Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973

What More is Required?

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You may be aware that the first article of the First Constitution of Pakistan 1956 provided that:

ARTICLE 1 —— PAKISTAN TO BE ISLAMIC REPUBLIC:

''1 (i) Pakistan shall be a Federal Republic to be known as the Islamic Republic of Pakistan.'' This Constitution of 1956 was abrogated on 7th of October, 1958 and Martial Law was imposed; and when, on 8th of June, 1962, Field Marshal Muhammad Ayub Khan, the Chief Martial Law Administrator, enforced his self-made Constitution, the word ''Islamic'' from its name was omitted. It was only named as ''Republic of Pakistan.'' However, when the first session of the National Assembly was convened at Dacca, on the move of the well-known member of Jama'at-e-Islami of the then East Pakistan, Barrister Akhtaruddin, the word ''Islamic'' was added before the word ''Republic of Pakistan'' and so by the first ''Constitution Amendment Act, 1963,'' Pakistan was again named as ''Islamic Republic of Pakistan.'' Its Islamic identification by its very name, as originally provided in the first Constitution of Pakistan 1956, made by the chosen representatives of both the wings of Pakistan, was thus restored. And since then, the name of this State continues to be ''the Islamic Republic of Pakistan.'' By the name itself it is plainly meant that this part of the land will be a cradle for Islamic democracy but the rulers of this Islamic Republic, whether elected or self-imposed, neither exhibited their knowledge of Islam nor Democracy as recognized by Islam.

ARTICLE 2 —— ISLAM TO BE STATE RELIGION:

Article 2 of the Constitution of Pakistan, 1973, for the first time provides that:

''2. Islam shall be the State religion of Pakistan.''

All Islam-loving people were very happy to find Islam to be the State Religion of Pakistan. But when this Article 2 came to be interpreted in the Court of Law, a Full Bench of the Sindh High Court comprising 5 judges, headed by its Chief Justice, held that:

> ''Article 2 is incorporated in the Introductory Part of the Constitution and as far as its language is concerned, it merely conveys a declaration. The question arises as to the intention of the Makers of the Constitution by declaring that ''Islam shall be the State Religion of Pakistan.'' Apparently, what the Article means is that in its outer manifestation the State and its Government shall carry an Islamic Symbol. This Article does not even profess that by its force, it makes Islamic Law to be the Law of the land.''

The Court further observed:

> ''... There is, therefore, no scope for the argument that Islamic Laws are to be enforced, in their entirety by virtue of Article 2 itself.'' (*Niaz Ahmed Vs. Province of Sindh* PLD 1977 Karachi 604 at pp. 648-49)

This judgment, to say the least, depicts Constitutional constraints of our Courts, while interpreting Article 2 of the Constitution.

ARTICLE 2A —— PRINCIPLES AND PROVISIONS SET OUT IN THE OBJECTIVES RESOLUTION TO BE EFFECTIVE PART OF THE CONSTITUTION:

This Article was added on 2nd March, 1985, to the original 1973 Constitution, by the late General Muhammad Zia-ul-Haque, the then President and Chief Martial Law Administrator by President's Order No. 14 of 1985 dated 2nd March, 1985. It reads as under:

> 2A. The principles and provisions set out in the Objectives Resolution reproduced in the Annex are hereby made substantive part of the Constitution and shall have effect accordingly.

In order to give background of the insertion of the above Article 2A, it may be added that the First Constituent Assembly, created under the Indian Independence Act 1947, to frame a Constitution for Pakistan, as an independent State, passed on 12th March, 1949, a historic resolution called the ''Objectives Resolution'' which, inter alia, laid down the parameters of the future Constitution of Pakistan to be framed by the Constituent Assembly.

Unfortunately, Constitution-making was delayed for various reasons which need not detain us here. The First Constitution was, however, promulgated on 23rd March, 1956, and the Objectives Resolution was made as its Preamble only, and it continued to be so in 1962, 1972 and 1973 Constitutions. It was General Zia-ul-Haque who made the Objectives Resolution as substantive part of the Constitution by inserting Article 2A therein, for the observations made by the late Chief Justice Hamoodur Rahman in *Ziaur Rehman's* case (PLD 1973 SC 49) on the question of the legal effect of the Objectives Resolution then incorporated as preamble to the Constitution of 1956 and 1962 and later on, in interim and Permanent Constitutions of 1972 and 1973 respectively.

In the case of State Vs. Zia-ur-Rahman (PLD 1973 SC 49) regarding the Objectives Resolution, Chief Justice Hamoodur Rahman observed that:

> ... 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.

So, in short, this was the background, among other things, that General Zia-ul-Haque incorporated the principles and provisions set out in the Objectives Resolution as substantive part of the Constitution and made them effective accordingly.

This Article 2A came up for consideration in several judgments of the High Courts of Sindh and Lahore as well as Supreme Court of Pakistan. Perhaps, the last of such judgments, wherein the effect of Article 2A was discussed in detail, is that of the Supreme Court reported as *Hakim Khan and Others* Vs. *Govt. of Pakistan and Others* (PLD 1992 Supreme Court 595) decided in July, 1992 on appeal from Full Bench Judgment dated 14.1.1992 of the Lahore High Court reported as ''*Sakina Bibi* Vs. *Federation of Pakistan* (PLD 1992 Lahore 99). The point at issue directly involved in the case was

whether Article 45 of the Constitution empowering the President of Pakistan to grant pardons, contravenes, in some respects, the Injunctions of Islam and if so, can it be struck down as repugnant by virtue of Article 2A or not? The High Court held it to be so. The Supreme Court in Hakim Khan's case while examining Articles 45 and 2A accepted the appeal against the said Judgment of the Lahore High Court and observed that:

> ...in the instant case, if the High Court considered that the existing provision of Article 45 of the Constitution contravened the Injunctions of Islam in some respects it should have brought the transgression to the notice of the Parliament which alone was competent to amend the Constitution, and could initiate remedial legislation to bring the impugned provision in conformity with the Injunctions of Islam.

Mr. Justice Dr. Nasim Hassan Shah, who headed the Bench, restricting to the main issue, held that a provision of the Constitution cannot be tested on the touchstone of Article 2A of the Constitution. Mr. Justice Shafiur Rehman, however, went a step further while observing that even a law, as to its repugnancy, cannot be tested on the touchstone of Article 2A of the Constitution and even if found repugnant to the principles and provisions set out therein, cannot be struck down.

With due respect, my impression is that the Hon'ble Supreme Court has sidestepped the issue by saying ''let Parliament do it.'' It should have examined the inconsistency between the two Articles, and if it upheld the finding of the High Court as to the repugnancy, it should have declared Article 45 as repugnant to Article 2A to the extent of such repugnancy and it should not have left the matter to the legislature alone. It is worthy to note that the entire Resolution, as such, has not been made part of the Constitution. It is only the principles and provisions of the Objectives Resolution which have been made operative by virtue of Article 2A. Perhaps, this fact was not brought to the notice of the Hon'ble Supreme Court. This may, perhaps, be one of the reasons that the matter was left to the Legislature alone, as is apparent from the Resolution, reading it as a whole. However, in my humble view, a High Court is empowered to declare repugnancy of a provision of the Constitution or law and strike it down on the basis of Article 2A, and then it may advise the Legislature to re-enact the same. The two provisions, inconsistent with each other, cannot be allowed to exist as equally operative, if the question is agitated before the Court.

