Enforcing Article 3 of the Afghan Constitution: Lessons from the Pakistani Federal Shariat Court

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Abstract

This article illuminates the possible negative consequences of enforcing Art. 3 of

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2004 Constitution of Afghanistan through judicial review. The argumentation is based on a historical survey of the origin and development of the Islamic repugnancy clause in Afghan legal history, a conceptual critique of the dogmatic ideal expressed in the Islamic repugnancy clause, ending with a comparison with the Pakistani experience with enforcing a similar clause through judicial review. It concludes that the current enforcement mechanism creates the fundamental risk of transferring quasi-legislative powers to a small un-elected group of officials by opening a gate to a supra-constitutional level of law that is not compatible with modern constitutionalism.

1. Introduction

Since the Supreme Court in Afghanistan has not yet had an opportunity to use its competence to enforce Art. 3 of the 2004 Constitution of Afghanistan, this article will draw on Pakistani case law in order illustrate some possible consequences connected with enforcing an Islamic repugnancy clause.

Much has been written about the questions of human rights and the conflicting values between European and Islamic state models. There may be much merit in such value-based analysis, and there shall be no doubt that ensuring human rights including in particular the equal rights of women is of utmost importance in Afghanistan. However, this article will not address these questions, but rather focus on how the enforcement of the Islamic repugnancy clause in Art. 3 may affect the functioning of the rational legal order.

The article is divided into three parts: the first part examines the origin of the Islamic repugnancy clause and its development in Afghan legal history, the second part explores the dogmatic ideal of the Islamic repugnancy clause through the prism of legal *mentalité*, and the third part consists of a comparison with the enforcement of the Islamic repugnancy clause in Pakistan.

2. The origin of the Islamic repugnancy clause and its development in Afghan legal history

2.1. The origin of the Islamic repugnancy clause

The history of the Islamic repugnancy clause begins a few decades before its arrival in Afghanistan. The first appearance was made in Art. 2 of the Persian constitution of 7 October 1907, supplementary to the constitution of 30 December 1906. The article reads:

> "At no time must any legal enactment of the Sacred National Consultative Assembly [...] be at variance with the sacred rules of Islam and the laws established by [the Prophet Muhammad]."

Apart from its specific Shi'ite and Persian flavor, this clause "bears credit for introducing the very language of repugnancy that would migrate transnationally into future constitutions."[2] While a complete genealogy of this clause is outside the scope of the present article, it is very likely that the drafters borrowed the concept of a repugnancy clause from then neighboring British India. The idea of a repugnancy clause dates back to 1668 when the British Crown leased the island of Bombay to the East India Company. In the charter accompanying the lease, "the company was required to enact laws 'consonant to reason and not repugnant or contrary to' and 'as near as agreeable to English law'."[3] The British repugnancy clause survived all the way up to the India Independence Act of 1947 when it was officially abolished (Section 6 (2)), and Tom Ginsburg and Dawood I. Ahmed argue that it is exactly from the colonial rule in British India, that the Persian constitutionalists found inspiration when introducing the first Islamic repugnancy clause in 1907.[4]

2.2. The Constitution of 1923

Twelve years later in Afghanistan, the young Shah Amanullah ascended to the throne after the assassination of his father Habibullah. Soon, Amanullah launched a series of administrative, financial, social, and legal reforms in order to modernize the country.[5] Most importantly for our examination, he initiated Afghanistan's first constitution in 1923 modeled on the Persian constitution of 1906 and Mustafa Kemal Atatü rk's administrative codes in Turkey;[6] both rather secular documents. Thus, Afghanistan's 1923 constitution did not contain any Islamic repugnancy clause despite numerous symbolic references to Islam and *sharia*. As with Amanullah's other reforms, the constitution was met with fierce resistance from religious and tribal leaders as well as the king's conservative advisers who pressured him to call a *loya jirga*[7] which could amend the constitution in favor

2. Ahmed, Dawood I. & Tom Ginsburg. "Constitutional Islamization and Human Rights: The Surprising Origin and Spread of Islamic Supremacy in Constitutions". Virginia Journal of International Law, vol. 54, no. 3 (2014), p. 18
3. Pearl, David. A Textbook on Muslim Law. London: Croom Helm, 1979, p. 23
4. Ahmed & Ginsburg (n 1), p. 18
5. Barfield, Thomas. Afghanistan: A Cultural and Political History. Princeton: Princeton University Press, 2010, p. 182f
6. Dupree, Louis. Afghanistan. Princeton: Princeton University Press, 1980. First published in 1973, p. 462
7. Since the concept of a loya jirga appears several times in the legal history of Afghanistan, it deserves some attention.

