always to have been validly made, taken or done and shall not be called in question in any court on any ground whatsoever[308].

The Land Reforms Act, 1977 was enacted by the elected Parliament by exercising its legislative powers provided under article 253 of the Constitution. The effect of clause 2 of this article is that the Parliament cannot even by a legislative action increase the ceiling fixed by law though it can further reduce the same. This was the effect of Section 3 of the 1977 Act which reduced the ceiling from 300 acres of unirrigated land to 200 acres and from 150 acres of irrigated land to 100 acres. Similarly, it reduced the permissible measurement of area of land which was previously equivalent to 15000 PIU but was reduced equivalent to 8000 PIU. Apart from the protection provided by the above mentioned constitutional provisions, some other provisions of

[308] See article 269 of the 1973 Constitution.

the Constitution saved the Regulation and the Act from the effect of the fundamental rights. These are analysed below with the issue of compensation for surrendering excess area.

Aftab Hussain J. in his leading judgment throws light on the objects of these provisions as well. Generally, these have been incorporated to fulfill the Constitutional commands of eradication of social evils and getting social justice as well as promotion of social and economic well being of people. The judgment points out that the objectives behind these provisions are reduction of feudalism, elimination of absentee landlordism, prevention of concentration of natural resources in few hands and to get maximum production out of land. The relevant part of the judgment reads as:

> ...The objects of the statute are diminution if not complete elimination of the course of feudalism, reduction of concentration of wealth in the hands of a few big landlords, lessening the evil of absentee landlordism and giving an impetus to the newly created category of small landowners as well as the old landowners to get the maximum output from their lands...The institution of big landlords or of absentee landlordism has always been a source of oppression against the cultivator...[309]

It is quite interesting that the judgment of the FSC also takes notice of the emergence of big landlords in Pakistan. The FSC acknowledges that *zamindars* emerged as beneficiaries of the British rule in the sub-continent. However, the FSC restrains itself from making a general comment in this regard. The FSC observed as follows:

> ...the British Governments granted big tracts of land as revenue-free Jagirs and revenue-paying Zamindaris to a large number of persons as a reward for their treachery to the cause of the sub-continent and for loyalty to a foreign Government. The Jagirs having been abolished by Martial Law Regulation 64 of 1959, most of the present day Zamindaris are either descendants or remnants of one time revenue or rent collectors who became self-styled Zamindars during disturbances or who were grantees from the British Government. The present day Zamindari system, however, came into vogue during the British period when the middle man was recognized as an owner of the land. Yet there

[309] Hafiz Ameen, PLD 1980 FSC 23, 60, 65

> are a large number of persons who became owner of lands reclaimed by them under the conditions of grants made by the Government before Independence as well as after Independence...From this history it is not possible to make a uniform declaration of validity or invalidity about the ownership of land. Each case will have to be decided on its own merits...[310]

Paragraph 13 of the 1972 Regulation, *inter alia,* provides that the land above the ceiling is to be surrendered and the same vests in the Government without any compensation. Likewise, Section 9 of the 1977 Act provides the same. However, Section 11 of this Act provides the compensation for the land surrendered under Section 9 at the rate of Rupees 30 per PIU. This compensation is uniform for all the surrendered land. Obviously, it may be well below the market value of the land in certain areas. In order to provide protection to these provisions which apparently seem inconsistent with the fundamental rights, various provisions were made part of the Interim Constitution of 1972 and the present Constitution.

Article 7 of the Interim Constitution generally declared all laws void if made inconsistent with the fundamental rights provided by the Interim Constitution. However, clause 3(b) exempted certain laws from the operation of this provision. Land Reforms Regulation, 1972 was one such law. Similarly, article 21 of this Constitution provided protection to property. Therefore, no property could be compulsorily acquired or taken possession of. This provision, however, was not absolute. A property could be acquired against the wishes of the owner for a public purpose such as housing facility. Moreover, this provision was not applicable to existing laws. The Land Reforms Regulation 1972, of course, was an existing law. In order to acquire property for a public purpose, the action should be backed by a law which should provide for the payment of compensation to the owner as fixed by such law. Such a law instead of fixing compensation can also provide for the principles and the manner according to which such compensation should be

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[310] Ibid, 65

paid. Importantly, clause 4 of article 21 barred the jurisdiction of courts to adjudicate upon any matter related to the adequacy or otherwise of the compensation.

The present Constitution contains similar provisions in the form of articles 8 and 24. Article 8 has already been discussed and analysed above in sufficient detail. Suffice here is to say that the principle of inconsistency with the fundamental rights hence void is inapplicable to the laws mentioned in the 1st Schedule. The land reforms laws are mentioned in this Schedule. Hence this provision is very similar to article 7 of the Interim Constitution. Likewise, article 24 is similar to that of 21 of the Interim Constitution analysed above. The rules related to compulsory acquisition of property are inapplicable to any existing law or any law made in pursuance of article 253. The 1972 Regulation is covered under the existing law while the 1977 Act is a law made in pursuance to article 253. Finally, clause 4 provides that the jurisdiction of courts is barred to determine the adequacy or otherwise of the compensation. The relevant part of article 24 provides as:

> (1) No person shall be deprived of his property save in accordance with law.
> (2) No property shall be compulsorily acquired or taken possession of save for a public purpose, and save by the authority of law which provides for compensation therefor and either fixes the amount of compensation or specifies the principles on and the manner in which compensation is to be determined and given.
> (3) Nothing in this Article shall affect the validity of...

(f) any existing law or any law made in pursuance of Article 253.

(4) The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court[311].

On the basis of the above discussed provisions the FSC held that it did not have jurisdiction under article 203D to declare these provisions repugnant or otherwise to the injunctions of Islam. Besides, the definition of law as provided in article 203B(c) excludes, *inter alia,* the Constitution from its ambit. Any attempt to declare the provisions of the Regulation or the Act imposing ceiling on the ownership or possession of property and dealing with compensation repugnant to the injunctions of Islam would ultimately have the effect of declaring articles 24 and 253 of the Constitution repugnant to the injunctions of Islam. This is, of course, beyond the jurisdiction of the FSC and the SAB. What cannot be done directly cannot be done indirectly formed the basis of the opinion of the majority of the FSC. After referring to all these constitutional provisions and analyzing them, Aftab Hussain J. believes that the makers of the Constitution have taken all possible steps to protect the land reforms laws from attack of any kind. He says:

> 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 future laws invalid if they abolish or increase the ceiling on ownership of land fixed by the Regulation[312].

The only member of the FSC who thought that the above analysed provisions of the land reforms laws pertaining to the fixation of ceiling and dealing with the compensation were not immune from the jurisdiction of the FSC under article 203D was Karimullah Durrani J. The main reason with him that outweighed in favour of jurisdiction was the non-obstante clause in article 203A. According to a well recognized principle of interpretation, the historical events that led to the

[311] See article 24 of the 1973 Constitution.
[312] Hafiz Ameen, PLD 1980 FSC 23, 42

insertion or addition of a constitutional provision must be taken into account while placing construction on the said provision was his view.

In this regard, Durrani J. traces the history of the incorporation of chapter 3A in the Constitution to conclude that the Islamic way of life and islamization of laws was one of the greatest demands of the Muslims of the sub-continent. This eventually led to the origin of Pakistan. In these circumstances, the purpose of the establishment of the FSC should be kept broad. Interestingly, he makes reference to the Islamic research organization and the Commission of 1956 Constitution, Advisory Council of 1962 Constitution and the Islamic Council of 1973 Constitution.

Karimullah Durrani J. is of the view that these bodies merely provided lip service for the islamization of laws, this led to a mass agitation in the form of Tehreek Nizam-e-Mustafa and then chapter 3A was made part of the Constitution. The definition of law as provided in 203B (c) is in the nature of exception and it should be construed by giving it a narrow meaning accordingly.

Durrani J. says the above analysed constitutional protection provided to the 1972 Regulation cannot oust the jurisdiction of the FSC. In support of his claim he refers to article 268 of the Constitution which provides protection to all existing laws unless repealed or altered by the appropriate legislation. The relevant part of article 268 of the present Constitution states as, "Except as provided by this Article, all existing laws shall, subject to the Constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature[313]." The point Durrani J. wants to make is that if the majority view is accepted with respect to article 268, article 203D should not give jurisdiction to strike down any law by the FSC because this power has been given to the appropriate legislature

[313] See article 268 of the 1973 Constitution.

and not to the FSC. However, Durrani J. seems wrong in his analysis. Because article 268 provides protection to existing laws but this protection is subject to the Constitution. This obviously means that if any existing law is inconsistent with the fundamental rights or the injunctions of Islam, the Courts will have power to strike down the same under their respective constitutional jurisdiction if not barred by any other provision.

If, however, for a moment Durrani's view point is considered correct, he further emphasizes that if the legislature wanted to exclude these laws from the jurisdiction of the FSC, some more explicit words other than the mere Constitution would have been used in 203B (c). Moreover, he asserts that all laws get their preservation and protection under one or the other provision of the Constitution and the procedure and the authority for repeal and amendment have also been provided in the Constitution. In this case the jurisdiction under 203D comes in direct conflict with such constitutional provisions because article 203D bypasses this all. The makers of the Constitution in their wisdom have removed this conflict by adding non-obstante clause in the beginning of chapter 3A.

This would mean the Constitution minus the manner and the machinery provided for repeal and amendment will be excluded from the jurisdiction only. Ironically, Durrani J. says if such constitutional protections provided to the impugned laws are taken into consideration to oust the jurisdiction of the FSC, its effect would be that article 203D would become redundant. But a constitutional provision cannot be held redundant. This reason given by Durrani J. is self contradictory. As the exercise of jurisdiction by the FSC to declare the provisions of the land reforms laws pertaining to the fixation of ceiling and compensation repugnant to the injunctions of Islam hence void would make at least two constitutional provisions i.e. article 24 (3)(f) and article 253 redundant which violates the established principles of constitutional interpretation.

Nonetheless, by giving the above reasons Durrani J. concludes that the FSC has the jurisdiction to test the validity of the impugned provisions of the land reforms laws on the touch stone of the injunctions of Islam. He remarks as follows:

> I am, therefore, of the view that the incorporation of Article 203-A, in the relevant Chapter confers jurisdiction on this Court to declare a law or a provision of law repugnant to (the) Injunctions of Islam despite the fact that such law or provision has a protected existence under any other provision of the Constitution. This jurisdiction also covers those laws which have been rendered intra vires of the different provisions of (the) Constitution by special provisions in the Constitution and which could have been ultra vires of the legislative powers of the Legislature in view of other principles laid down, elsewhere in the Constitution. The jurisdiction of this Court is ousted against the Constitution only in that a provision of the Constitution and not the effect thereof has been made amenable to the examination by this Court under Article 203-D[314].

Interestingly, after drawing the above conclusion Durrani J. admits that there are some laws other than the Constitution regarding which jurisdiction under article 203D cannot be exercised. In this regard, he refers to the Representation of the Peoples Act, 1976. The reason stated for this is that this law is enacted under the express command of the Constitution for giving effect to the directives contained therein. He says:

> The only exception to this rule is those laws which are enacted under the express command of the Constitution or framed for giving effect to the directives contained therein. The Representation of Peoples Act is one of those enactments which was enacted for bringing into being the Parliament required by the Constitution to be set up[315].

One wonders these are the very reasons given by the majority for not exercising jurisdiction with respect to ceiling imposing provisions as the same are enacted under the express command of article 253 of the Constitution for giving effects to the directives contained in articles 37 and 38 of the Constitution.

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[314] Hafiz Ameen, PLD 1980 FSC 23, 102
[315] Ibid

Responding to the contention of the non-obstante clause as used in article 203A, Aftab Hussain J. in his leading judgment asserts that it only provides for exercising jurisdiction under article 203D notwithstanding anything contained in the Constitution. But it cannot be interpreted in any way so as to extend the jurisdiction of the FSC to determine directly or indirectly the repugnancy of any constitutional provision with the injunctions of Islam or to make the same redundant. He said:

> The reference to Article 203-A is of no consequence. It only provides for the Court to act notwithstanding anything contained in the Constitution but it cannot be interpreted as extending its jurisdiction to directly or indirectly determining the repugnancy with Shariah (Islamic law or the injunctions of Islam) of any Constitutional provision or to virtually negativing it[316].

For Aftab Hussain J. there is no contradiction between the non-obstante clause as used in article 203A and the definition of law as contained in article 203B(c) since this definition excludes the Constitution from its ambit. Similarly, he sees no conflict between article 227 and article 253 of the Constitution. The former restricts the authority of the legislature to make any law repugnant to the injunctions of Islam and to bring all existing laws in conformity with such injunctions. The latter, on the other hand, provides for the authority of the legislature to enact a law for the fixation of a ceiling on the ownership or possession of property. In this regard, Aftab Hussain J. recalls the presence of a large number of ulema representing different schools of thought in the Parliament which adopted the Constitution unanimously. It is a strong indicative that the powers to be exercised under article 253 for fixing a ceiling on the holding of property by law are not repugnant to the injunctions of Islam. Moreover, a reference is made to Islami Manshoor (the manifesto) of All Pakistan Jamiat-ul-Ulema-e-Islam. This manifesto provides that the Government can impose a ceiling on holding of land to eradicate social evils and to promote

[316] Ibid, 45

social justice and economic well being of people. The relevant part of this manifesto is produced as follows:

> The Shariah has not fixed any maximum limit on the ownership of land but if individual ownership of big tracts of land becomes a cause of mischief in the social economic set up and the social welfare programme and the religious and national interests be in jeopardy or likely to suffer it would be open to the Government to place or fix a limit on the ownership of land in the light of the principles of Shariah[317].

On the contrary, the presence of such ulema in the Parliament and the unanimous making of the Constitution do not impress Durrani J. He says. "...the mere signing of a Constitution by a limited number of Ulema guided by the political whims and controlled by their parties could not impart that sacrosanctity (*sic.*) to the Constitution as to accord it the status of Ijma-e-Ummah (the consensus of Muslims)[318]."

However, Aftab Hussain J. suggests that if there is any conflict between the above discussed two provisions which must be resolved, the same can be done in the light of the Latin maxim "*leges posteriores priores contrarias abrogant*[319]" i.e. the latter laws abrogate prior contrary laws. This maxim has been relied by both Aftab Hussain and Karimullah Durrani JJ. However, each has relied upon this maxim in his own way.