According to the present view of the Honourable Supreme Court, the principles and provisions set out in the Objectives Resolution even after they have become part of the Constitution by virtue of Article 2A is devoid of any practical value. According to them, its value is that of an abstract declaration which is useless, unless there exist the wheel and the means to make it effective. With due respect, I beg to differ. If the view expressed in Hakim Khan's case is accepted that Article 2A is not self-executory in nature, and will require another statute to bring it into action, it negates the well-recognized and very widely known principle of the interpretation of every country's Constitution that any law repugnant to the Constitution is void. The reasoning, that since there is no indication in the Constitution that the violation of the principles and provisions of the Objectives Resolution as made effective under Article 2A, will not automatically come into play without a law, is hardly acceptable. Analogy has been sought from Article 8 which specifically provides that any law contrary to the fundamental right is void. In fact, there was no need for making a specific provision that a law coming into conflict with the fundamental right will be void to be provided in the Constitution.

It is inherent in itself (see American Constitution) that any law which is repugnant to any provision of the Constitution is void and the fundamental rights being also part and parcel of the Constitution the same rule will apply to them without making a specific provision for the same. Putting the question on the reverse, suppose there is no declaration in the Constitution that a law against the fundamental right guaranteed by the Constitution will be void, what will be its effect? Will the Courts not strike down the law if it comes into conflict with the fundamental right conferred and guaranteed by the Constitution? Certainly, they will not refuse to do so. Therefore, no such express provision in the Constitution is required to declare a law found against the fundamental right as void. Similarly, if a law passed by an Assembly not properly constituted, will the Courts abstain themselves from declaring as void the said law passed by the so-called Assembly? The Constitution is the Supreme Law. It controls the entire legislative activity and whatever law is brought into force it is to be in line with the fundamental law of the country, i.e. the Constitution, otherwise the whole scheme of things provided in the Constitution will become superfluous.

I regret to say that after reading the Judgment in *Hakim Khan's* case the impression about the effect of Article 2A of the Constitution that one gets is that Article 2A appears to be simply a decoration piece of legislation, as it lacks enforceability. The Honourable Supreme Court has shown its inability to declare Article 45 as repugnant to the Injunctions of Islam —— laid down in the Qur'an and *Sunnah* in terms it is couched in Article 2A, being itself the creation of the said Constitution. Maintaining its absolute neutrality, the Supreme Court feels satisfied to leave the matter to the Parliament without giving any finding whether there existed any repugnancy in Article 45 of the Constitution to the principles and provisions as set out in the Objectives Resolution now made an effective part of the Constitution under Article 2A.

It is respectfully submitted that no proper appreciation was made by the learned Judges of the Supreme Court that the principles and provisions (only) of the Objectives Resolution by virtue of Article 2A have been an effective and operative part of the Constitution. Otherwise there was hardly any justification to insert Article 2A to burden the Constitution at all. May I ask, with all humility at my command, had the law-makers intended to make the principles and provisions set out in the Objectives Resolution an operative part, what other words would have been appropriate or necessary to do so in place of what has been used here? The law-makers were not involved in an exercise in futility.

In furtherance of my view as expressed above, I may seek aid from the majority judgment dated 3.7.1993 written by Mr. Justice Abdul Qadeer Chaudhary (now retired) in *Qadiani's* case reported as *Zaheeruddin and others* Vs. *State* (1993 SCMR 1718), wherein the learned Judge observed that:

> It was for the first time in the Constitutional history of Pakistan, that the Objectives Resolution, which henceforth formed part of every Constitution as a preamble, was adopted and incorporated in the Constitution in 1985, and made its effective part. This was an act of the adoption of a body of law by reference, which is not unknown to the lawyers. It is generally done whenever a new legal order is enforced. Here in this country, it had been done after every Martial Law was imposed or the Constitutional Order restored after the lifting of Martial Law. The legislature in the British days had also adopted the Muslim and other religious and customary laws, in the same manner, and they were considered as the positive laws.

The learned Judge further observed:

> It is thus clear that the Constitution has adopted the Injunctions of Islam as contained in Qur'an and *Sunnah* of the Holy Prophet as the real and the effective law. In this view of the matter, the Injunctions of Islam as contained in Qur'an and *Sunnah* of the Holy Prophet are now the positive law. The Article 2A made effective and operative the sovereignty of Almighty Allah and it is because of that Article that the legal provisions and principles of law, as embodied in the Objectives Resolution, have become effective and operative. Therefore, every man-made law must now conform to the Injunctions of Islam as contained in Qur'an and *Sunnah* of the Holy Prophet (p.b.u.h). Therefore, even the Fundamental Rights as given in the Constitution must not violate the norms of Islam.

I may, therefore, conclude the discussion on the point of the enforceability of Article 2A through Courts of law, by adding that the principles and provisions set out in the Objectives Resolution by virtue of article 2A furnish an example of Legislation by Reference and have the potential of being positive Constitutional Law and thus the provisions, in case of contrariety, shall be held as repugnant.

Now, to end with this discussion, the purpose of insertion of Article 2A, is the enforcement of the Qur'an and *Sunnah* through Courts of Law within the framework of the principles and provisions of the Objectives Resolution. It is, therefore, very humbly submitted that the fundamental purpose and spirit of the Constitution must not be lost sight of. It should not be construed so as to avoid the higher norm deducible from the fundamental theme which is the significant feature of our Constitution of 1973.

However, the judgment of the Supreme Court as pronounced in *Hakim Khan's* case still holds the field. It, therefore, seems imperative that the parliament in order to uphold the supremacy of the Qur'an and *Sunnah* makes the following amendments in Article 2A:

(i) The phrase ''notwithstanding anything contained in the Constitution'' be added to Article 2A.

(ii) In order to remove any ambiguity, a new clause 2B be inserted in the Constitution as under:

''2B. Any provision of the Constitution or law or any custom having the force of law found inconsistent with the principles and provisions set out in the Objectives Resolution reproduced in the annex shall, to the extent of such inconsistency, be void.''

I may here venture to remind the Hon'ble Prime Minister, Muhammad Nawaz Sharif, of his speech made by him on 10th of April 1991 on the floor of the Parliament while moving the Enforcement of Shariat Bill, 1991, that the Constitution will be amended so as to make the Qur'an and *Sunnah* to be the Supreme Law of the land. Perhaps, at that time, he did not have the full support. But now Allah the Almighty has given to him three-fourth majority in the Parliament, and he may easily fulfil his promise to the nation made by him some six years ago.

ARTICLES 31, 37 (h), 38 (f) & 40 —— PRINCIPLES OF POLICY OF THE STATE:

The Constitution under Chapter 2 lays down certain principles of policy of the State, such as Article 31 provides that the steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam, according to the Holy Qur'an and *Sunnah*.

Article 37 (h) casts a duty on the State to prevent the consumption of alcoholic liquor other than for medicinal and, in case of non-Muslims, religious purpose. Article 38 (f) casts a duty on the State to eliminate *Riba* as early as possible. Article 40 provides for strengthening bonds with Muslims and promotion of international peace.

But this very Chapter of the Constitution itself provides that:

> ''the responsibility of deciding whether any action of an organ or authority of the State, or of a person performing functions on behalf of an organ or authority of the State, is in accordance with the Principles of Policy is that of the organ or authority of the State, or of the person, concerned.'' (Article 30 (1))

It further provides that

> ''the validity of an action or of any law shall not be called in question on the ground that it is not in accordance with the Principles of Policy, and no action shall lie against the State, any organ or authority of the State or any person on such ground.'' (Articles 30 (2)).