of Islam.[8] Although no repugnancy clause was introduced,[9] these amendments were great enough to satisfy the *ulama*[10] (at least for a while). However, there is difference in opinion about how important the amendments actually were - Louis Dupree calls them "minor",[11] while Ahmed and Ginsburg call them "major".[12]

At this point, one should bear in mind how Persia's first constitution came into being and how it differed from the Afghan experience. While the desire for modernization (including modern constitutions) in both countries was driven by strong anti-imperial sentiments and a wish for independence and a stronger position vis-a-vis foreign powers, the courses of development were very different. Where the first Persian constitution was the result of a broad coalition of forces, the Afghan constitution of 1923 was an exclusively top-down project. This factor is crucial when considering the role of the *ulama* in the constitutional process: with Abdur Rahman's centralization of power, the *ulama* had been incapacitated *vis-a-vis* the monarch. Furthermore, during the latter part of Habibullah's reign, the *ulama* had been alienated from the court. Therefore, when Amanullah imposed Afghanistan's first constitution, the *ulama* was not very close to the circle of power. Thus, the *ulama* was not included in a constitutional bargain as the one in Persia and could not in the same way demand what Ahmed and Ginsburg call an "insurance swap". The failure to give Islam a more prominent position in the constitution of such a deeply religious country as Afghanistan, Ahmed and Ginsburg argue, eventually led "to its demise and replacement with a constitution that provided robust Islamic supremacy clauses."[13]

In this regard, I will rely on Thomas Barfield's ((2010), p. 96) examination and critique of the concept: "An invented tradition is most effective when people believe it is a long-existing practice. What made the loya jirga appear to be such a tradition was its similarity to the smaller-scale jirgas used by Pashtun communities to resolve problems and approve collective actions. Raising the jirga to a national level could be made to appear as part of that tradition, even though historically it was not. The jirga process also fit the dynamics of Afghan politics well in three aspects. First, its legitimacy depended on meeting an accepted level of participation. [...] Second, votes on individual issues were never taken during a jirga; only when a consensus on a total package was agreed on would the results then be approved by acclamation. [...] Third, the people who participated in a jirga agreed to be bound by its results and stand behind its decisions."

8. Dupree (n 5), p. 462f

9. See Art. 72 of the 1923 Constitution: "In the process of legislation the actual living conditions of the people, the exigencies of the time and particularly the requirements of the laws of sharia will be given careful consideration."

10. Ulama is plural of the Arabic word alim, which can be translated to scholar. In principle, ulama can refer to any type of scholars, but is usually understood as a specific class religiously and legally trained clergymen in a Muslim society. Some ulama may as well be muftis who can pass down fatwas, i.e. non-binding legal opinions on the right conduct of believers.

11. Dupree (n 5), p. 462

12. Ahmed & Ginsburg (n 1), p. 53

13. Ahmed & Ginsberg (n 1), p. 48

While the *ulama* were more or less excluded from formal power under Amanullah, they still exercised great influence over the general population, and the public objections to Amanullah's reforms were formulated in religious terms.[14] After having further alienated the *ulama*,[15] and repeatedly provoked the conservatives and opposed tribes, in 1929 "anti-Amanullah elements, both inside and outside Afghanistan, combined to overthrow the King."[16]

2.3. The Constitution of 1931

In the wake of the civil war that brought Amanullah's reign to an end, a former general and diplomat, Mohammad Nadir Khan, returned from his retirement in France to assume power.[17] In September 1930, Nadir Khan summoned a *loya jirga* who "confirmed him as King of Afghanistan, announced support of his November 1929 proclamation (which renounced Amanullah's reform programs), and promised to move Afghanistan back into the mainstream of the Hanafi Shari'a of Sunni Islam."[18] Nadir Shah approved a National Council of 105 members who in October 1931 passed Afghanistan's second constitution. This new constitution have been characterized as "a hodgepodge of unworkable elements" with large parts "borrowed at random from various sources."[19]

While the "Constitution of 1931 [...] in some respects [was] significantly more liberal than that of 1923,"[20] it "also contained more references to Islam,"[21] and it introduced the second Islamic repugnancy clause in the world with the wording:

> "Articles passed by the National Council should not contravene the provisions of the sacred religion of Islam or the policy of the Kingdom." (Art. 65)

Although we here see the first Islamic repugnancy clause in Afghan constitutional law, Islam is juxtaposed with "the policy of the Kingdom" which makes the repugnancy clause in the Afghan 1931 Constitution less firm than that of the Persian 1907 supplementary constitution. Furthermore, the Afghan 1931 Constitution "did not invest any organ or person with the power of judicial review

14. Barfield (n 4), p. 183
15. Ibid., p. 189
16. Dupree (n 5), p. 463
17. Ibid., p. 458
18. Ibid., p. 463
19. Ibid., p. 464
20. Arjomand, Saïd Amir. "Constitutional Developments in Afghanistan: A Comparative and Historical Perspective". Drake Law Review, vol. 53 (2004-05), p. 948
21. Ahmed & Ginsberg (n 1), p. 55

of laws for conformity with the Šarī'at or the Constitution [...]"[22] However, "Nādir Shah decided to submit all laws and regulations to a certain Jam'iyyat al-'Ulamā' (society of the *ulema*) to ascertain their conformity with the Šarī'at."[23] This abstract review mechanism ultimately depended on the goodwill of the monarch and was not enshrined in the constitution. Even with this rather complex and at times self-contradictory system, Nadir Shah's constitution survived 33 years with only some minor amendments,[24] but as with so many Afghan rulers before him, Nadir Shah's reign ended abruptly and violently, when he was assassinated in November 1933.[25] He was succeeded by his youngest son, Zahir Shah, who was to remain king of Afghanistan for forty years.[26]

2.4. The Constitution of 1964

An unusually long period in terms of Afghan constitutional history ensued before Afghanistan adopted a new constitution, but in "1963, after over thirty years of relative stability and slow but steady economic and political progress, King Zahir (who had been on the throne for thirty years at the time) called for the drafting of a new constitution."[27]

Dupree praises the constitution of 1964 as "the finest in the Muslim world,"[28] and another scholar, Abdul Satar Sirat, calls it "modern and progressive."[29] Saïd Amir Arjomand joins the two contemporary commentators' praise of the 1964 Constitution with the words:

> "It was the product of the meeting of liberal constitutionalism and Islamic modernism that proposed to interpret the principles of Islam without undue restriction from the rigidities of medieval Islamic jurisprudence and succeeded in finding the finest formula for the reconciliation of Islam and constitutionalism in the Middle East to that date or since."[30]

It is no coincidence that of all Afghanistan's historical constitutions it was the one

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22. Arjomand (n 19), p. 950
23. Ibid.
24. Ahmed & Ginsburg (n 1), p. 55
25. Dupree (n 5), p. 463
26. Barfield (n 4), p. 197
27. Thier, Alexander J. "The Making of a Constitution in Afghanistan". New York School Law Review, vol. 51 (2006-07), p. 560
28. Dupree (n 5), p. 565
29. Sirat, A. S. "The Modern Legal System of Afghanistan". The American Journal of Comparative Law, vol. 16, no. 4 (1968), p. 564
30. Arjomand (n 19), p. 952

from 1964 that was chosen as the model for the 2004 Constitution.

The 1964 constitution includes many important features, but we will focus our attention on its Islamic repugnancy clause and how the legislation was supposed to be reviewed for conformity with Islam. The wording of the 1964 repugnancy clause is very similar to that of 1931:

> "There shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this Constitution" (Art. 64)

According to Sirat, this "requirement illuminates the concept of modernization in the legal system of Afghanistan and the relationship between modern laws and traditional laws."[31] This relationship was finely balanced indeed: since the constitution did not include a review clause for the conformity with Islam, it became the task of the National Center for Legislation in the Ministry of Justice (a purely secular institution under the King) to examine all laws for conformity with Islam and the constitution.[32] This delegation was arguably warranted in Art. 7 that simply stipulated that "[t]he King is the protector of the basic principles of the sacred religion of Islam".