Aftab Hussain J. is of the view that the place of a provision in a document determines its status as a latter or a prior law. Thus, article 253 being a latter law will have the effect of abrogating article 227 and other contrary provisions of chapter 3A being prior laws. Conversely, Durrani J. asserts that the place does not but the time of making a provision does determine its status as a latter or a prior law. Hence, the provisions of chapter 3A having been made part of the Constitution latter in time abrogate the contrary provision in the form of article 253. An analysis

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[317] Ibid, 60
[318] Ibid, 93
[319] Ibid, 45

of these views reveals that none of them is supported by the time honoured principles of constitutional interpretation. As discussed in chapter 3 above, a constitution is to be interpreted as an organic whole to give effect to all of its provisions. It will not be out of place to recall the observations made in Al-Jehad Trust case that if no reconciliation is possible between the conflicting provisions of a constitution, the one present in the original scheme of the Constitution and protecting its vital features is to be preferred to the one inserted by a Martial Law regime[320]. It is worth mentioning that the bar to exercise jurisdiction under article 203D applies only to the provisions pertaining to the fixation of ceiling on the ownership or possession of property and those related to the compensation of surrendered land for the above analysed reasons. There is no such bar with respect to other impugned provisions of the land reforms laws. Notwithstanding the bar of jurisdiction, the FSC with majority of four to one dismissed the Shariat Petitions thus validating the impugned provisions on merit as well. Zakaullah Lodhi J. agreed with the majority without discussing the merits of the case. Although he pointed out that he had "different approach on the subject of economic system of Islam[321]." Conversely, it is quite interesting to observe that in spite of his difference on the issue of jurisdiction with the majority, Durrani J. fully agrees with the leading judgment of Aftab Hussain J. on the issue of fixation of ceiling on the ownership or possession of property on merits. His concluding observations are worth quoting here:

> ...in spite of my difference of opinion on the ouster of jurisdiction of this Court with my learned brother Sh. Aftab Hussain, Member, I fully concur with him on...merits and on the conclusions drawn by him on the concept of Sharia on amassing wealth and property by individuals. All those petition which challenge the provisions of Martial Law

[320] Al-Jehad Trust through Raees-ul-Mujahidin Habib-ul-Wahab-ul-Khairi, Advocate Supreme Court and another versus Federation of Pakistan and others, PLD 1997 Supreme Court 84
[321] Hafiz Ameen, PLD 1980 FSC 23, 87-88

Regulation 115 and Land Reforms Act, 1977 to the extent of resumption of private holdings of land for the purpose of Reforms are to be dismissed[322].

The SAB, on the other hand, in appeal unanimously held that no provision of the land reforms laws is immune from the jurisdiction under article 203D of the Constitution. However, Shafiur Rehman J. is the only member who analysed the issue of jurisdiction. The other traditional judges i.e. Muhammad Afzal Zullah and Nasim Hassan Shah JJ. simply considered it sufficient to agree with the latter. Likewise, one aalim member, Moulana Muhammad Taqi Usmani J. endorsed the observations and views of Karimullah Durrani J. on the issue of jurisdiction. Similarly, Pir Muhammad Karam Shah J. agreed with the former without saying anything specific on the issue of jurisdiction. Shafiur Rehman J. gave three reasons for exercising jurisdiction under article 203D. These are analysed below.

The first reason relates to the observations made in Said Kamal Shah case[323]. Shafiur Rehman J. was also a member of the Bench who had heard this case. In this case, the SAB had the opportunity to analyse the various constitutional provisions providing protection to the land reforms laws. Recalling the observations made in that case, Shafiur Rehman J. holds that these laws are not immune from the jurisdiction under article 203D. He holds as follows:

> 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, any 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

[322] Ibid, 107

[323] Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah, PLD 1986 Supreme Court 360 [Shariat Appellate Bench]. In this case, *inter alia*, Paragraph 25 (3) (d) of the Land Reforms Regulation, 1972 was declared repugnant to the injunctions of Islam.

> 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 second is not[324].

As far as the above observations are concerned, it should be noted that the issue of jurisdiction with respect to the provisions of the land reforms laws pertaining to the fixation of ceiling and dealing with the compensation for the land to be surrendered above the ceiling is distinguishable from that of the other provisions of these laws. The exercise of jurisdiction under article 203D to determine the fate of Paragraph 25 (3) (d) of the 1972 Regulation does not render any provision of the Constitution directly or indirectly redundant. This distinction has been considered and appreciated by Aftab Hussain J. That is why he mentioned that not all the provisions of the land reforms laws are immune from the jurisdiction under article 203D. Even Shafiur Rehman J. while recalling the above observations acknowledges that the effect of article 253 has not been considered and analysed in Said Kamal Shah case. In fact, not only the effect of this article but also the effect of article 24 could be considered in the said case as the said provisions were not in issue in that case.

The second point raised by Shafiur Rehman J. in favour of jurisdiction seems to be more relevant. He points out that in spite of the comprehensive protection provided to the Land Reforms Regulation, 1972 under article 269 its provisions have been specifically saved from being void on the ground of inconsistency with the fundamental rights under article 8(3) (b). Similarly, if the makers of the Constitution would have wanted to save these provisions from being void on the ground of repugnancy with the injunctions of Islam, a similar provision would

[324] Ibid, 466

have been inserted in chapter 3A. Since no such provision is available, these provisions are not immune from the jurisdiction of the FSC and the SAB. He says:

> 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 on any ground whatsoever". In spite of such a comprehensive and complete bestowing of competency, validity and immunity they had to be protected by express provision of Article 8(2) (b) (*sic. Article 8(3) (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[325].

However, this reasoning is again unacceptable on at least two grounds. First ground is the same as stated above that the provisions impugned in Said Kamal Shah case had general constitutional protection but no article of the Constitution would become redundant in result of the exercise of the jurisdiction under article 203D. On the other hand, declaring any provision of the land reforms laws that imposes a ceiling on holding of property with or without consideration void would have the effect of making articles 24 (3) (f) and 253 of the Constitution redundant. Thus, the Constitution is excluded from the definition of law as provided in article 203B(c) so that the FSC or the SAB cannot declare any constitutional provision void or redundant. Second ground which is even more logical relates to the interpretation of the injunctions of Islam. One of the purposes of the making of the Land Reforms Regulation, 1972, as has been described in its preamble, is the enforcement of the injunctions of Islam related to the distribution of wealth. So the relevant part of the preamble reads as, "Whereas Islam enjoins equitable distribution of wealth and economic powers and abhors their concentration in a few hands...[326]" This clearly

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[325] Ibid

[326] See the preamble of the Land Reforms Regulation, 1972 (M.L.R. 115 of 1972)

indicates that the makers of the Regulation in their wisdom made a law to enforce the relevant injunctions of Islam. How then would it be possible for them to add a provision in chapter 3A to make the 1972 Regulation immune from the jurisdiction which is conferred to declare a law void if held repugnant to the injunctions of Islam?

The third ground asserted by Shafiur Rehman J. for the exercise of jurisdiction under article 203D relates to the scope of the word "law" as used in article 253(2). According to him, law as used in this provision is limited in its meaning to the law made by the Parliament. It does not include judicial pronouncements. Consequently, although the Parliament cannot make a law which allows a person to hold land above the ceiling, there is no such restriction on judicial pronouncements. Interestingly, Shafiur Rehman admits that if the law as used in this provision is held to include judicial pronouncements, the exercise of jurisdiction under article 203D would be in contravention of article 253. He says:

> It is true that if the material provisions of the Regulation and the Act are declared to be repugnant to the injunctions of Islam in the manner as the appellants seek them, the consequences under Article 203-D, clause (3) sub-clause (b) may have in substance the effect of contravening what is prescribed in Article 253[327].

There are two reasons prescribed by Shafiur Rehman J. to limit the scope of law to exclude judicial pronouncements. The first reason is related to the source of law as used in article 253. The word law has been used in both the clauses of this article. The source of law in clause 1 is the Parliament. Therefore, in clause 2 the source should be the same. He says, "The two clauses of this Article are coextensive with regard to the source of the law and there is no reason to extend the connotation of law in clause (2) to judicial pronouncements[328]."

[327] Qazalbash Waqf, PLD 1990 Supreme Court, 99, 138
[328] Ibid, 139

The second reason forwarded by him is the interpretation of the word law by the Supreme Court in Brig. (Retd.) F. B. Ali case[329]. In this case, the August Supreme Court held with majority that the word law as used in article 9 of the Constitution "is a formal pronouncement of will of competent law-giver[330]."

The third ground taken in favour of jurisdiction is also not very impressive. The word law as used in article 253(1) mentions the Parliament as a source of law only because it is the primary legislative organ. It is against the concept and scope of legislation that a body primarily intended for legislation is restricted to legislate in a particular field but another organ not primarily intended for legislation is authorized to interfere in the restricted filed. In other words, a law which the Parliament is incompetent to legislate cannot be made or declared valid by any other organ. As far as the interpretation of law by the Supreme Court in Brig. (Retd.) F. B. Ali case is concerned, that supports the last mentioned point. Law is a formal expression of competent law-giver. When a competent law-giver body lacks the constitutional authority to make a law, a body not so competent must be without such authority at all.

Interestingly, Shafiur Rehman J. despite his different view on jurisdiction agrees with the judgment of the FSC on merits to hold that the provisions of the land reforms laws which impose a ceiling are not repugnant to the injunctions of Islam. He held, "Simply because no such ceiling has actually been fixed in the Holy Quran itself or by Prophet (Peace be upon him) would not be negating the power of the State to fix a limit on distribution of national resources or maximum utilization of it by redistribution[331]." Similarly, Nasim Hassan Shah J. agrees with the FSC on merits. He holds, "...being of the opinion that on the merits of the case the view of the majority

[329] Brig. (Retd.) F. B. Ali versus The State, PLD 1975 Supreme Court 506
[330] Ibid
[331] Qazalbash Waqf, PLD 1990 Supreme Court 99, 141

of the Federal Shariat Court that the impugned laws are not repugnant to the Injunctions of Islam, is correct I would dismiss these appeals...[332]"

The above analysis of the views of the members of the FSC and the SAB related to the issue of the jurisdiction reveals that those who asserted that the impugned provisions of the land reforms laws are immune from the jurisdiction have stronger reasons. Similarly, if the collective views of the members of the FSC as well as the SAB related to the merits of the case are considered, it appears that six out of ten members hold the view that the provisions of these laws pertaining to the fixation of ceiling on holding of property are not repugnant to the injunctions of Islam.

4.3 Waqf and the Issue of Ceiling

The effect of the provisions of the land reforms laws imposing a ceiling was that excess land was resumed from all coming under the definition of person and holding land above the ceiling. One such person was Qazalbash Waqf. This waqf had been created by Nawab Nasir Ali Khan Qazalbash in Lahore[333]. The purpose of the creation of this waqf was to arrange mourning and taking out processions in memory of Shia imams, a sect of Muslims. Moreover, this waqf was also aimed at providing religious and educational needs of the Twelver, a sub-sect of Shia. This waqf held property more than 1020 acres of irrigated land. Therefore, when the provisions of Paragraph 8 of the 1972 Regulation which provided a ceiling of 150 acres of irrigated land were enforced, this waqf had to surrender a large area of land to the Government without any compensation. Similarly, after the enforcement of Section 3 of the 1977 Act which reduced the ceiling to 100 acres of irrigated land, this waqf had yet to surrender more land to the Government though this time compensation was paid according to the scheme of the Act as provided in chapter IV of the same.

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[332] Ibid, 132

[333] As far as the year of the creation of this waqf is concerned, two different dates are mentioned in the judgment of the SAB. Shafiur Rahman J. mentions the year 1892 of its creation while according to Moulana Taqi Usmani J. this is year 1952. However, the date of the creation of the waqf has no legal significance.

After the conferment of jurisdiction to declare a law void if held repugnant to the injunctions of Islam upon the Shariat Benches of High Courts under article 203B inserted by P.O. No. 3 of 1979 and the conferment of same jurisdiction upon the FSC under article 203D by P.O. No. 1 of 1980, a large number of Shariat Petitions were filed challenging various provisions of the land reforms laws. Qazalbash Waqf was one of such petitioners. Question No. 10 of the questionnaire circulated for opinions by the SAB referred above was specifically related to waqf property. It inquired about the status of a waqf in Islamic law and whether the State could acquire such property in case of public need.

An additional and distinct ground of attack on these laws taken by Qazalbash Waqf was that the waqf property according to the traditional Islamic law does not vest in any person. Rather, it vests in God Almighty[334]. Therefore, ceiling cannot be imposed on such property. In support of this argument it was explained with reference to the Islamic law that the waqf property is not alienable by way of sale, gift or any other mode of transfer so much so that even the law of inheritance is inapplicable in relation to such property[335]. Moreover, it was explained that in Islam an important attribute of waqf is perpetuity so a waqf cannot be used for a purpose other than the one for which it had originally been created[336]. Initially, it was argued that the acquisition of the waqf property without compensation amounts to usurpation of the same. However, where compensation was provided, its inadequacy was stressed.

Ironically, the last argument contradicts with the first. If the waqf property vests in God Almighty, no man can claim or accept compensation on His behalf. Nonetheless, these arguments found favour with only one member of the FSC i.e. Karimullah Durrani J. consequently, the FSC did not hold these provisions repugnant to the injunctions of Islam. The

[334] Hafiz Ameen, PLD 1980 FSC 23, 105.
[335] Ibid.
[336] Ibid, 106.

scene in the SAB, however, was different. The two ulema members along with the Chairman of the Bench got convinced by these arguments. Resultantly, these provisions were held repugnant to the injunctions of Islam to the extent an Islamic waqf was included in the definition of person and a ceiling was imposed on the property held by such waqf.

Conversely, two members of the SAB and four of the FSC rejected these arguments. Aftab Hussain J., the author of the leading judgment of the FSC, was of the view that the word person has been used in article 253 of the Constitution, so the FSC and the SAB did not have jurisdiction under articles 203D and 203F respectively to check these laws on the touchstone of the injunctions of Islam. Moreover, with respect to the argument of usurpation, it was clarified that if the Government acquires property not for itself but for public purpose, it cannot be termed as usurpation.

Besides, these judges were impressed by the arguments that article 260 of the Constitution defines the word person which includes any body politic or corporate. These terms include a juristic person. It is a settled law that a waqf can sue or can be sued in its own name. Similarly, the waqf completely fulfills the other attributes of a juristic person. Therefore, there was no reason to exclude an Islamic waqf from the definition of person to avoid the effects of the fixation of a ceiling on the property held by such waqf.

It is interesting to note that the traditional Islamic law does not recognize the concept of juristic person[337]. According to this view, a waqf cannot hold property in its own name. It is an irony to seek benefit from the traditional Islamic law on certain aspects and seek the advantages of the positive law on other aspects for the same person. In fact, a large number of differences among the different schools of thought of the Islamic law are due to an urge to maintain analytical

[337] Some contemporary Muslim jurists have tried to make a point that the Islamic law recognizes the concept of juristic person. However, other such jurists have rejected this view. For a detailed study on the subject consult Imran Ahsan Khan Nyazee, *Islamic Jurisprudence* (Islamabad: IIIT & IRI, 2000)

consistency within the same school of thought. Analysed from this perspective, the second view about an Islamic waqf i.e. it is included in the definition of person and hence not immune from the provisions imposing a ceiling on property, seems more appropriate.

4.4 Tenancy Agreement and the Grounds of Eviction of Tenants

Paragraph 25(1) of the Land Reforms Regulation, 1972 provides that a tenant can only be evicted from the land comprising the subject matter of tenancy on the grounds provided by the Regulation. It states as:

> Subject to the other provisions of this Regulation, a tenant shall not be ejected from his tenancy unless it is established in a revenue Court that he has –
>
> (a) failed to pay the rent in accordance with the terms of his tenancy; or
>
> (b) used the land comprised in the tenancy in a manner which renders it unfit for the purposes for which he held it; or
>
> (c) failed to cultivate or arrange for the cultivation of the land comprised in the tenancy in accordance with the terms thereof, or if there are no express terms in this behalf, in accordance with the customary manner of cultivation in the locality; or
>
> (d) sub–let his tenancy[338].