With the result that the Principles of Policy, however, solemn or sacrosanct they may appear to be, are not justiciable through Courts of Law, as also held by our superior Courts to be so.

Late Justice M. Munir, a former Chief Justice of Pakistan, in his Commentary on the Constitution of Pakistan 1962 (p. 215) while discussing the Principles of Policy has observed that:

> ''It is usual in constitutional instruments to set out the aims and objects of the State. The part of the Constitution in which they are stated is a sort of manifesto of the Constitution-makers, and, except where a strong ideological party controls the Government from outside, such declarations remain as dead as the manifestos of demagogues after elections.''

ARTICLE 41 (2), 62 (d), 62 (e), & 62 (h) —— QUALIFICATIONS OF THE MEMBERS OF THE ASSEMBLY:

The Constitution by Article 41 (2) provides that: ''a person shall not be qualified for election as President unless he is a Muslim....'' Article 62 (d) then provides that a person shall not be qualified to be elected or chosen as a Member of Majlis-i-Shoora (Parliament) unless ''he is of good character and is not commonly known as one who violates Islamic Injunctions.'' Article 62 (e) prescribes as one of the conditions for a Muslim to be elected or chosen as a member of Majlis-i-Shoora (Parliament), that he has adequate knowledge of Islamic teachings and practises obligatory duties prescribed by Islam as well as abstains form major sins.''

The provisions of Article 62 (along with Article 63 regarding Disqualification and Article 113 regarding application thereof to the members of the Provincial Assemblies) came up for examination before the Federal Shariat Court in the case reported as *Muhammad Salahuddin* (editor of weekly Takbeer) Vs. *Govt. of Pakistan* (PLD 1989 FSC) wherein it was, inter alia, observed that the spirit of the Qur'anic Injunctions has been embodied into the Constitution's Article 62 and 63 (along with Section 99 of the Peoples Representation Act) for their enforcement but the law (in practice) has been made a mockery. The judgment underlined a number of suggestions for the proper scrutiny of the candidates and the enforcement of the provisions of law. The then Government, instead of giving due consideration and effect to the suggestions and findings of the Federal Shariat Court, filed an appeal against the said judgment before the Shariat Appellate Bench of the Supreme

Court where the said appeal is lying dormant for about eight years, along with several other appeals against the judgments of the Federal Shariat Court in some other important matters, which are also pending since long.

In the recent general elections, there has been much hue and cry in the public about the scrutiny of the candidates of the National and Provincial Assemblies as provided under Article 62 but the persons holding top positions showed their apathy towards it and termed the provisions as unworkable, rather impracticable. But the said Government functionaries avoided the hearing of the appeal before the Shariat Appellate Bench against the said Judgment of the Federal Shariat Court. They also failed, rather neglected to frame a proper law for the same. One may very well construe the meaning and purpose of such acts and omissions of all concerned.

ARTICLE 227-230 —— THE COUNCIL OF ISLAMIC IDEOLOGY:

These provisions relate to the establishing of a Council of Islamic Ideology under the Constitution of 1973. Earlier, the Constitution of 1956 (Chapter 1 of part XII) contained two Islamic provisions, namely Article 197 and Article 198. Article 197 required the President to set up an Organization for Islamic Research and Instructions in advanced studies to assist in the re-construction of Muslim society on truly Islamic basis. Article 198 provided that no law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and *Sunnah*, and that the existing laws shall be brought in conformity with such Injunctions. The second clause of Article 198, however, provided that the effect shall be given to the above requirement as to the law-making in the manner indicated in the third clause of the Article. This clause of the Article enjoined upon the President to appoint a commission to make recommendations as to the measures for bringing existing laws in conformity with the Injunctions of Islam and the stages by which such measures shall be brought into effect. The Commission was also made responsible to compile in a suitable form, for the guidance of the National and Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

Mr. A. K. Brohi observed that:

> ''The overall effect of this Article was that the Legislature was supreme inasmuch as a law passed in contravention of the requirement of Article 198 could not be successfully challenged in a Court of Law, nor a writ of Mandamus could lie to compel the Executive or the Legislature to bring existing laws in conformity with the Injunctions of Islam.'' (Reference may be made to Brohi's Fundamental Laws of Pakistan, p. 782).

However, one day before the expiry of one year's time fixed in the Constitution, a Chairman of the above Commission was named by the then President of Pakistan, but no members were appointed nor any step taken to achieve the objectives indicated in Article 198.

In fact, before any beginning could be made in this direction, the said Constitution of 1956 was abrogated by the proclamation made by Iskandar Mirza, the then President of Pakistan, on 7th October, 1958, with General Muhammad Ayub Khan, Commander-in-Chief of Pakistan Army, as Chief Martial law Administrator.

Ayub Khan assumed the office of President of Pakistan and imposed on the country his self-made Constitution in 1962. In that Constitution, however, the setting up of an Advisory Council of Islamic Ideology was provided for in place of the Commission, as aforesaid.

Articles 199 to 203 of the Constitution of 1962 provided for the formation of the Council of Islamic Ideology, its constitution,

appointment of its members and term of their office, as well as that of the Chairman.

Article 204 provided that the functions of the Council shall be:

> (a) to make recommendations to the Central Government and the Provincial Governments as to means of enabling and encouraging the Muslims of Pakistan to order their lives in all respects in accordance with the principles and concepts of Islam, and to examine all laws in force immediately before the commencement of the Constitution (First Amendment) Act, 1963, with a view to bring them into conformity with the teachings and requirements of Islam as set out in the Holy Qur'an and *Sunnah*; and
>
> (b) to advise the National Assembly, a Provincial Assembly, the President or a Governor on any question referred to the Council, that is to say, a question as to whether a proposed law is or is not repugnant to the teachings of Islam as set out in the Holy Qur'an and *Sunnah*.

Under the Article 205, it was made incumbent on the Council that:

> not later than the 15th day of January in each year it shall prepare a report in regard to its proceedings during the year ending on the previous 31st day of December and submit the same to the President, who shall cause it to be laid down before the National Assembly.

Article 206 names the Council as ''Advisory Council of Islamic Ideology.'' Article 207 relates to establishing an ''Islamic Research Institute.'' Under the Rules of Procedure, it was provided later on that the Council was to seek opinion of the Institute on references received from the Government etc., on Islamic issues.

The Late Chief Justice M. Munir in his commentary on the Constitution of Pakistan, 1962, observed that the provision of law-making concerning Islam, as envisaged in 1962 Constitution, was ''merely illusory.'' In his own words:

> It remained merely as a statement of the position about Islam as a sort of manifesto of Constitution-makers. In fact, it proved to be a dead letter of the Constitution. So far as the Court's jurisdiction to declare a law as repugnant to Islam was concerned, it was denied to them.

The Constitution of 1962 was abrogated in 1969 and a permanent Constitution was passed by the collective will of the people of Pakistan expressed through their chosen representatives, in August, 1973. This Constitution, too provided that ''all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and *Sunnah*,'' and that ''no law shall be enacted which is repugnant to such Injunctions.'' A Council for Islamic Ideology (the word ''Advisory'' having been dropped) was also provided for and unlike the previous Constitution, a time-limit of 9 years, in all, was fixed to bring all the existing laws in conformity with the Qur'an and *Sunnah* (Articles 227-30).