Art. 64 must be read in conjunction with Art. 69, which stipulates that "in the area where no [law that has been passed by both Houses and signed by the King] exists, the provisions of the Hanafi jurisprudence of the shariaat of Islam shall be considered as law." Sirat analyses the relationship thus:

> "By this constitutional principle, the Afghan Legislature will adhere only to the basic principles of Islam, and will benefit from the advantages of all Islamic teachings (Hanafi, Shaffi, Malaki, Hanbali, etc.). The interesting point is that although the laws to be made are based on broad Islamic principles, if a case arises which is covered by no new law, the prevailing law in the court is only the Hanafi Doctrine. By choosing only the Hanafi Doctrine, the Constitution limits the courts' power and restricts conflicts of decisions."[33]

According to Dupree "several religious leaders [in the constitutional *loya jirga*] demanded to know why the Hanafi *Shari`a* had been placed in a secondary position to secular laws." They were explained that Art. 64 "covered repugnancy to Islam for all time," and in the end, only few voted against Art. 69, which Dupree optimistically considers "a great triumph for the new breed of liberal religious

31. Sirat (n 34), p. 566
32. Dupree (n 5), p. 580
33. Sirat (n 34), p. 566f

thinkers in Afghanistan."[34]

2.5. The Constitution of 1990

In the following decades, Afghanistan experienced major political and societal upheavals, including the abolition of the monarchy and the Soviet invasion, but some constitutional development was made with the 1990 Constitution of Afghanistan. For our purposes, the most relevant development was the establishment of a Constitution Council, which according to Art. 123 had the power to:

> "Evaluate the conformity of laws, legislative decrees, and international treaties with the Constitution."

This, of course, included Art. 2 of the 1990 Constitution:

> "The sacred religion of Islam is the religion of Afghanistan. In the Republic of Afghanistan no law shall run counter to the principles of the sacred religion of Islam and other values enshrined in this Constitution."

To this end, the Constitution Council had the right to:

> "Scrutinize the legislative documents presented for the President's signature and express opinion on their conformity with the Constitution of the Republic of Afghanistan." (Art. 124)

The Constitution Council was to be composed by a chairman, a deputy chairman, a secretary, and eight members appointed by the President. Thus, the 1990 Constitution introduced a separate (although not independent) institution for performing an abstract, a priori review of legislation. However, because of the civil war and the coming to power of the infamous Taliban, the 1990 Constitution had a short life and a limited legacy. Also, in the making of the 2004 Constitution, the 1964 Constitution rather than the 1990 Constitution was chosen as a point of the departure, and the Constitution Council was not kept in the new Afghan state.

2.6. The Constitution of 2004

Following the terrorist attacks by Al-Qaeda on 11 September 2001, the US together with its coalition partners invaded Afghanistan. Militarily the Taliban was quickly defeated and routed from Kabul. Unlike earlier foreign interventions, the regime was toppled without any new candidate in mind, so the US turned to the United Nations for this task. The UN convened a conference in the former

34. Dupree (n 5), p. 579

capital of West Germany, Bonn.[35] The result of this conference was the Bonn Accords,[36] which "set out a process rather than a detailed settlement of major political issues."[37] The Accords established an interim authority, which among other things was tasked with convening a constitutional *loya jirga* "in order to adopt a new constitution for Afghanistan. In order to assist the Constitutional Loya Jirga prepare the proposed Constitution, the Transitional Administration shall, within two months of its commencement and with the assistance of the United Nations, establish a Constitutional Commission."[38] Until the new constitution came in place, it was decided that the 1964 Constitution should be applicable on an interim basis.[39]

However, before turning to the Islamic repugnancy clause in the 2004 Constitution, it may be useful to quickly outline the power of judicial review that the Supreme Court holds. Although Art. 3 of the 2004 Constitution first and foremost is a duty put on the legislator, the Islamic repugnancy clause must be read in conjunction with Art. 121, which states:

> "At the request of the Government, or courts, the Supreme Court shall review the laws, legislative decrees, international treaties as well as international covenants for their compliance with the Constitution and their interpretation in accordance with the law."

The power to perform judicial review by the Supreme Court thus covers the constitution in its entirety, including Art. 3. However, Art. 121 does not specify the consequence of incompliance with the constitution. Rainer Grote argues with reference to Art. 162 that it must "be assumed that the Supreme Court possesses the power to declare void laws and legislative decrees which it holds to be in violation of the Constitution."[40]

As we shall see, this in effect means that the power of the Supreme Court to review legislation for compliance with Art. 3 is rather similar to that of the Federal Shariat Court (FSC) in Pakistan. However, one major difference is that ordinary citizens

35. Barfield (n 4), p. 283
36. Officially entitled Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment Of Permanent Government Institutions (concluded on 5 December 2001)
37. Rubin, Barnett R. "Crafting a Constitution for Afghanistan". Journal of Democracy, vol. 15, no. 3 July (2004), p. 6
38. Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions (I.6)
39. Ibid. (II.1.i)
40. Grote, Rainer. " Separation of Powers in the New Afghan Constitution". Zeitschrift fü r ausländisches öffentliches Recht und Völkerrecht, vol. 64 (2004), p. 912

cannot bring a constitutional case before the Supreme Court in Afghanistan.

