

# Implications of the Principles of Islam on the Constitutional Structural Rules and Constructing a Model for Independence of Judiciary in Islamic Countries: *Jurisprudence of the Supreme Constitutional Court of Egypt (SCC) and the Supreme Court of Pakistan (SCP)*

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## Abstract

*It is through the dual lenses of religious law- for the purposes of this essay I have just discussed Islamic religious law- and structural constitutional rules that I have examined the two of the most significant Islamic jurisdiction, i.e., Egypt and Pakistan. These two countries are where the constitutional courts have been relatively very independent and have had opportunities to interpret Islamic provisions along with other provisions of their constitutions. I have selected these two jurisdictions to see what forms Islam can take in future in the three more recent Islamic countries (Afghanistan, Iraq, and Tunisia) that have adopted constitutions. After undertaking an in-depth analysis of our two main jurisdictions, in the last part of this essay a model for a modern, democratic Islamic state with commitments to separation of powers and independence of judiciary is proposed. It is argued that an independent judiciary and separation of powers can be built and sustained in an Islamic country if the methodology developed by the Egyptian SCC in interpreting Shariah clause is combined with the approach of the Pakistani judiciary in securing the independence of independence by relying on the principles of Islam.*

## CHAPTER 1: Introduction

Starting from the late Enlightenment, the torch bearers of the Enlightenment and founders of modern social sciences have been sounding the death knell of religion.<sup>1</sup> However, the post-WW II period, particularly the last three decades, has seen a strong resurgence of religion globally<sup>2</sup>: we have seen creation of two states exclusively based on the religion, namely Pakistan and Israel; a revolution inspired by religion in Iran; the rise of the RSS and BJP in India;<sup>3</sup> ascendancy of the conservative religious forces in the US; and the resurgence of political Islam in the Middle East. The resurgence of the Islamists in the Middle East has been so strong that many commentators have called the “Arab Spring” as the “Islamic Spring”. In the aftermath of the Arab Spring, the process of constitution making in Tunisia, Libya, and Egypt has been marred with heated clashes between the secularists and the Islamists over the nature of the constitutions and the role of religion in their respective constitutions. In Egypt, many of these disagreements reached a point that where a “secular” military general sent packing home a democratically elected Islamist President, namely President Morsi, who hails from Muslim Brotherhood, the oldest and the most organized political organization in the Arab world. Similarly, in Turkey, we are amidst a tussle between the Kamalist seculars and the Islamists lead by the despotic Erdogan. Iraq, has been, likewise, marred by the controversies surrounding not only about the place of minorities (Christians and Yazidis) but also the proper place of Sunni and Shia Islam and the rights of women within the post-Saddam Iraqi. Apart from the Islamic world, we also see the resurgence of religion in politics in the oldest and the largest democracies of the world: the USA and India. In India, with the rise of a Modi, who is

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<sup>1</sup> See Peter L. Berger (ed.), *The desecularization of the world: Resurgent religion and world politics*, (Wm. B. Eerdmans Publishing, 1999).

<sup>2</sup> Giles Kepel, *The Revenge of God: The Resurgence of Islam, Christianity, and Judaism in the Modern* (Pennsylvania State University Press, 1994).

<sup>3</sup> Aijaz Ahmad, "India: Liberal democracy and the extreme right" In: Panitch L, Albo G (eds) *Socialist Register 2016 The Politics of the Right* (London: Merlin Press, 2016)

an ardent Hidutva adherent, the seculars and liberals feel that the long-cherished tradition of secularism in India is under a grave threat.<sup>4</sup>

The global resurgence of religion has engendered serious anxieties among the defenders of human rights, constitutionalism, and the rule of law. There are good causes for worrying, especially after the violent turn taken by the political Islam in the aftermath of 9-11 and the rise of ISIS in the Middle East. Before Iraq and ISIS, there were “Islamic states like Afghanistan, under the Taliban, who tried to establish an Islamic State, and Iran under Shiaite clergy. These three experiments in trying to create a religious state did not go well, as it is obvious by now.

## 1 Importance of the Present Undertaking

The resurgence in religion globally has been equally matched by the Islamization of the constitutions of Muslim majority countries.<sup>5</sup> This phenomenon is called “rise of Constitutional theocracy” by Ran Hirschl.<sup>6</sup> Due to this intense interest and slide towards theocratization of the constitutions there is a palpable anxiety about it. This anxiety about the increasing role of religion was evident at the time of drafting of Iraqi and Afghan Constitution and but after the Arab Spring and rise of Isis has reached a fever pitch.<sup>7</sup> It is precisely due to the continued and increased relevance of religion, particularly to the 1.6 billion Muslims of this planet, that we need more engagement with the religion. This paper is one such attempt from the comparative constitutional perspective.

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<sup>4</sup> Supra, Aijaz Ahmad, "India: Liberal democracy and the extreme right".

<sup>5</sup> See Dawood I. Ahmed & Tom Ginsburg, “Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions,” 54 VA. J. INT’L L. (2014); Constitutions of Afghanistan, Egypt, Iran, Pakistan, Qatar, Sudan, Yemen, and Basic Law of Saudi Arabia.

<sup>6</sup> Ran Hirschl, *Constitutional Theocracy* (Harvard University Press, 2010)

<sup>7</sup> Alexander Their, “Attacking Democracy from the Bench,” N.Y. TIMES, Jan. 26, 2004.

Three Islamic countries (Iraq, Egypt, and Afghanistan) have recently adopted constitutions and there is lot of concern about the forms/directions that these are Islamic countries who are experimenting with Islamic theocratic constitution are going to take?<sup>8</sup> What is the scope of human rights in an Islamic state. What about women rights? What is going to be the status of minorities in Islamic state? What would happen to the idea of citizenship?<sup>9</sup>

The focus of the legal scholarship is more on the substantive aspects of the Islamic law,<sup>10</sup> when it is not, then the scholarship is focused about Islam's compatibility with democracy and constitutionalism.<sup>11</sup> However, there is paucity of literature that explore the implications of the religious law for the interpretation of the structural constitutional rules (i.e., separation of powers, judicial independence, etc.). There is almost absence of debate about the Islamic angle of the structural issues, like: the independence of judiciary, the extent of governmental powers in the legislative and executive domains, especially when considered that the constitutions contain almost supra-legislative/-constitutional Islamic articles (e.g., *Objective Resolution* of Pakistan is one example)<sup>12</sup>. The need for an enquiry into the structural role of Islam in a constitutional framework is accentuated when considered that the primary function of a constitution is to layout structures of government and demarcate powers of different organs of a state. A constitution is a tool for resolving disputes among the various interests in a country, and since Islam, in many different manifestations, has emerged as a major player in politics across globe so investigating its

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8 Alexander Their, *Attacking Democracy from the Bench*, N.Y. TIMES, Jan. 26, 2004.

9 See the US State Department Report on International Religious Freedom: Hearing Before the Subcomm. on Int'l Terrorism, Nonproliferation & Hum. Rts., 108th Cong. (2004)

10 See, e.g., David A. Jordan, *THE DARK AGES OF ISLAM: IJTihad, APOSTASY, AND HUMAN RIGHTS IN CONTEMPORARY ISLAMIC JURISPRUDENCE*, 9 Wash. & Lee Race & Ethnic Anc. L.J. 55 (2003); M. Ozonnia Ojielo, "Human Rights and Sharia'h Justice in Nigeria, Golden Gate University School of Law 2003/04/01, Vol: 9, 135; Jennifer Kristen Lee, Comment, *Legal Reform to Advance the Rights of Women in Afghanistan within the Framework of Islam*, 49 Santa Clara L. Rev. 531 (2009)

11 John L. Esposito and John O. Voll, *Islam and Democracy* (Oxford: Oxford University Press, 1996).

12 See *Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and others* (PLD 1989 Kar. 404) ("Sharaf Afridi Case").

role from a structural perspective is urgently needed; existing constitutional scholarship is deficient in this regard.

The problem is also exacerbated by the development of political Islam in the latter half of 19<sup>th</sup> century and the 20<sup>th</sup> century. Modern Islamists have posed a peculiar problem to the governmental power: they have abandoned the classical concepts such as *siyasaḥ al Shariah* and insist on absolute subservience to *fuqaha*'s interpretation and have come up with the idea of "Islam being a complete code of life", a uniquely 20<sup>th</sup> Century phenomenon of Islam.<sup>13</sup> The role of government in the legislation therefore has been conceptually threatened by Islamist's arguments because they want Islam to regulate every sphere of human activity and want to leave little or no room for the three recognized organs of the state, and also undermine the separation of powers and proper role of different organs of state. *Ulema* insist not just on a right to veto any legislation, in fact, they insist on positive obligation upon the government to legislate Islam in every aspect of law.

Moreover, an inquiry from the perspective that I propose is a far more interesting and important because it can answer the more difficult questions surrounding Islamic constitutionalism, like: can an Islamic argument be made for structural rules of a constitution? does presence of a *Shariah* compliance/repugnancy clause(s) in a constitution mean eventual slide into theocracy, where *ulema* (Islamic religious scholars) decides what is Islamic and what is not? who has the authority to expound and interpret God's laws and who gets to legislate? *Ulema* or the government? What is the role of judiciary vis-à-vis *ulema* and government in an Islamic state? Can judiciary interpret *Shariah*? Can government undertake *ijtihad*? What is the role of

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<sup>13</sup> For an insightful discussion and rebuttals of modern conception of Islam, see Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: 1930).

Parliament/legislature in the face of Islamic provisions? Do Islamic provisions radically undermine/constrain the legislative sphere? Do Islamic provisions undermine the structural provision of the constitutions or do they support?

These questions are not just relevant from purely theoretical perspective but they are very important from practical, political, and constitutional point of view, especially as religion become increasingly relevant to a vast number of people in the world.

## 2 Structure

It is through the dual lenses of religious law- for the purposes of this essay I have just discussed Islamic religious law- and structural constitutional rules that I have examined the two of the most significant Islamic jurisdiction, i.e., Egypt and Pakistan. These two countries are where the constitutional courts have been relatively very independent and have had opportunities to interpret Islamic provisions along with other provisions of their constitutions. I have selected these two jurisdictions to see what forms Islam can take in future in the three more recent Islamic countries (Afghanistan, Iraq, and Tunisia) that have adopted constitutions. After undertaking an in-depth analysis of our two main jurisdictions, in the last part of this essay a model for a modern, democratic Islamic state with commitments to separation of powers and independence of judiciary is proposed. It is argued that an independent judiciary and separation of powers can be built and sustained in an Islamic country if the methodology developed by the Egyptian SCC in interpreting *Shariah* clause is combined with the approach of the Pakistani judiciary in securing the independence of independence by relying on the principles of Islam.

### 3 Understanding the *Shariah*, *Fiqh*, and the Islamic Law

Since in this essay a number of terms from Islamic studies are going to be employed, therefore for clearer conceptual understanding, before we proceed further, it is necessary to briefly discuss frequently used terms in this essay.

#### 3.1 *Shariah*

*Shariah* is frequently translated in English lexicon as "Islamic law" which many scholars have argued is "misleadingly simple". The danger with this translation is that it suggests that *Shariah* is a coherent, well defined, a code like body of substantive law that can be readily applied to any situation that arises in a society or state; however, the reality of *Shariah* is far more complex and different than the sense conveyed by the term Islamic law.<sup>14</sup> In fact, this translation and the understanding of *Shariah* that it conveys has played a part in giving rise to misconceptions among Muslims modernists themselves and has been a significant factor in the understanding of *Shariah* and Islamic state in Islamist parties in Egypt and Pakistan.<sup>15</sup> This translation equates *Shariah* with the modern nation state's concept of law, which is comprehensive and regulates almost every sphere of human activity in a society. Muslims under the influence of nation states understanding of law have tried to find "Islamic" equivalent nation state's codes.

So, what is the correct understanding of the *Shariah*? *Shariah* is an Arabic word and its literal meaning is "street," "path," or "way."<sup>16</sup> It is a path to salvation. It consists of God's commands and broad recommendations and guidelines as contained in *Quran* (God's word as

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14 Kristen Stilt, "Islamic Law and the Making and Remaking of the Iraqi Legal System," 36 *George Washington International Law Review* (2004), 694., 721

15 Madoudi, founder of Jamaat-i-Islami Pakistan and Muslim Brotherhood in Egypt. For discussion of role of modernist Islamism in Pakistan and Egypt, see S. V. R. Nasr, *The Vanguard of the Islamic Revolution: The Jamaat-i-Islami of Pakistan* (Berkeley: University of California Press, 1994)

16 Asifa Quraishi-Landes "Islamic Constitutionalism: Not Secular Not Theocratic Not Impossible" (2015) 16 *Rutgers Journal of Law and Religion* 553 at 554

revealed to Prophet Muhammad during his lifetime) and *Sunnah* (sayings and actions of Prophet Muhammad as recorded in hadith literature).<sup>17</sup> Therefore two primary textual sources of *Shariah*, which can be loosely translated as God's law, are Quran and *Sunnah*.<sup>18</sup> However, it is worth nothing that the commands of God, as revealed in Quran, that impose legal obligations or prescribe punishments are very few. Therefore, after the passing of the God's Prophet the logical questions for Muslims who wanted to follow the path to God became how to identify and follow the correct understanding of God's broader guidelines. This gave birth to field of *usul alfiqh* (jurisprudence).

### 3.2 *Fiqh*

The other term that is translated is "*fiqh*"; many a times both *Shariah*, *fiqh*, and Islamic law are employed interchangeably. However, again translating *fiqh* as Islamic law is misleading and incorrect. By translating both *fiqh* and *Shariah* as Islamic law not only a conceptual error is committed with far reaching consequence but it engenders real violence as seen in the dangerous ideologies of Islamic extremists or varieties of ISIS, Al-Qaeda, and Talibans. *Fiqh* literally means "understanding" or "comprehension": a human of *Shariah*; therefore, it is fallible and theoretically, at least, every Muslim is competent to subscribe to his own understanding of *Shariah*.<sup>19</sup>

In practice, however, the legal rules were derived or weaned out from Quran and *Sunnah* by utilization of complex interpretive and hermeneutic tools through a process called "ijtihād" by

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17 Hadiths are oral accounts of Prophet Muhammad's life and sayings as narrated by his companions after his death. Muhammad Zubayr Siddiqi, *Hadith Literature: Its Origin, Development and Special Features* (Cambridge: Islamic Texts Society, 1993); David S. Powers, *Studies in Qur'an and Hadith* (Berkeley: University of California Press, 1986); Jonathan A.C. Brown, "Did the Prophet say it or not? The literal, historical, and effective truth of hadiths in early Sunnism." The Free Library 01 April 2009. 11 April 2017 <[https://www.thefreelibrary.com/Did the Prophet say it or not? The literal, historical, and effective...-a0226668367](https://www.thefreelibrary.com/Did+the+Prophet+say+it+or+not?The+literal,+historical,+and+effective...-a0226668367)>

18 See generally, Joseph Schacht, *An Introduction to Islamic Law* (Oxford: Clarendon Press, 1964).

19 See for a lucid discussion of science of fiqh in Islamic jurisprudence Frank E. Vogel, *Islamic Law and Legal System: Studies of Saudi Arabia. Studies in Islamic Law and Society*, vol. 8. (Leiden: Brill, 2000) p. 35-50.



*fuqha* (practitioners of *fiqh*). *Ijtihad* literally means “exertion” or “effort”.<sup>20</sup> Since *Fuqha*, practitioners of *fiqh*, practiced *ijtihad* so they are also called *mujtihad*s (competent strivers).

### 3.2.1 *Fiqh* and Legal Pluralism:

Since the starting point of the *usul alfiqh* is that it is a human understanding of God’s law, therefore no one person or authority has exclusive claim, to the exclusions of others’ understandings, to the correct understanding of God’s law. The premise that *fiqh* is a human understanding also helped establish another premise in *usul alfiqh* that there was always a possibility of an error;<sup>21</sup> this is evident from the examination of texts of all the major works of *fiqh* where the sentence “God knows the best” was standard disclaimer at the end of every ruling issued by classical *fuqaha*. This premise was the reason that throughout Islamic history different Sunni schools existed side by side without sliding into persecution even remotely similar to the conflict between Catholicism and Protestantism as witnessed in Europe.<sup>22</sup> The idea is that if a competent and trained *fiqih*i (Islamic legal scholar) tries to understand God’s command according to best of his ability and is not dishonest, than despite the existence of theoretical possibility of his conclusion being erroneous, his conclusion is acceptable and anyone who chooses to follow the ruling will not be punished by God, for God does not punish someone who commits an honest error in good faith.<sup>23</sup> Since, the emphasize was more on the procedure not the end product, therefore there was wide room for existence of legal pluralism in Sunni Islam.<sup>24</sup>

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<sup>20</sup> Vogel 3-60.

<sup>21</sup> Vogel 56.

<sup>22</sup> Asifa 557.

<sup>23</sup> This idea was derived from well know Hadith of Prophet, see Clark Benner Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of the Shari’a into Egyptian Constitutional Law* (Brill 2006) (Studies in Islamic Law and Society 19) [“Lombardi, *State Law*”], 17.

<sup>24</sup> Baber Johansen, *Contingency in a Sacred Law. Legal and Ethical Norms in the Muslim Fiqh*, (Leiden-Boston-Köln, Brill Studies in Islamic Law and Society), 1999. 38-40

Over the course of centuries different *fuqha* came to different human interpretations of God's laws therefore as result hundreds of schools of *fiqh* developed. Schools are known as *madaahab* (singular *madahab*) and differed with each other on the methodology of interpretation as well on the substantive conclusions, but recognized each other as well.<sup>25</sup> However, in modern times only four *madhabs* have survived; each is named after the founders (*imams*) of each school. *Hanafi Madhab* has the largest following in Islamic world and the majority of Muslims in at least two of our jurisdictions (Pakistan and Afghanistan) follow while in Egypt and Iraq it is followed almost half of Sunni Muslims; while in our fifth jurisdiction, Tunisia, the majority of Muslims follow *Shafi madahab*. However, in Iraq the majority (around 60%) follows *Twelvers Shiaism*.<sup>26</sup> The significance of these schools becomes relevant, as discussed below, in the interpretive exercises concerning Afghanistan, which has Hanafi madhab enshrined in its Constitution; Egypt, where it becomes especially relevant from a constitutional perspective when a law is challenged before the SCC for being violative of the ruling of either Hanafi and/or Shafi jurisprudence;<sup>27</sup> and Iraq, where the differences between Shia and Sunnis schools of Islam have long history of violent conflict and these differences were very relevant at the time of drafting of the Constitution of Iraq.<sup>28</sup>

### 3.3 *Fuqaha and Mujtahids*

The issue surrounding the competence and qualifications of persons/institution eligible to derive *Shariah* law becomes center of almost of every jurisdiction that tries to incorporate Islam in its legal system. Islamists and *Ulema* (literally meaning scholars, a modern variation of *fuqaha*)

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<sup>25</sup> Lombardi, *State Law*, 16.

<sup>26</sup> Shia Islam also has two minor divisions: Ismailis, and Zaydis. For a superb introduction on Shiaism, see Seyyed Hossein Nasr, Hamid Dabashi, and Seyyed Vali Reza Nasr, *Shi'ism: Doctrines, Thought, and Spirituality* (Albany: State University of New York Press, 1989).