The entire Part IX (Articles 227 to 230) of the Constitution is devoted to the process of Islamization, which is evident from the very fact that the Part has been named as ''Islamic Provisions.'' Article 227 (1) provides that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Qur'an and *Sunnah*. Sub-article (2) of Article 227 provides that no law, which is repugnant to such Injunctions, shall be enacted. An explanation to clause (1) to this Article added by Constitution (Third Amendment) Order 1980 (P.O. No. 2 of 1980) with effect from September 17, 1980, provides that in the application of clause (1)

of Article 227 to the personal laws of any Muslim sect the expression ''Qur'an and *Sunnah*'' shall mean the Qur'an and *Sunnah*, as interpreted by that sect. Article 228 provides for the constitution and composition of the members of the Council of Islamic Ideology by the President who shall ensure, as far as practicable, that various schools of thought are represented in the Council. Article 229 provides for making a reference to the Council by the President of Pakistan or the Governor of Province or by a House or a Provincial Assembly, if two-fifth of its total membership so requires, for advice as to whether a proposed law is or is not repugnant to the Injunctions of Islam.

Article 230 states the Islamic Council's functions which are enumerated as under:

> (1) The functions of the Islamic Council shall be:
>
> (a) to make recommendations to Majlis-e-Shoora (Parliament) and the provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur'an and *Sunnah*;
>
> (b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;
>
> (c) to make recommendations as to the measures for bringing existing laws into conformity with the Injunctions of Islam and the stages by which such measures should be brought into effect;
>
> (d) to compile in a suitable form, for the guidance of Majlis-e-Shoora (Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

Article 230 further provides that:

> ''(2) When, under Article 229, a question is referred by a House, a Provincial Assembly, the President or a Governor to the Islamic Council, the Council shall, within fifteen days thereof, inform the House, the Assembly the President or the Governor, as the case may be, of the period within which the Council expects to be able to furnish that advice.
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> (3) Where a House, a Provincial Assembly, the President or the Governor, as the case may be, considers that in the public interest, the making of the proposed law in relation to which the question arose should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished, provided that, where a law is referred for advice to the Islamic Council and the Council advises that the law is repugnant to the Injunctions of Islam, the House or, as the case may be, the Provincial Assembly, the President or the Governor shall reconsider the law so made.
>
> (4) The Islamic Council shall submit its final report within seven years of its appointment, and shall submit an annual interim report. The report, whether interim or final, shall be laid for discussion before both Houses and each Provincial Assembly within six months of its receipt, and Majlis-e-Shoora (Parliament) and the Assembly, after considering the report, shall enact law in respect thereof within a period of two years of the final report.

As would appear from the provisions quoted above, the Council holds an advisory capacity; its recommendations are to be placed before both the Houses and each Provincial Assembly and these shall enact laws in respect thereof. As provided in Article 227 (2), the existing laws are to be brought in conformity with the Injunctions

of Islam, as mentioned in Clause (1) only in the manner provided in part IX. It seems to me that the Council may recommend the transformation of laws either in the form of a simple recommendation or a draft law and submit an interim annual report or final report. It, therefore, implies that the Council will forward its annual reports which may be deemed to be the interim reports and they will be considered by the two Houses and each Provincial Assembly within six months of their receipt, and whatever objections are raised or explanations are sought or questions are asked the Council will, then, submit its final report keeping in view the objections by the Assembly involving reconsideration by the Council on the points raised on matters covered by that annual interim report. It will be then re-submitted by the Council as final report, and the Parliament will enact laws in respect thereof, as provided in Article 230 (4) quoted above, within the next two years. Thus, as provided under Article 227 (2), it is the business of the Legislature only to enact and promulgate laws in conformity with the Injunctions of Islam, as laid down in the Qur'an and *Sunnah* but a glance through the legislative history reveals that the authority of the Parliament or the Provincial Assembly as envisaged under the Islamic Provisions in Chapter IX, has seldom been exercised. This, at least, is certain by their working during 1962-1977 as no law appears to have been brought in conformity with Islamic Injunctions, in the light of the reports of the Council submitted to the Government of Pakistan which, again, appears to have been seldom laid before the National and Provincial Assemblies. Let me quote from the Book ''Reflections of Islam'' by late Justice Hamoodur Rehman, former Chief Justice of Pakistan (Lahore: 1983, pp. 119-20). The learned author who also happened to be the Chairman of the Council during 1974-77, referring to the setting up of the Advisory Council of Islamic Ideology under the Constitution of 1962, stated:

> Then came the 1962 Constitution of Field Marshal Ayub Khan. This too retained the Objectives Resolution as its preamble, repeated the prohibition against making of laws inconsistent with the injunctions of Islam and directed that existing laws should be brought into conformity with such injunctions. These, however, were made principles of State policy. The validity of an action or law not in accordance with these principles could not be called in question in any Court. The Commission under the 1956 Constitution was replaced by a Council of Islamic Ideology whose functions were more or less similar to those of the Commission but the Council was required to submit annual reports to the President with regard to its proceedings and the latter was to cause them to be presented before the National Assembly.
>
> Such a Council was set up and it functioned till the second Martial Law in 1969 but none of its reports, I understand, were presented to the National Assembly.• The Second Martial Law abrogated the 1962 Constitution. No new Council was set up. No further steps were taken for Islamization until 1974. Similar provisions are to be found in the interim Constitution of 1972 and the Constitution of 1973. A new Council of Islamic Ideology was set up in February, 1974, with a term of three years. It was required to complete its task within seven years. The tasks assigned to it were the same as those assigned to the Commission under the 1956 Constitution and in addition it was called upon to make recommendations as to the ways and means of enabling Muslims in their individual and collective capacity to order their lives in accordance with the principles and concepts of Islam. It had also an advisory jurisdiction. If a question arose as to whether a law proposed to be enacted was in conflict with the injunctions of Qur'an

• To my knowledge, one report for the year 1966 was laid before the National Assembly (T.R)

and *Sunnah* it had to be referred to the Council for its opinion, only if a fixed number of members insisted.

The Council submitted its first interim report under clause (4) of Article 230 of the Constitution direct to the Speakers of the respective Assemblies for being laid before the Assemblies. It was so laid, discussed and adopted by the Assemblies of Baluchistan and N.W.F.P. No action was taken by the Speakers of the other Assemblies but the Central Government promptly amended the rules of procedures of the Council requiring it to submit its reports to the Central Government. After this no report was laid before any Assembly even though the Constitution required this to be done within six months of its receipt.

Mr. Justice Hamoodur Rahman further observed:

> In this background, it is not surprising that present Martial Law Authorities should have decided to give importance to the process of Islamization as it is still the belief of the overwhelming majority of the people of Pakistan that their salvation lies in this. They also believe that the dismemberment of the country in 1971 was mainly due to the failure of the previous regimes to realize this basic fact that Islam is the only force that can cement the people of Pakistan into a nation. If the principles of justice, equality and brotherhood preached by Islam had been put into practice, the secession of East Pakistan might well have been avoided. This still holds good for what is now left of Pakistan. Hence the anxiety to see that the process is implemented as speedily as possible.