Furthermore, the enforcement through judicial review should be seen as the last bastion of the Islamic repugnancy clause for as Muhammad Hashim Kamali writes:

> "a legal bill that is in clear conflict with the principles of Islam is hardly likely to be presented to, let alone passed by parliament, and even less likely to be promulgated by the head of state, as that would most likely go against public opinion and prove politically inexpedient. One is, in other words, more likely to be concerned with implicit and more subtle cases of repugnancy."[41]

While the text of the 1964 Constitution was used as a point of departure for the drafting of the 2004 Constitution, the final document shows some significant differences - especially with respect to the role of Islam. Art. 64 of the 1964 Constitution was kept in its original wording in the first draft for the 2004 Constitution: "there shall be no law repugnant to the basic principles of the sacred religion of Islam and the other values embodied in this Constitution." However, in its final and approved version the repugnancy had changed slightly to: "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan" (Art. 3).[42] This means that now the conformity is measured against "the tenets and provisions" instead of the concept of "the basic principles" of Islam. Also, the reference to other "other values" has been omitted. This deliberate change has attracted the attention of various scholars. Kamali, who was among the drafters of the 2004 Constitution, explains the change thus:

> "The 1964 constitution contained a similar clause to the effect that legislation may not contravene 'the basic principles of the sacred religion of Islam' (Art. 64). The 2004 constitution instead adopted the phrase 'beliefs and ordinances' of the sacred religion of Islam. These provisions seem to be essentially conveying the same message although somewhat differently in respect of detail. Neither of these two, nor in fact, any of the other constitutions of Afghanistan, however, elaborated on the precise meaning and import of these phrases, leaving the question therefore unanswered as to what exactly the 'basic principles' were as opposed to subsidiary rules of Islam that constituted the criteria of repugnancy. The 2004 constitution has, in fact, phrased the test of repugnancy more widely to include not only the basic principles, but also

41. Kamali, Muhammad Hashim. " References to Islam and Women in the Afghan Constitution" In Arab Law Quarterly, vol. 22 (2008), p. 286

42. Note on translation: "tenets" are some places translated as "beliefs", and "provisions" as "ordinances".

> virtually all the beliefs and ordinances of Islam. The word 'ahkām, plural of hukm: ruling, ordinance, judgment' may be said to have a legal connotation and may refer mainly to the Shari'a, but even this explanation is of little help to lay down a pragmatic test by which to determine the conformity or otherwise of a particular statutory ruling with Islam."[43]

Andrew Finkelman interprets the reference to "the tenets and provisions" of Islam as a reference to *sharia* specifically.[44] However, a specific reference to *sharia* was deliberately avoided in the draft presented to the constitutional *loya jirga* after having being inserted in an earlier draft by the Islamist lobby.[45] So by inference we must conclude that "tenets and provisions" does not mean the same as *sharia*. But what does it then mean? Said Mahmoudi calls it "a legally vague concept and prone to broad interpretations" and argues that it can be "a reference not only to the *Sharī'a stricto sensu*, but also to the fiqh and perhaps even to the doctrine of Islamic law."[46] While J. Alexander Thier argues that "[t]he use of 'provisions' in particular indicates something closer to reliance on the established Islamic *sharia*"[47] and Nathan J. Brown writes that the word *ahkam* (provisions) "might also be translated as rulings and is difficult to interpret as other than a reference to Islamic law,"[48] Ramin S. Moschtaghi explains that "since it is very common in Darī/Farsī to use a pair of words conveying a single meaning, the term "beliefs" (*mo taqedāt*) combined with "ordinances (*aḥkām*) does not necessarily provide an additional meaning to *aḥkām*."[49]

Thus, there seems to be little consensus in the academic literature on how to interpret this deliberate change in wording. Perhaps this tells us that there can be no final and authoritative interpretation of a so vaguely formulated provision. Taking a step back, the following section will offer the broader framework

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43. Kamali (n 46), p. 286

44. Finkelman, Andrew. "The Constitution and Its Interpretation: An Islamic Law Perspective on Afghanistan's Constitutional Development Process, 2002–2004". Al Nakhlah, art. 2 (2005), p. 2