This provision was challenged on the ground that a landlord and a tenant may enter into a tenancy agreement with their free consent. This tenancy agreement may provide for the tenure of the tenancy and contain a number of grounds of eviction other than those provided by the above provision. On the expiry of the tenure of the tenancy, the landlord should be entitled to seek the eviction of the tenant. However, this provision curtails this right. Hence, such curtailment of the right of the landlord with respect to the use of his land is against the injunctions of Islam.

Moulana Muhammad Taqi Usmani J. got impressed with this argument. Muhammad Afzal Zullah and Pir Karam Shah JJ. concurred with him to hold with majority the above provision repugnant to the injunctions of Islam. The main reason for such opinion was held the sanctity of the contract. Moreover, it was observed that the tenant cultivated the land of the landlord on the

[338] See Paragraph 25 of the Lands Reforms Regulation, 1972 (M.L.R.115 of 1972)

basis of the contract. After the contract comes to an end, the consent of the landlord expires, and it is forbidden in Islam to use the property of another without his/her consent.

The grounds relied by the SAB for holding the above provisions repugnant to the injunctions of Islam if analysed in the light of the discussion preceded under the heading 2.4 above, seem very weak. Suffice here is to mention that the State has very frequently intervened for the protection of the rights of the depressed classes of the society. The enactment of the Bonded Labour System (Abolition) Act, 1992 was a result of the judgments passed by the Supreme Court for the enforcement of the fundamental rights of the brick kiln labourers, a depressed class of the society[339]. Various provisions of this Act were challenged in Syed Shabbir Hussain Kazmi case before the FSC under article 203D being repugnant to the injunctions of Islam[340]. One of the grounds taken by the petitioners to challenge the said Act before the FSC was the sanctity and the freedom of the contract. The FSC rejected this argument and explained that a contract containing unfair terms and conditions cannot be enforced. Landlords usually taking disadvantage of their high and influential position exploit the tenants and enter into contracts containing unfair conditions. In these circumstances, intervention by the State through legislation for the protection of the fundamental rights of the downtrodden tenants cannot be declared repugnant to the injunctions of Islam.

Nonetheless, the SAB exercising jurisdiction under article 203F reversed the judgment of the FSC and holding certain provisions of land reforms laws repugnant to the injunctions of Islam. Finally, a review petition against the judgment passed by the SAB in Qazalbash Waqf case was filed by the Government of Pakistan under article 188 of the Constitution. However, the said

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[339] Darshan Masih alias Rehmatay and others versus the State, PLD 1990 Supreme Court 513

[340] Syed Shabbir Hussain Kazmi and others versus Government of Pakistan and others, 2006 PLC (C.S.) 49 [Federal Shariat Court]

review petition was dismissed whereby the finality was given to the findings reached by the majority in Qazalbash Waqf case. An analysis of the said review petition is given below.

4.5 Review Filed by the Government

The review under article 188 of the Constitution is regulated by Order XXVI in Part IV of the Supreme Court Rules, 1980. This Order contains nine rules. For the purpose of the present research rules 1, 2, 8 and 9 are relevant. Rule 1, *inter alia,* provides that the Supreme Court can review its judgment in civil proceedings if any of the grounds provided in Rule 1 Order XLVII (O. XLVII, R. 1) of the Code of Civil Procedure, 1908 (CPC) is made out. However, it should be noted that this rule will not be applicable if the same is in conflict with the law and practice of the Supreme Court.

O. XLVII, R. 1, CPC provides, *inter alia,* that a person who considers himself/herself aggrieved by a decree or order from which no appeal is provided by law, and who because of some mistake or error floating on the face of the record or for any other sufficient reason desires to get the decree or order passed against him to be reviewed may seek a review of the same from the same court which passed the decree or the order. Therefore, in the instant case, review under the law was competent because it fulfilled all the above mentioned conditions as explained below:

i. the final order passed by the SAB in Qazalbash Waqf case is an order passed in civil proceedings.

ii. the order of the SAB under article 203F is not an appealable order.

iii. the Government is an aggrieved person since the law made by the Government was declared null and void.

iv. the order of the SAB rendered article 24(3)(f) and article 253 of the Constitution redundant. This fulfills the requirement of the mistake or error floating on the record of the case or other sufficient cause.

v. the review petition was filed before the Supreme Court and no conflicting law or practice of the Supreme Court was indicated to hold the review petition not maintainable.

The second relevant rule i.e. Rule 2 of O. XXVI of the Supreme Court Rules, 1980 provides, *inter alia,* that the limitation for filing a review petition is thirty days from the date of the pronouncement of the judgment to be reviewed. In the instant case, the judgment was pronounced on 10.08.1989. However, the review petition was not filed within thirty days as provided in rule 2. Rather, it was filed with a delay of more than hundred and forty days. This provided the Review Court one of the grounds for the dismissal of the same. However, Section 5 of the Limitation Act, 1908 provides that a review petition can be filed beyond thirty days where sufficient cause is shown for delay in filing the application etc. Moreover, it is a settled principle of law that technicalities should not create hurdles in delivering substantive justice. Although the Bench hearing the review petition did not dismiss the said petition on the sole ground of delay in filing the review petition, it is a common practice to condone the delay in such cases of national importance.

The third relevant rule is in the form of rule 8. It provides that the application for review is to be fixed before the same Bench that passed the judgment under review. It should be recalled that in Qazalbash Waqf case, the appeal was heard by a five member Bench headed by Muhammad Afzal Zullah J. The application for review, however, was heard by the same Bench other than the head of the Bench. This time the Bench was headed by Nasim Hassan Shah J. while the fifth member was Abdul Qadeer Chaudhry J. Interestingly, the dismissal order was authored by Shafiur Rehman J. who had written a dissenting note in the main case. Perhaps by this time he had changed his views or he strictly restricted himself within the scope of the review jurisdiction.

Before analyzing the last relevant rule, it is considered expedient to analyse the dismissal order passed in the review petition. The Government sought the review of the judgment of the SAB on two grounds. First, it was asserted that the judgment of the SAB has rendered article 253 of the Constitution invalid which is not allowed given the definition of law in article 203B(c) which excludes the Constitution from the exercise of jurisdiction by the FSC under article 203D. Next, it was contended that the SAB had held in its judgment that ceiling on land holding can be fixed in certain circumstances. In view of this finding, Paragraph 8 of the Land Reforms Regulation, 1972 and Section 3 of the Land Reforms Act, 1977 could not be declared null and void.

The Review Court rejected both these arguments and additionally pointed out the unexplained delay of one hundred and forty four days to dismiss the application for review filed by the Government. With respect to the redundancy of article 253 of the Constitution, the Review Court simply responded that this issue has already been dealt with in the main case and need not be repeated in this limited jurisdiction as re-hearing is not allowed in review. The Court said:

> The presence and effect of Article 253 of the Constitution on the jurisdiction of the Court seized of a matter under Chapter 3-A of the Constitution was considered at great length in the various opinions recorded on this specific subject. What the learned counsel representing the Federation seeks is actually a re-hearing of the matter so far as this particular question is concerned and not invocation of any of the grounds available for getting the judgment reviewed. In the circumstances, we feel that such a rehearing or reconsideration of the matter in review is not permissible under the law[341].

As far as the second ground is concerned, the Court acknowledged that fixation of ceiling on land holding is not repugnant to the injunctions of Islam per se. Thus, any law which provides for the fixation of ceiling on land holding enforceable prospectively and excluding the excessive property achieved by the operation of law from the effects of ceiling would not be repugnant to

[341] Government of Pakistan, Ministry of Law and Parliamentary Affairs (Law and Justice Division) versus Qazalbash Waqf, Lahore and 26 others, 1993 SCMR 1697 [Supreme Court of Pakistan], 1699-1701

the injunctions of Islam. The Court explained that since the impugned provisions were enforceable retrospectively and did not exclude involuntary acquisition of property above the ceiling, the same were held repugnant to the injunctions of Islam. The Court said:

> It is true that the judgment upholds the fixing of a ceiling on land holding but it does so with two important limitations or qualifications. The first is that such a law fixing the ceiling on land holding could not be applied retrospectively so as to deprive the people of land in excess of the ceiling so fixed. The second was that violation of the ceiling limit could be prospectively penalized and controlled only in cases of voluntary acquisition of property. Involuntary accretions resulting in exceeding the ceiling as in the matter of inheritance could not be penalized by forfeiture of the excess or its resumption. As the provision of the fixation of ceiling in the Land Reforms Act, 1977 was coupled with these two vicious or repugnant features, the ceiling so fixed was itself declared to be repugnant to the Injunctions of Islam. It was not that the fixation of ceiling in the abstract and prospectively was considered repugnant to the Injunctions of Islam[342].

It is quite interesting to observe that Shafiur Rehman J. in his dissenting opinion in Qazalbash Waqf case held that acquisition of property by way of inheritance is not an impediment in the enforcement of the provisions of the land reforms laws imposing a ceiling on land-holding. He evaluates the opinions and drafts prepared by the other members of the SAB in his dissenting note. He points out certain assumptions and misconceptions in the draft judgments proposed to be given by the other members. One such misconception discovered by him relates to the operation of the law of inheritance. He strongly rejects this contention that the fixation of ceiling destabilizes the law of inheritance. He explains that the inheritance gets complete by the operation of law. Once this process is complete and a person acquires property by way of inheritance, it is now to ascertain whether he holds property within the ceiling or above the ceiling. In the latter case, he/she is required to surrender the excess land of his/her choice. There

[342] Ibid, 1701

is, therefore, no suspension of the law of inheritance. Shafiur Rehman J. explained this all as follows:

> The fourth misconception is that such a ceiling subverts the mandatory law of inheritance prescribed by the Injunctions of Islam. It does not because the process of inheritance is complete and thereafter the inheritor has a choice to retain the inherited property or the other one if there is an excess. The resumption is from him. The surrender is also by him after he has inherited the property[343].

Ironically, he chooses to be the author of the judgment in the review application and contradicts his own stance which he had previously taken in the main case.

The last relevant rule applicable to the application for review under analysis is rule 9 of the Supreme Court Rules, 1980. It provides that a person seeking the review can only file one application in this regard. It states as. "After the final disposal of the first application for review no subsequent application for review shall lie to the Court and consequently shall not be entertained by the Registry[344]." In the light of this rule, the judgment of the SAB in Qazalbash Waqf case having been reviewed and maintained has got finality on the subject though given on a wrong assumption of jurisdiction.

After a comprehensive analysis of the decisions of the FSC and the SAB, the discussion is brought to the point of analyzing the jurisdiction and powers of the Supreme Court and the possibility of exercise of jurisdiction by the apex court in the given legal circumstances. This is done in the next chapter.

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[343] Qazalbash Waqf, PLD 1990 Supreme Court 99, 147

[344] See Rule 9 of the Supreme Court Rules, 1980.

CHAPTER 5

JURISDICTION OF THE SUPREME COURT AND THE DOCTRINE OF PRECEDENT

5. Introduction

In this chapter the jurisdiction of the Supreme Court under article 184(3) and the doctrine of precedent as envisaged in the Constitution are analysed. More particularly, the analysis is made to find out whether the apex court, in the present legal scenario, being the guardian of the Constitution can exercise jurisdiction under the said article and other enabling provisions of the Constitution to redress the violations of the fundamental rights of the agricultural tenants and other village labourers/artisans pointed out in the first chapter of this work. In this regard, the scope of article 184(3) in the light of the obstacles highlighted in the previous chapter and those contained in article 203G read with article 203GG is evaluated. This leads the discussion to the doctrine of precedent with reference to the Supreme Court and the Federal Shariat Court (FSC). The objective behind this discussion and analysis is to assert that the Supreme Court can exercise such jurisdiction. Rather, the same is essential and desired to make those provisions of the Constitution effective which the SAB has rendered redundant in Qazalbash Waqf case. Once it is established that the SAB declared the land reform laws repugnant to the injunctions of Islam on a wrong assumption of jurisdiction, and the redundant provisions become functional, the violations of the fundamental rights of the agricultural tenants and other village labourers/artisans are likely to be redressed. Moreover, it will result in the abolition of the exploitative institution of landlordism. Consequently, the mandate of articles 37 and 38 to eradicate the social evils and to promote the social justice and economic well being of the people will be achieved.

5.1 Jurisdiction of the Supreme Court

The Supreme Court has been vested with various jurisdictions and powers under different constitutional provisions. These jurisdictions and powers include the original jurisdiction of the Supreme Court under article 184, appellate jurisdiction under article 185 to hear appeals against the final decisions of the High Courts, advisory jurisdiction under article 186 to give an opinion on a question of law of public importance to the President of Pakistan, power to transfer cases pending before different High Courts under article 186A, power to do complete justice under article 187 and power of the Supreme Court to review its own decisions under article 188 of the Constitution. However, for the purposes of the present work, the analysis will be restricted only to the extent of the original jurisdiction of the Supreme Court under article 184 as well as the power to do complete justice under article 187 of the Constitution. Asif Saeed Khan Khosa J. in the famous Panama case emphasized the importance of power to do complete justice in the following words. He remarked, "It is not for nothing that Article 187(1) of the Constitution has empowered this Court to do "complete justice" where all other avenues of seeking justice are either unavailable or blocked[345]." Moreover, the Supreme Court in the case regarding pensionary benefits of the judges of superior courts while commenting on the various jurisdictions of the Supreme Court remarked that these jurisdictions are interlinked and overlapping. The basic aim of providing these different jurisdictions to the apex court by the Constitution is to advance the cause of justice. This is the only way that the persons wronged and deprived of their rights may get appropriate relief. The Court said:

> ...all the above discussed jurisdictions conferred to the apex Court under the scheme of the Constitution are closely interlinked, rather, overlapping in some areas, therefore, without entering into the intricacies of such technicalities, this Court is competent to pass

[345] Imran Ahmad Khan Niazi and others versus Mina Muhammad Nawaz Sharif and others, PLD 2017 Supreme Court 265, Paragraph 68 (Asif Saeed Khan Khosa J.). See also Imran Ahmad Khan Niazi and others versus Mina Muhammad Nawaz Sharif and others, PLD 2017 Supreme Court 692.

any order to foster the cause of justice; eliminating the chances of perpetuating illegality and to save an aggrieved party from being rendered remediless[346].

As far as the original jurisdiction of the apex court under article 184 is concerned, it is exclusive in respect of certain disputes while concurrent in respect of certain others. It is exclusive with respect to disputes between any two or more governments as provided in clauses 1 and 2 of this article. While under clause 3 of the same provision, the Supreme Court has jurisdiction to enforce the fundamental rights provided by the Constitution. This jurisdiction is concurrent with the High Courts with the only additional requirement that the lis in the Supreme Court must involve a question of public importance. Besides, the essential condition of being an aggrieved person to invoke the jurisdiction of High Courts for the enforcement of the fundamental rights is not so essential to invoke the jurisdiction of the apex court under the last mentioned clause.

The Supreme Court under article 184(3) while the High Courts under article 199 of the Constitution have jurisdiction to enforce the fundamental rights provided by chapter I of part II of the Constitution as well as other constitutional provisions that work within the framework of the fundamental rights. It should be noted however, that jurisdiction under article 199 can only be invoked when there is no other adequate and efficacious remedy available to an aggrieved person. On the other hand, article 184(3) does not require any such trapping. Thus, the remedy under the last mentioned provision can be availed independent of any other alternative remedy or forum available to the petitioner.