General Muhammad Zia-ul-Haque in September, 1977, reconstituted the Council. All provisions relating to the Council remained the same and intact, except that its maximum number of members was increased from 15 to 20 and the condition for the appointment of its Chairman that he shall be a person who is or has been a judge of the High Court or the Supreme Court, was amended by him in or about September 1982 (p.o. NO. 13 of 1982) as he felt uneasy and found it difficult to get along smoothly with a judge. (I was then the judge of the High Court of Sindh, and also Chairman of the Council.) Now any person from amongst the members of the Council can be appointed Chairman of the Council. However, during his period, too, no annual report of the Council was laid before the Majlis-e-Shoora nominated by him. In fact, the Council was denied permission in writing to send its various reports to the members of the Majlis-e-Shoora. The Law of Pre-emption, Qanoon-e-Shahadat and the Law of Qisas and Diyat and Ihtiram-e-Ramzan Ordinance drafted by the Council and vetted by the Ministry of Law were, however, laid before the Majlis-e-Shoora, which discussed and passed them.

The Reports of the Council for 1977-78 to 1983-84, alongwith many other subject-wise parts, were laid before the National Assembly and Senate after lifting of Martial Law and revival of the Constitution. Some of the Reports were discussed therin but no legislation was made in respect thereof. But in the National Assemblies elected in 1988, 1990, and 1993, no report of the Council is reported to have been laid before the Assemblies, except once in 1996 on the personal request of Maulana Fazlur Rahman (then M.N.A), Secretary General of Jamiat Ulama-e-Islam as reported in the Press. This report, too, was simply laid before the House, but not discussed at all.

With this short resume one can very well ascertain the attitude of the Government and the National and Provincial

Assemblies towards the enforcement of Islam in Pakistan. And particularly after 1993, the wheel turned the other way round: Secularization moved ahead. Islam has been no more on the agenda. Council of Islamic Ideology has been politicized inasmuch as the General Secretary of a political party which happened to be an ally of the ruling party was appointed the Chairman of the Council.

ARTICLES 203 (c) TO 203 (h): FEDERAL SHARIAT COURT:

On or about 1st of January, 1978, General Muhammad Zia-ul-Haq made a public announcement that the Superior Courts of Pakistan will be empowered to strike down ''any'' law repugnant to the Qur'an and *Sunnah*, as void. But, perhaps, on second thought, instead of conferring general jurisdiction on the High Courts and the Supreme Court to implement that announcement, a Shariat Bench in each of the four High Courts and one Appellate Shariat Bench in the Supreme Court were established by a Presidential Order promulgated on 10th February, 1979, with powers to declare as void, any ''law'' as defined, if found repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and *Sunnah* of the Prophet (SAW). After nearly 15 months, a separate Court for the purpose called ''Federal Shariat Court'' came into being and for that purpose a Constitution Amendment Order was promulgated on 26th June, 1980, and a new Chapter 3-A was added to the Constitution. The Federal Shariat Court was thus constituted comprising one Judge from each of the four High Courts as member thereof and a retired judge of the Supreme Court as its Chief Justice. After about a year, it was found expedient that three *Ulama* of traditional learning and well versed in Islamic law, be also included in the said Federal Shariat Court as members thereof. Later on, two *Ulama* with similar qualifications were also included in the Shariat Appellate Bench of the Supreme Court, to make the entire set up workable and acceptable to the people.

CHAPTER 3A —— FEDERAL SHARIAT COURT

In order to give fuller idea, the whole Chapter 3A relating to the Federal Shariat Court is reproduced below:

203A. The provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution.

203B. In this Chapter, unless there is anything repugnant in the subject or context,

[1][(a) ''Chief Justice'' means Chief Justice of the Court;]

(b) ''Court'' means the Federal Shariat Court constituted in pursuance of Article 203C;

[1][(bb) ''Judge'' means Judge of the Court;]

(c) ''law'' includes any custom or usage having the force of law but does not include the Constitution, Muslim personal law, any law relating to the procedure of any court or tribunal or, until the expiration of [2][ten] years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure; and [(d)....]

203C. (1) There shall be constituted for the purposes of this Chapter a court to be called the Federal Shariat Court.

[3][(2) The Court shall consist of not more than eight Muslim [4][Judges], including the [4][Chief Justice], to be appointed by the President.]

[5][(3) The Chief Justice shall be a person who is, or has been, or is qualified to be, a Judge of the Supreme Court or who is or has been

a permanent Judge of a High Court.

(3A) Of the Judges, not more than four shall be persons each one of whom is, or has been, or is qualified to be, a Judge of a High Court and not more than three shall be Ulema who are well-versed in Islamic law.]

(4) The [4][Chief Justice] and a [4][Judge] shall hold office for a period not exceeding three years, but may be appointed for such further term or terms as the President may determine:

Provided that Judge of a High Court shall not be appointed to be a [4][Judge] for a period exceeding [5][two years] except with his consent and [6][, except where the Judge is himself the Chief Justice,] after consultation by the President with the Chief Justice of the High Court.

[(4A) The [4][Chief Justice], if he is not a Judge of the Supreme Court, and a [4][Judge] who is not a Judge of a High Court, may, by writing under his hand addressed to the President, resign his office.]

[7][(4B) The President may, at any time, by order in writing,

(a) modify the term of appointment of a Judge;

(b) assign to Judge any other office; and

(c) require a Judge to perform such other functions as the President may deem fit;

and pass such other order as he may consider appropriate.

Explanation. In this clause and clause (4C), ''Judge'' includes Chief Justice.

(4C) While he is performing the functions which he is required under clause (4B) to perform, or holding any other office assigned to him under that clause, a Judge shall be entitled to the same salary, allowances and privileges as are admissible to the Chief Justice or, as the case may be, Judge of the Court.]

(5) A Judge of a High Court who does not accept appointment as a [8][Judge] shall be deemed to have retired from his office and, on such retirement, shall be entitled to receive a pension calculated on the basis of the length of his service as Judge and total service, if any, in the service of Pakistan.

(6) The principal seat of the Court shall be at Islamabad, but the Court may from time to time sit in such other places in Pakistan as the [Chief Justice] may, with the approval of the President, appoint.

(7) Before entering upon office, the [Chief Justice] and a [Judge] shall make before the President or a person nominated by him oath in the form set out in the Third Schedule.

(8) At any time when the [9][Chief Justice] or a [9][Judge] is absent or is unable to perform the functions of his office, the President shall appoint another person qualified for the purpose to act as [9][Chief Justice] or, as the case may be, [9][Judge].

(9) A [9][Chief Justice] who is not a Judge of the Supreme Court shall be entitled to the same salary, allowances and privileges as are admissible to a Judge of the Supreme Court and a [9][Judge] who is not a judge of a High Court shall be entitled to the same salary, allowances and privileges as are admissible to a Judge of a High Court.

[10][203CC. *Panel of Ulema and Ulema members*] *Omitted.*

203D. (1) The Court may, [11][either of its own motion or] on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government, examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the *Sunnah* of the Holy Prophet, hereinafter referred to as the Injunctions of Islam.

[12][(1A) Where the Court takes up the examination of any law or provision of law under clause (1) and such law or provision of law appears to it to be repugnant to the Injunctions of Islam, the Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or to the Provincial Government in the case of a law with respect to a matter not enumerated in the either of those Lists, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before the Court.]