<sup>27</sup> Egypt was originally hub of Shafi madhab but it had become Hanafi due to strong Ottoman influence after it came under Ottoman rule, for Ottoman Millet system was partial to Hanafi madhab, see Karen Barkey & George Gavrilis, *The Ottoman Millet System: Non-Territorial Autonomy and its Contemporary Legacy*, in *Ethnopolitics* 15(1):24 (2016).

<sup>28</sup> Intisar A. Rabb, "We the Jurists": Islamic Constitutionalism in Iraq, 10 U. Pa. J. Const. L. 527 (2014), 540-56.

claim that they are the ones who should have the right to say what Islam is. However, in opposition to *fuqaha*, the government (legislature and sometime executive also) claims that it the one who should be final authority in deciding on laws concerning Islam, and courts, especially constitutional courts, are not left behind over this heated contestation over the authority to interpret Islam. Courts claim that they are the ones who should have the final say on adjudicating on compatibility of laws with *Shariah*. These issues have been at the forefront of debates and contestations in Pakistan, Egypt, Iraq, and Afghanistan.

In Pakistan Sharia courts were introduced to resolve this problem but the problem/contest still exists;<sup>29</sup> while in Egypt there has been a long running feud between the SCC (secular court), government (legislature and executive, Islamists (primary Muslim brotherhood), and traditional jurists (led by the state sanctioned Al-Azhar University establishment). In Iraq a powerful Shia establishments (*marja' iyya*)<sup>30</sup> of Najaf and Karbala that has emerged as a strong contender for the right to interpret Shia Islam and to decide what is Islamic<sup>31</sup> and it was instrumental in the drafting of Iraqi constitution and wielded great influence in incorporating the religious provisions in the constitution, as discussed below in the section dealing with Iraq. In Afghanistan, in the long running civil war, the authority to interpret Islam is a key issue and its resolution after the promulgation of the 2004 Constitution is far from clear. Therefore, considering the contest over authority is of fundamental significance is constitutional democracies, it is important to understand the role of jurists in classical Islamic jurisprudence.

29 Charles H. Kennedy, Repugnancy to Islam: Who Decides? Islam and Legal. Reform in Pakistan, 41 INT'L & COMP. L.q. 769, 772–773 (1992).

30 It means office of a maraja, an exalted juristic authority.

31 On the role of maraja in the post-Saddam Iraq see Sajjad Rizvi, Political mobilization and the Shi'i religious establishment (marja'iyya), International Affairs 86: 6, (2010), available at [onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2010.00944.x/pdf](http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2346.2010.00944.x/pdf)

As discussed above, the process of deriving legal rules for concrete problem was called *fiqh* and the practitioners of this science were called *fuqaha* and mujtahids. There is a difference of rank/interpretive ability/authority between a faqih and mujtahid: a practitioner of *fiqh* was called *faqih* but not *mujtahid* because a *mujtahid* wielded greater interpretive authority and freedom; a *fiqh* becomes a mujtahid when high quality of his learning and scholarship is recognized by his contemporaries. A mujtahid then is capable of driving novel and innovative solutions/rulings to the problems whose answer the existing *fiqh* lacked. A *fiqh*'s work, on the hand, was mostly similar to our modern day judges. There were many *fuqaha* but only a few *mujtahid* at a given time.<sup>32</sup> Both Shia and Sunni jurists laid out detailed requirements for the qualifications and disqualification of a mujtahid. Imam Shafi, a founder of Shafi madhab, even provided a long list of qualification of a mujtahid.<sup>33</sup> Since a mujtahid was supposed to perform *Ijtihad* by deriving *fiqh* from primary sources Quràn, and *hadith* literature(sayings of prophet); and secondary sources, consensus (*ijmà*) of the community of *fuqaha*, and juristic logic (*qiyas*), etc., therefore it was required that he be deeply conversant with the textual sources, that ran into hundreds of volumes, but he was also required to be trained in logic, rhetoric, etc. and be well aware of the social, political and economic conditions prevailing in the society.<sup>34</sup> These twin requirements of deep religious training and familiarity with the worldly affairs meant that only persons from juristic class could speak on religious matters and issue legal rulings.<sup>35</sup>

32 On the discussion concerning qualifications of a mujtahid and faqih, see Gleave, Robert, "Political Aspects of Modern Shi'i Legal Discussions: Khumayni and Khu'i on Ijtihad and Qada", in B. A. Roberson (ed.), *Shaping the Current Islamic Reformation* (London: Frank Cass, 2003), 95-107.

33 See Al-Khatib al-Baghdadi, *Kitab al-Faqih wa-l-mutafaqqih*, ed. 'Adil b. Yusuf al-'Azzazi, 2 vols. (Riyadh: DSr Ibn al-Jawzi, 1417/1996), 273.

34 Lombardi, *State Law*, 22-28.

35 See Schacht, *An Introduction to Islamic Law*, 35-45.

## CHAPTER 2: Significant Islamic Provisions in the Constitutions of Iraq, Afghanistan, Tunisia, Egypt, and Pakistan

Since Afghanistan, Iraq, and Tunisia are the latest Islamic countries in constitution were adopted and heated debates concerning the scope of Islamic provisions took place, therefore the relevant constitutional provisions of these countries are examined along with comparison with the provisions of contained in our two main jurisdictions (Egypt and Pakistan).

### 4 Islam as the State Religion

This clause is, at present, the most ubiquitous clause among the Islamic Constitutions and is found in almost every Islamic Constitution except Turkey. This clause is mostly found at the beginning of constitution and is often considered descriptive in nature and understood to set the broader identarian commitment of a country. It is due to the symbolic importance of Islam that after the World War II those Muslims countries that inclined towards socialism and/or nationalism witnessed either the removal or dilution of this clause from their constitutions. For example, Naseer did not include this clause in all the Egyptian constitutions that he promulgated in the post-Revolutionary period, it was only reinserted after Sadat abandoned Naseer ideology and promulgated a new constitution.

This clause often gains significance in the interpretation of other *Shariah* related provisions in the following two manners. .

## 4.1 Potential to Dilute Islamic-ness of “*Shariah* is a/the source of legislation” clause

First, since it is often found in the company of the clause “*Shariah* is a/the source of legislation” clause, so it is argued that both are related. In Egypt, the original Article 2 of the constitution of 1971 enshrined these two clauses thus:

“Islam is the religion of the state and Arabic is its official language. The principles of Islamic Sharia are a principle source of legislation.”

For ten years, from 1971 to 1980, it was argued that the second sentence in the Article was not enforceable and justiciable because it was merely descriptive in nature rather than being prescriptive. The argument was that since the first part of the sentence is clearly descriptive and about the identity of the state rather than about enforceable legal obligation(s), so there arises a very strong presumption that the second part, declaring *shariah* a principle source of legislation, was also merely descriptive, and it was about the identity of the state. It was due to the strength of this argument that even the Islamists in Egypt came to recognize this article as merely descriptive and demanded an amendment to the Article 2 to replace it with a stronger clause making *Shariah* the principle source of legislation.<sup>36</sup> This amendment was finally enacted in 1980.

A similar article is also found in the 2004 Constitution of Iraq: “Islam is the official religion of the State and is a foundation source of legislation...” (Article 2(1)).

Some scholars have argued that the presence of state religion clause before ‘the foundation source of legislation’ clause points towards the presumption that the later clause is also descriptive rather than being prescriptive.<sup>37</sup>

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<sup>36</sup> Lombardi, *State Law*, 125-135.

<sup>37</sup> Stilt, 740-42; Rabb, 535-538.

## 4.2 Potential of the *Shariah* Legislation Clause to Aid other *Shariah* Related Provisions

Second manner in which state-religion clause can become significant is that it can secure a greater role of Islam in the interpretation of the other articles of the constitution and can potentially act as a supra constitutional article. The SCP in the case discussed below cited this article to establish that the nature of the Pakistani Constitution of 1973 is Islamic, therefore the SCP should interpret the constitutional provision, including structural rules, in the light of Islam.

Out of our two other jurisdictions, Afghanistan and Tunisia, also have this provision. In Tunisia, it is one of the three articles in the constitution that refer to Islam.

## 5 *Shariah* or Islam as “a” or “the” Source of Legislation

This is one of the most contested and perhaps the most significant clause found in the constitution of Islamic countries. This provision is at the top of agenda of all the Islamist parties and often even secular parties in Muslim-majority countries are forced to agree to this provision or to at least not actively oppose it. In modern times, every Islamic Country (e.g., Afghanistan, Iraq, Egypt, etc.), except Tunisia,<sup>38</sup> that has adopted a new constitution inserted this provision in its constitution.<sup>39</sup>

### 5.1 Legislating According to *Shariah* in Pakistan

The earliest debate in any Islamic country concerning the role of Islam in the legislation took place in Pakistan, in 1949. Soon after the establishment of Pakistan the Constituent Assembly

<sup>38</sup> In Tunisia, constitutionalization of this clause was the most contested issue after the Revolution; see, Kareem Fahim, “Tunisia Says Constitution Will Not Cite Islamic Law”, New York Times (March 26, 2012), available at <http://www.nytimes.com/2012/03/27/world/africa/tunisia-says-constitution-will-not-cite-islamic-law.html>.

<sup>39</sup> For the history of this clause and spread to Islamic countries, see Clark B. Lombardi, Constitutional Provisions Making Sharia “A” or “The” Chief Source of Legislation: Where Did They Come From? What Do They Mean? Do They Matter?, 28 Am. U. Int’l L. Rev. 733-74 (2013)

charged with the drafting of the constitution adopted broad principles that were to guide the assembly in the drafting. It soon adopted a document called the “Objective Resolution”. It was a set of broad principles that envisioned a very broad role of Islam in the new state of Pakistan. The Resolution was forcefully resisted by all the non-Muslim member of the Assembly, i.e., by one quarter of the members of the Assembly.<sup>40</sup> The Objective Resolution, inter alia, contained a provision that comes closer to the modern form of the “Shariah is a source of legislation” clause. It stated that:

“Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust... *Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and the Sunnah...*” (Emphasis supplied).<sup>41</sup>

The opponents argued that this Resolution was tantamount to establishment of “*Herrenvolk*” and “amounted to a betrayal of minorities...and a defeat to the *ulema*”.<sup>42</sup> Objective Resolution was incorporated as a preamble of all the subsequent constitutions of Pakistan.<sup>43</sup> It was, however, in 1985, it was made a substantive part of the Constitution by an amendment by General Zia ul Haq.<sup>44</sup> It was interpreted by the judges to be a repugnancy clause” and was relied on to invalidate legislation.<sup>45</sup>

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40 Lau, 188.

41 Article 2A of the Constitution.

42 Lau, 189.

43 Constitutions of 1956, 1962, and 1973.

44 Article 2A of the Constitution of 1973.

45 Lau, 190-91.



This Resolution was also invoked by the SCP in the Al-Jehad Trust case<sup>46</sup> to interpret structural constitutional rules and secure independence of judiciary.<sup>47</sup>

## 5.2 *Shariah* as “A” or “The” Source of Legislation in Egypt

The clause recognizing the principles of *Shariah* as a chief source of legislation was introduced in the Constitution of Egypt for the first time in 1971.<sup>48</sup> The Constitution Drafting Committee adopted/borrowed this clause from the Article 1 of the Egyptian Civil Code of 1948/49.<sup>49</sup> The Code was drafted by the great Egyptian *neo-taqlid* scholar Sanhuri’s and he incorporated similar clause in the Civil Code of Iraq as well.<sup>50</sup>

The Islamists were, however, not happy with drafting for two reasons: First, there was a perception that the Article 2 was descriptive in nature than being perspective. This belief was strengthened by the fact that the clause was placed next to the clauses that made declaration about the state religion and official languages of Egypt, thereby lending credence to the argument that it was simply descriptive in nature and was just affirming the Islamic identity of Egypt. Second, the perception of the clause being was strengthened in the ensuing discussions surrounding Article when the members of the drafting committee in response to the debate weighed in and said it did not impose any constitutionally binding obligation on the state to strictly legislate in accordance with *Shariah*. The members of the Drafting Committee shot down proposal changing the phrasing of the clause to the “principles of Islamic Sharia are the chief source of legislation”.

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<sup>46</sup> *Al-Jehad Trust v Federation of Pakistan* (PLD 324 SC 1996).

<sup>47</sup> See discussion below in the chapter dealing with Pakistan.

<sup>48</sup> Article 2 of 1971 Constitution.

<sup>49</sup> For a detailed drafting history of the Egyptian constitution, see Bruce Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* (1999).

<sup>50</sup> An Egyptian scholar of Islamic and University professor; see Enid Hill, *The Place and Significance of Islamic Law in the Life and Work of ‘Abd al-Razzaq Ahmad al-Sanhuri, Egyptian Jurist and Scholar 1895–1971* (Cairo: American University in Cairo Press, 1987).

The discussions following the adoption of the 1971 Constitution gave rise to a strong consensus the Article was descriptive; therefore, as the 1970s progressed Islamists started arguing for amending the Article 2 to make the principles of Islamic Sharia as “the chief source of legislation”. A Parliamentary Preparatory Committee was constituted to consider the proposed amendment and give a report. The Preparatory Committee in its report concerning the amendment held wide consultation and issued a report in which it emphasized giving the political branches, i.e., legislature and executive, more time and discretion to Islamize the laws at its own pace. The Report downplayed the role of judiciary in the Islamization of laws and put the responsibility squarely on the shoulders of the legislature. Because, in its view, it was best suited to carry out this task and define and determine the principles off *Shariah* through negotiations with other stake holders and through experimentation. The Committee, however, recommended amending the Article 2 of the Constitution as follows: “The principles of Islamic Sharia are the chief source of legislation.”

The Article was finally amended in 1989 and the article “a” before the clause “chief source of legislation” was replaced by the more forceful article “the”. However, even after the passage of the amendment it was not clear whether the legislature was constitutionally bound by principles of *Shariah* or not and controversy continued until the SCC delivered a judgment on the justiciability in 1985.<sup>51</sup>

### 5.3 Iraq: Struggles over “a” or “the” source” and “foundation source” of Legislation

The issue of making the *Shariah* the primary source of legislation also proved to be very contentious in Iraq as well. Present Article 2.1. of the Iraqi Constitution states:

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<sup>51</sup> The *Riba Case*, discussed below in detail.

Islam is the official religion of the state and a foundation<sup>52</sup> source of legislation. No law can be passed that contradicts Islam's settled [legal] rules [or settled Islamic (legal) rules] (thawbit ahkom al-Islam).

However, the Transitional Administrative Law (“TAL”)<sup>53</sup>, the interim law enacted after the US invasion in 2003, contained a similar clause that declared that

“Islam...is to be considered a source of legislation.”

Iraqi TAL clause was, however, different from the Egyptian phrasing, with which Iraqi intelligentsia is well acquainted. The provision stipulated that Islam itself “is to be considered a source of legislation” rather than the Islamic *Shariah*. Later on at the time of the drafting very lengthy debates among secularists and Kurd block on one hand, and the Shia block, on the other hand, took place. In Iraq the debate was two-fold: (1) was *Shariah* going to be a source of legislation or the source of legislation, and (2) how important was going to be, i.e., was it going to be a/the chief source?

### 5.3.1 A Source or the Source?

During this process, a number of competing phrasings had appeared: "the fundamental source," "the first source," "the basic source," "a main source," "a source among sources," and "a fundamental source."<sup>54</sup>

Like Egypt vigorous debates and contestation took place around these sub-clauses at the time of drafting of the Constitution of 2004.<sup>55</sup> The discussion and fears surrounding the debate concerning Islam being “a source of legislation” rather than not being “the source of legislation”

<sup>52</sup> Various translated as “main” and “basic”.

<sup>53</sup> Law of Administration for the State of Iraq for the Transitional Period, available at <http://www.cpa-iraq.org/government/TAL.html>

<sup>54</sup> See, Ashley Deeks & Matthew Burton, “Iraq’s Constitution: A Drafting History”, 40 Cornell Int’l L.J. 1 (2007), 7-10; IRAQ CONST. § 1, art. 2 (July 22, 2005 draft); IRAQ CONST. § 1, art. 2 (Aug. 6, 2005 draft).

<sup>55</sup> For a first-hand account of the drafting of the Iraqi Constitution, see Ashley Deeks & Matthew Burton, “Iraq’s Constitution: A Drafting History”, 40 Cornell Int’l L.J. 1 (2007), 7-10

were similar to the Egyptian experience. The secularist and liberal Kurdish block was very reluctant to change the clause in the new constitution to “the source of legislation”, while the Shia block was very instant on it.<sup>56</sup> At the end the Islamic prevailed and the relevant Article 2.1 of the new Constitution of 2004 read thus:

Article 2.1. Islam is the official religion of the state and a foundation<sup>57</sup> source of legislation. No law can be passed that contradicts Islam's settled [legal] rules [or settled Islamic (legal) rules] (thawbit ahkom al-Islam).

### 5.3.2 Shariah to be a “foundation” source of legislation

After much debate, the new Constitution dropped the words phrase "to be considered" from the clause “Islam...is to be considered a source of legislation” and replaced it with the phrase “a foundation source”.<sup>58</sup> This was reflective of the intent that Islam was to have more prominent role under the 2004 Constitution.<sup>59</sup> This change in phrasing was similar to Egyptian evolution of the Article 2.

## 5.4 Tunisia’s Failed Attempt at Making Islam to be “the main source of legislation”

After the Tunisian Revolution and overthrow of Ben Ali, the long suppressed local Muslim Brotherhood inspired party, Al-Nahda, party won 41% of the seats in the Constituent Assembly in the October 2011 elections.<sup>60</sup> At top of Al-Nahda agenda was the issue of role of Islam in the new Tunisia and its constitution. Its members agitated for a constitutional provision declaring Islam to

<sup>56</sup> See Intisar A. Rabb, “We the Jurists”: Islamic Constitutionalism in Iraq, 10 U. PA. J. CONST. L. 527, 538-44 (2008)

<sup>57</sup> Various translated as “main” and “basic”.

<sup>58</sup> Ashley, 9-10.

<sup>59</sup> Rabb, 539.

<sup>60</sup> Habib Toumi, “Al Nahdah Wins Historic Tunisia Elections,” GULF NEWS (Oct. 28, 2011), <http://gulfnews.com/news/region/tunisia/al-nahda-wins-historic-tunisia-elections-1.919988>; see also Morgan Lorraine Roach, “Tunisia’s Hizb Al-Nahda: A Nightmare for Some and a Blessing for Others,” THE FOUNDRY, THE HERITAGE FOUNDATION (Sept. 16, 2011, 12:08 PM), <http://blog.heritage.org/2011/09/16/tunisia-hizb-al-nahda-a-nightmare-for-some-and-a-blessing-for-others/>.

be “the main source of legislation”<sup>61</sup> and to Islamize Ben Ali is “un-Islamic laws”. However, this proposal proved to be a hard sell for the wider Tunisian population and other parties in the Assembly. Atmosphere became so toxic that a secularist, socialist opposition leader was assassinated by an Islamists. This threatened the entire revolution and could potentially have pushed Tunisia to civil war. Secular opposition, however, continued to vehemently contest al-Nahda’s proposals concerning enshrining *Shariah* in the Constitution.