45. Biloslavo, Fausto. "The Afghan Constitution between Hope and Fear". CEMISS Quarterly, vol. 2, no. 1 (2004), p. 67

46. Mahmoudi, Said. "The Sharī'a in the New Afghan Constitution: Contradiction or Compliment?". ZaöRV, vol. 64 (2004), p. 870f

47. Thier (n 32), p. 578

48. Brown, Nathan J. "Bargaining and Imposing Constitutions: Private and Public Interests in the Iranian, Afghani and Iraqi Constitutional Experiments". In Constitutional Politics in the Middle East: With Special Reference to Turkey, Iraq, Iran and Afghanistan, pp. 63–76. Ed. by Saïd Amir Arjomand. Portland: Hart Publishing, 2009, p. 72

49. Moschtaghi, Ramin S. "Constitutionalism in an Islamic Republic: The Principles of the Afghan Constitution and the Conflicts between Them". In Constitutionalism in Islamic Countries: Between Upheaval on Continuity, pp. 683–713. Ed. by Rainer Grote & Tilmann J. Röder. New York: Oxford University Press, 2012, p. 692

to which any Islamic repugnancy clause ultimately refers; in other words, the dogmatic ideal of the Islamic repugnancy clause.

3. The dogmatic ideal of the Islamic repugnancy clause

To approach this dogmatic ideal in a systematic manner, I have borrowed the concept of legal *mentalité* defined as "(the collective mental programme), or the interiorised legal culture, within a given legal culture."[50] The inventor of this concept, Pierre Legrand, admits that the pitfalls of applying such a concept are manifold,[51] but I believe that it is the best way to examine a legal culture that is interiorized but not essential; enduring but not unchangeable; overarching but not holistic. In other words, "[o]ne is thus, ideally, looking for a representative common core - always bearing in mind, however, that one may have to settle for an imperfect approximation thereof."[52] Also, the concept of legal *mentalité* holds no promise of going into all particularities. In the following, two central aspects of the Islamic legal culture will be examined in order to expose the legal *mentalité*:[53] The sources of law, and the method of reasoning.

To begin with the very basics, the sources of Islamic law are the Quran, the *sunnah*, and *ijma*. Some scholars suggest that also *qiyās* or *ijtihad* are to be counted among the sources of law, but I must maintain that these concepts strictly speakingcover methods of legal reasoning and are not sources in themselves.

Naturally, the Quran holds a special place in the Islamic legal *mentalité* as it is believed to be the authentic record of the word of God, which makes it "the first basic source for locating the foundation of a particular norm of law."[54] The Quran contains some five hundred verses of a legal nature,[55] which is less than one tenth of the complete number of verses. These can be divided and categorized in different ways. First of all, some parts of the Quran were revealed to the Prophet Muhammad while the early Muslim community resided in Mecca, and later

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50. Legrand, Pierre. "European Legal Systems are not Converging". International and Comparative Law Quarterly, vol. 45 (1996), p. 60

51. Ibid., p. 63

52. Ibid.

53. A note on terminology: "The term Islamic law generally is used in reference to the entire system of law and jurisprudence assosicated with the religion of Islam, including (1) the primary sources of law (Shari'ah) and (2) the subordinate sources of law and the methodlogy used to deduce and apply the law (Islamic jurisprudence called fiqh in Arabic)." Abdal-Haqq, Irshad. "Islamic Law: An Overview of Its Origin and Elements". In Understanding Islamic Law: From Classical to Contemporary, p. 2ff. Ed. by Hisham M. Ramadan. Oxford: AltaMira Press, 2006, p. 3

54. Hassan, Farooq A. "The Sources of Islamic Law". Proceedings of the Annual Meeting (American Society of International Law), vol. 76 (1982), p. 65

55. Hallaq, Wael B. An Introduction to Islamic Law. New York: Cambridge University Press, 2009, p. 16

other parts were revealed in Medina. Both parts contain verses of legal relevance, but whereas the Meccan part contain "the essentials of belief and monotheism, matters of worship, and disputation with unbelievers" as well as "legal rulings on the permitted and forbidden varieties of food, the prohibition of murder and infanticide, safeguarding the property of orphans, the prevention of injustice (*ẓulm*)" etc., the Medinan part emphasises "rules to regulate matters of war and peace, the status and rights of conquered people, the organisation of family and principles of government [...]"[56] Another distinction is between *qatʿi* (definitive) and *zanni* (speculative) rulings. A *qatʿi* ruling is clear and explicit why only one interpretation can exist. On the contrary, a *zanni* ruling is formulated in a way that leaves it open for several different interpretations and therefore open for the exercise of *ijtihad*.[57]