(2) If the Court decides that any law or provision of law is repugnant to the Injunctions of Islam, it shall set out in its decision:

(a) the reasons for its holding that opinion; and

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect [:][13]

[13][Provided that no such decision shall be deemed to take effect before the expiration of the period within which an appeal therefrom may be preferred to the Supreme Court or, where an appeal has been so preferred, before the disposal of such appeal.]

(3) 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 Concurrent Legislative List, or the Governor in the case of a law with respect to a matter not enumerated in either of those Lists, shall take steps to amend the law so as to bring such law or provision into conformity with the Injunctions of Islam; and

(b) such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decision of the Court takes effect.

[14]* * * * *

[15][203DD (1) The Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudood* for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:

Provided that nothing in this Article shall be deemed to authorize the Court to convert a finding of acquittal into one of conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his

own defence.

(3) The Court shall have such other jurisdiction as may be conferred on it by or under any law.]

203E. (1) For the purposes of the performance of its functions, the Court shall have the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of any document;

(c) receiving evidence and affidavits; and

(d) issuing commission for the examination of witnesses or documents.

(2) The Court shall have power to conduct its proceedings and regulate its procedure in all respects as it deems fit.

(3) The Court shall have the power of a High Court to punish its own contempt.

(4) A part to any proceedings before the Court under clause (1) of Article 203D may be represented by a legal practitioner who is a Muslim and has been enrolled as an advocate of a High Court for a period of not less than five years or as an advocate of the Supreme Court or by a jurisconsult selected by the party from out of a panel of jurisconsults maintained by the Court for the purpose.

(5) For being eligible to have his name borne on the panel of jurisconsults referred to in clause (4), a person shall be an *aalim* who, in the opinion of the Court, is well-versed in Shariat.

(6) A legal practitioner or jurisconsult representing a party before the Court shall not plead for the party but shall state, expound and interpret the Injunctions of Islam relevant to the proceedings so far as may be known to him and submit to the Court a written statement of his interpretation of such Injunctions of Islam.

(7) The Court may invite any person in Pakistan or abroad whom the Court considers to be well-versed in Islamic law to appear before it and render such assistance as may be required of him.

(8) No court fee shall be payable in respect of any petition or application made to the Court under [16][Article 203D.]

[17][(9) The Court shall have power to review any decision given or order made by it.]

203F. (1) Any party to any proceedings before the Court under Article 203D aggrieved by the final decision of the Court in such proceedings may, within sixty days of such decision, prefer an appeal to the Supreme Court [:][18]

[18][Provided that an appeal on behalf of the Federation or of a Province may be preferred within six months of such decision.]

(2) The provisions of clauses (2) and (3) of Article 203D and clauses (4) to (8) of Article 203E shall apply to and in relation to the Supreme Court as if reference in those provisions to Court were a reference to the Supreme Court.

[19][(2A) An appeal shall lie to the Supreme Court from any judgment, final order or sentence of the Federal Shariat Court.-

(a) if the Federal Shariat Court has on appeal reversed an order of acquittal of an accused person and sentenced him to

death or imprisonment for life or imprisonment for a term exceeding fourteen years; or, on revision, has enhanced a sentence as aforesaid; or

(b) if the Federal Shariat Court has imposed any punishment on any person for contempt of the Court.

(2B) An appeal to the Supreme Court from a judgment, decision, order or sentence of the Federal Shariat Court in a case to which the preceding clauses do not apply shall lie only if the Supreme Court grants leave to appeal.]

[20][(3) 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.

(4) A person appointed under paragraph (b) of clause (3) shall hold office for such period as the President may determine.

(5) Reference in clauses (1) and (2) to ''Supreme Court'' shall be construed as a reference to the Shariat Appellate Bench.

(6) While attending sittings of the Shariat Appellate Bench, a person appointed under paragraph (b) of clause (3) shall have the same power and jurisdiction, and be entitled to the same privileges, as a Judge of the Supreme Court and be paid such allowances as the President may determine.]

203G. 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.

[21][203GG. 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.]

203H. (1) Subject to clause (2) nothing in this Chapter shall be deemed to require any proceedings pending in any court or tribunal immediately before the commencement of this Chapter or initiated after such commencement, to be adjourned or stayed by reason only of a petition having been made to the Court for a decision as to whether or not a law or provision of law relevant to the decision of the point in issue in such proceedings is repugnant to the Injunctions of Islam; and all such proceedings shall continue, and the point in issue therein shall be decided, in accordance with the law for the time being in force.

(2) 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.

(3) Neither the Court nor the Supreme Court shall in the exercise of its jurisdiction under this Chapter have power to grant an injunction or make any interim order in relation to any proceedings pending in any other court or tribunal.

CRITICAL STUDY OF THE PROVISIONS OF THE CONSTITUTION RELATING

TO FEDERAL SHARIAT COURT

i) Article 203A provides that the provisions of chapter 3A pertaining exclusively to the Federal Shariat Court shall have effect notwithstanding any thing contained in the Constitution. It means that in case the provisions of Chapter 3A come into conflict with any other provisions of the Constitution, the provisions contained in Chapter 3A will prevail and override any other provision of the Constitution to the extent of inconsistency. All powers enumerated in Chapter 3A are thus vested in the President of Pakistan.

ii) Article 203B (c) defines ''law'' which means and ''includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law, any law relating to the procedure of any court or tribunal or, until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure.'' It is thus apparent that the scope of the jurisdiction of Federal Shariat Court is restricted. It cannot examine the provisions of the Constitution, not-withstanding their repugnance to the Injunctions of Islam as laid down in the Qur'an and *Sunnah*. So was the position relating the Muslim Personal Law. The Muslim Family Laws Ordinance promulgated by General Ayub Khan during Martial Law, and made effective since 15th July 1961, could not be challenged in the Federal Shariat Court even if any provision thereof was repugnant to the Injunctions of Islam. All laws relating to the procedure of any Court or Tribunal are also beyond the purview of the Federal Shariat Court. Furthermore, the jurisdiction of the Federal Shariat Court stood barred from examining any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure. However, this bar relating to fiscal law was provided in the Constitution for a period of ten years from the commencement of Chapter 3A which came to an end on 25th June 1990. The bar was thus lifted automatically, on expiry of the period fixed in the Constitution. It was only then that the Federal Shariat Court on having acquired the jurisdiction, to examine fiscal law was able to pronounce its most renowned judgment, inter alia, on banking interest, holding it to be *Riba*, as prohibited in the Holy Qur'an and *Sunnah* of the Holy Prophet (SAW).