Interestingly, the application of the doctrine of laches is also not strictly applied in proceedings under this article. The Supreme Court in Muhammad Nawaz Sharif case while explaining the

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[346] Begum Nusrat Ali Gondal versus Federation of Pakistan and others, Regarding pensionary benefits of the judges of superior courts from the date of their respective retirements, irrespective of their length of service as such judges. PLD 2013 Supreme Court 829, Paragraph 64

difference between the proceedings under the two provisions remarked as, "The attributes of Article 199 of being an aggrieved person or of having an alternate remedy and depending upon the facts and circumstances even laches cannot restrain the power or non-suit a petitioner from filing a petition under Article 184 and seeking relief under it[347]."

The concurrence of jurisdiction between the Supreme Court and the High Courts for the enforcement of the fundamental rights has been recognized in many cases. Thus, the Supreme Court in Begum Nusrat Bhutto case has held, "Clause (3) of Article 184 of the Constitution gives a concurrent power to the Supreme Court to make an order for the enforcement of Fundamental Rights in the same terms as could be made by a High Court under the provisions of Article 199[348]." Article 184(3) provides as:

> Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter 1 of Part II is involved, have the power to make an order of the nature mentioned in the said Article[349].

The opening words of the above provision indicate that the jurisdiction of High Courts to enforce the fundamental rights under article 199 is not taken away by this provision and the same remains intact. Nonetheless, no High Court can exercise such jurisdiction to enforce the fundamental rights of the agricultural tenants and other village labourers/artisans in the present circumstances. This is so because the judgment of a superior court i.e. the Shariat Appellate Bench of the Supreme Court in Qazalbash Waqf case is in field.

This judgment is binding on all courts in Pakistan including the High Courts as provided by article 189 of the Constitution. It should be noted, however, that it has been discussed above that the judgment of the SAB in the said case is final only with respect to the Islamic perspective of

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[347] Muhammad Nawaz Sharif versus President of Pakistan, PLD 1993 Supreme Court 473, 805

[348] Begum Nusrat Bhutto versus Chief of Army Staff and Federation of Pakistan, PLD 1977 Supreme Court 657, 673

[349] See article 184(3) of the 1973 Constitution.

land reform laws and the fundamental rights perspective of these laws is yet to be adjudicated. Even then the more appropriate way is to invoke the jurisdiction of the apex court to avoid any implications of the law of precedent which makes the judgments given by the superior courts binding on the lower courts. Moreover, it is recalled that the jurisdiction of High Courts can only be invoked by aggrieved persons. The agricultural tenants and other such persons though aggrieved are forced to surrender their grievances and rights given the exploitative institution of landlordism as analysed in chapter one above. Therefore, the jurisdiction to enforce the fundamental rights of the agricultural tenants and other such classes can only be properly exercised by the Supreme Court. The legal effects and obstacles, if any, created by the judgment of the SAB in Qazalbash Waqf case and the provisions contained in chapter 3A of the Constitution are analysed after the analysis of the above quoted constitutional provision.

5.1.1 Jurisdiction of the Supreme Court under Article 184(3)

The scope of jurisdiction under article 184(3) is still evolving. There are a number of judgments of the Supreme Court which have discussed the scope of this provision. In this regard, an oft-quoted judgment is the one given in Benazir Bhutto case[350]. The Supreme Court, in this case, threw sufficient light upon the scope of article 184(3). It has been held by the Court in this case that the language of this provision is open-ended. There is nothing in the language of this provision that suggests as to who may invoke the jurisdiction of the apex court and what will be the nature of the proceedings by which such jurisdiction may be invoked. Similarly, whether the proceedings initiated under this provision are for the enforcement of the fundamental rights of an individual only or those of a group or class of persons. The Court held that this all indicates that this provision should be interpreted in such a way that fulfills the purpose of its enactment. The Court held:

[350] Miss Benazir Bhutto versus Federation of Pakistan and another, PLD 1988 Supreme Court 416

> ...while construing Article 184(3), the interpretative approach should not be ceremonious observance of the rules or usages of interpretation, but regard should be had to the object and the purpose for which this Article is enacted, that is, this interpretative approach must receive inspiration from the triad of provisions which saturate and invigorate the entire Constitution, namely, the Objectives Resolution (Article 2-A), the Fundamental Rights and the directive principles of State policy so as to achieve democracy, tolerance, equality and social justice according to Islam[351].

In this regard, the Court further explained that the strict rule of *locus standi* is not applicable in proceedings under article 184(3). That is why such proceedings are sometimes called public interest litigation. Such proceedings have been very helpful to provide legal protection to those who are unable to approach the court for the enforcement of their rights for any reason.

It would not be out of place to mention here that the Supreme Court in Darshan Masih case exercised jurisdiction under this clause without there being a formal petition[352]. In this case, the Supreme Court initiated the proceedings on the basis of a telegram received by the Chief Justice of Pakistan requesting the latter to provide liberty to a number of brick kiln labourers. Since then the apex court has taken a number of suo moto actions and commenced proceedings under article 184(3) to enforce the fundamental rights involving questions of public importance.

Likewise, the Supreme Court in the Panama case has observed that the jurisdiction under article 184(3) is still evolving[353]. The apex court has exercised this jurisdiction in a variety of cases. Therefore, no strict procedure has been followed and no hard and fast rules have been laid down for the exercise of this jurisdiction. The Supreme Court has followed the procedure best suited to the nature of the relief requested and the circumstances of the case. In this regard, the Court observed as follows:

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[351] Ibid. 496

[352] Darshan Masih alias Rehmatay and others versus the State, PLD 1990 Supreme Court 513

[353] Imran Ahmad Khan Niazi and others versus Mina Muhammad Nawaz Sharif and others, PLD 2017 Supreme Court 265, Imran Ahmad Khan Niazi and others versus Mina Muhammad Nawaz Sharif and others, PLD 2017 Supreme Court 692

> ...the scope and practice regarding exercise of jurisdiction by this Court under Article 184(3) of the Constitution is still evolving and that no specific procedure for exercise of that jurisdiction has so far been laid down by this Court. The cases dealt with by this Court under that jurisdiction thus far have varied vastly in their subject and content and, therefore, this Court has consciously avoided to shut the door to any procedural modality which may be best suited to an effective and proper determination of an issue competently brought to this Court under that jurisdiction. It is for that reason that no hard and fast rule has so far been laid down by this Court regarding the mode, mechanism or modality through which the jurisdiction of this Court under Article 184(3) of the Constitution may be exercised and it has been left to the Court to decide as to which lawful procedure would suit the requirements of a given case best. It is the nature of the issue and the circumstances of the case which are to determine the procedure to be adopted[354].

In a number of cases it has been held by the apex court that the proceedings under article 184(3) are inquisitorial in nature rather than adversarial. Besides, it has become an established law by now that the Supreme Court can grant even the relief that is not claimed in the prayer. Similarly, the Court is empowered while exercising such jurisdiction to inquire into or get inquired a factual controversy through a commission or an agency or any other appropriate body so that the Court may be properly assisted to determine the controversy. Thus, the Supreme Court in the Panama case observed, "It is settled by now that the jurisdiction of this Court under Article 184(3) of the Constitution is inquisitorial in nature rather than adversarial and while exercising such jurisdiction this Court can ascertain, collect and determine facts where needed or found necessary[355]."

Moreover, the apex court while exercising jurisdiction under article 184(3) in Shehla Zia case appointed NESPAK as commissioner to give its opinion on the disputed fact between the parties. In fact, in this case WAPDA wanted to construct a grid station and a transmission line near a

[354] Ibid, Paragraph 73 (Asif Saeed Khan Khosa J.)
[355] Ibid, Paragraph 69 (Asif Saeed Khan Khosa J.)

residential area[356]. This was likely to expose the residents of the locality to the hazards of the electromagnetic field of the grid station and the transmission line. This fact was denied by the respondents. Therefore, a commissioner was appointed by the Court to determine "whether there is any likelihood of any hazard or adverse effect on health of the residents of the locality[357]."

Similarly, in the famous memo gate scandal case a high level judicial commission was appointed under the chairmanship of Qazi Faez Isa J. who was serving at that time as the Chief Justice of Baluchistan High Court[358]. This case originated from an article published in the Financial Times, London on 10 October 2011 by one Mansoor Ijaz. To be very precise, it was alleged in this article that a confidential memorandum had been written on behalf of the President of Pakistan addressed to Mr. Mike Mullen, Chairman Joints Chief of Staff of the Unites States armed forces. In fact, a request had been made by the former to the latter to send a very strong and urgent message to the high-ups of the Pakistan armed forces not to give any tough time to the civilian government. This fact, however, was denied by the civilian government of Pakistan.

A number of petitioners including a political party i.e. Watan Party, knocked the door of the Supreme Court invoking its original jurisdiction under article 184(3) of the Constitution. The claim of the petitioners was that this confidential memo violated their fundamental rights provided by articles 9, 14 and 19A of the Constitution and the matter obviously involves questions of public importance. The Supreme Court holding the petition maintainable appointed a commission to ascertain the origin, authenticity and purpose of the alleged confidential memorandum. The Court said:

> Thus, it is held that to delineate measures with a view to ensure enforcement of fundamental rights, a probe is called for to ascertain the origin, authenticity and purpose

[356] Ms. Shehla Zia and others versus Wapda, PLD 1994 Supreme Court 693
[357] Ibid, 712
[358] Watan Party and others versus Federation of Pakistan and others, PLD 2012 Supreme Court 292

of creating/drafting for delivering it to Admiral Mike Mullen through James Jones, thus, a question squarely fallen within the definition of term "public importance"[359].

The other important phrases used in the above stated clause include "a question of public importance", "Fundamental Rights conferred by Chapter I of Part II" and "an order of the nature mentioned in the said Article" i.e. article 199. The only phrase desired to be analysed here is the first one i.e. a question of public importance. The second phrase has already been analysed in chapter 2 above to conclude that this jurisdiction can be exercised to enforce the fundamental rights provided by chapter I of part II of the Constitution as well as other constitutional provisions working within the framework of these rights. Finally, with reference to the nature of order mentioned in article 199 suffice is to say that the Supreme Court can make an order declaring that the SAB declared land reform laws repugnant to the injunctions of Islam on a wrong assumption of jurisdiction if the provisions contained in chapter 3A of the Constitution could be reconciled. The declaration that an authority or a court exercised jurisdiction not vested in it is fully covered under the scope of article 199.

Historically, the Supreme Court had the jurisdiction and power to enforce the fundamental rights under article 22 of the 1956 constitution. This provision formed the last article of Part II of the 1956 constitution titled "Fundamental Rights". However, this provision did not make "a question of public importance" an essential requirement for the exercise of the jurisdiction by the Supreme Court. No such provision is found in the constitution of 1962 or the interim constitution of 1972. Article 22 of the 1956 constitution is reproduced below:

> (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
>
> (2) The Supreme Court shall have power to issue to any person or authority, including in appropriate cases any Government, directions, orders or writs, including writs in the

[359] Ibid, Paragraph 31

nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) The right guaranteed by this Article shall not be suspended except as otherwise provided by the Constitution.

(4) The provisions of this Article shall have no application in relation to the Special Areas[360].

The involvement of a question of public importance was made a condition for the exercise of jurisdiction by the Supreme Court for the enforcement of fundamental rights by clause 3 of article 184 of the 1973 Constitution. Since then the apex court has interpreted these words in a number of cases. These different interpretations indicate that in some cases a question of public importance has been held to be involved even where the jurisdiction is invoked by a single petitioner while in other cases no such question has been held to be involved where the number of petitioners exceeds few hundreds. It is pertinent to mention here that it is the Supreme Court that has the final authority to determine the meanings of this phrase according to the nature and circumstances of the case. In this regard, the case of Sohail Butt is worth mentioning[361]. In this case, the apex court happened to explain this phrase. According to this explanation, this phrase has not got a precise definition. Nonetheless, the same does not have a rigid meaning. It can only be defined by a process of judicial inclusion or exclusion. The bottom line is that the matter should involve issues in which the community is generally interested as opposed to the particular interest of the individuals. In the following lines, few such cases are analysed to determine the scope of this phrase.

In Munir Hussain Bhatti case it has been held that in order to determine whether the case involves a question of public importance, the court is not to be influenced by the public

[360] See article 22 of the 1956 Constitution.

[361] Sohail Butt versus Deputy Inspector General of Police , 2011 SCMR 698 [Supreme Court of Pakistan]

sentiments[362]. Similarly, the court is not required to conduct an opinion poll to ascertain whether the general public is interested in the outcome of the case. Rather, the court is required to consult the jurisprudence developed on the issue through the precedents because the contours of the law are settled through precedents[363].

The Supreme Court in Manzoor Elahi case just a couple of years after the incorporation of this phrase in the above mentioned clause interpreted it[364]. In this case, the arrest and detention of a member of the Parliament was challenged being violative of the fundamental rights granted by articles 10 and 15 of the Constitution. It was determined that the requirement of public importance is fulfilled if the case raises a question that affects the whole body of people or an entire community. That is to say the legal rights or liabilities of a whole community are affected by the questions involved in the case. It is irrelevant that the individual who is the subject matter of the case at bar is an important person or an ordinary individual. The Court held:

> The learned Attorney General is clearly right in saying that a case does not involve a question of public importance merely because it concerns the arrest and detention of an important person like a Member of Parliament. In order to acquire public importance, the case must obviously raise a question which is of interest to, or affects, the whole body of people or an entire community. In other words, the case must be such as gives rise to questions affecting the legal rights or liabilities of the public or the community at large, even though the individual, who is the subject matter of the case, may be of no particular consequence[365].

Similarly, in Employees of the Pakistan Law Commission case the Supreme Court was to respond to a preliminary objection raised by the respondents regarding the maintainability of the

[362] Munir Hussain Bhatti advocate versus Federation of Pakistan and others, PLD 2011 Supreme Court 407
[363] Ibid
[364] Manzoor Elahi versus Federation of Pakistan, PLD 1975 Supreme Court 66
[365] Ibid, 145

constitutional petition filed under article 184(3)[366]. In this case, the petitioners claimed the right of accommodation during the tenure of their service. According to the petitioners, the denial of the accommodation was a violation of their fundamental right to life and equality before law since other similarly placed government employees were provided this facility. As the petitioners claimed that the grievance was of a collective nature, therefore, it involved a question of public importance. The respondents, on the contrary, maintained that the matter is beyond the scope of article 184(3); hence the petition was not maintainable. The Supreme Court held that if a class of persons collectively faces the violation of their fundamental rights and the same could not be redressed by any forum due to their inability to knock any door, the Supreme Court is entitled to interfere in the matter under article 184(3). In this regard, the Court clarified that the matter should not be restricted to the redressal of any individual grievance rather it should be a collective grievance involving questions of public importance. The Court said:

> It is now well-settled that if there is violation of Fundamental Rights of a class of persons who collectively suffer due to such breach and there does not seem to be any possible relief being granted from any quarter due to their inability to seek or obtain relief, they are entitled to file petition under Article 184(3). The dispute should not be mere an individual grievance, but a collective grievance which raises questions of general public importance[367].