Representatives of these parties announced that al-Nahda’s proposed constitutional provision emphasizing Islam as the main source of legislation was unacceptable because al-Nahda did not identify which interpretation of Islamic law Tunisians should follow.<sup>62</sup>

In face of strong opposition, Al-Nahda diluted its position on the weightage that the *Shariah* would carry in the new constitution by proposing that of sharia would be a “source among sources” of legislation.<sup>63</sup> However, when even this proposal was not accepted, al-Nahda finally dropped the proposal altogether and explained that it had been abandoned because the meaning of sharia is not fixed and different for different groups that would leave great room for judicial or public authorities to misinterpretation.

The article concerning Islam that was finally adopted was the same as that contained in Article 1 of Tunisia’s 1957 constitution. Article 1 of Tunisia’s 2004 constitution states:

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61 Sarah J. Feuer, “Islam and Democracy in Practice: Tunisia’s Ennahdha Nine Months” In, MIDDLE EAST BRIEF 5 (Crown Center for Middle East Studies, Brandeis University, Sept. 2012), <http://www.brandeis.edu/crown/publications/meb/MEB66.pdf>.

62 Duncan Pickard, “The Current Status of Constitution Making in Tunisia,” CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE (Apr. 19, 2012), <http://carnegieendowment.org/2012/04/19/current-status-of-constitutionmaking-in-tunisia/ah1s>. see also Patrick Goodenough, Sharia Rises in Tunisia’s Constitution-Drafting Process, CNSNEWS.COM (Mar. 2, 2012), <http://cnsnews.com/news/article/shari-rises-tunisia-s-constitution-drafting-process>.

63 Duncan Pickard, “The Current Status of Constitution Making in Tunisia”.

“Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic, and its type of government is the Republic.”

## 5.5 Afghanistan

Afghanistan’s latest constitution of 2004 is very Islamic and contains reference of Islam in fourteen of its one hundred and sixty two articles. It pays special respect to Islam in its preamble and in the first three articles, declaring Afghanistan an Islamic Republic with Islam as official state religion and bound to not enact any “law shall [that] contravene[s] the tenets and provisions of the holy religion of Islam in Afghanistan.” Despite this repugnancy clause, in Afghan constitution, there is, however, a positive command making sharia a source of legislation is missing. The closest the constitution comes to such a provision is Article 130, which stipulates,

“When there is no provision in the Constitution or other laws regarding ruling on an issue, the court’s decisions shall be within the limits of this Constitution in accord with *Hanafi jurisprudence* ...”

It is interesting that Afghanistan’s constitution is unique in that it constitutionalize jurisprudence of a particular *madahab*- no other Islamic constitution makes reference to any of the four *madahabs*.

## 6 Repugnancy Clauses in Islamic Constitutions

Like the Sharia as the source of legislation clause, the Islamic repugnancy clauses have also spread to many Islamic constitution of the world.<sup>64</sup> These clauses are also focus of much debate and considerable attention at the time of drafting of constitution and can prove to be instrumental

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<sup>64</sup> For introduction and spread of these clauses, see Hamoudi, Haider Ala, “Repugnancy in the Arab World,” Willamette Law Review, Vol. 48:427, 2012.

interpreting the structural constitutional rules, as can be seen from the Pakistani SC's judgment in Al-Jehad Case.<sup>65</sup> This clause was first introduced in the constitution of Pakistan of 1956.

## 6.1 Repugnancy in Pakistan

The Constitution of Pakistan enshrines repugnancy clauses similar to the constitutions of Afghanistan and Iraq. In the Pakistani Constitution, however, there are two such articles each assigning the power to declare repugnancy to two different institutions.

### 6.1.1 Islamic Council

Article 227 assigns this responsibility to Islamic Council. It states:

"All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions...

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part."

But the Constitution envisages only an advisory and recommendatory Council of Islamic Ideology that has been tasked to make recommendations to the legislature.<sup>66</sup>

### 6.1.2 Federal Shariat Court

Part VII of the Constitution titled in its Chapter 3A assigns this jurisdiction to a special court, Federal Shariat Court (FSC). Article 203D states:

"Powers, Jurisdiction and Functions of the Court.

(1) The Court may, 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 Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam."

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<sup>65</sup> See discussion below.

<sup>66</sup> Part IX.

But Article 203B(a) severely limits FSC's jurisdiction by defining "law" as to "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".

## 6.2 Repugnancy in Iraq

In Iraq, at the time of drafting of the constitution of 2004, the exact scope of repugnancy was of considerable debate among not only the constitutional drafters, but among the Occupation forces and Western Human rights NGOs, and women and minorities.<sup>67</sup> Apart from secularists, ethnic minority, Kurds, with its own autonomous region was also wary of this provision because of the consequences it could potentially have in undermining federal character of Iraq and decreasing autonomy of Kurdistan. These fears stemmed from lack of clarity concerning what exactly could count as sharia and giving such wide powers to unelected judges that were expected to be appointed by the Shai majority. Kurds due to their historical autonomy that they had enjoyed even in Saddam's time preferred to keep power in the hands of political branch because that is where they could, due to their muscles despite being in majority, negotiate with the federal government more effectively.<sup>68</sup> The disagreement and concerns of different section over the repugnancy clause are evident form the unusual phrasing of the relevant Article 2:

"Article 2: First: Islam is the official religion of the State and is a foundation source of legislation:

- A. No law may be enacted that contradicts the established provisions of Islam.
- B. No law may be enacted that contradicts the principles of democracy.

<sup>67</sup> See Haider Ala Hamoudi, "Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution", (October 26, 2010). St. Thomas University Law Review, Vol. 7, No. 3, 2010.

<sup>68</sup> Ashley Deeks & Matthew Burton, "Iraq's Constitution: A Drafting History", 40 Cornell Int'l L.J. 1 (2007).



C. No law may be enacted that contradicts the rights and basic freedoms stipulated in this Constitution.”

The placement of sub-clauses B and C in the same article that establish Islamic repugnancy reveals the deep-seated apprehension of the opponents of religious repugnancy clause. In order to ensure that this clause is not misused by the Supreme Court, the drafter placed the principles of democracy and the rights and basic freedom stipulated in the constitution next to its religious repugnancy clause. This is very unique phrasing.

After much haggling the parties in the final draft made a significant change to the original TAL draft: the old clause that prohibited laws that contradicted "the agreed-upon (through consensus), settled tenets of Islam" with a clause that prohibited the enactment of laws that contradicted "the settled Islamic (legal) rules." According to Rabb, this change “underscores the focus on law rather than religion.”<sup>69</sup> This change tries to shift the focus back to law from religion as enshrined in the first sentence of Article 2.1 (i.e., Islam is ... a basic source of legislation”) helps limit the role of religion and make the Article 2.1 as whole equivalent to the Article 2 of the Egyptian Constitution. However, the true scope of this article seems still very uncertain and text can support both an expansive reading as well as a narrow one.

### 6.3 Repugnancy in Afghanistan

Afghanistan in keeping with the tradition of its old constitutions has enshrined a repugnancy clause in its Article 3:

“In Afghanistan, there shall be no law repugnant to the ordinances of the sacred religion of Islam and other values in this constitution.”

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<sup>69</sup> Rabb, 539.

## 6.4 Repugnancy in Egypt

The Constitution of 1971 did not have any explicit repugnancy clause, however, amendment to the Article 2 in 1980 that made the principles of Islamic *Shariah* the main sources of legislation was construed by SCC in 1850 to impose the repugnancy restriction on all legislation passed after the amendment.<sup>70</sup>

## 6.5 Repugnancy in Tunisia

During the drafting of the post-revolutionary constitution the Islamists wanted to introduce repugnancy in the constitution through the vehicle of making principles of sharia as the main source of legislation. The Tunisian Islamists wanted to follow the SCC of Egypt's example and argued that the enactment of the principles of *Shariah* to be the main source of legislation clause would entail repugnancy.<sup>71</sup>

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<sup>70</sup> See Riba case discussed below.

<sup>71</sup> Sarah J. Feuer, "Islam and Democracy in Practice: Tunisia's Ennahdha Nine Months", In, MIDDLE EAST BRIEF 5 (Crown Center for Middle East Studies, Brandeis University, Sept. 2012), <http://www.brandeis.edu/crown/publications/meb/MEB66.pdf>; Asma Ghribi, Efforts to Abolish Death Penalty in Tunisia Impeded by Islamic Law, TUNISIALIVE (Mar. 28, 2012), <http://www.tunisia-live.net/2012/03/28/efforts-to-abolish-death-penalty-in-tunisia-impeded-by-islamic-law/>.

## CHAPTER 3: Article 2 Jurisprudence of the SCC of Egypt

### 7 Significance of Egypt and Why Study it?

Historically Egypt has been model of law in the Islamic Countries of Middle East and North Africa and debates in *Shariah* law and Islamic political theory taking place there have been greatly influential throughout Islamic world. Legal developments in Egypt, especially, its uniform civil code<sup>72</sup> has been very influential in shaping the civil codes of other Arab countries, especially Iraq, Tunisia, and Libya.<sup>73</sup> In the Muslim world, Egypt was the leader in incorporating referenced to Islam in civil code, personal status law and the Constitution and personal law, which had been historically thoroughly Islamic, was codified for the first time. From the point of view of present research undertaking Egypt is important because it exemplifies a country whose history, struggle with Islamic law and tensions arising due to its incorporation of Islamic law in state law are either similar to or have influenced other jurisdictions discussed here, especially Iraq and Tunisia but Pakistan has also been influenced by politic-legal theory developed in Egypt. Moreover, one of the most important scholar in the field of civil code and family law was also an Egyptian scholar of Islamic and University professor namely Abdel Razziq Sanhuri. He single-handedly drafter the Civil Codes of Egypt, Iraq,<sup>74</sup> and Libya, and was instrumental in drafting of the constitutions of Bahrain and Sudan.<sup>75</sup>

Moreover, apart from the influence of Egyptian civil code, the (in)famous *Shariah* legislation clause (“*Shariah* is a/the primary source of legislation”) is also an Egyptian invention Egypt;<sup>76</sup> the

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72 The Civil Code of Egypt of 1948 (Law No. 131 of 1948)

73 See generally, Nathan Brown, *The Rule of Law in the Arab World: Courts in Egypt and the Gulf*, (Cambridge: Cambridge University Press, 1997)

74 AL-QANUN AL-MADANI AL-IRAQI [Civil Code] (1951).

75 Enid Hill, A1-Sanhuri and Islamic Law, 10 CAIRO PAPERS IN SOCIAL SCIENCE 106 (1987); Stilt 729-455

76 Stilt, 730.

constitution drafters in Iraq and Afghanistan while incorporating *Shariah* in their respective constitutions were profoundly mindful of the clause and the consequence of this clause. The finally phrasing in Iraq was also a weaker version of the Egyptian clause.<sup>77</sup> Since the Iraq and Afghanistan have incorporated similar reference to Islam therefore an examination of the construction of this language in concrete cases by the SCC can guide us that in what way Islamic provisions from the perspective of separations of powers can be interpreted in two countries that have adopted their constitutions recently. Moreover, it is important to study because the theory for assessing the compatibility of laws with *Shariah* law as developed by the SCC of Egypt is the most comprehensive in the Muslim world.

## 8 Historical Background of Islamization in Egypt

For a complete and richer understanding of the modern debates concerning the role of *Shariah* in Egyptian Constitution and its interpretation by the SCC, it is helpful to briefly examine the historical background and the context in which Islamization of the Constitution took place starting from 1970 and further consolidated through an amendment in 1980.

### 8.1 Historical Influence of Islam

Before discussing the Egypt came under the influence of Islam in the seventh century, when it was conquered from the Byzantine Empire, during the reign of third Caliph of Islam, Umar. Advent of Islam completely changed the legal and political structures of Egypt and later centuries it became great center of Islamic learning where one of the most important Madhab, i.e., *Shafi*, took roots. In the sixteenth century another conquest of Egypt by the Ottoman Turks also had great influence in shaping the contemporary legal institutions of Egypt. Ottomans introduced the *Millet*

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<sup>77</sup> See Stilt, 727-28.

System to Egypt and it was governed by *Hanafi* madhab, despite the fact that the majority of Egyptian were *Shafi*. The result of imposition of *Hanafi madhab* by Ottoman is that now most Egyptians are *Hanafi*, and the family law and debates concerning *Shariah* and Islam are heavily *Hanafi* inspired. At the start of 19<sup>th</sup> century the brief occupation of Egypt by Napoleon Bonaparte laid the foundation of the modern Egypt and had long term implications for the legal systems of Egypt. The French influence on the legal system of Egypt is most patent in the Egyptian Civil Code of 1948 which is still in force.<sup>78</sup>

## 8.2 Attempts at Constitution Making Before 1971

The earliest attempt at the what scholars have called constitution making in Egypt was made under the French influence in 1837 when the founder of modern Egypt Mohammed Ali issues Organic Law (“*Siyastnama Kaw*”). This law structured the government and tried to create governing councils to supervise state activities.<sup>79</sup>

The second attempt at Constitution making was took place in 1882 when a constitution was promulgated and significant powers were given to the legislature. The Constitution of 1882 proved to be short lived due to *Orabi* Revolt. After the *Orabi* Revolt the British occupied Egypt and they introduced two significant Organic Laws: one at the start of the rule (1883) and second at the tail end of their rule (1913). These Laws established Legislative Councils were meant to give more autonomy to Egyptians in the legislative sphere.<sup>80</sup>

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<sup>78</sup> Hill, *Al-Sanhuri and Islamic Law*, 420.

<sup>79</sup> See in Kevin Boyle and Adel Omar Sherif, ‘The Road to the 1971 Constitution- A Brief Constitutional History of Modern Egypt’ in Kevin Boyle and Sherif, Adel Omar (eds) in *Human Rights and Democracy: The Role of the Supreme Constitutional Court of Egypt*, (1996) ,4.

<sup>80</sup> Kevin, 5-6.

Finally, in 1923 the first modern Egyptian Constitution was adopted after the British declared it to be a sovereign state. The 1923 continued to be in operation, with one disruption, till 1952 when Naseer abolished it and promulgated a revolutionary constitution in 1956.

### 8.3 Islamic Provisions of 1971 Constitution<sup>81</sup>

The Constitution of 1971 was drafted after the death of Naseer and on the ascension of Sadat. Tamir Moustafa has made very convincing arguments explaining the motives and reasons for the adoption of the new constitution.<sup>82</sup> In his view, it was primarily for economic reasons that the new constitution was adopted. Moreover, another reason was an acceptance of the long term demand of the large majority of Egyptian population for a public role of Islam in the affairs of state. Due to complex of reason, shoring up of decreasing legitimacy of the regime being the most prominent one, Sadat abandoned the secularist policy of Naseer and drafted a new constitution that was more Islamic in Character than all the constitution promulgated in Egypt hitherto. It is, therefore, no surprise that there was vigorous debate about the role of Islam at the time of drafting of the constitution and intellectuals from all sides participated in this debate.<sup>83</sup>

It was the result of this debate and popular demand that the Constitution contained some symbolic provisions concerning the role of Islam. The most prominent among them was the Article 2. There are two main noteworthy points in this Article. First, all the constitutions and emergency laws framed under Naseer did not recognize Islam as the state religion but the latest Constitution once again recognized Islam to be the religion of the state, as had the constitution of 1923 done. Second, for the first time, in the history of Egypt a clause recognizing the principles of *Shariah* as

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<sup>81</sup> Although the latest constitution in Egypt is from 2014, which was promulgated after ousting President Morsi and repealing the Constitution drafted by the Muslim Brotherhood Parliament in 2012, the Constitution for the purposes of our present essay is of 1971, which is very similar to the Constitution of 2014.

<sup>82</sup> See Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007), 235.

<sup>83</sup> See Lombardi, “Shariah”, 755; J.P O’Kane, Islam in the New Egyptian Constitution in 26 MIDDLE EAST JOURNAL, 137-48 (Spring 1972).

a chief source of legislation was introduced in the Constitution. The Constitution Drafting Committee adopted/borrowed this clause from the Article 1 of the Egyptian Civil Code of 1948/49,<sup>84</sup> which was drafted by Sanhuri.

The Islamists were, however, not happy with drafting because of two reasons: First, there was perception that the Article 2 was descriptive in nature than being perspective. This belief was strengthened by the fact that the clause was placed next to the clause that declared the state religion and official languages of Egypt, thereby lending credence to the argument that it was simple descriptive in nature and was just affirming the Islamic identity of Egypt. Second, the perception of the clause being was strengthened in the ensuing discussions surrounding the article when the members of the drafting committee in response to the debate weighed in and said it did not impose any constitutionally binding obligation on the state to strictly legislate in accordance with *Shariah*. The members of the Drafting Committee shot down proposal changing the phrasing of the clause to the “principles of Islamic Sharia are the chief source of legislation”.

## 9 Making of Sharia “the” Chief Source of Legislation in Egypt (1980)

The discussions following the adoption of the 1971 Constitution gave rise to strong consensus the Article was descriptive, as the 1970s progressed Islamists started arguing for amending the Article 2 to make the principles of Islamic Shariah as “the chief source of legislation”. As a result, Sadat in order to shore up his failing legitimacy, especially after the Camp David Agreement with

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<sup>84</sup> For a detailed drafting history of the Egyptian constitution, see Bruce Rutherford, *The Struggle for Constitutionalism in Egypt: Understanding the Obstacles to Democratic Transition in the Arab World* (1999).

Israel,<sup>85</sup> and to placate increasingly violent Islamists, decided to constitute a parliamentary preparatory Committee to consider the proposed amendment and give recommendation.

## 9.1 Formation of Parliamentary Commission

The preparatory committee in its report concerning the amendment held wide consultation and issued a report in which it emphasized giving the political branches, i.e., legislature and executive, more time and discretion to Islamize the laws at its own pace. The Report downplayed the role of judiciary in the Islamization of laws and put the responsibility squarely on the shoulders of the legislature because in its view it was best suited to carry out this task and define and determine what were the principles off *Shariah* through negotiations with other stake holders and through experimentation. The Committee, however, recommended amending the Article 2 of the Constitution to replace “a” with “the” in the Article 2. The Article was finally amended in 1980 and the article “a” before the clause “chief source of legislation” was replaced by the more forceful article “the”.

### 9.1.1 Struggles over “a source” and “a main source” in Iraq

Remarkably similar vigorous and often acrimonious debates and contestations took place around these sub-clauses at the time of drafting of the Constitution of 2004. Transitional Administrative Law (“TAL”), the interim law enacted after the US invasion in 2003, also contained a similar clause that declared that “Islam...is to be considered a source of legislation. It shall not be permitted to enact a law conflicting with the settled tenets of Islam that have been agreed through consensus.”

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<sup>85</sup> Lombardi, *State Law*, 130.



Iraqi TAL clause was, however, different from the Egyptian phrasing, with which Iraqi intelligentsia is well acquainted, in at least in two respects: first, the provision stipulated that Islam itself “is to be considered a source of legislation” rather than the Islamic *Shariah*; second, it goes a step further from the Egyptian Constitution and reinforces the first part by including a what is called *Shariah* Repugnancy clause, i.e. “It shall not be permitted to enact a law conflicting with the settled tenets of Islam that have been agreed through consensus.”