The second basic source of Islamic law is the *sunnah* (the exemplary sayings and deeds of God's messenger Muhammad):[58] "Since the word of God was revealed to the Prophet Muhammad, his actions and sayings were and are believed to have been the best possible interpretation of God's commandments contained in the Quran."[59] Thus, the actions and pronouncements of the Prophet are canonical.[60] The *sunnah* consists of the *hadith* (which can both refer to the body of *hadith* and to a single *hadith*).[61] The number of *hadiths* originally exceeded half a million, but through retrospective selection, sifting and validation it was reduced to about 5,000 sound *hadiths* that can be applied.[62] These were compiled in a number of books and "*[h]adiths* not contained in them were considered weak and unreliable, while those included became authoritative."[63] Depending on the nature of transmissions from the first class of transmitters (who had sensory perception of what the Prophet had said and done) to the last narrator, some *hadiths* provide certain knowledge and some only probable knowledge.[64] However, it is acknowledged that the solution of everyday legal problems only requires probable knowledge (while theological questions, on the other hand, require

56. Ibid., p. 23
57. Ibid., p. 27f
58. Hallaq (n 60), p. 16
59. Hassan (n 59), p. 66
60. Zubaida, Sami. Law and Power in the Islamic World. London; New York: I.B. Tauris, 2003, p. 13
61. Hallaq (n 60), p. 16
62. Zubaida (n 65), p. 18; Hallaq (n 60), p. 16
63. Zubaida (n 65), p. 30
64. Hallaq (n 60), p. 17

certain knowledge).[65] As with the verses of the Quran, the *sunnah* can be divided into legal and non-legal (and some in between). The legal *sunnah* can further be "divided into three types, namely the *Sunnah* which the Prophet laid down in his capacities as Messenger of God, as the head of state or imam, or in his capacity as a judge."[66] When solving a legal problem the jurist may encounter one or more contradictory *hadiths*, but different methods exists to determine which *hadith* is then preferable.[67]

Thusly, the two basic sources of Islamic law are God's will mediated either through the wording of the Quran or through the deeds and utterings of His messenger, which means that in "Weberian terms, Islamic law itself is irrational to the extent that it depends on divine sources without rational justification."[68] This reference to Weberian[69] irrationality, however, needs to be nuanced. In the introduction to his anthology on legal and ethical norms in Islamic law, Baber Johansen discusses the legacy of Max Weber's analysis of Islamic law as sacred law. He writes: "Wherever revelation is a source of the law and its norms are established through legal revelation, the law is, according to Max Weber, "procedurally irrational" (*formell irrational*) because the sources through which the legal norms are brought about cannot be rationally controlled and, therefore, the process of the derivation of law follows an irrational procedure."[70] However, a sacred legal system may develop a type of legal formalism, but "according to Weber, the kind of "formal rationality" which they develop, does not have the force to build logically coherent legal systems."[71] Thus, Weber took the first step in conceptualizing one of the fundamental differences between Islamic law and secular law.[72] As we shall see in this article, this difference plays a central role when assessing the effect an Islamic repugnancy clause may have on the positive legal order.

The last source of Islamic law is *ijma* which Wael B. Hallaq defines technically as

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65. Ibid.

66. Kamali, Mohammad Hashim. Principles of Islamic Jurisprudence. 3rd ed. Cambridge: The Islamic Texts Society, 2003. First published in 1989, p. 69

67. Hallaq (n 60), p. 18f

68. Makdisi, John. "Legal Logic and Equity in Islamic Law". The American Journal of Comparative Law, vol. 33, no. 1 (1985), p. 92

69. Max Weber (1864-1920), German economist and sociologist.

70. Johansen, Baber. "The Muslim Fiqh as a Sacred Law". In Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh, pp. 1-76. Ed. by Baber Johansen. Leiden: Brill, 1999, p. 49

71. Ibid., p. 50f

72. See Ibid., p. 51ff, for a discussion of Weber's legacy in the study of Islamic law

> "the agreement of the community as represented by its highly learned jurists living in a particular age or generation, an agreement that bestows on those rulings or opinions subject to it a conclusive, certain knowledge."[73]