On the contrary, the Supreme Court in Abdul Wahab case dismissed a petition filed under article 184(3) of the Constitution being not maintainable filed by more than three hundred ex-employees of the Habib Bank Limited[368]. One of the main points which formed the basis of the dismissal order was that the petition did not involve a question of public importance. In this regard, the Court observed that the grievance of the petitioners was personal in nature based on

[366] Employees of the Pak. Law Commission versus Ministry of Works, 1994 SCMR 1548 [Supreme Court of Pakistan]
[367] Ibid, 1551
[368] Abdul Wahab and others versus HBL and others, 2013 SCMR 1383 [Supreme Court of Pakistan]

the contractual relationship. The petitioners though exceed few hundred are the only persons interested in this case. The general public had no interest or concern with this matter and would not be affected by it in any manner. Therefore, it could not be termed as a matter involving a question of public importance[369].

It is important to note that the Supreme Court has redressed the violation of the fundamental rights under article 184(3) even where a bar was created by a constitutional provision on the exercise of jurisdiction by courts. In this regard, the case of Iftikhar Muhammad Chaudhry, the Chief Justice of Pakistan (CJP) as he then was, is very important and deserves to be discussed and analysed here[370]. However, it is a lengthy case involving a number of issues so the discussion and analysis will be restricted to the extent of bar of jurisdiction only.

This case was decided by a full bench consisting of thirteen judges of the Supreme Court. Out of the remaining four judges who did not become part of the bench, three were the members of the Supreme Judicial Council (SJC) and had been arrayed as respondents. While one member, Falak Sher J. refused to become part of the bench. In fact, he claimed seniority over the CJP and this matter was still pending determination. In these circumstances, to rule out any shadow of bias against the CJP, Falak Sher J. did not deem it proper to sit as a judge in a case in which the CJP was himself a petitioner.

Succinct facts relevant to the present discussion are that a reference had been filed against the CJP in the SJC under article 209 of the Constitution on ground of misconduct. The CJP, on the other hand, filed a constitutional petition under article 184(3) before the Supreme Court challenging, *inter alia*, the proceedings of the SJC. It should be noted that the proceedings before the SJC had been protected under article 211 of the Constitution and a bar had been created by

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[369] Ibid

[370] Chief Justice of Pakistan Iftikhar Muhammad Chaudhry versus President of Pakistan through Secretary and others, PLD 2010 Supreme Court 61

this article on the exercise of jurisdiction by any court. Article 211 provides, "The proceedings before the Council, its report to the President and the removal of a Judge under clause (6) of Article 209 shall not be called in question in any court[371]." Therefore, one of the many objections raised by the respondents on the maintainability of the constitutional petition was the bar of jurisdiction created by article 211.

The Supreme Court turned down this objection with a majority of ten to three judges. The main judgment speaking for the majority was authored by Khalil-ur-Rehman Ramday J. Besides, separate notes supporting the majority view were also provided by Nawaz Abbassi and Ch. Ijaz Ahmad JJ. While dissenting members were Faqir Muhammad Khokhar, M. Javed Buttar and Saiyed Saeed Ashhad JJ. Rest of the members agreed with the judgment authored by Ramday J. Interestingly, the reported judgment does not find mention of the dissenting view other than a sentence by the editor. It reads. "Minority views of Faqir Muhammad Khokhar, M. Javed Buttar and Saiyed Saeed Ashhad, JJ (R), having not been received, same could not be reported[372]."

To reconcile the bar contained in article 211, the Supreme Court classified the proceedings for the removal of a judge of the Supreme Court or a High Court under article 209 into three stages. These are pre-reference proceedings, proceedings before the SJC and post-reference proceedings. Article 211, *inter alia*, provides protection to the proceedings before the SJC and the post-reference proceedings. These two proceedings cannot be questioned in any court. However, no such protection is provided to pre-reference proceedings.

It should be noted that a number of steps are required to be taken as provided in article 209 and other relevant rules before the proceedings are actually taken in the presence of the SJC. These steps include the receipt of information by the competent authority regarding any of

[371] See article 211 of the 1973 Constitution.
[372] Chief Justice of Pakistan Iftikhar Muhammad Chaudhry versus President of Pakistan through Secretary and others, PLD 2010 Supreme Court 61

the grounds on which a judge of the Supreme Court or a High Court can be removed, the evaluation of the said information by the competent authority so as to form an independent opinion whether a reference should be sent to the SJC for inquiry and so on. All such steps are called pre-reference proceedings by Ch. Ijaz Ahmad J[373].

The majority held that pre-reference proceedings are not immune from judicial review by the Supreme Court under article 184(3). Since the pre-reference proceedings are justice-able, the same may be declared void ab initio if found to have been taken mala fide or based on ulterior motive in colourful exercise of powers and in a capricious manner. The Supreme Court tracing all the events since 09.03.2007 till the initiation of proceedings before the SJC held that the reference filed by the President against the CJP was neither based on good faith nor in the proper exercise of the constitutional duty.

Besides, the proceedings actually taken before the SJC i.e. the second stage, was also not held absolutely immune from the jurisdiction of the Supreme Court under article 184(3). In this regard, the opinions of Khalil-ur-Rehman Ramday and Ch. Ijaz Ahmad JJ. are worth discussing here. Ramday J. pointed out that the apex court has determined the scope of ouster clause used in various constitutional provisions in a number of cases. He pointed out that article 281(2) of the Interim Constitution 1972 and articles 269 and 270A of the present Constitution contain similar expressions. Some of these provisions were analysed and their scope determined by the Supreme Court in Zia-ur-Rehman case[374]. The Court held that the right of final interpretation of the law rests with the Supreme Court even if it be a provision that ousts the jurisdiction of the Court. The Court held:

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[373] Ibid

[374] The State versus Zia-ur-Rehman and others, PLD 1973 Supreme Court 49

5.2.1 The Effect of the Previous Judgments of the Shariat Benches on the FSC

This discussion is relevant because in Hafiz Muhammad Ameen case analysed in chapter 4 above, it was a major point of discussion[378]. There was a disagreement among the members of the FSC in this case on the binding nature of the judgments rendered by the Shariat Benches of High Courts. The Shariat Bench of Peshawar High Court had declared certain provisions of different laws repugnant to the injunctions of Islam, hence void. After the establishment of the FSC, the provisions that had already been declared void by the Shariat Bench were again challenged before the FSC. In these circumstances, a primary concern for the FSC was whether jurisdiction with respect to these provisions could be exercised at all. The following discussion and analysis further elaborates this issue.

One of the impugned provisions in Hafiz Muhammad Ameen case was Paragraph 25 (3) (d) of the Land Reforms Regulation, 1972. This provision provided the first right of pre-emption to the tenants with respect to the land comprising the tenancy. The said provision had already been declared repugnant to the injunctions of Islam by the Shariat Bench of the Peshawar High Court in Naimatullah Khan case[379]. In these circumstances, a preliminary question was whether the FSC is bound by the decision in Naimatullah Khan case or the FSC could decide the matter afresh.

Three members, Agha Ali Hyder, Zakaullah Lodhi and Karimullah Durrani JJ., were of the view that the FSC is so bound. On the other hand, Aftab Hussain and Salahuddin Ahmed JJ. were of the considered view that the FSC is not so bound. Interestingly, this issue had already been determined by the FSC itself in an earlier judgment known as Muhammad Riaz case[380].

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[378] Hafiz Ameen, PLD 1980 FSC 23

[379] Haji Naimatullah khan and another versus Government of Pakistan through Ministry of Law, PLD 1979 Peshawar 104 [Shariat Bench]

[380] Muhammad Riaz versus Federal Government and others, PLD 1980 FSC 1

In this case, the FSC consisted of the same five members as did in Hafiz Muhammad Ameen case. Moreover, these members were exactly split in their views on the said issue as in this case. In Muhammad Riaz case, several provisions of the Pakistan Penal Code, 1860 (PPC) and the Code of Criminal Procedure, 1898 (Cr.PC) were challenged under article 203D being repugnant to the injunctions of Islam[381]. Interestingly, some of these provisions had already been declared so repugnant by the Shariat Bench of the Peshawar High Court exercising jurisdiction under article 203B(1) of the Constitution inserted by P.O. No. 3 of 1979 in Gull Hassan case[382]. Therefore, a preliminary point to be settled before the FSC was whether the decision in Gull Hassan case was binding on the FSC. Obviously, if it was found that the FSC is bound by the decision in Gull Hassan case, it need not determine the fate of impugned provisions afresh.

Salahuddin Ahmed and Aftab Hussain JJ. were of the view that the FSC is not bound by the judgment rendered by the Shariat Bench of the Peshawar High Court. There were two good reasons with these judges for holding this view. First, it was observed that the jurisdiction of the Peshawar High Court was limited to its territorial boundaries. While the territorial jurisdiction of the FSC extended throughout Pakistan. Therefore, any decision given by the former cannot bind the latter due to the difference of the extension of the territorial jurisdiction of the two Courts. Second, it was pointed out that according to the well established rules of precedent, a smaller bench cannot bind a larger bench of the same court. The Shariat Bench of the Peshawar High Court consisting of three judges cannot bind a Bench consisting of five judges of the FSC.

These reasons were responded by Agha Ali Hyder, Zakaullah Lodhi and Karimullah Durrani JJ. who were of the view that the FSC is bound by the judgments of the Shariat Benches constituted under article 203B(10) of the substituted chapter 3A. There were three main reasons for holding

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[381] Ibid

[382] Gull Hassan versus Government of Pakistan, PLD 1980 Peshawar 104 [Shariat Bench]

this opinion with these judges. First, article 203D provided exactly the same jurisdiction on the FSC as had been conferred on Shariat Benches of High Courts under article 203B of the substituted chapter 3A. Thus, both could declare a law or any provision thereof void if the same was found to be repugnant to the injunctions of Islam. Second, the decisions of the FSC are appealable in the SAB under article 203F. Similarly, the decisions of the Shariat Benches were appealable to the SAB under article 203C of the substituted chapter 3A. Thus, the appellate forum is the same for the FSC as well as the Shariat Benches. Third, article 203H (2) provided that all the cases pending in any Shariat Bench of any High Court shall stand transferred to the FSC after the constitution of the FSC. Moreover, the FSC shall start proceedings in all such cases from the stage from where these cases are transferred. Thus, the proceedings that have already been taken by the Shariat Benches are recognized by the FSC.

On the basis of these similarities the majority held that the FSC is a successor court of the Shariat Benches in every sense of the word though differently constituted. According to the established norms of the precedent, a successor court is bound by the decisions of its predecessor. Additionally, the appeals were pending before the SAB against the decision of the Shariat Bench of the Peshawar High Court in Gull Hassan case. In these circumstances, the FSC considered itself bound by the judgment that had already been pronounced in Gull Hassan case and declined to decide these matters afresh.

The reasons given by both the sides are very sound and it is very difficult to prefer one over the other. However, following the majority rule the FSC has been held to be bound by the decisions of the Shariat Benches of High Courts. Nonetheless, it should be noted that it was only the Shariat Bench of Peshawar High Court that had rendered few judgments under this jurisdiction.

All such judgments have had their effects on the decisions of the FSC and it is no more a practical issue though academic debates have always attracted these issues.

5.2.2 Precedent under Article 189 and Article 203GG

An introductory discussion on this issue has already preceded in chapter 3 above. Article 189 makes the decisions of the Supreme Court binding on all courts in Pakistan while the article 203GG makes the decisions of the FSC binding on a High Court and on all courts subordinate to a High Court. This obviously does not include the Supreme Court. However, the Supreme Court itself has held in Zaheeruddin case that in certain cases the decision of the FSC is binding even on the Supreme Court[383].

In fact. this observation was made by Abdul Qadeer Chaudhry J. It was held that the FSC is vested with exclusive jurisdiction under article 203D to decide the vires of a law on the touch stone of the Islamic injunctions. This fact is supported by article 203G. The last mentioned article creates a bar on all courts and tribunals in Pakistan including a High Court and the Supreme Court to exercise jurisdiction with respect to any matter which is in the jurisdiction or power of the FSC. In this scheme, if the FSC decides a case and its decision becomes final, it will be binding even on the Supreme Court. The decision of the FSC becomes final if it is not challenged in the SAB or it is maintained by the SAB. When the decision is maintained by the SAB, it is debatable whether the decision gets binding on the Supreme Court being a decision of the FSC or that of the SAB. In the former case, a lower court binds a higher court. While in the latter case, one bench of the Supreme Court binds the other bench of the same court.

[383] Zaheeruddin and others versus the State, 1993 SMR 1718 [Supreme Court of Pakistan]

It is against the established norms of precedent that a lower court binds a higher court. However, in the light of the judgment of the Supreme Court in Zaheeruddin case this unique kind of precedent exists in the Constitution. Abdul Qadeer Chaudhry J. observed in this case as follows:

> The Article 203A of the Constitution lays down that the provisions of Chapter 3A shall have effect notwithstanding anything contained in the Constitution. Further Article 203G provides that "Save as provided in Article 203F, no Court or tribunal, including the Supreme Court and a High Court, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court." These provisions when read together, would mean that a finding of the Federal Shariat Court, if the same is either not challenged in the Shariat Appellate Bench of the Supreme Court or challenged but maintained, would be binding even on the Supreme Court[384].

Surprisingly, Abdul Qadeer Chaudhry J. did not refer to article 203GG that actually makes the decision of the FSC a binding precedent. However, according to this provision the decision of the FSC is a binding precedent subject to articles 203D and 203F. As far as mentioning of article 203F is concerned it is very understandable that the appellate forum may alter the decision of the FSC. In such a case, the decision of the appellate forum and not that of the FSC will rule the field. But "subject to article 203D" is confusing. The FSC exercises original jurisdiction under this provision. On the other hand, according to article 203E (9), the FSC can review its decisions and orders. Where the FSC reviews its earlier decision that had been given under article 203D a question arises as to whether the binding decision will be the one that has been given later under article 203E (9) or the earlier given under article 203D. It is hardly refutable that the later decision shall be binding and not the earlier since the earlier does not exist anymore. In these circumstances, article 203GG should not be subject to article 203D. Rather, it should be subject to article 203E.

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[384] Ibid, 1764

It is important to note that there is no provision in chapter 3A which makes the decision of the SAB binding on other courts. However, it has been held that the SAB is a bench of the Supreme Court[385]. Therefore, the decision of the SAB is binding on other courts under article 189 of the Constitution as a decision of the Supreme Court. This brings the discussion to an important question whether a decision of the SAB is binding on the Supreme Court itself. If this question is answered in affirmative, a subsidiary question arises in what capacity the SAB binds other benches of the Supreme Court. There may be two possibilities of so doing. One, the SAB binds other benches of the Supreme Court as any other larger bench of the same court binds an equal or a smaller bench of that court. Two, the SAB being a special bench binds even the other larger benches of the Supreme Court within the scope of its exclusive jurisdiction.

The Supreme Court has held in Zaheeruddin case as well as in Mst. Aziz Begum case that the Supreme Court is bound by the decisions of the SAB[386]. Both these cases are discussed and analysed below. However, before this discussion and analysis, it is important to note that the decision of the FSC or the SAB is binding only to the extent of Islamic perspective. While the decision of the Supreme Court is binding on the SAB as well as the FSC in all respects other than the Islamic perspective.