The discussion and fears surrounding the debate concerning Islam being “a source of legislation” rather than not being “the source of legislation” were similar to the Egyptian experience. The secularist and liberal Kurdish block was very reluctant to change the clause in the new constitution to “the source of legislation”, while the Shia block was very instant on it.<sup>86</sup> At the end the Islamic prevailed and the relevant Article 2.1 of the new Constitution of 2004 read thus:

Article 2.1. Islam is the official religion of the state and a basic source of legislation. No law can be passed that contradicts Islam's settled [legal] rules [or settled Islamic (legal) rules] (thawbit ahkom al-Islam).

The new Constitution dropped the words phrase "to be considered" from the clause “Islam...is to be considered a source of legislation” and replaced it with the phrase “a basic source”. This was reflective of the intent that Islam was to have more prominent role under the 2004 Constitution.<sup>87</sup> This change in phrasing was similar to Egyptian evolution of the Article 2.

Another change made in the Article was that the old clause that prohibited laws that contradicted "the agreed-upon (through consensus), settled tenets of Islam” with a clause that

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<sup>86</sup> See Rabb, 538-44.

<sup>87</sup> *Id.*, 539.

prohibited the enactment of laws that contradicted "the settled Islamic (legal) rules." According to Rabb, this change "underscores the focus on law rather than religion."<sup>88</sup> This change that tries to shift the focus back to law from religion as enshrined in the first sentence of Article 2.1 (i.e., Islam is ... a basic source of legislation") helps limit the role of religion and make the Article 2.1 as whole equivalent to the Article 2 of the Egyptian Constitution.

## 9.2 Ambiguity in the Post-Article 2 Amendment Era Egypt

The Amendment did not end the debate and contest over the meaning and significance of Article 2. Dispute arose over three points: (a) what was meant by the clause that sharia was to be "the principal source of legislation"? (b) what was the meaning of "Islamic *Shariah*"? (c) who was going to decide what the sharia was? and what was the meaning of Article 2?

### 9.2.1 Contestation over the Significance/Meaning of the Amendment

In the first step, the contest revolved around the implications of the amendment for the legislation: did it mean that the Article was exhorting the legislation to prefer *Shariah* as the chief source while legislating? Was the Article 2 was imposing a binding obligation on the legislature to enact all legislation in accordance with *Shariah*? If it was imposing a binding obligation, was the legislature required to revise all previous laws to make them *Shariah* compliance and if need arises and reenact all past statutes that offended *Shariah*?

Secularists insisted that the Article at the maximum ask the legislature to merely prefer *Shariah* as a source of legislation and it did not impose any constitutionally binding and enforceable duty on the legislature. The legislature was free to legislate in whatever manner it

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<sup>88</sup> *Id.* 539.

deemed fir. Religious proponents of Article 2, on the other hand, insisted that Article 2 imposed a binding obligation to make all (both previously passed before the amendment and future laws) laws *Shariah* compliant.

### 9.2.2 Defining *Shariah*

Second issue was concerning on over the definition of “*Shariah*”. Muslims have never historically agreed on what precisely *Shariah* is. Some had a very expansive definition of sharia, others a narrow one. There was, however, no generally agreed upon framework of *Shariah* that could help legislature in deriving legal rules from.

### 9.2.3 Final Decision Making Authority

Third issue related to the first two was on the final decision-making authority. Islamists argued that since amended Article 2 imposed a legal binding duty on the legislature to make all laws constant with Islam, therefore in the constitutionally scheme of things the SCC could enforce it by conducting judicial review. Islamist sought to empower the judiciary and wanted Islamization through the SCC because they did not have much chances in the legislative sphere where Hosni Mubbarak ruled absolutely and had officially abandoned Sadat’s Islamization project. The government on the other hand, argued that it was up to the political branch to undertake *Shariah* at its own pace.

Similarly, there was considerable disagreement on the final authority that would determine what *Shariah* was. Even Islamists were split on this issue: neo-traditionalist/*neo-taqlid* scholars wanted to reserve this power for *ulema* and Hanafi jurisprudence, while Islamists and modernists, including Muslim Brotherhood, were deeply suspicious of the traditional *ulema* and emphasize textual *ijtihad*. Al-Azhar University was another contender. The Government/legislature insisted

it was best suited to decide what *Shariah* was. Finally, there was the SCC, that also had a constitutionally secured right of judicial review. At the end, it was the SCC that emerged as the final arbiter on *Shariah*.

### 9.3 Abandonment of Islamization Project

In the mid-1980s the President Hosni Mubarak abandoned the Islamization initiated by his predecessor and instead started a crackdown on Muslim Brotherhood. The Parliamentary Commission tasked with issuing a report on conformity of laws of Egypt with Islamic taking cue from Mubarrak also refused to issue a report, after sitting working on it five years.<sup>89</sup> The Islamists were therefore justifiably disappointed with the government and had lost hope of any Islamization through the legislature, thus many of them turned to violent extremism. It seems there was deadlock with a government bent on pushing its secular agenda and refusing to give an inch to Islamists and Islamist becoming more violent. It was at this moment of a crisis in Egyptian politics that the SCC entered the foray as more and more modern sections of the Brotherhood started petitioning the SCC for forcing the government to comply with the Article 2.<sup>90</sup>

## 10 Article 2 Debate: Enter the SCC in the

It was amidst this crisis that the SCC finally issued two opinions, on the same day, in 1985 on Article 2. These cases are discussed in detail below, suffice to say here that the first challenged the law allowing charging of interest by a lender to be against the Article 2, and the second case had assailed Jihan's Law, a law enacting wide ranging amendments to Muslim personal law and civil code, for being violative of principles of the Islamic *Shariah*. The SCC decided both the cases,

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<sup>89</sup> Lombardi, *State Law*, 137-39.

<sup>90</sup> For ideological and practical concerns of the SCC, see *id.* 147-157.

without going into the substantive interpretation of Article 2, on procedural and technical grounds. Through these cases the SCC indicated that the Article 2 was justiciable.

## 11 Creation of the SCC

### 11.1 Structure of the Egyptian Judicial System

In Egypt the SCC sits at the apex for determination for the interpretation of constitutional issues that might arise in the proceedings before the national courts of general jurisdiction or before the administrative courts. The Egyptian system is almost a replica of the French system. There are national courts of general jurisdiction, Court of Cassation sitting at the apex. Then there are administrative courts, headed by the High Administrative Court (*Al- Ma`kama al-Idariyya al-'Ulya*) whose decision is final in the administrative matters.<sup>91</sup>

### 11.2 Establishment of the First Institution for Judicial Review

The SCC of originally created in 1969 by President Naseer to weaken the powers of the Supreme Court of Egypt.<sup>92</sup> Naseer regime decided to give powers of the judicial review to an institution which it thought it would be able to control and check more easily.<sup>93</sup> However, soon afterwards President Naseer passed away and President Sadat as a part of comprehensive reforms to kickstart Egyptian economy envisioned a Constitutional Court similar to Sadat's in the Constitution of 1971. However, the SCC that was written in the Constitution did not became operational/established on ground until 1979 because the government never drafted the necessary legislation. In 1979, Sadat finally passed Law 48 of 1979<sup>94</sup> that restructured the SCC and gave it

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<sup>91</sup> *Id.* 142.

<sup>92</sup> Law No. 81 of 1969.

<sup>93</sup> Law No. 66 of 1970 .

<sup>94</sup> Law No. 48 of 1979, published in Kevin Boyle and Sherif, Adel Omar, *Human Rights and Democracy*.

more independence but the President firmly held the powers over appointments of judges to the SCC.<sup>95</sup> It is these great powers of the executive over appointment of judges to the SCC that would prove to be SCC's *Achilles'* heel and be the decisive tool in the hands of President Mubarak when he proceeded to tame the SCC and destroy its independence.

### 11.2.1 Jurisdiction of SCC

Law 48 of 1979 defines the jurisdiction of the SCC. Article 25 gives it three types of jurisdiction: (a) adjudication of particular disputes arising over particular cases between two Egyptian courts, e.g., national courts and administrative courts; (b) issue authoritative interpretations of legislative acts in case of conflicting interpretation by different courts; and (c) perform constitutional review in limited cases on the reference of the subordinate courts, if the subordinate courts recommend that significant questions of constitutional importance have arisen during the course of the proceedings and they demand an interpretation of the Constitution by the SCC. It is significant to note that the law does not provide direct access to the SCC.

### 11.2.2 Appointments to SCC under Law 48 of 1979

Article 5 of the Law gave wide absolute discretion to the President to appoint the Chief Justice of SCC through a Presidential decree. The only restriction on the presidential discretion is that the appointee should be competent to become a judge of the SCC. In 2001 President Mubarak used this provision to reign in the SCC by appointing his right-hand man, his former deputy justice minister Fathi Nagib, as the Chief Justice of SCC.<sup>96</sup> Similarly, in the matter of the appointment of associate justices, the president enjoys a great discretion, however, he required to consult with the Chief Justice before the final appointment.<sup>97</sup> The most important aspect of the law is its silence on

<sup>95</sup> See Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007), 57-87.

<sup>96</sup> *Id.* 198-199.

<sup>97</sup> Article 5 of Law 48 of 1979.

the number of associate justices. It meant that the President could appoint as many justices as he please. This provision proved to be the most significant weapon in the hands of the executive when it started court packing in early 2000 to undermine and eventually destroy the independence of the SCC.<sup>98</sup>

### 11.3 Justiciability of the Article 2

As is evident from the above discussion that there was also debate around the justiciability of Article 2. It appears that initially the SCC agreed with the view of secularists and government that Article 2 was not justiciable. The Court initially considered Article 2 claims to be barred by the “political question doctrine” as developed by the US Supreme Court.<sup>99</sup> This initial resistance of SCC is captured by Justice Abdel Rahman Nosseir,

“The general guidance given by the court in this concern is that such political questions (or acts of sovereignty) are closely interrelated with the sovereignty of the State, internally and externally, and encompass, by their nature, profound political considerations which justify giving the legislative or executive branches full discretionary power in order to realize the security and well-being of the country. As a result, this category of political questions (or acts of sovereignty) may not be subjected to legal control, neither on its constitutionality or its legality.”<sup>100</sup>

Non-justiciability of Article 2 was also supported by the Parliamentary Preparatory Committee Report. According to the Report, it was a political responsibility of the legislature rather than it being a job of courts to undertake Islamization.<sup>101</sup>

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<sup>98</sup> Tamir, 199-200.

<sup>99</sup> Lombardi, *State Law*, 160.

<sup>100</sup> *Id.* 160, n4.

<sup>101</sup> *Id.* 160.

## 12 Methodology of the SCC

A critical examination of the SCC case law on Article 2 challenge reveals that over the years it has developed a distinctive methodology to review the claims concerning compatibility of legislations with the principles of *Shariah*; this methodology has had profound implications for constitutional structural rules, separation of powers, constraints on governmental powers, independence of judiciary and judicial power, especially power of judicial review. In this essay the SCC's interpretive methodology has been gleaned by critically examining seven cases from 1985 to 1997 that dealt with the Article 2 challenges; out of these seven, five cases concern substantive interpretation by the SCC, while of the two other cases one was decided on procedural grounds and the other was decided on non-retroactive application of Article 2- these two cases were the earliest cases in which SCC ruled on Article 2 (after it was amended in 1980) albeit on non-substantive grounds.

### 12.1 Consistency of the Legislation with the *Shariah*

It was for the first time in 1993, i.e., almost fourteen years of the Amendment to Article 2, that the SCC gave a substantive interpretation to the Article 2 in the Case No. 7 of Judicial Year 8.<sup>102</sup> In this case the SCC for the first time indicated what the Court understood by the clause held what was when the SCC ruled in 1985 in the *Riba Case* that the Article 2 required that the legislation enacted must respect *Shariah*. In 1985, the last case to have been decided on the basis of Article 2 challenge, the SCC had upheld the Riba provisions of the Egyptian Code on the basis of the doctrine of non-retroactive application of Article 2 and had just additionally held as *obiter dicta* that the Article 2 imposes an obligation on the legislature to respect *Shariah* in all legislation

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<sup>102</sup> Case No. 7 of Judicial Year 8 (May 15, 1993), SCC, vol. V, Part 2, 265–90, all the translations of Egyptian cases are by Lombardi.



enacted after the Amendment of Article 2. Since there was no need to interpret Article 2 for the reaching the result that the SCC did, therefore it refrained from interpreting the *Shariah* component of the Article 2. In 1993 finally clarified, though in a very cryptic manner, that the Article 2 required the government to respect:

- (i) the absolutely certain and universal rulings of *Shariah*, and
- (ii) the goals of *Shariah*.

Concerning the absolutely certain and universal rulings of *Shariah* the SCC says:

A legislative text is not permitted to contradict Islamic legal rulings that are absolutely certain in their authenticity and meaning. It is these rulings alone in which *Ijtihad* is not permitted. They represent the Islamic shari 'a, its universal principles and established roots which are not subject to interpretation or alteration; and it is inconceivable that the interpretation of them [the universally applicable principles] will change with a change of time or place...<sup>103</sup>

Then SCC goes on to state the second limb of its test by laying out the area/sphere where *Ijtihad* by the legislature is permissible and what should be its goals:

[The legislative text may only] the rulings that are probable whether with respect to their authenticity or their meaning or both. The sphere of *Ijtihad* is limited to them [the probable rulings of the shari'a]... And they [the rulings that are merely probable] change with the change of times and place in order to guarantee their malleability and vigor in order to face new circumstances and in order to organize the affairs of the people, with respect to their welfare from the consideration of law... It is necessary that *Ijtihad* occur within the frame of the universal roots of the Islamic shari 'a) . . . building practical rulings and, in discovering them [these rulings], relying on the justice of the shari 'a, [and] expecting the result of them [these rulings] to be a realization of the general goals of the shari 'a, among which are the protection of religion, life, reason, honor, and property.<sup>104</sup>

<sup>103</sup> Case No. 7 of Judicial Year 8 (May 15, 1993), 283 translated by Lombardi, *State Law*, qtd at 180.

<sup>104</sup> Case No. 7 of Judicial Year 8 (May 15, 1993), 283 translated by Lombardi and qtd at 180.

What this means is that as long the legislature meets the twin criteria set in Article 2, it can legislate as it deems appropriate. At a superficial level it might appear that the SCC is putting strict constraints on the legislative sphere however a closer examination of the afore-mentioned two-prong test reveals that actually the legislature has gained more freedom from the SCC's intervention. Because (a) it has freed the legislature from the dead hands of the jurists of past and decreased the role of *ulema*, and (b) the criteria are so broad that almost every legislation in Muslim country, where government is even remotely attentive to the aspiration of its people, can meet the criteria laid down by the SCC. Both of these points are explained below.

## 12.2 Identifying the absolutely certain rulings of the shari'a

Concerning the first-prong of the test the question arises what does the SCC mean by “Islamic legal rulings that are absolutely certain in their authenticity and meaning...” and “universal principles and established roots” of *Shariah*. This prong can be further divided into two further parts: (a) a ruling must be derived from an absolutely certainty and authentic text, and (b) the meaning of the ruling must have been universally accepted and established in *Shariah* over the centuries.

Here the SCC is utilizing and borrowing the terminology from the modernist and neo-*Ijtihad* schools of interpretations on one hand, and from the classical and neo-taqlid traditions of Islamic jurisprudence on one hand. In a master stroke, on the one hand, the Court is borrowing and appealing to two competing interpretative schools that have been active in political and legal sphere since mid-19<sup>th</sup> century; while on the other hand, the SCC by utilizing both the methods is undercutting and undermining actual implications and constraints that Islam can have for the legislative sphere.

In the part (a) of first prong when the court says that in order to find a law to be in contradiction to a ruling of *Shariah*, the ruling must be absolutely certain and authentic, it is appealing to neo-*Ijtihad* and modernists traditions of Muhammad Abdou and Rashid Rida; both had profound influence on the ideologues of the Muslim Brotherhood which in turn has been a major player in political Islam. Rida's can be characterized as an Islamic utilitarian<sup>105</sup> who laid the foundation of modernist thought and neo-*Ijtihad* traditions in Islam. He contended that only authentic and absolutely certain rulings of Quran should be applied and rest of matters should be left for *Ijtihad* to be undertaken by the state through the utilization of human reason. Rida imposed a very high barrier for accepting rulings of Sharia and his methodology meant that were very few rulings in Quran that met his high standard. In practice this meant that a vast amount of literature and legal rulings developed by the *fiqh* over centuries become irrelevant and the state is freed to legislate as long as it keep in mind the welfare of its people. Moreover, his emphasis on absolute certainty and authenticity meant that lots of hadith literature was

On the other hand, in the part (b) of the first-prong test where the Court insist that "it is inconceivable that the interpretation of [the absolutely certain rulings] will change with a change of time or place", it is borrowing from and appealing to the neo-traditionalist or neo-taqlid tradition; the most prominent scholar from this tradition in the 20<sup>th</sup> century scholar was Sanhuri. Neo-taqlid tradition emphasize on the vast *fiqh* literature developed by four madhabs and insist on discovering modern laws in almost *Langdellian*<sup>106</sup> fashion.<sup>107</sup> To write civil codes of Egypt and Iraq, Sanhuri compared the established principles of *Shariah* as laid down by jurists over time and insisted on following their examples. Taqlid tradition, unlike modernists, does not emphasize much

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<sup>105</sup> Neo-taqlid tradition.

<sup>106</sup> Christopher Columbus Langdell, the first Dean of the Harvard Law School developed case study method, see Richard A. Danner, *Law Libraries and Laboratories: The Legacies of Langdell and His Metaphor*, 107 *Law Library Journal* 7-55 (2015).

<sup>107</sup> See Amr Shalakany, "Between Identity and Redistribution: Sanhuri, Genealogy and the Will to Islamize," *Islamic Law and Society*, (2001).

on the absolute certainty or absolute authenticity. The SCC in this sub-prong checks if a textual command has been interpreted by all classical jurists in a similar way at different times and places. This is a very heavy hurdle to pass because classical jurists, and they were hundreds of them, rarely agreed, on one interpretation. The practical consequence for the SCC is that it can easily show that there were differences among the classical jurists on the interpretation which a challenger is trying assail an impugned legislation with.

Therefore, the SCC's insistence in the first-prong of test in evaluating a ruling on the yardstick of the both the neo-*Ijtihad* and neo-traditionalists means that practically there are very few *Shariah* ruling that can meet the twin criteria of the first prong. The practical consequence is that the Court has found few precepts that meets its high criteria set in the first prong.<sup>108</sup> Even once the Court has discovered a precept that is absolutely authentic and certain in its meaning, the forms the precepts have taken are general, leaving great room for the government to make a judgment call and interpret that general command of *Shariah* into a concrete law. For example, the SCC in the famous Veil ban case found that the precept that *Shariah* commanded women to "cover" themselves, however, what the *Shariah* did not specify the exact manner and mode of covering. It means that the interpreter of command, here the legislature, has a great room to interpret covering. The SCC reasoned that covering didn't necessarily mean full veil or even head covering. The state as an undertaker of *Ijtihad* could interpret "covering" keep in mind the goals of *Shariah* and utility of the society. Since the government had an interest in the education and dignity of women, therefore it could impose veil ban in educational institutes.