(iii) The Federal Shariat Court was also debarred, as aforesaid, to entertain a Shariat petition wherein any provision in the Muslim Personal Law was challenged on the ground of its repugnancy to the Injunctions of Islam. However, in 1979, the then Shariat Bench of the High Court of Peshawar headed by its able Chief Justice Mr. Justice Abdul Hakim Khan, gave a judgment on the provisions of Section 4 of the Muslim Family Laws Ordinance, 1961, relating to succession of an orphan grandson, declaring the same to be repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and *Sunnah*. The case was reported as *Mst. Farishta* Vs. *Federation of Pakistan* (PLD 1980, Peshawar 47). The Government filed an appeal in the Shariat Appellate Bench of the Supreme Court which set aside the said judgment, holding that the Federal Shariat Court had no jurisdiction to examine Muslim Personal Law. And that the Muslim Family Laws Ordinance, 1961, fell within the domain related to Muslim Personal Law. The decision is reported in PLD 1981 Supreme Court 120. It may be added that dozens of petitions have been filed, at intervals, in the Federal Shariat Court, challenging the various provisions of

the Muslim Family Laws Ordinance and some other statutes relating to the Muslim Personal Law but they were all dismissed summarily during all these years in view of the judgment of the Shariat Appellate Bench of the Supreme Court, as the said judgemnet was binding on the Federal Shariat Court. Fortunately, the point was again agitated in or about 1993 before the Shariat Appellate Bench of the Supreme Court in another case, challenging in an appeal some provision of the Muslim Family Laws Ordinance 1961. This time the Shariat Appellate Bench of the Supreme Court had become wiser by the inclusion of the two *Ulama* as ad hoc members of the Shariat Appellate Bench. The Bench reviewed the Judgment in *Farishta's* Case. The Supreme Court, however, remanded the case in appeal to the Federal Shariat Court. The case is reported in PLD 1994 SC 507.

Now, therefore, the curbs on examining the provisions of Muslim Personal Law stand removed, with certain limitations, by virtue of the above Judgment of the Supreme Court and in my humble view now any citizen of Pakistan will be at liberty to file Shariat Petition challenging the provisions of Muslim Family Laws Ordinance on the ground of their repugnancy to the Injunctions of Islam as laid down in the Holy Qur'an and *Sunnah*. The present position is that not only the case in which the Supreme Court reviewed its earlier Judgment as remanded to the Federal Shariat Court for reconsideration and fresh decision, some other petitions have also been filed challenging several provisions of the Muslim Family Laws Ordinance 1961 which are pending decision for the last several years before the Federal Shariat Court.

(iv) However the bar to examine any provisions of the Constitution or any procedural law relating to Court or Tribunal still continues. It would, therefore, be advisable to redefine the term ''law'' so as to bring within the jurisdiction of the Federal Shariat Court the provisions of the Constitution and laws relating to the procedure of any Court or Tribunal. It will be further advisable to delete the words ''Muslim Personal Law'' from its definition in order to avoid any ambiguity or confusion which may arise from the latter Judgment of the Supreme Court on the possibility of reinterpretation in future by another Bench of the Supreme Court. The last phrase of this definition clause ''or until the expiration of ten years from the commencement of this Chapter, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure'' may be deleted, as having become redundant due to expiry of time fixed therein. These steps if taken will help to establish supremacy of the Holy Qur'an and *Sunnah* through the Federal Shariat Court and also of the Parliament which is to ultimately implement the decision of the Federal Shariat Court by means of the re-enactment of a law or any provision thereof, to bring it in conforrmity with Islamic Injunctions.

(v) Article 203C provides that the Federal Shariat Court shall consists of not more than eight Muslim judges, including the Chief Justice, to be appointed by the President. The Chief Justice shall be a person who is, or has been or is qualified to be Judge of the Supreme Court or who is or has been a permanent judge of High Court. Of the judges, not more than four shall be persons, each one of whom is or has been or is qualified to be a judge of High Court and not more than three shall be *Ulama* who are well-versed in Islamic law. The Chief Justice and a Judge shall hold office for a period not

exceeding three years, but may be appointed for such further term or terms as the President may determine. It was further provided that serving Judge of a High Court shall not be appointed to be a Judge of Federal Shariat Court for a period exceeding two years except with his consent and, except where the judge is himself the Chief Justice, after consultation by the President with the Chief Justice of the High Court.

(vi) The appointment of a judge of the Federal Shariat Court including the Chief Justice is purely temporary. The term of office will not exceed 3 years at one point of time; it may be for a lesser period, say, for one year or two or till further order. He may be removed at the whim of the appointing authority i.e. the President, e.g. Mr. Justice Salahuddin, a retired judge of the Supreme Court, was appointed as the first Chief Justice of the Federal Shariat Court for one year only. His term of office was not extended. Justice Sardar Fakhr-e-Alam of Peshawar High Court, now Chief Election Commissioner, was appointed Chief Justice to replace immediately the Chief Justice Sheikh Aftab Hussain, (now deceased) till further orders. Sardar Sahib was removed from Chief Justiceship only after a few months. He, however, continued to be a judge of the Federal Shariat Court to complete his term of office for two years. In my own case, on my retirement as Senior Puisne Judge of the High Court of Sindh in June 1990. I had gone outside Pakistan and joined International Islamic University, Malaysia, as Full Professor of Shari'ah Law. I was then offered by the President Ghulam Ishaq Khan to come back and head the Federal Shariat Court. I was thus appointed its Chief Justice but for one year only. The term was extended for another year but probably due to my delivering Judgment on *Riba*, my term was not further extended. So, I could serve the Shariat Court only for two years.

(vii) So far as the appointment of a serving Judge of a High Court or Supreme Court as a Judge or Chief Justice of Federal Shariat Court his term of office could not exceed two years except with his consent. Now by virtue of the famous Judgment of the Supreme Court in the Judge's Case delivered on 20th March 1996, it is no more possible for the appointing Authority to transfer any serving Judge of High Court or Supreme Court to the Federal Shariat Court for whatever period it may be, except with his consent. As you know, Mr. Justice Nasir Aslam Zahid, the Chief Justice of the Sindh High Court, and Mr. Justice Khalil-ur-Rehman Khan, the " would be" Chief Justice of Lahore High Court, were transferred to the Federal Shariat Court during Benazir Bhutto's premiership, though for a period of two years, but without their consent. So the provision of law relating to the appointment of serving Judges of the High Court was generally used as a measure to get rid of ''undesirable'' Chief Justice and Judges of the High Court. Earlier, in November 1992, Mr. Justice Muhammad Ilyas Khan of the Lahore High Court, who was next to Chief Justice Mian Mahboob Ahmed, and was likely to be the Chief Justice of the Lahore High Court on Mian Mahboob Ahmed's going to Supreme Court, was transferred as Judge of Federal Shariat Court during Mr. Mohammad Nawaz Sharif's premiership. But when Mr. Mohammad Nawaz Sharif was compelled to say good-bye to his high office of premiership of the country and the reins of power came into the hands of Benazir Bhutto the tables were turned in favour of Mr. Justice Mohammad Ilyas Khan who was appointed as a Judge of Supreme Court, and was then appointed as the Acting Chief Justice of Lahore High Court in place of

Mr. Justice Mehboob Ahmed who was appointed to be the Judge of the Federal Shariat Court. Mian Mehboob Ahmed not having accepted the appointment as a Judge of the Federal Shariat Court was deemed to have retired from his high office of Chief Justice of the Lahore High Court, as provided under sub-article 5C of Article 203 C (4 & 5). There are several other cases as to how serving Judges of the High Court of Lahore, Peshawar, Sindh and Baluchistan were made to serve unwillingly as Judges of the Federal Shariat Court under the orders of General Mohammad Zia-ul-Haque and Ghulam Ishaque Khan. Federal Shariat Court thus became a dumping ground for the serving Judges who were considered to be ''undesirable'' by the President or the Prime Minister of the country. Thanks to Almighty Allah that this process of victimization of serving Judges came to an end by virtue of the Supreme Court's Judgment on 20th March, 1996.

(vii) On top of it, it was provided under sub-article 4B of Article 203C that the President may, at any time, by order in writing:

(a) modify the term of appointment of a Judge;

(b) assign a Judge to any other office; and

(c) require a Judge to perform such other functions as the President may deem fit and pass such other order as he may consider appropriate.