Zaheeruddin and others versus The State is a very important case in the context of the present research and needs to be analysed in detail[387]. This case was decided by the Supreme Court exercising its appellate jurisdiction under article 185 of the Constitution. The Court consisted of a full bench of five members who gave a split judgment as shall be analysed below. In this case, the Court decided a number of appeals against different orders passed in different cases decided

[385] In Re: Said Kamal Shah, PLD 1990 Supreme Court 865
[386] Zaheeruddin and others versus the State, 1993 SMR 1718 [Supreme Court of Pakistan], Mst. Aziz Begum and others versus Federation of Pakistan and others, PLD 1990 Supreme Court 899
[387] Ibid

by two High Courts, the Lahore High Court and the one exercising jurisdiction in the province of Baluchistan.

On 26.04.1984 an Ordinance numbering XX of 1984 was issued by the President of Pakistan. This Ordinance was called the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984. Section 3 of this Ordinance inserted two provisions in PPC. These provisions are Sections 298B and 298C of the PPC.

It should be noted that according to article 260(3) (b) of the Constitution persons of the Qadiani group or the Lahori group who call themselves Ahmadis or by any other name are included in the definition of a non-muslim. These non-muslims are the followers of Mirza Ghulam Ahmad of Qadian, a place in India. That is why they are called Ahmadis after his name or Qadiani referring to his place of birth.

The basic difference in the belief of these non-muslims and the Muslims is that the former do not believe in the finality of the prophet-hood of Muhammad (PBUH) which amounts to the denial of explicit teachings of the Holy Quran. This belief is so dangerous that it makes the entire teachings of Islam questionable. When the Prophet of Islam is not considered the last and the final messenger of Allah, any person claiming to be his successor and the messenger of Allah will have the full authority to bring any changes in the true teachings of Islam.

It is believed that this sect emerged in 1889 at the behest of the imperial power. The basic aim behind this conspiracy was to divide the Muslims of the sub-continent so that they get weaker and weaker to resist the imperialists with full power. Since this sect was formed and encouraged to divide and weaken the Muslims of the region, the Ahmadis disguised themselves into the cloth of Islam and posed to be true Muslims. That is why, they planned and insisted to use the titles,

epithets and descriptions reserved for certain holy personages, places of worship of Muslims and certain Islamic rituals and ceremonies.

The object of declaring such persons non-muslims was to safeguard and protect the holy personages of Islam, the sanctity of important teachings and rituals of Islam. These non-muslims had been using specific titles and epithets for their own clergies, places of worship and religious rituals that had actually been reserved for the Islamic personages, places of worship and holy rituals. In this background, it was provided by Section 298B(1) that if a person of the Qadiani group or Lahori group whether called Ahmadis or by any other name refers, addresses or uses any title or epithet for any person, place of worship or religious ritual or ceremony reserved for the Muslims and specific to Islam, he/she shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

In the light of this provision it is banned for such non-muslims to refer or address any person other than a Caliph of Muslims or a companion of the Holy Prophet (PBUH) as Ameer-ul-Momineen, Khalifat-ul-Momineen, Khalifat-ul-Muslimeen, Sahaabi or Razi Allaho Anho. Similarly, the title of Ummul-Momineen is banned for any person other than a wife of the Prophet (PBUH). Likewise, the title Ahle-bait is reserved for the family members of the Prophet (PBUH). Hence, the use of Ahle-bait is also forbidden for any person who does not belong to the family of the Prophet (PBUH). In the like manner, a place of worship of such non-muslims cannot be termed as Masjid.

The Muslims offer prayers five times a day. The call to prayer is called Azan in Islam. Section 298B(2) declares that if such non-muslims use the term of Azan for their call to prayers or use a similar call to prayer as used by Muslims, it is an offence under the last mentioned provision.

This offence is punishable in the like manner as provided by Section 298B (1) i.e. imprisonment of either description which may extend to three years and fine.

Section 298C declares that a non-muslim of the above description cannot pose himself/herself to be a Muslim either directly or indirectly. Similarly, it is forbidden by law to declare the faith of such non-muslims as Islam. Since the faith of such non-muslims is a distorted form of Islam, the law forbids them to preach their religion. Because by preaching their religion or inviting other people to accept their faith they are not actually spreading their religion but, in fact, distorting the true picture and teachings of Islam. This, of course, must be strictly prohibited and banned in a State where Muslims are in majority. Moreover, the Constitution vide article 2 declares Islam to be the State religion. Finally, it is prohibited by law for such non-muslims to outrage the religious feelings of Muslims in any manner whatsoever. All these acts have been made punishable under Section 298C with imprisonment of either description for a term which may extend to three years and with fine.

The above discussed Ordinance of 1984 was challenged in the FSC by way of different Shariat petitions invoking the jurisdiction of the FSC under article 203D in Mujibur Rehman case[388]. It was claimed by the petitioners that the law made by the said Ordinance is void ab initio and a nullity in the eyes of law being repugnant to the injunctions of Islam. The FSC after hearing lengthy arguments and analyzing all aspects of the case gave a very exhaustive judgment on the subject. The petitioners were unable to impress the FSC and make a case in their favour. Consequently, the FSC dismissed all these petitions. It was found by the FSC that none of provisions of the Ordinance is repugnant to the injunctions of Islam. The Ordinance, therefore, was declared a valid law as far as the jurisdiction under article 203D is concerned[389].

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[388] Mujibur Rehman and 3 others versus Federal Government of Pakistan and another, PLD 1985 FSC 8

[389] Ibid

The above decision of the FSC was challenged in the SAB under article 203F by the petitioners before the FSC invoking the appellate jurisdiction of the SAB[390]. It is interesting to note that the appeals in the SAB against the decision of the FSC were not disposed of on merit. Rather, the appellants withdrew their appeals without arguing the case on merits. Nonetheless, the effect of the withdrawal of the appeals by the appellants is that the decision of the FSC in Mujibur Rehman case holds the field. Consequently, the Ordinance providing for the prohibition of the anti-Islamic activities of the Ahmadis and punishments thereto still remains a valid law as far as its Islamic perspective is concerned.

It is interesting to note that the same Ordinance was challenged before the High Court by invoking the constitutional jurisdiction of the Court under article 199 by filing two separate constitutional petitions. One of these petitions numbering 2591/84 was filed on 30.05.1984 i.e. a little more than a month after the promulgation of the Ordinance on 26.04.1984. The other petition numbered 2309 of 1984 and the same was amended on 06.06.1984 by the petitioners to pray for the suspension of the Ordinance till the final disposal of the said petition. It was generally claimed by the petitioners that the said Ordinance is ultra vires of the Provisional Constitutional Order, 1981 as the same is inconsistent with the fundamental rights particularly those provided by articles 19, 20 and 25 providing for the freedom of speech, freedom of religion and equality before the law respectively[391].

It was contended by the petitioners that the restrictions imposed by Section 298B PPC regarding the use of certain expressions is an unlawful curtailment on the freedom of speech. Similarly, the

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[390] Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan, PLD 1988 Supreme Court 167 [Shariat Appellate Jurisdiction]

[391] It should be borne in mind that the Constitution was held in abeyance pursuance to the Proclamation of Martial Law of the 5th day of July 1977. After the Proclamation, the Laws (Continuance in Force) Order, 1977 was promulgated which, *inter alia*, provided that the State shall be governed as nearly as may be possible in accordance with the provisions of the Constitution that has been held in abeyance. After that a number of President's Orders (P.Os) were issued. The Provisional Constitutional Order, 1981 was one such Order.

restrictions imposed by Section 298C PPC on the propagation and preaching of one's faith and religion to others is a negation of the freedom of religion. Finally, Ahmadis should be treated like other non-muslims in all matters. The law provides freedom to other non-muslims to express their holy personages, places of worship and religious rituals and ceremonies by whatever name they like. Likewise, they enjoy legal freedom to profess, practice and propagate their religion. Therefore, the restrictions imposed by Sections 298B and 298C of the Penal Code amount to discrimination within non-muslims and the same is forbidden by article 25 of the Constitution.

Nevertheless, both the above mentioned constitutional petitions were dismissed in limine considering the judgment given by the FSC in Mujibur Rehman case under article 203D a bar on the maintainability of the petitions. Intra court appeals (ICA) were filed without success against the orders in both the petitions. The appeal bench hearing the arguments against the order passed in constitutional petition No. 2309/84 made very important observations while disposing of the ICA. The bench did not consider the said judgment of the FSC under article 203D a bar on the maintainability of the petition. Rather, the bar of making inconsistent laws with the fundamental rights provided by the Constitution was considered non-existent at the time of the promulgation of the Ordinance and at the time of hearing the ICAs.

It was observed by the appeal bench that the Constitution of 1973 providing the fundamental rights is not enforced in its entirety. The Constitution had been held in abeyance by the Proclamation of the Martial Law of the 5th day of July 1977. While article 2(1) of the Laws (Continuance in Force) Order, 1977 provided that the State shall be governed as nearly as may be in accordance with the provisions of the Constitution subject to this Order or any other law made by the President or the CMLA. However, article 2(3) of the same Order suspended all the fundamental rights provided by the original scheme of the Constitution.

In pursuance to the above referred Proclamation and the Order, another Order called the Provisional Constitution Order, 1981 was promulgated by the President on 24 March 1981. This Order adopted certain provisions of the 1973 Constitution. But importantly no provision of the Constitution providing the fundamental rights was adopted. The effect of this all according to the appeal bench is that the fundamental rights still remain suspended. Thus, no law could be declared void on the sole ground that the same was inconsistent with the fundamental rights provided by the 1973 Constitution. The appeal bench, nonetheless, was pleased to observe that had the fundamental rights been in force, the arguments of the appellants would have been worth examination. These observations of the appeal bench have been taken note of in the judgment of Shafiur Rehman J. in Zaheeruddin case. He observed as follows:

> If the Constitution of 1973 had been in force in its entirety the argument of the appellants would have been worth examination but this is not so...It is significant to note that the adopted provisions do not include any of the Fundamental Rights including Article 20 upon which the appellants rely. Thus the said Article like all other Fundamental Rights is not enforceable at present. It is, therefore, idle on the part of the appellants to suggest that the said Article continues to remain a rider on the Ordinance making power of the President. We would accordingly reject the contention of the appellants that even under the present Constitutional position the President, while making an Ordinance still suffers from the limitations set out in the Fundamental Rights[392].

The above part of the judgment is very significant. It clearly suggests that the High Courts and the Supreme Court are competent to determine the fundamental rights perspective of a law even if the Islamic perspective of the same has been determined under chapter 3A. Thus, each court has its own scope of jurisdiction and the exercise of jurisdiction by one court within its scope does not bar the other to exercise the jurisdiction within the scope of the other court.

[392] Zaheeruddin and others versus the State, 1993 SMR 1718 [Supreme Court of Pakistan], 1740

Apart from the above discussed two constitutional petitions, another constitutional petition No. 2089/89 was filed in Lahore High Court under article 199. This petition challenged three different orders dated 20.03.1989, 21.03.1989 and 25.03.1989 passed by the Punjab Government, District Magistrate Jhang, and the Resident Magistrate, Rabwa respectively. The background of this petition is that in March 1989 the Ahmadis wanted to arrange centenary celebrations of their religion publically. This was likely to outrage the feelings of the Muslims and disturb the public peace and tranquility particularly in the presence of Sections 298B and 298C PPC on the book.

In order to avoid all this, the Home Secretary, Government of the Punjab banned the centenary celebrations of the Ahmadis throughout the Province of the Punjab by issuing an order dated 20.03.1989 in exercise of his powers under Section 144 Cr.PC. Similarly, the District Magistrate Jhang also exercised his powers under the last mentioned provision to ban a number of activities of the Ahmadis which were likely to create disorder in public peace and outrage the feelings of the Muslims in the district Jhang by issuing an order dated 21.03.1989. The said order was to last till 25.03.1989. The Resident Magistrate, Rabwa extended the said orders on 25.03.1989 till further orders.

All the above orders were challenged being repugnant to article 20 of the Constitution which had been revived in 1985. The Lahore High Court dismissed the said constitutional petition No. 2089/89 mainly holding that article 20 does not provide absolute freedom of religion. Rather, this freedom is subject to law, public order and morality. A detailed analysis of the merits of the case is beyond the scope of this research.

In all the above discussed cases, the jurisdiction of the High Court was directly invoked under article 199 of the Constitution. However, in the following cases the appellate and revisional jurisdiction of the High Court was invoked under the provisions of the Cr.PC. A number of

criminal cases were registered against different persons by different complainants under Section 298C PPC. All such cases were registered in the police stations of Quetta city.

Interestingly, the allegations against the accused persons were very similar. It was alleged in different FIRs that the accused persons were wearing badges of kalima Tayyaba and on inquiry such persons posed themselves to be Muslims while, in fact, they were known to be Ahmadis. The act of wearing the badges and posing to be Muslims by Ahmadis constituted an offence under Section 298C PPC according to the FIRs. On trial all the accused persons were convicted under the said provision and were awarded different sentences by the trial courts.

All these convictions and sentences were challenged in the High Court invoking its appellate jurisdiction. Contrarily, the prosecution considered that the sentences awarded by the trail courts were insufficient and did not match the gravity of the offence. Consequently, revision petitions were filed in all cases in order to get the enhancement of the sentences. The High Court, however, maintained the decisions of the trail courts in all the cases and dismissed both the appeals as well as the revisions.

All the decisions of both the High Courts passed in above discussed three constitutional petitions as well as in criminal cases were challenged before the Supreme Court invoking its appellate jurisdiction under article 185. The Supreme Court disposed of all these cases by a consolidated judgment reported as Zaheeruddin and others versus The State and others (1993 SCMR 1718) [Supreme Court of Pakistan].

The most important point for determination before the Supreme Court in this case was the constitutionality of the Ordinance No. XX of 1984. The Supreme Court was asked to determine the fundamental rights perspective of the said Ordinance. It should be recalled that the FSC had already declared the same a valid law and the decision of the FSC had been maintained by the

SAB. In these circumstances, another very vital question was whether the Supreme Court could exercise jurisdiction to determine the fundamental rights perspective of the Ordinance when its Islamic perspective had already been determined under chapter 3A.

The arguments presented before the Supreme Court were more or less similar to those advanced earlier before the High Courts. However, at the time of hearing of these cases before the Supreme Court in 1993 the Constitution was in force in its entirety. Thus, the fundamental rights test could be applied if there was not any other bar in the exercise of the jurisdiction by the Court.

One such bar was pointed out by Dr. Syed Riaz-ul-Hassan Gilani, Senior Advocate Supreme Court representing the Federal Government in this case. His contention was that the Ordinance No. XX had been directly challenged before the FSC in Mujibur Rehman case being repugnant to the injunctions of Islam and the fundamental rights[393]. In this case, the FSC had declared the said Ordinance a valid law. Similarly, the SAB in Capt. Retd. Abdul Wajid case while disposing of the appeal against the decision of the FSC in Mujibur Rehman case upheld this Ordinance[394]. Therefore, in these factual circumstances the Supreme Court could not determine the vires of the said Ordinance otherwise. This argument was based on the authority of the decision of the Supreme Court in another case reported as Mst. Aziz Begum and others versus Federation of Pakistan and others[395]. The arguments of the senior counsel on this point as reported in Zaheeruddin case are reproduced below.