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<sup>108</sup> See, e.g., Case No. 35 of Judicial Year 9, 6 S.C.C. 331, 350 (1994)

It is due to this methodology of the SCC that it has never struck down a law for not meeting the first-prong of its test; whenever, the SCC has struck down a law it has been on the grounds of not meeting the second-prong of the test, larger goals of *Shariah*.

This further means that the government gets space in which to legislate without those legislations being struck down as un-Islamic.

### 12.2.1 Making Hadith Literature Redundant and Creating More Space for the Government

The room for legislative activity and governmental regulations is also expanded by the fact that the first prong of the SCC's test results in discarding of majority of hadith literature because it cannot meet the stringent criteria of "absolute certainty and authority of meaning and interpretation at all times and places". The result is that again the legislature domain is greatly expanded once vast majority of hadith literature gets out of the equation. Moreover, although theoretically the SCC has accepted hadith literature as a valid source of Sharia, in its opinion has rarely cited any hadith except one generic hadith ("no harm and no retribution" (*la darar wa-la dirar*)) laying out utilitarian principle in the formulation state policies.<sup>109</sup> It is telling that in its first substantive interpretation of Article 2 SCC did not even discuss or refer to a single hadith.<sup>110</sup>

## 12.3 Respecting the Goals of the Shariah (*Maqasid Al Shariah*)

If a challenge to a legislation gets past hurdle of absolutely certain and authentic ruling, then the Court move to the second-prong of the test, i.e., goals of *Shariah* that should not be contravened by a legislation. Maqasid (singular *maqsad*, meaning goal) is well established field in the Islamic

<sup>109</sup> Case No. 35, Judicial Year 9 (August 14, 1994), 354.

<sup>110</sup> Case No. 7, Judicial Year 8 (May 15, 1993).

jurisprudence and is recognized and developed by traditional *ulema*, neo-classists, modernists, as well as neo-ijihadis. Theory of Maqasid is an Islamic theory of rationalistic utilitarianism. According to Maqasid theory, a careful and critical analysis of God's commands reveals that the *Shariah* came to promote certain goals/objectives. The classical jurists have identified five broad *Maqasids* of *Shariah*, namely the protection of religion, life, reason, progeny, and property. The SCC has also identified five *Maqasid* in multiple judgments:

“It [ijtihād] must pursue methods of reasoning out the rulings (al-a'kām) and binding supports (al-qawā'id al-ḍābiṭa) for the “branches” of shari'ah (furū'ihā), guarding the general goals of the shari'ah (al-maqāṣid al-'amma li-'l-shari'ah) so that religion, life, reason, honor, and worldly goods are protected.”<sup>111</sup>

The SCC has, however, replace the classical goal of progeny with honor, as underlined above.

Since in practice all the Article 2 cases decided by the SCC have been decided on the second-prong of goals, so it necessary to understand how does this second-prong of SCC tests operate. The Court has divided the second-prong into two further related sub-prongs to, what Lombardi calls, (a) “specific goals,” and (b) “general goals” of *Shariah*.

### 12.3.1 “Specific Goals”

In the goals analysis prong of the test the SCC starts by identifying a specific goal that the ruling/law under consideration is trying to achieve/promote. For example, the specific goal of child custody laws is the welfare of children; specific goal of divorce laws is to protect women from harm; specific goal of veil laws is promotion of “modest”; etc.

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<sup>111</sup> Case No. 7, Judicial Year 8 (May 15, 1993), 283; Case No. 8, Judicial Year 17 (May 18, 1996), 1031.

### 12.3.2 “General Goals”

The second sub-prong is the goals that all law must promote, that is the general public welfare. The general goal is derived from the famous hadith laying the “supreme utilitarian principle of *Shariah*” legislation. The Court held that this hadith is a

“a chief rule from among the pillars of the Islamic shari'a. Its applications are many even if it is precise in its conciseness. And from this principle the jurists derived a number of rulings which are to be considered interpretations of it. Among these—and this is to be considered to be further an extension of the principle—is [the rule] that harm has to be pushed away as much as possible, and [the rule] that harm should be eliminated.”<sup>112</sup>

The second sub-prong, i.e., general goals, again provide a mechanism to the SCC to save laws passed by the legislature in the public interest. The Court has held that even where there is found to be a specific goal in a particular matter but due to change in circumstances that specific goal of *Shariah* ruling is in contradiction with the general goal, then in such a scenario the general goal will trump over specific goal.<sup>113</sup> In fact, the Court has held that the general goal requirement imposes an obligation on the government to take steps for the general welfare and legislate.

Therefore, according to the second-prong of the twin criteria laid by the SCC, in order for a contested law to be upheld it is necessary that it should not contradict the (a) specific goal that are identified by the SCC very liberally and broadly; and (b) the general goals, i.e., the public interest/welfare. As seen above it is very hard and rare for a law to contradict the twin criteria laid out in the second prong.

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<sup>112</sup> Lombardi, *State Law*, 196.

<sup>113</sup> Case No. 35 of Judicial Year 9, 6 S.C.C. at 350.

## 12.4 Expanding the Sphere of Legislative Activity Through Goals Analysis

It is on the basis of this goals analysis that the SCC has interpreted Islamic law to uphold laws promulgated that were more equal and progressive than the ones promoted by the classical jurists. The Court has ruled in favor of children and women on the basis of its goals analysis and advanced progressive interpretations- in the process recognizing and expanding the legislative sphere of the government without being accused of contradicting principles of *Shariah* as enshrined in the Article 2.

### 12.4.1 Child Custody Case

For example, when in Case No. 7 of Judicial Year 8, decided on May 15, 1993 the Article 20 of Egypt's Personal Status Law (Law No. 100 of 1985) was assailed for being inconsistent with Islam because it contravened the Hanafi jurisprudence by providing right of custody to divorced women beyond the age limits of children recognized by Hanafi law, the SCC refused to accept the argument of the husband. The Court applying its two-prong test first held that there was no absolutely certain authentic ruling in Quran on custody of a minor; then it moved to second prong of the test and held that since the goal of custody law was the protection of and promotion of welfare of children, therefore the legislature was competent to legislate as long as the law was not inconsistent with the goals of *Shariah*, in this case welfare of child.

### 12.4.2 Right to Retroactive Child Support Case

In Case No. 29 of Judicial Year 11, (March 26, 1994)<sup>114</sup> decided in 1994, the SCC also upheld the legislation (Article 2 of Personal Status Law of 1929 as amended by Law 100 of 1985 ("Jihàn's Law)) stipulating child support to a divorced wife<sup>115</sup> since the date of separation rather

<sup>114</sup> Case No. 29 of Judicial Year 11, decided on March 26, 1994.

<sup>115</sup> Personal Status Law of 1929 as amended by Law 100 of 1985.



than the date of decision Court. Article 2 of the Personal Status Law was challenged for being inconsistent with the principles of *Shariah*. The plaintiff argued that the Hanafi jurisprudence only mandated child support from the date of the order passed by a court not from the date of residence with mother.

Applying its two prong test the SCC was quickly able to conclude that because “there is no absolutely certain text) providing a conclusive ruling about a child’s need for support [from his father] for a period in the distant past, then, as regards this [issue], the path of *ijtihad* has been left open.”<sup>116</sup> The SCC again give a wide discretion to the government for *Ijtihad* and come up with laws that it think are best for the welfare of child- since welfare of children is the paramount goal of *Shariah* rules concerning children. The Court while giving wide discretion recognized the utilitarian principles (i.e., hadith “do not injure or repay one injury with another” underlying the *Shariah* law and insist on giving wide discretion to the government in the enactment of laws.

#### 12.4.3 Women’s Right of Divorce Case

The SCC in 1994 again upheld a progressive legislation concerning in Case No. 35 of Judicial Year 9, (August 14, 1994)<sup>117</sup> commonly known as *Women’s Right of Divorce Case* (“Divorce Case”). It was the third case in which SCC decided the case by undertaking substantive interpretation of Article 2. In this case again a provision of re-enacted Jihan’s Law (Law 100 of 1985) was challenged. The amended provision had given special rights to women to seek divorce, by invoking “harm” principle, in case their husbands took second wives. The law was challenged on the basis of being against the principles of *Shariah* because, according to the petitioner, Quran

<sup>116</sup> Case No. 29, Judicial Year 11 (March 26, 1994), 251.

<sup>117</sup> Case No. 35, Judicial Year 9 (August 14, 1994), printed in SCC, vol. VI, 331–58.

explicitly permitted polygamy as did the jurisprudence of all the major *fiqh* and interpretations of almost all the classical *fuqaha*.

Applying its two prong test, the SCC was easily able to find certain authentic verses in Quran that permitted polygamy, however, like other cases discussed here it upheld the legislation of the second-prong. In Court's opinion, the right to practice polygamy is not an absolute right but a conditional right: a man can only permitted to take multiple wives if it could be shown that his other marriages would promote the goals of *Shariah*. The specific goals in this case are the just and equal treatment of wives and the advancement of their welfare and general goal is the welfare of the society. The Court went to hold that since the law allowed divorce on the principle of harm to wives, therefore it was consistent with *Shariah*:

the legislative text under attack contains a specific rule for divorcing on account of harm, and it is necessary that the legislative text that has been attacked be interpreted to bring its rules into agreement with God's speech, may He be exalted, "Consort with them honorably" and likewise in light of the universal rule that the Prophet, peace be upon him, formulated by saying "no harm, no retribution."<sup>118</sup>

The SCC in this opinion again relying on the utilitarian calculus upheld the validity of law. The Court while relying on the religious principle of "no harm, no retribution" implicitly accepted that the government was in a better position to assess the benefits and harms of a particular law and it was government's (*ulul al-amr*) right to undertake *Ijtihad* to come up with laws/policies that promote the goals of *Shariah*, i.e., general welfare.

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<sup>118</sup> Lombardi, *State Law*, 232; Case No. 35, Judicial Year 9 (August 14, 1994), 354.

#### 12.4.4 Alimony Case

Similarly, a second issue in the Case No. 7 of Judicial Year 8, 1993 was whether a law permitting a judge to order a husband to provide compensation to his divorced wife was inconsistent with Article 2. A husband had challenged Article 18 of the 1925 Personal Status Law, as amended in 1985, on the grounds that it was inconsistent with the Hanafi *fiqh*. The SCC straight away applied its two prong test and was able to three Qur'anic verses on the on the subject of compensation wife (*muta*) and concluded that these verses only showed that a man should treat his divorced wife with “kindness”; however, there was no mention of the amount of compensation to be provided. Then moving on to the second prong the Court drawing on the verses examined in the first part held that the verses showed that the specific goal of the *Shariah* law in divorce matters was “welfare of divorced women”. And the specific goal was the social welfare. The Court concluded that the legislation did not contravene either of two types of goals and the legislature was competent to legislate, holding:

And whereas: It is clear from examining the doctrines of the jurists regarding the meaning of the Qur'anic texts which have come to us in the matter of mut'a that they differ on the scope of their application and on whether it [the giving of mut'a] is, on the one hand, obligatory or, on the other hand, meritorious [but not required]. And this only means that since these texts are probable in meaning, they are unclear about the desire of God, may He be exalted.”

The SCC went on to recognize the power of the government (*wali al-amr*) to undertake *ijtihad*,

“And thus the *wali al-amr* is permitted to practice *ijtihad* so as to develop a legislation and to organize [the shari 'a's] rules by establishing the essence of the right in them. He [the *wali al-amr*] explicates its demand and unifies its application. He [the *wali al-amr*] establishes its edifice on a conception of equality with a view to removing all aspects of difference in it, and does not contradict the roots of the shari 'a, or any of its principles... There is nothing in the Qur'anic texts informing us that God, may he be exalted, decreed it [a particular type or amount of mut'a] or set limits on it, inasmuch as they

signify permission to organize it [the mut'a] so that he<sup>36</sup> realizes for the people, their benefits [that are] stipulated by the shari 'a...<sup>119</sup>

## 12.5 More Power for the *Walì al-Amr*

The SCC's interpretation of Article has had profound implication for the structural constitution rules, especially the separation of powers and the proper sphere of legislative activity. It is argued here that the SCC through the interpretation of Islamic principles has considerably expanded the competence of the government to legislate. It has achieved this by the following three means:

- a) By narrowly interpreting of principles of Sharia;
- b) *Siyassah Shariah*: Expanding the role of the government;
- c) Government's is Competent to undertake Ijtihad; and
- d) Eliminating the Role of the Fourth Pillar of state, i.e., Islamic Jurists/Rival Claimants of Legislature

These three methods often overlap and can be seen at play simultaneously in all the Article 2 rulings of the SCC.

### 12.5.1 Taming the Beast of Principles of *Shariah*: Narrow Interpretation

As seen in the section above- analyzing the two-prong test developed by the SCC for invalidating a law on the basis of principles of *Shariah*- the standards set by the SCC are very high and it is almost impossible to cross the four sub-prongs, both main prongs are further divided into two each. In the first prong, as discussed above, first of all there are not many rulings of Quran

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<sup>119</sup> Lombardi, *State Law* 214-15.

and *Sunnah* that absolutely certain and authentic in their meaning and transmission, and then the SCC insistence on applying the hybrid methodology, borrowed from neo-*Ijtihad* and Neo-Taqlid traditions, of two competing and often hostile schools further diminish the number of rulings that can fulfil the criteria of first prong. For practical purposes, it means that the legislature has more space to legislate because there are hardly any rulings of *Shariah* left that it can possibly contravene.

Once, with great difficulty, a ruling manages to pass the strict threshold of first-prong, then it further subjected to the consuming fore of the second prong of goal analysis. In the second part in the analysis of specific goals the SCC identifies them very broadly, therefore leaving great subjective room for legislative discretion and interpretation. The Court further strengthens the legislative discretion in policy and legal matters by insisting that the specific goals must be compatible with general goal of *Shariah*, i.e., the aggregate general welfare of society. The government is competent to assess the laws in the light of utilitarian considerations.

#### 12.5.2 *Siyassah Shariah*: Expanding the role of the government

Another interpretive tool through which the SCC has considerably expanded the freedom of government to legislate is by relying on the classical doctrine of *siyàsa shar'iyya*.<sup>120</sup> The most important theory articulating this position was the theory of *siyasa shar'iyya* is a classical doctrine developed by Hanbali jurists Hanbali jurist Ibn Taymiyya<sup>121</sup> and Ibn Qayyim al-Jawziyya<sup>122</sup> that literally means “statecraft in accordance with the *shari'ah*.”<sup>123</sup> This theory has been widely accepted

120 See Case No. 7 of Judicial Year 8 (May 15, 1993); Case No. 6, Judicial Year 9 (March 18, 1995), SCC, VI, 542–66 at 561; Lombardic, *State Law* 179.

121 d. 1328 C.E. See his book Ibn Taymiyyah, *al-Siyāsah al-shar'iyyah* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1988); bn Taimiyya, *Ibn Taimiyya on Public and Private Law in Islam: Or Public Policy in Islamic Jurisprudence*, trans. Omar A. Farukh (Beirut, Lebanon: Khayats, 1966).

122 d. 1350 C.E.

123 See Mohamad Hashim Kamali, *Siyasah Al-Shariyah* (The Policies Of Islamic Government), IIU Law Journal, Vol. 1, No, 1989. P. 141.

by almost all 19<sup>th</sup> and 20<sup>th</sup> century Islamist.<sup>124</sup> According to this theory, an Islamic state's ruler's law enjoys a presumption of consistency with the shari'a and it is to be considered legitimate if met twin criteria:

- (1) Ruler's law did not command its subject people to sin, and
- (2) the law advanced the public welfare, i.e., second sub-prong of SCC's second prong.<sup>125</sup>

This theory derives from the Islamic concept of the government that posits that the government is a trust ((*amānah*) in the hands of *ulul al amr* (ruler)<sup>126</sup> and it is based on the exposition of the famous ruler's verse of Quran.<sup>127</sup>

The SCC in its goals analysis section relies on the theory of *Siyasah Shariah* to give wide latitude to the government in enacting laws and policies in the general welfare. The advantage of using this theory and its vocabulary has been that the Court has been able to carve legitimacy for itself and demonstrate to the Islamists that it is engaging with the classical traditions and modernist Islamist theories and simultaneously the Court has been able to give wide discretion to the government.

### 12.5.3 *Walī al-Amr* is Competent to undertake *Ijtihad*

Building upon the theories of *siyāsa shar'īyya* and *Amānat al-Ḥukm* (the government as a trust) the Court has created room and it may be even argued a duty to undertake *Ijtihad* to promote the general welfare. This is a very radical step because in the classical tradition it was firmly

<sup>124</sup> See Lombardi, *State Law*, 47-57

<sup>125</sup> For an excellent discussion of this concept See Rosenthal, Erwin Isak Jakob Rosenthal, *Political Thought in Medieval Islam: An Introductory Outline*. (Cambridge University Press, 1968) 46-55

<sup>126</sup> Mohamad Hashim Kamali, *Siyasah Al-Shariyah* (The Policies of Islamic Government), *IIU Law Journal*, Vol. 1, No, 1989, 157-159

<sup>127</sup> Quran: 4:58.

recognized that *Ijtihad* could be undertaken only by highly qualified and religiously trained mujtahid (jurists).<sup>128</sup> In the alimony case discussed above the SCC held that:

“And whereas: It is clear from examining the doctrines of the jurists regarding the meaning of the Qur’anic texts which have come to us in the matter of mut’a that they differ on the scope of their application and on whether it [the giving of mut’a] is, on the one hand, obligatory or, on the other hand, meritorious [but not required]. And this only means that since these texts are probable in meaning, they are unclear about the desire of God, may He be exalted. And thus the wali al-amr is permitted to practice ijtihad so as to develop a legislation and to organize [the shari’a’s] rules by establishing the essence of the right in them. He [the wali al-amr] explicates its demand and unifies its application. He [the wali al-amr] establishes its edifice on a conception of equality with a view to removing all aspects of difference in it, and does not contradict the roots of the shari’a, or any of its principles”<sup>129</sup> (emphasis provided).

Similarly, in the Child Support Case<sup>130</sup> held that if “there is no absolutely certain text) providing a conclusive ruling about a child’s need for support [from his father] for a period in the distant past, then, as regards this [issue], the path of *ijtihad* has been left open.”<sup>131</sup> As discussed above that the threshold for rulings to qualify as certain and absolute in meaning and authenticity is very high so for practical purposes it means there is wide discretion that the government enjoys for undertaking *Ijtihad* and coming up with laws that it think are best for the welfare of child based on the recognized utilitarian principles.

This methodology of the SCC served to weaken and almost elimination of the role of the Islamic jurists in determining what is Islamic and what is not and what can be legislated and what not.