In this clause and clause (4 c), ''Judge'' included Chief Justice. However, while holding any other office assigned to him under clause 4 b, he shall be entitled to the same salary, allowances and privileges as are admissible to the Chief Justice or as the case may be, Judge of the Court. To give an example of the victim of these provision of law, Sheikh Aftab Hussain, a senior Judge of the Lahore High Court and the Chief Justice of Federal Shariat Court, while on an official trip to Sudan in or about September/October 1984 was removed from the office of Chief Justiceship of Federal Shariat Court and was made an Advisor to the Ministry of Religious Affairs. This position for a man like Shaikh Aftab Hussain, or for that matter any other Chief Justice, was highly derogatory and so he totally refused to accept that position and submitted his resignation to President General Zia-ul-Haque.

I would, therefore, humbly suggest that Mian Muhammad Nawaz Sharif, the Prime Minister of Pakistan, while bringing amendments in the Constitution relating to Judiciary, must not lose sight of the present terms and conditions of the appointment of the Judges and Chief Justice of the Federal Shariat Court. Sub Article 4B, 4C, and 5 of Article 203C must be deleted to restore the dignity and honour of the Judges and Chief Justice of Federal Shariat Court. Moreover, their terms of appointment, privilege and pension should be rationalized with the Judges of the High Court and the Supreme Court, as also recommended by the Chief Justices' Committee in 1992, of which I was a member.

(ix) Regarding *Ulama* Judges, it is necessary to mention that in the case of Federal Shariat Court not more than three *Ulama* who are well-versed in Islamic Law would be appointed in the Federal Shariat Court (203C (3a)). It is further provided that not more than 2 *Ulama* will be appointed as ad hoc members of the Shariat Appellate Bench. It is noticeable that only one *Aalim* Judge is working in the Federal Shariat Court for the last seven years. I emphasize that two more *Ulama* Judges

should be appointed in Federal Shariat Court as soon as possible.

(x) Ad hocism in the matter of appointment of Judges of Supreme Court has been done away with by virtue of the Judgment of the Supreme Court dated 20th March, 1996. It will be in the fitness of things if the *Ulama* members of the Shariat Appellate Bench are also made permanent Judges of the Supreme Court; they must serve as full-time Judges of the Supreme Court like other Judges with full devotion and loyalty to Shari'ah in the Supreme Court. If the Registrar of the Supreme Court is required to submit a chart of the actual working days of the *Ulama* members of the Shariat Appellate Bench, I am sure it will not exceed two to three weeks a year, with the result that the appeals against the decisions of the Federal Shariat Court are lying dormant for years together in the Shariat Appellate Bench of the Supreme Court. This, to my mind, is a vital reason for delays in Justice in the matter of Shariatization of Pakistan Laws. It is also necessary that the qualifications of *Ulama* Judges should be mentioned in the Constitution and their age of retirement should be in accordance with Judges of the High Court and Supreme Court, to make the whole set up workable, efficient and meritorious.

A New Approach:

(xi) And, last but not the least, there are a number of suggestions which may revolutionize the whole process of Islamization through Federal Shariat Court, which is a composite Court of all Federating Units of Pakistan. These suggestions are summarized as under:

(a) The provisions relating to Council of Islamic Ideology, for its ineffectiveness and due to the existence of Federal Shariat Court, be deleted. This will avoid unnecessary duplication of the work of Islamization of laws and save expenditure.

(b) The functions of the Federal Shariat Court may be expanded so as to include some of the functions of advisory nature of the Council which may be assigned to the Federal Shariat Court. The present staff recruited by the Council may be absorbed in the Federal Shariat Court. Those who are working in the Council on deputation may be sent back to their parent departments.

(c) The provisions relating to the Shariat Appellate Bench in the Supreme Court should be deleted. The ad hoc *Ulama* members of the Shariat Appellate Bench who have been appointed from amongst the Judges of the Federal Shariat Court should be sent back to the Federal Shariat Court.

(d) The Federal Shariat Court will constitute its two permanent Benches, i.e.,

1. The Federal Shariat Court, on its Original Side, will hear Shari'ah petitions and also advise a House, a Provinical Assembly, the President, or a Governor, on any question referred to the Shariat Court as to whether or not a proposed law is or is not repugnant to the Injunctions of Islam. This function is currently being performed by the Council of Islamic Ideology under sub-clause (b) of clause (1) of Article 230 of the Constitution, and is suggested to be included in the functions of the

Federal Shariat Court, as already stated.

2. The Federal Shariat Court (Appellate Side) will hear *Shari'ah* appeals arising out of the decisions of the Original Side Bench of the Federal Shariat Court.

(e) The minimum number of the Judges of the Federal Shariat Court, including Chief Justice, should be fixed as not less than eleven, out of whom there shall, at least, be six *Ulama* Judges.

(f) The present appellate jurisdiction of the Federal Shariat Court to hear criminal appeals against the Judgments of the Sessions Courts in Hudood Cases should be transferred to the High Courts of respective provinces. This will speed up the disposal of the criminal appeals and will make justice less expensive. The Judges of the Federal Shariat Court will then find more time to be devoted to Shari'ah petitions. The relevant provisions in the Hudood laws may accordingly be amended.

(g) The Revisional Jurisdiction of the Federal Shariat Court as conferred on it under Article 203 DD should, however, continue with it.

It is hoped that these steps, if taken, will make the creation of the Federal Shariat Court purposeful for which it was originally conceived.

Endnotes

1. Substituted, inserted and omitted by P.O. No. 5 of 1982, Arts. 2 and 3.
2. Substituted successively by P.O. No. 7 of 1983 an dP.O. No. 2 of 1984 and P.O. No. 14 of 1985, Art. 2 and Sch., to read as above.
3. Substituted by P.O. No. 7 of 1981, Art. 2.
4. Substituted by P.O. No. 5 of 1982, Art. 2.
5. Substituted by P.O. No. 24 of 1985, Art. 4.
6. Inserted by P.O. No. 4 of 1980, Art. 2.
7. Inserted by P.O. No. 14 of 1985, Art. 2 and Sch.
8. Substituted by P.O. No. 5 of 1982, Art. 3.
9. Substituted by P.O. No. 5 of 1982, Art. 3.
10. Article 203 CC, which was inserted by P.O. No. 5 of 1981, omitted by P.O No. 7 of 1981, Art. 4.
11. Inserted by P.O. No. 5 of 1982, Art. 4.
12. Inserted by P.O. No. 1 of 1984, Art. 2.
13. Substituted and added, and shall be deemed always to have been so substituted and added, by P.O. No. 1 of 1984, Art. 2.
14. Clause (4) omitted by P.O. No. 4 of 1980, Art. 3.
15. Article 203DD, as inserted *ibid*, substituted by P.O. No. 5 of 1982, Art. 5.
16. Substituted by P.O. No. 4 of 1980, Art. 5, for ''this Article.''
17. Added by P.O. No. 5 of 1981, Art. 3.
18. Substituted and added by P.O. No. 9 of 1983, Art. 2.
19. Inserted by P.O. No. 5 of 1982, Art. 6.
20. Substituted by P.O. No. 12 of 1982, Art. 2.
21. Inserted by P.O. No. 5 of 1982, Art. 7.