> ...Ordinance XX of 1984 was directly challenged before the Federal Shariat Court on the ground of its being repugnant to the injunctions of Islam and violative of the Fundamental Rights. The Federal Shariat Court had negatived the contention and the

[393] Mujibur Rehman and 3 others versus Federal Government of Pakistan and another, PLD 1985 FSC 8
[394] Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan, PLD 1988 Supreme Court 167 [Shariat Appellate Jurisdiction]
[395] Mst. Aziz Begum and others versus Federation of Pakistan and others, PLD 1990 Supreme Court 899

> Shariat Appellate Bench of the Supreme Court had while allowing the withdrawal of the appeal held that the judgment of the Federal Shariat Court shall remain in the field. In view of the decision of the Supreme Court in Mst. Aziz Begum and others v. Federation of Pakistan and others...the decision of the Shariat Appellate Bench of the Supreme Court will hold the field and is not open to examination or review by the Supreme Court otherwise...[396].

This argument was not accepted by two members of the bench. The dissenting judges were Shafiur Rehman and Saleem Akhtar JJ. Both these judges decided the appeals on merits though each wrote his separate judgment. Shafiur Rehman J. allowed the appeals and set aside the convictions and sentences awarded under Section 298C PPC in various criminal cases while Saleem Akhtar J. allowed the appeals and remanded the same for retrial. It was held by these judges that certain restrictions such as the use of the terms Azan and Masjid for call to prayer and place of worship respectively could not be lawfully imposed. Similarly, the restriction to invite other people to accept Qadiani faith was unreasonable. Thus, such restrictions imposed by Sections 298B and 298C PPC inserted by Section 3 of Ordinance No. XX of 1984 were held to be inconsistent with the fundamental rights provided by various articles of the Constitution. To that extent these provisions were declared ultra vires of the Constitution being inconsistent with the fundamental rights hence void.

On the other hand, the majority of the judges accepted the arguments advanced by Syed Riaz-ul-Hassan Gilani. Rather, it was contended on behalf of the appellants that the finding of the FSC in Mujibur Rehman case is of no consequence as far as this Court is concerned. This contention of the appellants was refuted by the majority. The majority judgment was authored by Abdul Qadeer Chaudhry J. and agreed by Muhammad Afzal Lone and Wali Muhammad Khan JJ. The judgment of the FSC in Mujibur Rehman case and that of the SAB in Abdul Wajid case were

[396] Zaheeruddin and others versus the State, 1993 SMR 1718 [Supreme Court of Pakistan], 1745

considered final authority on the issue. It was held that the judgment of the FSC is binding even on the Supreme Court if the same is either not challenged or challenged but maintained by the SAB. In this regard reference was made to the provisions of chapter 3A more particularly to articles 203A and 203G. Nonetheless, all the appeals were decided purely on merits. The merits of the appeals for the purposes of the present research are not important and thus not analysed here. What is important for us is whether the Supreme Court can exercise jurisdiction to decide the fundamental rights perspective of a law when the Islamic perspective of the same has been determined under chapter 3A. The findings of Abdul Qadeer Chaudhry J. in this respect are reproduced below.

> It is to be noted that Mujibur Rehman and others had challenged the...order of the Federal Shariat Court in the Shariat Appellate Bench of the Supreme Court...This Court in that appeal held as under:
> "Judgment of the Federal Shariat Court shall rule the field."
> The present appeal has been filed and is being heard on the general side under Art. 185 of the Constitution...Consequently, the above given findings of the Federal Shariat Court cannot be ignored by this Court[397].

The provisions of chapter 3A have already been analysed in detail above and need not be discussed again. As far the arguments of Syed Riaz-ul-Hassan Gilani are concerned, he based his arguments on the authority of Mst. Aziz Begum case. It is, therefore, considered expedient to analyse this case before analyzing the majority and minority views in Zaheeruddin case.

Mst. Aziz Begum case was decided by a full bench of the Supreme Court consisting of five judges on 02.06.1990[398]. All the judges were unanimous in their decision. Shafiur Rehman J. agreeing with other members preferred to give his separate reasons. In this case, a constitutional petition No. 1-R of 1988 under article 184(3), a couple of civil appeals and a number of civil

[397] Ibid, 1764
[398] Mst. Aziz Begum and others versus Federation of Pakistan and others, PLD 1990 Supreme Court 899

review petitions were disposed of by a single judgment. Each of these cases is not desired to be discussed here in detail. However, the constitutional petition under article 184(3) will be analysed after the analysis of the points desired to be evaluated in this case.

All these cases revolved around pre-emption matters. Even the relief claimed by the petitioner in the constitutional petition concerned the right of pre-emption. In particular the claims were based upon Sections 15 and 30 of the Punjab Pre-emption Act, 1913. The enforcement of these provisions after the judgment of the SAB in Said Kamal Shah case and the judgment of the Supreme Court in Aziz Ahmad case was also under consideration[399].

As has been discussed above, various provisions of different laws dealing with the right of pre-emption were declared null and void being repugnant to the injunctions of Islam in Said Kamal Shah case by the SAB. The decision of the SAB was to take effect on 31.07.1986. Meanwhile, it was desired that a new law of pre-emption be enacted though no such law could be made within this time. This led to the placement of different interpretations on this judgment by different courts while disposing of pre-emption matters. Consequently an uncertainty in the application of the law of pre-emption was created.

In Mst. Aziz Begum case the appellants/petitioners approached the Supreme Court with the contention that their claims regarding pre-emption matters were rejected by relying upon certain cases placing interpretation on Said Kamal Shah case. These relied upon cases had been overruled in 1989 by the Supreme Court vide its judgment reported as Ahmad versus Aziz Ahmad etc. The effect of this overruling according to the appellants/petitioners is that their claims stand revived.

[399] Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah, PLD 1986 Supreme Court 360 [Shariat Appellate Bench], Ahmad versus Aziz Ahmad etc., PLD 1989 Supreme Court 771

Given the uncertainty created by the judgment in Said Kamal Shah case, the Shariat Appellate Bench of the Supreme Court had initiated proceedings in a suo moto Shariat review petition and gave a final judgment on 26.05.1990 in the said petition[400]. This judgment clarified that Sections 15 and 30 of the Punjab Pre-emption Act, 1913 have ceased to have effect in their entirety from 31.07.1986. Therefore, no pre-emption suit can be continued based on these provisions after the said date. However, if any pre-emption suit based on these provisions has been decreed before the said date, proceedings can continue in that case.

In the light of this judgment of the SAB, the Supreme Court held that the judgment given in suo moto Shariat review proceedings was a final verdict on the issue. It is in the light of this judgment of the SAB that the uncertainties created by the judgment in Said Kamal Shah case are to be settled and the pre-emption matters are required to be disposed of accordingly.

Faced with this position, the appellants/petitioners contended that the SAB had no jurisdiction to initiate suo moto Shariat review proceedings to clarify its earlier verdict given in Said Kamal Shah case. This argument, however, had already been responded in the said suo moto Shariat review petition. It had been held that the Shariat Appellate Bench of the Supreme Court is and remains a bench of the Supreme Court. Therefore, the SAB had jurisdiction to initiate suo moto Shariat review proceedings under article 188 of the Constitution as any other bench of the Supreme Court could exercise this jurisdiction.

In these circumstances, the Supreme Court dismissed the constitutional petition, both the appeals and all the review petitions. The Court was pleased to observe that the order of the SAB in suo moto Shariat review proceedings is an order passed by a court of competent jurisdiction. In the presence of such an order no court or tribunal including the Supreme Court can properly exercise

[400] In Re: Said Kamal Shah, PLD 1990 Supreme Court 865

any jurisdiction or power regarding any matter which is within the power or jurisdiction of the SAB. The Supreme Court, therefore, cannot enforce any claim or grant any relief that is based on the non-existent provisions. The Court making a reference to the order of the SAB in suo moto Shariat review petition said:

> The above order having been found to have been competently passed no Court or Tribunal including Supreme Court can entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court. Hence we cannot go into the correctness or otherwise of the decision of the Shariat Appellate Bench or vary in any way its order that it shall have effect as from 31.07.1986[401].

On the basis of the above observation of the Supreme Court in Mst. Aziz Begum case, Syed Riaz-ul-Hassan Gilani formed the above discussed arguments in Zaheeruddin case. However, the analysis of the circumstances of Mst. Aziz Begum case and the above observation made therein reveal that the arguments of the leaned counsel are not well formed. Both the cases are distinguishable on facts as well as circumstances.

The fundamental rights jurisdiction is altogether a different jurisdiction. It should be noted that under the scheme of the Constitution, a law can only validly remain on the statute book if it passes two tests. One test is with respect to the fundamental rights while the other is with respect to the injunctions of Islam. Thus, a law must neither be inconsistent with the fundamental rights nor repugnant to the injunctions of Islam. Both these tests must be passed simultaneously but separately. It means that passing one test does not make the other test inapplicable. It is so because each test is to be applied by a distinct court exercising its own jurisdiction.

There is only one possibility that a law can still be a valid law even if it does not pass these tests or either of them. In such a case, the law must be given protection under clause 3 of article 8 to

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[401] Mst. Aziz Begum and others versus Federation of Pakistan and others, PLD 1990 Supreme Court 899, 909

avoid the inconsistency with the fundamental rights test or it must be excluded from the definition of law as provided in article 203B(c) to avoid the test of repugnancy with the injunctions of Islam. Here comes the application of articles 189 and 203GG of the Constitution and the same is analysed after concluding Zaheeruddin case.

In Zaheeruddin case the impugned Ordinance having been declared a valid law by the FSC and maintained by the SAB was challenged being inconsistent with the fundamental rights. It means the Ordinance had successfully passed one test but was still to pass the other. In these circumstances, the judgment of the FSC and the SAB cannot bind the Supreme Court sitting in other jurisdiction. On the other hand, in Aziz Begum case the provisions of the pre-emption law did not pass the test of repugnancy with the injunctions of Islam and thus failed at this stage. These provisions, therefore, could not be enforced.

Finally, before reverting to Zaheeruddin case, the constitutional petition No. 1-R of 1988 is analysed briefly. In this petition, the petitioners claimed that they have a fundamental right to get their pending cases decided in accordance with the provisions of Section 15 of the Punjab Pre-emption Act, 1913. This fundamental right is based on article 25 providing equal protection of law to all the citizens. However, the above analysis shows that in 1988 Section 15 of the said Act had ceased to have effect. Therefore, leaving apart other requirements of article 184(3), the relief claimed by the petitioners could not be provided to them. Consequently, the fate of the said petition was not different from other cases.

In the following lines, the majority and minority opinions in Zaheeruddin case and the exercise of jurisdiction by the FSC in Mujibur Rehman case with respect to the fundamental rights discussed above are analysed. A thorough reading of Mujibur Rehman case reveals that the FSC not only applied the repugnancy test of the injunctions of Islam on the provisions of the

impugned Ordinance but also the inconsistency test of the fundamental rights. At pages 120 to 122 of the judgment the impugned Ordinance was evaluated in the light of article 20 of the Constitution. In this regard, the FSC held that the impugned Ordinance is covered by the exception provided in this article with respect to maintenance of public order and law. To this extent, the FSC erred in giving its judgment. It is well known that the FSC does not enjoy jurisdiction to determine the fate of a law on the touch stone of the fundamental rights. This jurisdiction is enjoyed by a High Court and the Supreme Court under articles 199 and 184(3) respectively. It leads to the obvious conclusion that the last mentioned courts can exercise jurisdiction to apply the fundamental rights test even where the FSC or the SAB has already applied the repugnancy test of the injunctions of Islam. That is why Shafiur Rehman J. had to say that the respondents mainly argued their case on a wrong assumption. They could not differentiate between the forums of attack on the Ordinance. The forum for the vires of the Ordinance with respect to the injunctions of Islam is the FSC where the case is to be argued in the light of the injunctions of Islam and not in that of the fundamental rights. While in the present case the forum for the vires of the Ordinance with respect to the fundamental rights is the Supreme Court where the case is to be argued in the light of the fundamental rights and not in that of the injunctions of Islam. This was remarked by Shafiur Rehman J. in the following words:

> Our difficulty in handling these appeals has been that the respondents have by and large argued the matter as if the vires of the impugned portions of the ordinance are being tested for their inconsistency more with injunctions of Islam than for their inconsistency with the Fundamental Rights. This has brought in religious scholars volunteering to assist the Court generating lot of avoidable heat and controversy at the argument and post argument stage[402].

[402] Zaheeruddin and others versus the State, 1993 SMR 1718 [Supreme Court of Pakistan], 1756

The majority opinion seems to have considered this point too. It is perhaps for this reason that the majority opinion was by and large based on pure merits of the case.

It should be noted that article 203G does not create any obstacle in the exercise of jurisdiction by the Supreme Court under article 184(3) of the Constitution. Because the bar created by article 203G on the exercise of jurisdiction by the Supreme Court or a High Court is limited to matters within the power or jurisdiction of the FSC. This provision, therefore, implies that the Supreme Court or a High Court are barred from exercising jurisdiction to determine the vires of a law on the touch stone of the injunctions of Islam. On the other hand, the FSC, as is known, has not been vested with the jurisdiction to decide the vires of a law on the touch stone of the fundamental rights under any legal or constitutional provision. Hence, it is misapprehended that article 203G on its own creates a legal obstacle in the exercise of jurisdiction by the Supreme Court under article 184(3). In fact, this issue came to surface because of the above analysed observations made by Abdul Qadeer Chaudhry J. in Zaheeruddin case.

As far as article 203GG is concerned, its application is that the decision of the FSC is binding on all courts to the extent it determines the vires of a law on the touch stone of Islamic injunctions. Thus, where the FSC determines that a certain law is repugnant to the injunctions of Islam hence void, its decision will be binding on all courts. No court including the Supreme Court or a High Court will have jurisdiction to enforce the provisions of that particular law because that law will cease to have effect as soon as the decision of the FSC takes effect. Moreover, the fundamental rights perspective of that law need not be determined since it has failed to pass the first test so the second test need not be applied. It should be noted, however, that it is true only where the exercise of jurisdiction is proper[403].

[403] Proper exercise of jurisdiction in the present context means that the FSC has determined the vires of a law which has not been excluded from the definition of law under article 203B(c).

On the other hand, if the FSC declares a particular law not to be repugnant to the Islamic injunctions, the decision of the FSC will still be binding. However, the effect of this binding decision will be different from the one discussed in the above paragraph. In this case, the law has successfully passed the first test; therefore, neither the Supreme Court nor a High Court will have jurisdiction to declare that law void being repugnant to the injunctions of Islam. However, the other test i.e. the fundamental rights test still remains to be applied. In case, that law fails the second test, it will cease to have effect being ultra vires of the Constitution. In this case, the decision of the court will be binding on the FSC pursuance to article 201 or article 189 as the case may be.

The above analysis may suggest that the two tests prescribed for the validity of a law are of equal force. It is correct to a certain extent but it is not the whole truth. There is a very fine difference between these two tests. This difference pertains to the difference in the powers, functions and jurisdiction of the courts applying these tests[404].