128 See Frank Vogel, “Conformity with Islamic Shari’a and Constitutionality under Article 2: Some Issues of Theory, Practice, and Comparison,” *Democracy, the Rule of Law and Islam*, eds. Eugene Cotran, Adel Omar Sherif (CIMEL Book Series No. 6: London: Kluwer, 1999), 530-32

129 Case No. 7 of Judicial Year 8, 1993.

130 Case No. 29 of Judicial Year 11, (March 26, 1994) .

131 Case No. 29, Judicial Year 11 (March 26, 1994), 251. Lombardi, *State Law*, 222

#### 12.5.4 Eliminating the Role of the Fourth Pillar of state, i.e., Islamic Jurists/Rival Claimants of Legislature

Historically *Ulema* (Islamic jurists) have been rival claimant to the legislative powers of the ruler. They were what Intisar Rabb has called the “Fourth Pillar” of the government of Islamic state.<sup>132</sup> There was always this persistent tension between the *Wali al-amr* and the jurists over the legislations. They served a serious constrain on the legislative powers of the government. The Ottomans tried to resolve this persistent problem by appointing a grand Mufti, who under took what we can call a priori review of legislation. However, in Egypt the Grand Mufti’s authority was not very much recognized by the *ulema*, leading to persistent antagonism between Ottoman Sultan and Egyptian *ulema*. Similarly, in the post-Revolutionary period Naseer nationalized Al-Azhar in an attempt to bring Islamic jurists under its control and carefully appointed loyalist as the Grand Shaykh of Al-Azhar.<sup>133</sup>

The SCC undermined the claim and historic role of *ulema* in dictating the legislature in several ways. Firstly, by recognizing the competency of the government to undertake *ijtihad*, thereby undermining the claim that they were the ones who were only competent and trained to undertake *ijtihad*.<sup>134</sup> Secondly, by establishing itself as the final arbiter on all things Islam and delegating a great amount of other powers to the government, the SCC implicitly said that there was no need to defer to *ulema* in religious matters. Thirdly, the SCC in its opinion and proceedings never consulted or cited the opinions of contemporary *fuqaha*. Fourthly, the SCC in several opinions overruled the opinion of even the founders of the great founders of the great four madhabs

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<sup>132</sup> Intisar A. Rabb, “We the Jurists”, 555-65.

<sup>133</sup> See Jocelyne Cesari, *The Awakening of Muslim Democracy: Religion, Modernity, and the State* (Cambridge University Press, 2014), 23-59

<sup>134</sup> Lombardi, *State Law*, 183.



of Sunni Islam<sup>135</sup> thereby sending the message that the government and the Court can even overrule the great classical jurists themselves. Fifthly, the SCC by undertaking to examine the Islamic-ness of law itself, that is secular constitutional judge with no training in *fiqh*, undermined the claim that only *ulema* trained in the *fiqh* and *Shariah* could examined and expound on *Shariah* matters. Sixthly, in the most significant of the cases brought before it by the greatest center of Islamic learning in the Islamic world, i.e., Al-Azhar, the SCC refused to grant relief to it, thereby further eroding the authority of Islamic jurists.

## 12.6 Expanding the Role of the Constitutional Court

The SCC decisions and methodology also had profound impact on: the role of the Constitutional Court in separation of powers scheme, the nature and extent of judicial constitutional powers, the constitutional judicial review, Courts independence, and Court's relationship with other rival institutions, both formal and informal. The Court used the vehicle of Article 2 to firmly established its right of constitutional review, enforce checks and balances, clarify the separation of powers and powers of the government, and consolidate its own independence.

### 12.6.1 Establishing Constitutional Review

The SCC through the interpretation of Article 2 has consolidated and extended its jurisdiction of constitutional review. The Court very creatively in one of the most significance cases in the history of SCC, i.e., the Riba Case, extended its jurisdiction to examine laws on the yardstick of amended Article 2 despite the fact that the legislative intent, as revealed from

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<sup>135</sup> Retroactive Payment Case, Child Custody Case, Alimony Case, and Divorce Case.

parliamentary debates and Commission Reports, was to not make it justiciable, and there was weak textual support to make it justiciable.

#### 12.6.1.1 Riba Case<sup>136</sup>

Rector of the Al-Azhar University assailed the provisions of Egyptian Civil Code that allowed a lender to charge annual interest (*riba*) on the principal amount. Rector refused to pay the interest due and argued that the interest provision was illegal because it was against the Article 2 for being in contradiction to the principles of *Shariah*. The SCC finally gave a judgment in May 4, 1985 and without going into substantive discussion whether *riba* was against the *Shariah* or not, dismissed the case on the basis of doctrine of non-retroactive application. Court held that the Article 2 imposed a duty on the legislature to promulgate *Shariah* compliant laws only after the enactment of the amendment in 1980 and since the *riba* law challenged before it was from the period before the amendment therefore it was saved from article 2 scrutiny.

This was particularly difficult case for the SCC but SCC found a solution that gave something to everyone and also enhanced its own powers of judicial review in the process. The government was relieved that the law was not struck down because Egyptian economy like the rest of economies is highly independent on interests, whole banking sector operates on, and striking down of interest law would have meant economic ruin and great uncertainty as a great number of financial contracts were based on interests.

The Islamists were partially satisfied by the fact they the SCC had indicated that the Article 2 was justiciable and the Court was willing to examine all legislation enacted after 1980. Until then it was not clear whether Article 2 was justiciable or not and Court had not taken up a single

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<sup>136</sup> Case No. 20 Judicial Year 1 (May 4, 1985); Trans. Saba Habachy, "Supreme Constitutional Court (Egypt)—Shari'a and Riba: Decision in Case 20 of Judicial Year 1," Arab Law Quarterly 1 (1985–1986): 100–7.

case since 1971, i.e., when Article 2 of the Constitution was originally promulgated. This decision meant a victory for Islamist as they were now free and encouraged to bring more cases on the basis of Article 2 challenge and attempt Islamization through a Court because they did not have any hopes left in the legislative sphere as Hosni Mubbarak had officially abandoned Sadat's Islamization in 1985.<sup>137</sup>

And most importantly, the SCC by indicating that would be willing to review laws enacted after the amendment to Article 2 in 1980 not only consolidated its powers of constitutional review but extended to an Article of wide import that hitherto was thought to be non-justiciable. It is also significant that before this case the SCC had not struck down any law enacted by the legislature even on other grounds, therefore, it was a very significant and bold move on the part of SCC. The SCC was, however, not far from crossing the bridge of striking down law: in the same day after it issued Riba Case decision it struck down Jihan's Law.<sup>138</sup>

#### 12.6.1.2 Jihan's Law Case

Jihan's Law was very comprehensive family law amendments enacted in 1979 by President Sadat on the instance of his wife, Jihan.<sup>139</sup> These laws were soon challenged by the Islamists on for being in contradiction with the settled principles of *Shariah* thus being violative of Article 2. The SCC, however, struck down the Law on procedural grounds-holding that since the Law was enacted by the President under his emergency powers without their being an emergency, therefore it was unconstitutional. according to the Court, family law matters hardly required an "emergency" solution for which the President had to use his extra-ordinary legislative powers to enact wide ranging amendments to the Personal Status Laws and Civil Code. Parliament was the proper forum

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<sup>137</sup> Lombardi, *State Law*, 139-40.

<sup>138</sup> Law 44 of 1979.

<sup>139</sup> See Lombardi, *State Law*, 169-173.

for such enactments. Since the Jihan's Law was very controversial and Islamists enjoyed considerable support among the populace, especially among the large middle class, therefore the satisfaction, though not full, of the Islamists helped the Court in establishing its independence and rallying popular support behind it.

The SCC, thus, in these two cases very cleverly and strategically established itself as an independent actor who was willing to challenge the powerful President and if need be strike down laws as well.

## 12.7 Establishment the SCC as a Legitimate Interpreting Authority of Sharia

As discussed above, the SCC through its creative method undermined the role of traditional and age old established interpreters of *Shariah*. This had profound ramification for the separation of powers, checks and balances and greatly enhanced the powers of the judiciary and the legislature at the expense of the “fourth pillar” of the Islamic state. The Court shifted the power of *Ijtihad* from *Ulema* to the government and restricted its own role to performing a very weak for of judicial review based on the Islamic principles. In practice, it meant that the Court would only interfere in handful of cases where the legislature is going against clear and authentic rulings of Quran, which are very few in number. Moreover, it the SCC through the utilization of the religious law eliminated first the independent status that they had historically enjoyed in the governmental power by (a) dividing their traditional powers among the formal secular judiciary and the legislature, and (b) by pushing them into the pure political realm, i.e., now at most they can influence the law and policies by engaging in electoral politics and capturing the legislature or executive through electoral means. Moreover, the Court has never felt a need to defer of the opinion of *ulema* in the

cases before it. In six Article 2 cases that it decided between 1989 and 1992, the SCC did not once refer to opinion of either contemporary *alim* or the past authorities of four Sunni madhabs.<sup>140</sup>

In this vein, the SCC in two very important *Retroactive Child Support Case* and *Alimony Case* rejected the explicit rulings of the *Hanafi Fiqh* and declared that it had ample powers and expertise to determine what was Sharia compliant and what was not. In these cases the SCC Court also upheld the rights of the legislature to undertake *Ijtihad* and reach conclusions that could contradict the established rulings *ulema* of the *Hanafi fiqh*.

## 12.8 Strengthening the Independence of Judiciary

The SCC through its Article 2 was able to become very independent and powerful and it remained so until 2000. This was done partly by its care cultivation of its diverse constituencies and interest groups. In the Egyptian context, the biggest danger facing the judiciary has been historically a strong executive. The SCC starting from 1985 that is when it started adjudicating on Article 2 cases built a very impressive and diverse coalition that protected it from strong executive and advance its independence vis-à-vis other two pillars of the state. The coalition and support base cultivated by the SCC included Islamists, liberals, political parties and the government itself. According to Tamir Moustafa<sup>141</sup> and Ran Hirschl<sup>142</sup>, the SCC delivered certain goods to the government that helped it maintain its independence. Adjudication on Islamic issues provided opportunities for Islamists to air their grievances in public and engage with the larger society, at times when the Brotherhood and Islamist were under severe censorship and facing state oppression. Islamist got respectability when the highest state institution engages with them, therefore they

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<sup>140</sup> Lombardi, *State Law* 183.

<sup>141</sup> Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*.

<sup>142</sup> For liberals appeal for the SCC, especially in the light of Article 2 jurisprudence, see Ran Hirschl, *Constitutional Theocracy*, 105-115

supported the Court and its independence.<sup>143</sup> Moreover, the SCC would occasionally also provide partial relief to the Islamists, e.g., Riba case and Jihan's Law case, therefore keeping them engaged.

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143 See Clark B. Lombardi & Nathan J. Brown, "Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court Reconciles Islamic Law with the Liberal Rule of Law," 21 AM. U. INT'L L. REV. 379 (2006); Clark B. Lombardi, "The Supreme Constitutional Court of Egypt: Managing Constitutional Conflict in an Authoritarian, Aspirationally "Islamic" State," 3 J. Comp. L. 234, (2008)

## CHAPTER 4: Supreme Court of Pakistan Securing Independence Through Islam

### 13 Islamization of the Constitutional Law in Pakistan

To fully appreciate the reasoning of the SCP in the Al-Jehad case it is imperative to brief look at the Islamic legal and political background under which the SCP operates.

#### 13.1 Founding a Country on the Basis of Religion

Pakistan was created after a long struggle and demand of Muslims of South Asia on the basis of separate religious identity. It is one of the only two countries in the world that was created on the basis of religion. Islam therefore is built into its very DNA but after its independence in 1947, it took some time and bitter debates on the precise form and the extent of Islamization to give legal shape to Islam in Pakistan.<sup>144</sup> Before we embark on identification and analysis of judicial decisions in which Islamic concepts of justice has been employed by the superior courts, it is necessary to briefly summarize the Islamic Provisions of the Constitution of Pakistan.

#### 13.2 Objective Resolution

The first attempt in the Islamization derive regard was the Objective Resolution. It is the most important and one of the most contentious part of the Constitution. It was passed in 1949 by the first Constituent Assembly after much debate and despite objections of the minority members to provide guidance to the Constituent Assembly in the framing of the constitution. Since this

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<sup>144</sup> Martin Lau Islam, "Islam and the Constitutional Foundations of Pakistan", in: Rainer Grote, Tilmann Roeder (eds.), *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Oxford University Press, 2012, pp. 171-199.

Resolution is of fundamental importance in understanding the Islamization of laws in Pakistan, therefore it is reproduced at length below:

"Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust...Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed...Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and the Sunnah...Wherein shall be guaranteed fundamental rights including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, worship and association, subject to law and public morality.....Wherein the independence of the Judiciary shall be fully secured..."

In all the constitutions that Pakistan adopted afterwards, Objective Resolution was added as a preamble to them.

### Making Objective Resolution as the Substantive Part of the Constitution

However, in 1985 under the regime of President Zia-ul-Haq, who undertook extensive Islamization reforms, the Objective Resolution was made a substantive part of the Constitution of 1973 through the insertion of Article 2A, which stated:

*"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".*



Making of the Objective Resolution as a substantive part of the Constitution played a great role in Islamization of the legal system of Pakistan. Martin Lau through extensive analysis of case law demonstrated the role of the judiciary in this process.<sup>145</sup>

The most significant and revolutionary aspect of the Objective Resolution was its insistence on the key aspect of modern constitutionalism and rooting them in the Islamic tradition. It injunction that “the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed”, proved to be of great significance as the case law mentioned below will demonstrate.

### 13.3 The Establishment of the Federal Shariat Court (FSC) in Pakistan

The most significant creation of Zia’s Islamization, however, is the Federal Shariat Court, a constitutional and appellate court created through insertion of an entire chapter in the Constitution. It has far reaching jurisdiction:

"The Court may, 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 Qur'an and Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam."

The jurisdiction and influence of this Court has been checked by the secular constitutional court, i.e., the Supreme Court. The SCP, being an appellant forum of the decision of FSC, has tamed the FSC by either reversing FSC’s decision or not deciding the appeals and keep them pending for decades.

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<sup>145</sup> Lau, Martin, 'Article 2a, the Objectives Resolution and the Islamisation of Pakistani Laws.' In: Ebert, H.-G. and Hanstein, T., (eds.), *Beitraege zum Islamischen Recht III*. Frankfurt am Main; (New York: Peter Lang, 2003), pp. 173-204.

## 13.4 Repugnancy Clauses

The Constitution of Pakistan enshrines repugnancy clauses similar to the constitutions of Afghanistan and Iraq. In the Pakistani Constitution, however, there are two such articles, each assigning the power to declare repugnancy to two different institutions.

### 13.4.1 Jurisdiction of Islamic Council in Repugnancy

Article 227 assigns this responsibility to Islamic Council. It states:

"All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, in this Part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions...

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in this Part."

But the Constitution envisages only an advisory and recommendatory Council of Islamic Ideology that has been tasked to make recommendations to the legislature.<sup>146</sup>

### 13.4.2 Jurisdiction of the Federal Shariat Court in Repugnancy

Part VII of the Constitution titled in its Chapter 3A assigns this jurisdiction to a special court, Federal Shariat Court (FSC). Article 203D states:

"Powers, Jurisdiction and Functions of the Court.

(1) The Court may, 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 Sunnah of the Holy Prophet, hereinafter referred to as the Injunctions of Islam."

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<sup>146</sup> Part IX

But Article 203B(a) severely limits FSC's jurisdiction by defining "law" as to

“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”.

### 13.5 Other Islamic Features of the Constitution

Article 1 declares that “Pakistan shall be a Federal Republic to be known as Islamic Republic of Pakistan,”, while Article 2 declares Islam to the state religion.

## 14 Al-Jehad Case

This case is considered the most important case in the history of independence of judiciary on Pakistan. In this case the SCP interpreted around twenty two constitutional provisions to take out the power of the appointment of judges from the hands of the executive and placed it in the hands of the Chief Justice of Pakistan and Chief Justices of High Courts, respectively. Moreover, the Court put an end to the widely used practice of the executive to not fill the permanent vacancies at the constitutional courts and instead making ad-hoc judges for a renewable period of two years. This practice undermined the independence of judiciary for the reason that the ad-hoc judges were incentivized by the political branch to not rule against its because at the end of tenure it was the executive who was going to decide if the ad-hoc judges was going to be reappointed or not. Furthermore, the SCP put an end to the practice of transferring the judges to other courts without the consent of a judge to be transferred. Similar, other directions were given to end government's

interference in the judiciary. SCP also laid down criteria and additional qualifications for appointment of judges.

The significance of this case lies in the fact that all the major pronouncements that the SCP gave were *prima facie* against the plain meaning of the relevant provisions of the constitution. The Court “read down”- which was essentially a legal euphemism for striking down and making constitutional provisions inoperative- several articles of the constitution, by creatively interpreting the Islamic provisions of the constitution. The Court derived the principles of independence of judiciary and separation of powers from the Islamic law and history to pass a comprehensive and far reaching judgment that have had profound implications for the constitutional structural rules, independence of judiciary, separation of powers, and mechanisms of checks and balances.

#### 14.1 Background of the Al-Jehad Case

The background of the case is of two types: political and legal needs of the ruling party, and the a comparative constitutional law background, i.e., a recent judgment by the Supreme Court of India on the appointment of judges.

##### 12.8.1 Political Background

In 1993, the People’s Party Pakistan (PPP) headed by the late Benazir Political had re-won the election after being dismissed by the President just three years ago and formed a new government. The party had won the second election in the span of six years but the establishment (military, opposition, and right wing Islamists) were refusing to accept a women PM and were deeply suspicious of the PPPs loyalty. PPP since late 1960s had established itself as anti-establishment party and had become increasingly militant as well after its founder and Benazir father Zulfikar Ali Bhutto was hanged by the military junta on murder charge. The judiciary had

gone out of its way to assist the military in hanging the senior Bhutto. Moreover, the PPP had been put of power for 14 years and during this time its opponent Zia ul Haq had appointed judges to the constitutional courts that were in line with his ideology and many of these judges were ideologically against PPP. So there was mutual mistrust between the PPP and the judiciary and the new government was deeply cognizant of two major decisions that the SCP had given against it: First, it had hanged its founder; and second, the SCP had upheld the dismissal of its first government in 1990 by the President by disregarding its own precedent in which the SCP had theoretically rejected President Zia's earlier dismissal of the Parliament. Since the sword of Article 58(2)(B), which gave powers of dismissal to the President, was hanging on the government so it naturally wanted friendly judges on the bench if the President decided to dismiss its government again. Another problem besetting the government was its slim majority and danger of horse-trading, i.e., members of the Parliament changing their party loyalties either through inducement of pressure, bringing the government down A loss of majority and impropriety that always involves in such politicking mean that the issue would eventually end up before the Supreme Court.

It was in this background that the government appointed a number of its party members and loyalists as judges of the high courts by disregarding the recommendations of the Chief Justices. Moreover, the government used to constitutional tools available at its disposal to pressurize judges to make them more compliant. The tools available with the executive were primarily concerning transferring judges to the FSC, where judges did not want to go, and not filling permanent vacancies and instead making ad-hoc appointments.

## 12.8.2 Comparative Constitutional Law Background: A Judgment by the Indian Supreme Court

According to Justice Ajmal Mian, who wrote a very detailed concurring opinion and later became the Chief Justice of Pakistan, one of the stimuli for taking up this case was the announcement of decisions by the Supreme Court of India (SCI) in the Second Judges case.<sup>147</sup> Chief Justice Sajjad Ali Shah, author of the main opinion, had gotten to know about the Indian decision in which the SCI had interpreted the word “consultation” used in the Indian constitution for making appointment of judges. The SCI held that the consultation with the Chief Justice of India and Chief Justices of respective high courts should be meaningful and it should be the Chief Justice who should have the final authority in the appointment of judges. The SCP of Pakistan in its judgment extensively quoted the Indian judgment to support its own arguments.

## 14.2 Facts of Al-Jehad

The Petitioner, a practicing lawyer, filed a direct petition in 1994 before the Supreme Court challenging the appointment of the then Acting Chief Justice of Pakistan, appointment of the Chief Justice of the High Court of Sindh as Judge of the Federal Shariat Court and non-confirmation of the six Additional Judges of the High Court of Sindh as they were not appointed as permanent Judges.

## 14.3 Introduction to Court’s Reasoning

After ruling on the technical issues concerning maintainability and locus standi of the petitioner, the Court moves on to the substantive issues, i.e., appointment of judges in consultation with the Chief Justice of Pakistan. The two main issues framed by the Court are as follows:

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<sup>147</sup> *Supreme Court Advocates-on-Record Association v. Union of India* (AIR 1994 SC 268)

1. “Whether under Article 193 of the Constitution, the President has unfettered discretion to appoint any person as a Chief Justice of a High Court or is he bound to follow- the guide line if provided in the Constitution or Constitutional convention, if any?
2. What is the import of the words "after consultation" used inter alia in Articles 177 and 193 of the Constitution? To what extent the President is bound to accept the opinion, of the Chief Justice of Pakistan and/or Chief Justice of a High Court while making appointment of Judges in the Supreme Court and High Courts under the above Articles 177 and 193 of the Constitution.<sup>148</sup>”

The Court reaches its conclusion by adjudicating on four issues. First, examine the nature of the constitution and declare it to be Islamic. Second, building on the first issue the Court finds that the constitution establishes trichotomy of powers with strong constitutionally guarantees for ensuring independence of judiciary; the SCP relate this second conclusion with the Islamic nature of the constitution and asserts that the independence of judiciary follows from the Islamic nature of the constitution and makes an argument for Islamic basis of separation of powers. Third, the Court examines the meaning of the term “consultation” in Islam, Pakistani precedents, legal academic literature, and comparative jurisdictions, especially India. Fourth, the Court examines the binding nature of “constitutional convention” in Islam, Pakistani precedents, legal academic literature, and comparative jurisdictions.

#### 14.4 Islamic Nature of the Constitution

In the first step, the Court undertake to highlight the nature of the Pakistani Constitution and lists down provision from the Constitution to show to demonstrate that it is Islamic in nature. It highlights the fact that according to the Constitution, Pakistan is not a secular State but an Islamic Republic and “Islam is the State religion”. It points out that according to Article 2A, the Objectives Resolution has been made the substantive part of the Constitution.<sup>149</sup> Objective Resolution

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<sup>148</sup> Al-Jehad, Para 16

<sup>149</sup> For an excellent and detailed analysis of the Objective Resolution and Article 2A, see Martin Lau, 'Article 2a, the Objectives Resolution and the Islamisation of Pakistani Laws.' In: Ebert, H.-G. and Hanstein, T., (eds.), (Beitraege zum Islamischen Recht III. Frankfurt am Main; New York: Peter Lang, 2003).

contains provision for the role of Islam and independence of judiciary. According to the Court, “What is very important in this context is the fact that Article 2A was inserted in the Constitution ... and made the substantive part of the Constitution which blends the Constitution with the spirit of Islam”<sup>150</sup> (emphasis provided).

Lastly, the Court point towards the Article 227(1) of the Constitution that states:

227. Provisions relating to the Holy Qur'an and Sunnah.

(1) “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...”

What is interesting here that Court does not quote and conveniently ignores the sub-clause 2 of the Article 227 that states:

“Effect shall be given to the provisions of clause (1) only in the manner provided in this Part.” (emphasis supplied).

This is crucial omission because the phrase “this Part” here refers to Part IX of the Constitution titled "Islamic Provisions" that establishes an Islamic Council under Article 227 and under Article 230 confer very limited non-binding advisory and recommendary functions to the Council.<sup>151</sup> Part IX, that includes Article 227(1) quoted by the SCC, does not envision any role for any Court, including the SC. It, in fact, limits the scope of the sub-clause 1 of Article 227 to implementation through just a toothless Islamic Council. From a plain reading of the Article 227

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<sup>150</sup> Al-Jehad, Para 33

<sup>151</sup> Article 230 “Functions of Islamic Council. (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 Quran 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; and (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” (underlining supplied). It is clear from the underlined portions that the Council has powers to only make recommendation and advice and it is upto the legislature to adopt them or reject them.



and other articles of Part IX it clear that according to this part the obligation of Islamization of laws primarily lie on the political branches and *ulema* have been just given an advisory role.<sup>152</sup> Here the similarity with the Egyptian situation from 1971 to 1985 is unmistakable. As discussed in the section dealing with Egypt, it was understood that the Islamization as envisioned by the original Article 2 and its amended form was to be carried out by the political branches not courts. Apex constitutional courts of both the jurisdictions- in fact in the Pakistan case the SCP seems to be constrained from employing article 227(1) in its service- from carrying out were not conferred any jurisdictions to Islamize the laws by undertaking Islamic constitutional review, however, both the courts assumed jurisdictions.

#### 14.5 Separation of Powers and Independence of Judiciary in Islam

After establishing that the Constitution of Pakistan is Islamic in nature and that the Court should interpret the Constitution in the light of injunctions of Islam, the Court in one paragraph the constitution establishes trichotomy of powers with strong constitutionally guarantees for ensuring independence of judiciary. The SCP links the separation of powers and independence of judiciary that it finds in the second part of its analysis with its earlier conclusion about the Islamic nature of the constitution. The Court without much discussion asserts that the separation of the judiciary from executive is an Islamic development:

“Upon the advent of Islam, the Judicial functions were separated from the executive functions at its, very initial stage by the Holy Prophet (P.B.U.H.) by appointing a Qadi for each Province. The separation of judiciary from executive was implemented more effectively during the Caliphate of

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<sup>152</sup> Part IX is consistent with the original scheme of things envisioned by the original Constitution of 1973. It was only in 1985 that Chapter 3A was added in Part VII of the Constitution and separate Federal Shariat Court was given Islamic constitutional review, however, even Chapter 3A does not confer any jurisdiction on the SC to undertake Islamic Constitutional review.

Second Caliph Hazrat Umar as he appointed Qadis free of control of the Governors. The reason being that the foundation of Islam is on justice. The concept of justice in Islam is different from the concept of the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons. Justice in Islam seeks to attain a higher standard of what may be called "absolute justice" or "absolute fairness".<sup>153</sup>

The Court then proceed on a lengthy undertaking to establish that the modern conception of justice and independence of judiciary are actually Islamic. First the court discusses the conception of justice at length in Islam by citing verses from Quran<sup>154</sup>, citing hadith of Prophet Muhammad concerning justice and need for impartiality of judges, narrating incidents from administrations of first four righteous Caliphs, by digging historical practices of Abassid Rulers and opinions and commentaries of classical Islamic jurist, and finally quoting commentaries modern scholars of Islam on independence enjoyed by judges in Islamic system of governance. The Court marshals impressive and long list of authorities in its support.<sup>155</sup>

#### 14.5.1 How is the Independence of Judiciary to be Secured?

After establishing that justice and independence of judiciary are the paramount concerns of Islam, the SCP proceeds to determine what exactly is independence and how it can be secured. According to the Court, since the realization of justice requires independent, impartial, and competent judicial officers, therefore judges must be appointed on strict merit basis and they should be given securities. SCP after survey of the vast amount of literature concerning justice and judges summarizes the qualities that according to Islam a judge should possess. These qualities are:

- “the Judges are not to be led by personal likes or dislikes, love or' hate”;

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<sup>153</sup> Al-Jehad, Para 21(a)

<sup>154</sup> Sura Aal e Imran (4 135); Surah Maida, 5/9; Surah Nisaa, 4/58; Surah Maida, (5/8), (5/45).

<sup>155</sup> Al-Jehad, Para 21, 35-47

- “the Judges should maintain strict impartiality and even treatment in the Court inter se between the litigant parties notwithstanding that one of the parties might be very powerful and influential”
- “to a Judge, all are equal in the eye of the law. As God dispenses justice among His subjects, so a Judge 'Should judge without any distinction whatsoever”;
- “a Judge must exhibit patience and perseverance in scanning the details, in testing the points presented as true and sifting facts from fiction and, when truth presented itself to them, he must pass judgments without fear, favour or prejudice”;
- “a Judge should not be corrupt, covetous or greedy”;
- “a Judge must be a man of having deep insight, profound knowledge of *Shariah*, God-fearing, forth right, honest, 'sincere man of integrity”;
- “a Judge must be upright, sober, calm and cool., nothing should ruffle his mind from the path of rectitude”.

### Treating Power of Appointment as a Sacred Trust

The Supreme Court after laying down this list proceeds to invoke the Islamic principle of *amanut ul hukum* (government/governance is a trust) and holds that in Islam the power to appoint judges is a sacred trust. This power “should be exercised in utmost good faith, any extraneous consideration other than the merit is a great sin entailing severe punishment.”<sup>156</sup> This trust must be discharged by the authority with great care and it “should select people of excellent character, superior caliber and meritorious record.”

Furthermore, the SCC implicitly suggests that from the Islamic injunctions on the independence of judiciary it follows that for fully securing independences of judiciary, judges “should be given such a prestige and position in the State that none of the Government functionaries can over lord them or bring them harm” and a “should be paid handsomely so that

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<sup>156</sup> Al-Jehad, Para 22, 52

[their] needs are fully satisfied and [they are] not required to beg or borrow or resort to corruption”.<sup>157</sup>

#### 14.6 “Consultation” with the Chief Justice in Appointment of Judges in Islam

The SCP after laying out broad parameters and constitutional and Islamic principles under which it thought were going to be decisive in the interpretation turned towards the actual constitutional interpretive problem before it. What is meant by Presidential appointment of judges “after consultation with the Chief Justice”. Article 177(1) and 193(1) of the Constitution dealing with the appointment of judges of the Supreme Court and High Courts, respectively, stated:

**Article 177(1) Appointment of Supreme Court Judges.**

“The Chief Justice of Pakistan shall be appointed by the President, and each of the other Judges shall be appointed by the President *after consultation with the Chief Justice.*”

**Article 193(1) Appointment of High Court Judges.**

“A Judge of a High Court shall be appointed by the President *after consultation-*

(a) with the Chief Justice of Pakistan;

(b) with the Governor concerned;

and except where the appointment is that of Chief Justice, with the Chief Justice of the High Court.”

The SCP interpreted the meaning of the requirement of consultation with the Chief Justice by employing three different types of sources. First, it looked at the drafting histories of the provision and declared that the opinion of the Chief Justice was binding upon the executive. Second, it examined the Islamic sources to discover the meaning of the word “consultation” in the

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<sup>157</sup> Al-Jehad, Para 22

Islamic sources and held that in the context of judges' appointment, "consultation" meant primacy of Chief Justice nominee. Third, it held that independence of judiciary in Islam and Islamic precedents proved that Chief Justice had a right to appoint subordinate judges. Fourth, the court undertook comparative analysis, particular of Indian SC's precedents, to examine the meaning of "consultation" to declare that Chief Justice's opinion in matters of appointment of judges was binding.

#### 14.6.1 Drafting History

Examining the drafting history and debates on the consultation, the SCP relied on the changes made to the relevant provisions of the Draft Constitution Bill of 1973 Constitution on the recommendations of the Supreme Court. IT pointed to changes. The Draft contained a provision that envisioned appointment of judges to the SCP by President from a panel of three nominees "recommended" by the Chief Justice. When the SCP resisted the idea of selection from a panel, the final draft partially accepted SC's recommendations and dropped the proposal of panel and replaced the phrase "recommended by the Chief Justice" with a stronger phrase "after consultation with the Chief Justice".

After a detailed consideration, the Judges of the Supreme justice Court in the meeting did not support the idea of recommending a panel of three names by Chief Justice and instead suggested that the Chief Justice of Pakistan may be appointed by the President and each of the other Judges be appointed by the President on the recommendation of the Chief Justice. In the High Courts idea of a panel of names was opposed and suggestion was made that "consultation" may be retained, but "consultation" with the Governor of the Province be deleted in view of the emphasis in the Draft Constitution on the greater independence of the Judiciary. It appears that the

suggestions of the Supreme Court on the Draft Constitution Bill were partly accepted inasmuch as the requirement of a panel of the Judges was dropped, "recommendation" was replaced with "consultation" and the proposal about dispensing with the consultation" of the Governor was not accepted. According to the SCC, it showed that the drafters wanted a accepted a greater role of the Chief Justice in the appointments because:

“for the “efforts were made to use or not to use the word "consultation" within the compass of the independence of the Judiciary to make the appointments of the Judges as free as possible to be made with as great say as possible of the Chief Justices. In that light one has to see that even the endeavor was made to use the word "recommendation" instead of consultation to make it more weighty so that the opinion of the Chief Justices should not easily be rejected.”<sup>158</sup>

#### 14.6.2 Meaning of “Consultation” in Islam

The Court examined the Islamic sources to discover the meaning of the word “consultation” in the context of place of judiciary in Islam. It held that in the context of judges’ appointment, “consultation” meant that the Chief Justice had the binding authority in appointing judges.<sup>159</sup> For this purpose the Court first cited a hadith about the word consultation and then it quoted a long list of sources ranging from Quran to practices of Muslim rulers to show that in Islam it was prerogative of the Chief Judge to appoint subordinate judges and ruler’s intervention was very limited.<sup>160</sup> “[M]uch importance is given in Islam to "consultation" and ... much respect and binding force is given to the opinion of the Qazi or Judge and very wide powers given to the Chief Justice including all appointments of subordinate Judges under him.”<sup>161</sup>

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<sup>158</sup> Al-Jehad, Para 32

<sup>159</sup> The concurring opinion of Justice Ajmal Mian however rejected the contention that in Islam the Chief Judge had an absolute authority and power in appointment of subordinate judges, *see* Al-Jehad, Para 44.

<sup>160</sup> Al-Jehad, Para 34-47.

<sup>161</sup> Al-Jehad, Para 46.

### Consultation of the Chief Justice is *Ijma* (Consensus) of Islam

In fact, it appeared that the main opinion accepted one of the Petitioner's contention that the "'consultation" of the Chief Justice of Pakistan being the Head of the Judiciary carries force of '*Ijma*' and, therefore, has binding force." For this purpose a Verse 159 of *Surat Al-Imran* was quoted:

"It was by the mercy of Allah that thou was lenient with them (O Muhammad), for it thou had been stem and fierce of heart they would have dispersed from round about thee. So pardon them and consult with them upon the conduct of affairs. And when thou art affairs. And when thou art resolved, then put thy trust in Allah. Lo' Allah loveth those who put their trust (in Him)."

This passive acceptance is very interesting because *Ijma* is one of the five sources of Islamic *Shariah*. It has a very high standard and it has been traditionally understood be a consensus of a large number Islamic jurist. Here the SCP seems to have conferred the right of *Ijma* on just one individual, i.e., Chief Justice.<sup>162</sup>

#### 14.6.3 Meaningful Consultation in Pakistan

The Supreme Court also looked at a precedent of Sindh High Court that had held that the consultation between the President and the Chief Justice "should be meaningful as observed in Indian Supreme Court cases."<sup>163</sup> The Constitution of Pakistan contains several clauses that uses the word consultation.<sup>164</sup> The Court also distinguished the word "consultation" used in non-judiciary related provisions of the Constitution from the judiciary related by reasoning that despite

<sup>162</sup> Concurring opinion of Justice Ajmal Mian, however, rejected this contention explicitly, see *Al-Jehad*, Para 44.

<sup>163</sup> *Sharaf Faridi and 3 others v. The Federation of Islamic Republic of Pakistan through Prime Minister of Pakistan and others*, PLD 1989 Kar. 404

<sup>164</sup> Article 72(l), Article 160, Article 200(l), 203-C(4), Article 218(2)(b), and Article 235(l).

textual similarities the requirements of consultation in judicial appointments are different. It held that,

“We are interpreting the word 'consultation' to widen and enlarge its normal scope for the reasons ...that we would like to assign meaning to 'consultation', which is consistent and commensurate with the exalted position of Judiciary as is envisaged in Islam... *[and]* we would like to give positive interpretation to 'consultation' which promotes independence of Judiciary.”<sup>165</sup>

Later in the judgement it again emphasized its Islamic approach “we have tried to construe it [consultation] in the light of other factors, such as, Islamic provisions in our Constitution and separation of judiciary which has already taken place.”<sup>166</sup>

#### 14.7 Binding Nature of Constitutional Conventions in Islam

The Supreme Court after justifying its interpretation of “consultation” through drafting history, Islam, through constitutional scheme of things, and through comparative jurisdiction, proceeded to justify its decision that the “consultation” of the Chief Justice was binding and decisive from the perspective of the constitutional convention. Courts argument proceeded in three steps. In the first step, it demonstrated that there was a constitutional convention concerning consultation with the Chief Justice. Second, the constitutional convention concerning consultation was binding because (a) well established constitutional conventions are binding and (b) constitutional conventions are binding due to Islamic concept of “*Urf*”. For this purpose, it used all the resources it could gather: Pakistani precedents, Indian precedents, English precedents, Islamic precedents, Islamic history and law, academic legal scholarship, etc.

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<sup>165</sup> Al-Jehad, Para 82.

<sup>166</sup> Al-Jehad, Para 79



## Islamic concept of '*Urf*'

In the first step, after analyzing, at length, the legal history with the aid legal theorists like Dicey,<sup>167</sup> the Court concludes that there does exist a constitutional convention in the appointment of judges where the opinion of the Chief Justice has been considered binding. Then, in the second step, the SCP demonstrates that it is a requirement of Islam to respect and uphold well established customs/conventions given they are not against injunctions of Islam. To reach this conclusion, the SCP relied a number of treatises of classical *fuqha*, modern treatise on Islamic law<sup>168</sup>, and Federal Shariat Court's precedent.<sup>169</sup> The Court further agreed with the conclusion of Rahim:

“Those customs and usages of the people of Arabia, which were not expressly repealed during the lifetime of the Prophet, are held to have been sanctioned by the Law-giver by His silence. Customs ('urf ta'amul, 'adat) generally as source of laws, are spoken of as having the force of Ijma', and their validity is based on the same texts as the validity of the latter. It is laid down in '*Hedaya*' that custom holds the same rank as Ijma' in the absence of an express text, and in another place in the same book, custom is spoken of as being the arbiter of analogy.”<sup>170</sup>

### 14.8 Meaning of “Consultation” in India

Lastly, the SCP looked to India jurisdiction to justify the wide meaning of consultation proposed by the SC. It justified its attempt thus:

“We have to make reference to India time and again for the reason that before the partition it was one country, hence the problems which we are facing today in the present era, are more or less common. The same problem had arisen in India with regard to the scope of the word "consultation"... Persistently, efforts were made in India by the Executive to have final say in the appointment of the Judges by restricting the scope of the “consultation” to a mere formality...”<sup>171</sup>

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167 Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, ed. Roger E. Michener (Indianapolis: Liberty Fund 1982).

168 Abdur Rahim, *The Principles of Muhammadan Jurisprudence (According to the Hanafi, Maliki, Shafi's and Hanbali Schools)*, M.A., (1968).