The Supreme Court applying the fundamental rights test has twofold jurisdiction under article 184(3). One aspect of this jurisdiction is the power of the Court to declare a law void being repugnant to the fundamental rights. The other aspect of this jurisdiction is that the Court can redress the violations of the fundamental rights provided by the Constitution and enforce the same. Moreover, being the apex court and the guardian of the Constitution, the ultimate right of interpretation of a constitutional provision rests with the Supreme Court. Thus, the Supreme Court cannot allow rendering a constitutional provision redundant.

The FSC, on the other hand, applying the Islamic injunctions test is vested with jurisdiction under article 203D only to determine the vires of a law on the touch stone of the injunctions of

[404] The fundamental rights test can be applied by the Supreme Court as well as a High Court. Nonetheless, in the context of present research the analysis is restricted only to the jurisdiction of the Supreme Court.

Islam. Nowhere in the Constitution is provided a set of Islamic injunctions to be enforced by the FSC. Likewise, article 203B(c) excludes the Constitution from the definition of law in respect of which the FSC has to exercise all its powers and jurisdiction.

What follows from the above discussion and analysis is that a law declared void by the Supreme Court under article 184(3) being inconsistent with the fundamental rights cannot be upheld by the FSC or the SAB under chapter 3A in any case. On the contrary, a law declared void by the FSC under article 203D or by the SAB under article 203F being repugnant to the injunctions of Islam can still be upheld by the Supreme Court if the following conditions are present:

i. The FSC or the SAB has exercised jurisdiction under article 203D or 203F respectively with respect to a law not covered by the definition of law as provided in article 203B(c).

ii. The exercise of jurisdiction by the FSC or the SAB has made one or more articles of the Constitution redundant.

iii. The law in respect of which jurisdiction has been exercised is essentially required for the enforcement of the fundamental rights.

In the above circumstances, the decision of the FSC or the SAB will amount to coram non judice and to have been taken without jurisdiction thus per incuriam. Consequently, the Supreme Court will be fully entitled to exercise jurisdiction to set aside the effects of the judgment of the FSC or the SAB and make the entire provisions of the Constitution effective. Similarly, the other requirements of article 184(3) are also satisfied in the above circumstances. The promulgation of a law essentially required for the enforcement of the fundamental rights clearly suggests that the matter involves questions of public importance related to the enforcement of the fundamental rights.

Finally, the effects of the judgment of the SAB in Qazalbash Waqf case on the exercise of jurisdiction under article 184(3) by the Supreme Court to redress the violations of the agricultural tenants and other village classes are analysed. The provisions of the Land Reforms Regulation, 1972 and the Land Reforms Act, 1977 which have been declared repugnant to the injunctions of Islam in this judgment can be classified into two categories i.e. the constitutionally protected provisions and the provisions which do not have such protection. The provisions pertaining to the fixation of ceiling on land-holding and those providing for inadequate compensation or no compensation at all for the surrendered land, for example, fall into the category of constitutionally protected provisions. While other provisions of the land reforms laws such as Paragraph 25(3) (d) of the 1972 Regulation providing the first right of pre-emption to the tenants with respect to land comprising the subject matter of tenancy fall into the second category.

In respect of the provisions which have no constitutional protection, the judgment of the SAB is final from all aspects and there is no room for interference by the Supreme Court[405]. On the other hand, in respect of the constitutionally protected provisions, the judgment of the SAB amounts to coram non judice and to have been delivered without jurisdiction thus per incuriam. All the above mentioned conditions which entitle the Supreme Court to exercise jurisdiction under article 184(3) are present with respect to these provisions.

Article 203B(c) excludes the Constitution from the definition of law. Therefore, the declaration of repugnancy by the SAB in respect of Paragraphs 8 and 10 of the 1972 Regulation and Section 3 of the 1977 Act and other provisions dealing with the compensation amounts to a declaration of repugnancy with respect to articles 253 and 24(3)(f) of the Constitution. It is so because the said provisions of the land reforms laws have been made under the specific mandate of these

[405] It should be noted, however, that the effects of the judgment of the SAB with respect to such provisions should be removed by adopting other legal means such as beneficial legislation for the tenants.

constitutional articles. The jurisdiction of the SAB is barred with respect to these provisions based on the principle "What cannot be done directly cannot be done indirectly". Hence the first condition mentioned above is satisfied.

Article 253 empowers the legislature to prescribe maximum limits as to the ownership and possession of the property. Moreover, any law increasing the ceiling already fixed by law is declared void. The judgment of the SAB has removed the ceiling on property. This has made articles 24(3) (f) and 253 redundant. It satisfies the second condition mentioned above.

The fixation of ceiling on property by law is essentially required for the elimination of landlordism which is a direct cause of the violation of the fundamental rights of a large number of disadvantageous people. The fundamental rights of these people cannot be enforced without such elimination. It satisfies the third condition required for the interference by the Supreme Court.

The above analysis of the judgment of the SAB in Qazalbash Waqf case and other relevant issues establishes that the Supreme Court can exercise jurisdiction under article 184(3) to set aside the effects of this judgment being per incuriam to the extent of the constitutionally protected provisions of the land reforms laws. To conclude this work, a comprehensive conclusion covering the whole research is drawn in the next and final part of this work.

CONCLUSION

This is the final part of this work. The above discussion and analysis of various issues, lead to the conclusion that, in the beginning, there was plenty of land available that could be cultivated. At that time all the rights in land belonged to the actual tiller of the soil. With the passage of time as the population increased, the urge for land to meet the requirements of life became more and more. For ages it was customary that the rulers were interested only in their share from the land in the form of land revenue. All other interests in land were that of the tillers of the soil. At the time of the advent of the English East India Company in the sub-continent the Mughal rulers were following this customary practice.

As the time passed, the English Company was granted the right of revenue collection from certain areas. This right was generally exercised through an intermediary between the Company and the peasants. It appears that the Company was solely interested in collecting as large revenue as possible by quick and expeditious methods. In 1793, Lord Cornwallis made a permanent settlement with the intermediaries and granted them proprietary rights in the soil on the English pattern. Thus, the rent collectors emerged as landlords and the peasants got the status of tenants under such landlords. This newly emerged class expressed its loyalty to the imperialists to gain more and more control over the land and the tenants. In consideration, the imperialists granted large areas of revenue free land to this class commonly known as *jagirs*.

At the time of independence of Pakistan, the landlords were the real owners of the land and they had nothing to give to anybody from the payments received by the tenants. Moreover, such landlords also started imposing other extractions on the tenants given the dependence of the latter on the former. Thus, the exploitative institution of landlordism and feudalism with all the social evils highlighted in the first chapter strengthened its roots.

This kind of land tenure was incompatible with the objectives and spirits of the newly born State whose birth was a result of the democratic efforts of the Muslims of the sub-continent. Even before the dream of independence came true, the miseries of tenants were realized by the great Quaid who ordered the formation of Sindh *Hari* Enquiry Committee. Similarly, after independence, land reforms remained a hot issue in the country. In this regard, the makers and framers of all the constitutions of the country ensured the inclusion of such provisions in these documents. Thus, we find express and explicit references to the eradication of social evils, promotion of social justice and economic well being of people including express mention of tenants.

Likewise, the legislature is empowered to prescribe maximum limits as to the ownership and holding of property. That is why major State institutions including the Parliament have endeavoured to ensure social justice and economic well being of people. The social evils created by landlordism and feudalism have been sufficiently addressed by making suitable laws. Much awaited land reforms were first introduced by General Ayub Khan in 1959. This was followed by the Martial Law Regime of Zulfiqar Ali Bhutto in 1972 and then by an elected Parliament in 1977.

The legislation in this regard was a real hallmark. The speeches made by several parliamentarians while debating the Land Reforms Bill, 1977 reveal that they are fully familiar with the problems of agricultural tenants and other classes of village community. It is obviously for this reason that all the bodies that were assigned the task of land reforms including the legislature have recommended the fixation of ceiling on land-holding.

However, the landlords dominated the ruling elite. In these circumstances, it was never easy to introduce land reforms with success in the country. This caused several problems in their proper

implementation. Nevertheless, to redress the grievances of the down trodden classes of the society till the fruits of these reforms could be fully enjoyed, the Constitution ensured the protection and enforcement of their fundamental rights. In this regard, the attitude of the superior courts has been remarkable. The liberal interpretation of various articles providing the fundamental rights by these courts has been very helpful in achieving the goals set out in the Objectives Resolution, 1949.

The courts have kept their eyes open in protecting natural and national resources, and checked every act of exploitation and forced labour brought to their notice. Their role in promoting democratic values is also commendable. In this regard, the courts have particularly sided with the poor, depressed and down trodden classes of the society. Consequently, any step or declaration that has the effect of making these laws void does not conform to the standards set by the Supreme Court and High Courts for the protection and enforcement of the fundamental rights.

The country was still struggling to implement these reforms in letter and spirit when General Zia-ul-Haq imposed Martial Law on 5th July 1977. In order to gain public sympathy for his extra-constitutional steps, the slogan of islamization was raised. Nonetheless, the makers of the Constitution had already sufficiently provided for a comprehensive mechanism for the islamization of laws in Pakistan. Moreover, the Constitution in its original scheme already provided for the practice of true Islamic values in all spheres of life.

The process of islamization of laws in Pakistan has been a prime concern of the framers of all the constitutions ever since the independence of Pakistan. The establishment of various bodies in the form of Commission, Organization for Islamic research, Advisory Council and the Council of Islamic Ideology indicate the intentions of the framers of the constitutions to help the Muslims of Pakistan to live their lives in accordance with the teachings of Islam.

In the presence of such provisions, the insertion of chapter 3A particularly with the non-obstante clause and that too by a Martial Law regime has hardly served any interest of Islam. Rather, it has resulted in some irreconcilable conflicts between constitutional provisions. The verdicts in Al-Jehad Trust case and the proceedings in riba case at different forums dealt under chapter 3A sufficiently support this contention[406]. The power vested under chapter 3A to determine the validity of a law on the touch stone of the injunctions of Islam was seen as a good opportunity by all those who were adversely affected by the land reforms.

The land reforms laws were, therefore, challenged under article 203D in the FSC. Nonetheless, the FSC did not side with the landlords. Consequently, the Shariat petitions challenging these laws were dismissed both on the issue of jurisdiction as well as on merits. On the other hand, the judgment of the SAB in Qazalbash Waqf case declaring the fixation of ceiling repugnant to the injunctions of Islam has made the entire process of land reforms controversial. It should be kept in view that the need for comprehensive land reforms has been acknowledged as one of the top priorities of all the constitutional regimes. This judgment has also made articles 24(3) (f) and 253 of the Constitution ineffective and inoperative. This is admittedly against the settled rules of interpretation of constitutional provisions.

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[406] Al-Jehad Trust through Raees-ul-Mujahidin Habib-ul-Wahab-ul-Khairi, Advocate Supreme Court and another versus Federation of Pakistan and others, PLD 1997 Supreme Court 84, Dr. Mahmood-ur-Rehman Faisal and others versus Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad and others, PLD 1992 FSC 1, Dr. M. Aslam Khaki versus Syed Muhammad Hashim and 2 others, PLD 2000 Supreme Court 225 [Shariat Appellate Jurisdiction], United Bank Ltd. versus Messers Farooq Brothers and others, PLD 2002 Supreme Court 800 [Shariat Review Jurisdiction].

Fortunately, the Supreme Court being the guardian of the Constitution has always insisted on the harmonious interpretation of the provisions of the Constitution. In this regard, the apex court has found means to save these provisions in one way or the other. It is by now settled law and practice that no provision of the Constitution should be rendered ineffective or redundant. The critical appraisal and analysis of the reasons given by different members hearing the cases concerning land reforms laws in the FSC, the SAB and the review petition determine that the SAB has not exercised jurisdiction in accordance with the Constitution to declare the impugned provisions of the land reforms laws repugnant to the injunctions of Islam hence void.

Besides, there is a clear difference of opinion among the judges upon the Islamic or otherwise character of these provisions. It has been pointed out under heading 3.2.9 above that if a law is declared repugnant to the injunctions of Islam under chapter 3A, a bar is created even on the exercise of jurisdiction by the Supreme Court to enforce the provisions of such law. The finality of the decision of the SAB in Qazalbash Waqf case coupled with the bar on the jurisdiction of the Supreme Court is considered one of the greatest legal obstacles in the way of land reforms. Nonetheless, the case has been decided by the SAB on the wrong assumption of jurisdiction. Moreover, the bar on jurisdiction of the Supreme Court mentioned above is required to be analysed in the light of the doctrine of *stare decisis*. Likewise, the fundamental rights perspective of the Qazalbash Waqf case is yet to be determined by the Supreme Court since the SAB lacks the jurisdiction to adjudicate upon this aspect of the case.

A critical analysis of the jurisdiction of the Supreme Court under article 184(3) read with article 187 substantiate the claim that the Supreme Court can exercise such jurisdiction to enforce the fundamental rights of the poor rural community associated with land. The Court while exercising such jurisdiction has taken up different issues. Many a times, investigation bodies and inquiry

commissions have been formed to determine disputed factual controversies. The procedure has been kept open to provide maximum possible relief according to the nature and circumstances of the case. Even the apparent bars on the exercise of jurisdiction have not precluded the Court from the enforcement of the fundamental rights. This is evident from the case of Iftikhar Muhammad Chaudhry[407].

Besides, the jurisdiction under article 184(3) can be exercised to declare a law void if the same is found to be inconsistent with the fundamental rights. Likewise, a law can also be declared void under chapter 3A if the same is held repugnant to the injunctions of Islam. According to the doctrine of precedent as provided in the Constitution and practiced in Pakistan, if a law is declared void under chapter 3A. such decision is binding on the Supreme Court. Consequently, the provisions of such a law cannot be enforced under ordinary circumstances after the decision under chapter 3A takes effect.

However, there is a fine difference between the declaration of a law being void under article 184(3) and chapter 3A. The Supreme Court is the highest judicial forum and the guardian of the Constitution. Resultantly, the right of final interpretation of a constitutional or legal provision lies with the Supreme Court. Similarly, it has been given powers to enforce a number of constitutional provisions provided in the form of the fundamental rights. On the contrary, there is admittedly no Islamic injunction that is to be enforced by any forum under chapter 3A.

In the light of above, the Supreme Court can set aside the effects of the judgment of the SAB in the Qazalbash Waqf case because of the following three reasons:

i. The land reforms laws have been promulgated to protect the fundamental rights of a vast majority of village population.

[407] Chief Justice of Pakistan Iftikhar Muhammad Chaudhry versus President of Pakistan through Secretary and others, PLD 2010 Supreme Court 61

ii. Any declaration that declares the fixation of a ceiling on land-holding repugnant to the injunctions of Islam amounts to rendering articles 24(3) (f) and 253 of the Constitution redundant, ineffective and inoperative.

iii. Neither the FSC nor the SAB can hold any provision of the Constitution redundant though it may actually be repugnant to any of the injunctions of Islam.

In these circumstances, the judgment of the SAB amounts to have been given without jurisdiction and without lawful authority thus per incuriam. It is high time that the Supreme Court played its constitutional role to redress the grievances of the poor rural community and enforce their fundamental rights.

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