169 *Pakistan and others v. Public at Large and Others*, (PLD 1987 SC 304).

170 Al-Jehad, Para 25.

171 Al-Jehad, Para 70.

The Court discussed the Indian SC's case *Supreme Court Advocates-on-Record Association v. Union of India*<sup>172</sup> to reach exactly the same result and give the same meaning to the consultation as the SC of India had done 2 years ago.

## CHAPTER 5: Analyzing SCP's Reasoning in Comparison with SCC's

SC's method of reasoning (taking Islam as the main tool for interpreting the Constitution) and its interpretation of the substantive provisions of law ("consultation") has profound impact on the structural constitutional rules. Below is further analysis of the methodology employed by the SCP in identifying: what is Islam? what are the valid sources of Islam? who will decide what is Islam? and what is the role of legislature, judiciary, and *ulema* in identifying Islam for the purposes of constitutional interpretations? This analysis undertaken below is comparative in nature and compares and contrast with the Egyptian SCC methodology in interpreting *Shariah*.

### 15 Very Expansive and Broad Method

The SCP method of identifying "injunctions of Islam as laid down in the Holy Qur'an and Sunnah" is very broad, expansive, imprecise, and goes way beyond the express provisions of the Constitution, as laid down in Objective Resolution (Article 2A) and Article 227.

#### 15.1 Confusing Islam as a Religion and Injunctions of Islam

SC's reasoning confuses Islam as a religion and injunctions of Islam and this has profound legal implications. Islam is a more expansive and wider term, while injunctions are much narrower and fewer. The SCP fails to take into account the express words of the two Articles on which it is basing its interpretation on. Article 2A states: "Wherein the Muslims shall be enabled to order their

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<sup>172</sup> AIR 1994 SC 268.

lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and the Sunnah.” Article 227 in clause (1) says, “all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.” It is clear that the scope of scrutiny concerning repugnancy of laws with Islam is limited to just “the injunctions of Islam as laid down in the Holy Qur'an and Sunnah.” The Constipation is using in a very precise sense and clearly stating that repugnancy should be measured against only the primary sources of *Shariah*, which are Quran and Sunnah, and implicitly exclude the secondary sources of *Shariah*.<sup>173</sup> The SC, however, in its takes a very expansive definition of Islam and employs not only primary sources but extend itself to secondary sources of *Shariah* [classical juristic reasoning (*ijtihad*), consensus (*ijma*), analogical reasoning (*qiyas*), juristic preference (*istihsan*), and to some extent public interest (*istislah*); and to history of Islamic empires and Islamic culture and civilization. This is problematic for the simple reason that there are clear conceptual differences, with legal consequences, among terms like Islam, Islamic law, injunctions of Islam, *Shariah*, and *fiqh*, as discussed in the previous chapters and in the section dealing with Egypt.

## 15.2 What is Islam?

Second, the SCP's lack of focus on the injunctions part of the Article raises a further question: what does the Court mean by Islam, as employed by it in the judgments? It appears that it takes the religion of Islam itself as a starting point and then proceed to derive legal rules from everything that this religion ever has touched in its saga expanding over fourteen hundreds. The Court draws upon a lot from the practices and legal institutions of cultures, civilizations, and

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<sup>173</sup> For an introductory discussion on the sources of *Shariah*, see Mohammad Hashim Kamali, “Law and Society: The Interplay of Revelation and Reason in the *Shariah*,” in Oxford History of Islam John L. Esposito (ed.) (Oxford: Oxford University Press, 2000)

empires that embraced Islam thereby erasing all distinction between Islam as a culture, civilization and *Shariah*.<sup>174</sup>

This extremely wide and all-encompassing approach towards interpreting Islam has great ramifications for the interpretation of constitutional structural aspects and gives great power to the Court at the expense of the other two political branches. The situation becomes further alarming when considering SC's jurisprudence regarding Article 2A- the Court has declared it to be a supra-constitutional article and has made several articles of the constitution redundant in the name of harmonious interpretation of the constitution.<sup>175</sup>

### 15.2.1 Comparison with Iraqi Article 2

Considering Pakistani SC's interpretation of Islam in such a wide sense, despite strong textual pull for a narrow interpretation, it is possible that the imprecise usage of term *Isla* in Article 2 of the Iraq constitution could lend itself to an abuse by an activist Supreme Court. For the Constitution of Iraq makes Islam itself, not Islamic *Shariah*, as a foundation source of legislation. This confusion can be dangerous and can provide unlimited discretion to the judiciary at the expense of the legislature. It can have grave consequences for the Iraqi constitution scheme of things.

## 16 What are Valid Sources of Islam/*Shariah*

The SC of Pakistan differs from the Egyptian SCC greatly that it does not lay out any criteria about the sources of Islam. SCC as explained above in the section dealing with Egypt has a very strict methodology to determine what sort of sources it deems to be valid. Pakistani SC does not

<sup>174</sup> The conceptual confusion on the category of "Islam" and "Islamic" see Shahab Ahmed, *What Is Islam?: The Importance of Being Islamic*. (Princeton, NJ., Princeton University Press, 2015)

<sup>175</sup> See Martin Lau, 'Article 2a, the Objectives Resolution and the Islamisation of Pakistani Laws.' In: Ebert, H.-G. and Hanstein, T., (eds.), (Beiträge zum Islamischen Recht III. Frankfurt am Main; New York: Peter Lang, 2003); Hakim Khan v. Government of Pakistan, PLD 1992 SC 595.

set high standards for accepting textual sources for deriving rulings and it appears is open to all textual sources. Below is a source wise comparison of the two courts:

## 16.1 Primary Sources of *Shariah*

For accepting the two primary sources of *Shariah*, i.e., Quran and Sunnah, the SCC has laid a two-prong test and the first prong sets very high standards to determine rulings of *Shariah* that are absolutely certain and authentic in their meaning. By this the SCC means that (a) a ruling must be derived from an absolutely certainty and authentic text, and (b) the meaning of the ruling must have been universally accepted and established in *Shariah* over the centuries.

### 16.1.1 Quran

Since Muslims consider the text of Quran to be authentic so the SCC accepts its authenticity but often goes against it by pointing out that meaning is not clear and certain and jurists have not agree over the meaning of the authentic text. Pakistani SC accept the plain and ordinary meaning of a text without going at the back of it.

### 16.1.2 Sunnah

The SCC rarely quotes any hadith except a utilitarian hadith<sup>176</sup>. In his opinions it has quoted just a handful of them, in fact for a period of four years 1989-1992 it did not quote a single hadith. One of the reason can be the authenticity problem of hadith since the SCC has high standard of authenticity, and authenticity of hadith is difficult to establish due to chain of narration problems. Or maybe the Court is deliberating ignoring the vast literature and creating more room for its interpretive sphere and for the legislature as well. On the other hand, Pakistani SC quotes extensively from the hadith literature.

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<sup>176</sup> "No harm, no retribution".

## 16.2 Secondary Sources

Pakistani SC appears to accept all the possible secondary sources of *Shariah* as valid without much scrutiny except two main secondary sources, i.e., *Ijtihad* and *Siyasah al-Shariah*. SCC, on the other hand, hardly ever makes usage of secondary sources except that of *Ijtihad* and *masalah*. Below is a comparison, in the order of importance of the sources under *usul ul fiq*, of the approaches of the two courts towards the secondary sources.

### 16.2.1 Ijma

It is the most important secondary source and means consensus on a religious matter. SCC, first does not use *ijma* often but when it does it holds the claim of *ijma* to a very high standard to determine if there exist a consensus of all the past jurists of all the schools. This standard is almost impossible to meet because jurists often disagreed with each other.

### 16.2.2 Qiyas

It means analogical reasoning. SCC does not seem to accept it and has never used it, but the SC of Pakistan build its entire edifice of separation of powers and independence of judiciary through *qiyas*.

### 16.2.3 Ijtihad

SCC gives great importance to *Ijtihad* and exhort the legislature to do *ijtihad*. Pakistani SC in its judgment did not mention this source one neither it relied on it.

### 16.2.4 Masalah (Public Interest)

The SCC of relies extensively on the public interest doctrine based on the well-known hadith, "no harm and no retribution" (*la darar wa-la dirar*)), laying out utilitarian principle in the

formulation state policies. SCC decides most cases in the second limb of its test on the basis of public interest. SC of Pakistan, however, does not invoke it explicitly but seems to be accepting it.

#### 16.2.5 Recognition of *Urf* (Custom)<sup>177</sup>

The Pakistani court declared the constitutional convention of appointing justices in consultation with the Chief Justice binding on the basis of *urf*. According to SC's logic, *Urf* trumps the legislature. SCC, on the other hand seems to have taken a different approach and rejected it recently in a 2013 decision that had challenged the constitutionality of Article 242 of the Penal Code, which criminalizes female genital mutilation, and claimed that the law was against Islamic Custom.

#### 16.2.6 *Siyasah Shariya*

Pakistani Court does not invoke this concept but as seen above that the SCC of Egypt relied on it extensively to give more room and space to the government in the discharging its duties and making laws in the public interest without the danger of law being struck down on the basis of *ulema*'s arcane objections.

### 16.3 Other Sources

The SC of Pakistan relied extensively on the contemporary secular and religious legal scholarship which the Egyptian SCC has never done in its judgments.

#### 16.4 Who is going to decide?

Who is going to be the final arbiter of disputes between organs of the state and different sections of society and how aggressive and independent that arbiter is going to be are other

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<sup>177</sup> See G. Libson and F.H. Stewart, "Urf." Encyclopaedia of Islam in P. Bearman et al (eds.), (Brill, 2008)

important issues on which the approaches of the two courts differ greatly. This issue goes way beyond simple judicial review and has great implications for the constitutional structural rules and separation of powers and checks and balances.

#### 16.4.1 Judicial Power

Supreme Court of Pakistan (SCP) seems to have a very aggressive approach in securing the judicial power, especially the independence of judiciary by taking full control of the appointments mechanism. For this purpose it strategically derives arguments from Islam and interpret them in such a broad manner in the service of its objective of securing its independence. First, at the admissibility stage, it adjudicated on the standing of the Petitioner in an extremely liberal sense despite the government's protestations and proceeded to interpret twenty-three articles of the Constitution.<sup>178</sup> Second, it assumes Islamic jurisdiction, despite there being a clear bar of the jurisdiction as contained in Article 227(2); it thus ignores clear text of the Constitution. Third, the SCP for all practical purposes struck down four sub clauses of the Constitution<sup>179</sup> to secure independence of judiciary. These Articles of the Constitution provided a loop hole to the President to appoint transfer trouble making judges to the Federal Shariat Court and if they refused such transfer order they were assumed to have voluntarily resigned from the post. Striking down constitutional provision in the name of "reading down" demonstrated the willingness of the Court to jealously guard its own independence. Fourth, the substantive interpretation of the word "consultation" reduced the role of the executive to a rubber stamp who was just required to issue a notification appointing Chief Justice's nominees.

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<sup>178</sup> Al-Jehad, Para 3.

<sup>179</sup> Article 203-C (4), (4-B) and (5).



On the other hand, in the interpretation of Islamic provision the approach of the SCC of Egypt has been more cautious and respectful of the other branches of the government.

#### 16.4.2 Assumption of Jurisdiction

Both the SCP and Egyptian SCC employed Islamic provisions to expand their jurisdictions. As have been shown above the SCP did not have jurisdiction to adjudicate on the basis of Islamic repugnancy but employing the vehicle of Islam it assumed jurisdiction and interpreted 22 articles of the Constitution. Similarly, the prevalent view before 1985 was that the Article 2 of the Constitution of Egypt was not justiciable and SCC did not have jurisdiction but SCC did assume jurisdiction.

#### 16.5 Lack of Regard for the Legislature and *Siyasah al Shariah*

The SCP through the utilization of principles of Islam tried to absolute independence from both the other branches of the government, i.e., the legislature and the executive. Under the Pakistani Constitutional scheme of things, the judges enjoy security of tenure, the power of impeachment rests with the judges themselves, and their budget is not discussed in the Parliament and neither their accounts are audited by the parliamentary Public Accounts Committees. For the political branches the only legal mechanism of checks over judiciary and to give input was through appointment of judges and through presidential power to transfer judges to the FSC, which was constitutionally above the provincial high courts but in practice was considered less prestigious than a high court. The SCP eliminated these last mechanism through which political branches could check the judiciary. SCP did this by first eliminating the role of the executive from appointments and “reading down” explicit provision of the constitution to eliminate the practice

of transferring of judges to FSC. Reading down of the constitution meant a severe theoretical blow to the legislature. It was clearly indicated to the legislature that it could not amend the constitution and legislate as it pleases in the matters that concern the judiciary because the independence of judiciary was secured by Islam and everything else, including the constitution, had to be interpreted in the light of Islam. This meant SCP was after the introduction of Islamic provisions was in possession of a supra-constitutional power.

The SCP building on the principles enunciated in this case decided three more cases concerning the appointments of judges. In the first case *Al-Jehad* No. 2<sup>180</sup> it gave comprehensive direction to ensure implementation of its judgment in *AL-Jehad* No. 1. In the second case, *Malik Asad's* case,<sup>181</sup> the SCP relying on *Al-Jehad* 1 and the principles of Islam concerning independence of judiciary took away the power to appoint the Chief Justice of Pakistan from president and held that Islamic principles required that the senior most judge be appointed as Chief Justice on the vacation of the office of the Chief Justice. In the third case, the SCP rebuffed legislature's modest constitutional amendment to appoint judges through a Judicial Commission headed by the Chief Justice but having a representation of parliamentarians.<sup>182</sup>

The SCC of Egypt, on the other hand, has been very respectful towards the government and has in fact utilized the principles of sharia, especially concepts such as *ijtihad*, *Siyasah al shariya*, and *masalah* to increase the governmental power.

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180 P L D 1997 Supreme Court 84.

181 P L D 1998 Supreme Court 161.

182 *District Bar Association (Rawalpindi) v Federation of Pakistan*, PLD 2015 SC 401; See Waqqas Mir, "Saying not what the Constitution is ... but what it should be: Comment on the Judgment on the 18th and 21st Amendments to the Constitution *District Bar Association (Rawalpindi) v Federation of Pakistan* PLD 2015 SC 401", =available at [https://sahsol.lums.edu.pk/sites/default/files/Saying%20not%20what%20the%20Constitution%20is\\_0.pdf](https://sahsol.lums.edu.pk/sites/default/files/Saying%20not%20what%20the%20Constitution%20is_0.pdf)

## Conclusion: An Islamic Model for Independent Judiciary and Separation of Powers

With the exception of few Muslim countries, independent and well-respected judiciary hardly exist in Islamic countries. This weakness, i.e., absence of a robust and independent third organ of the state results in violation of powers, lack of checks, and ultimately increase in rising extremism or sometime even civil war. A weak judicial organ also results in undercutting the authority of the political branches, helps in feeding Islamic radicalism in the long run. It is the lack engagement with and suppression of Islamists that helps in making many Islamists more radical. One of the most important consequences of lack of independent judiciary is the decrease in legitimacy of the three organs of the state. It is not just the judiciary that suffers, the legislature and the executive also suffer. They are severely constrained in even their legitimate sphere of activity. The Islamists label the laws as Un-Islamic and question the authority of the government to legislate and enact laws and policies. Paradoxically, the lack of independent judiciary therefore becomes a major factor in weakening even those institutions that on the assumption that autonomy and independence is a zer-sum equation among the three organs weaken the judiciary. In all the Islamic countries, the SCC of Egypt established itself, from 1985 to 2000, as a legitimate institution on the adjudication of matters concerning Islam; even the fiercest Islamists in Egypt came to respect its authority. It achieved this feat, despite facing very tough pressure both from the most organized Islamist political movement in the Middle East, i.e., Muslim Brotherhood, and an authoritarian regime of Hosni Mubbarik on the other hand. SCC establish itself, chiefly, by developing a very systematic theory of judicial review in the cases concerning challenges on the basis of Islamic *Shariah*. This theory in turn had profound implications for the interpretation of structural constitutional rules as seen above.

Analysis of the SCC jurisprudence shows that it has devised a very unique method to incorporate and interpret the principles of religious law/*Shariah* in the Egyptian Constitution. While interpreting the express structural provisions of the Constitution, the SCC has never explicitly invoked the principles of Islam; however, while interpreting the Islamic provisions of the Constitution, it has developed a methodology that have had profound implications for the structural aspects of the Constitution (i.e., a remarkable job the separation of powers, independence of judiciary and power of judicial review) and the role of Islamic jurists in a constitutional democracy that has constitutionally enshrined commitments to the principles of separation of powers. This method has given freedom to the State to legislate more freely in the public interest without being constrained by imprecise and often contradictory interpretation of Islam offered by the *ulema*. Furthermore, the SCC has restored extremely broad legislative competence of and discretion to ulil amr (government) by drawing upon the theory of *Siyasah Shariah*.)The SCC by strategically intervening and purporting to interpret the religious provisions, has increased its legitimacy thereby enhancing its independence and firmly establishing itself as a legitimate and powerful player actor in the separation of powers scheme of things as is evident from the Ribba Case and the Jihan's law case. Moreover, it was able to shift the authority of *Ijtihad* to ulil amr from *ulema*.<sup>183</sup> The SCC relegated/pushed the Islamic jurists to the political sphere that had profound implications for the separation of powers. It helped the SCC to establish itself as a legitimate interpreting force thereby breaking the hold of *ulema* (the Fourth Pillar of the Islamic state). It established itself as the final arbiter thereby eliminating the need for the existing three branches of the government to defer to *ulema*.

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<sup>183</sup> Case decided on May 15, 1993; Lombardi, *State Law*, 181

Despite the development of a very useful method of interpretation Islamic law, its independence was destroyed by the Mubbarik regime starting from 2001 through the instrument of appointment of judges to the SCC. It appears that the SCC was unable to protect itself from the political branch that resulted in delegitimizing the SCC court.

Pakistani judiciary, on the other hand, is perhaps the far the most independent judiciary in all the Islamic world and it has been able to maintain its independence since 1994 despite two attempts by a military dictator to curtail its autonomy.<sup>184</sup> The analysis of the Pakistani case above and subsequent jurisprudence built upon that case reveals that the Pakistani constitutional courts have achieved their independence through a very creative deployment of principles of Islam to interpret laws concerning constitutional structural rules. The Pakistani constitutional courts, it may be said, owe their independence to laws. However, its methodology of interpreting of interpreting the principles of Sharia and incorporating leaves much to be desired, as shown by Martin Lau very convincingly.

The strengths and weaknesses of the constitutional courts of both the Islamic countries leads me to conclude that if the methods of both constitutional courts are combined then there're is a real possibility of a strong and independent judiciary that will be not only establish itself an impartial and legitimate organ, but will also be able to give the space needed to the legislature and the executive to enact policies in the public interest. A truly independent judiciary can be a bulwark against rabid fanaticism and extremism. The Islamic countries (Afghanistan and Iraq) that have recently enshrined Islam in their constitution can benefit from this model drawn from Egyptian and Pakistani jurisprudence.

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<sup>184</sup> For an introduction to President Musharaff's attempts on judicial independence, see Anil Kalhan, "Gray Zone' Constitutionalism and the Dilemma of Judicial Independence in Pakistan," 46 Vanderbilt Journal of Transnational Law 1 (2013).

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