The classical definition is even stricter: "nothing less than a universal consensus of the scholars of the Muslim community as a whole can be regarded as conclusive *ijmāʿ*."[74]

Considering the decentralized nature of Islamic law, it is not hard to imagine that there exists a considerable gap between the theory and practice of *ijma*. Nonetheless, according to Kamali "*Ijmāʿ* plays a crucial role in the development of *Sharīʿah*" and it "ensures the correct interpretation of the Qurʾan, the faithful understanding and transmission of the *Sunnah*, and the legitimate use of *ijtihād*."[75] However, *ijma* is itself ultimately a product of human (intellectual) labour and not revelation,[76] and can therefore never abrogate rulings in the Quran or *sunnah*.[77]

However, the sources do not make the law alone and it "may well be argued that law is [...] the product of the premises and methods from and through which it is derived."[78] In fact, the importance of legal reasoning to the Islamic legal *mentalité* cannot be overstated, for as Joseph Schacht points out, Islamic law is "a doctrine and a method",[79] and Bernard Weiss writes: "[Islamic law] affirms with equal emphasis that the Holy Law is not given to man ready-made, to be passively received and applied; rather, it is to be actively constructed on the basis of those sacred texts which are its acknowledged sources."[80] The sources in themselves contain only relatively few actual legal provisions, and these are usually formulated in a general and metaphorical manner.[81] Therefore, they are ill-equipped to stand alone as a legal system, why the majority of legal norms instead are found through applying different methods of legal reasoning to the sources.82 These different processes form the concept of *ijtihad*,[83] which directly

73. Hallaq (n 60), p. 21
74. Kamali (n 71), p. 228
75. Ibid., p. 231
76. Ibid., p. 228
77. Ibid., p. 204
78. Hallaq, Wael B. "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and the Common Law". Cleveland State Law Review, vol. 34, no. 79 (1985), p. 79
79. Schacht, Joseph. "Problems of Modern Islamic Legislation". Studia Islamica, no. 12 (1960), p. 108
80. Weiss, Bernard. "Interpretation in Islamic Law: The Theory of Ijtihād". The American Journal of Comparative Law, vol. 26, no. 2 (1978), p. 199
81. Hallaq (n 60), p. 19
82. Makdisi (n 73), p. 92
83. Hallaq (n 60), p. 27

translates into endeavor or self-exertion.[84] Contrary to *ijtihad* is the concept *taqlid*, which mean (uncritical) imitation (of earlier jurists).[85] While the sources of Islamic law may be characterized as defined, exhaustible and ultimately irrational, the methods of *ijtihad* applied by Islamic jurists are multiple and involve a high degree of human intellectual effort. Thusly, Sunni Islamic jurists apply a variety of methods of deductive and inductive nature to derive substantive and positive rules: *qiyas*, *istishab*, *istislah*, and *istihsan*. The exact classification and hierarchy of these methods differ from legal school to legal school and from scholar to scholar and the following will, admittedly, generalize in this regard.

Qiyas has been characterized as the "chief tool [...] which serve[s] to harness textual legal evidence to cover yet unsolved cases arising in real life",[86] which makes it the most common legal argument in Islamic law.[87] As stated above, Islamic law builds on divinely revealed sources, but since these sources only give indications about right conduct, Muslims must apply the sources to real life problems by drawing parallels between the two.[88] A proper exercise of *qiyās* consists of four elements: "the new case that requires a solution (*farʿ*); the original case, in the canonical sources, to which the analogy is to be made (*asl*); the rationale (*ʿilla*) common to the two cases, which makes analogous; and the rule (*hukm*), attached to the original case and transferable to the new one because of their supposed similarity."[89] Obviously, the decisive factor in such an analogical argument is the quality of the *ʿilla*,[90] but "[o]nce it is known beyond doubt that both cases, the original and the assimilated, share one and the same *ʿilla*, the judgement of the original case is transferred to the assimilated, thus ensuring that the judgement decreed by God was extended to another case of the same genus."[91]

The concept of *istihsan* has erroneously been perceived as the Islamic equivalent of equity, i.e. a system of natural justice allowing a fair judgement in a situation which is not covered by the existing laws. The difference between *istihsan* and equity is due to the fact that Islamic legal *mentalité* does not recognise natural law as we know it in the West. However, according to Mohammad Hashim Kamali

84. Weiss (n 85), p. 199
85. Ibid.
86. Hallaq, Wael B. "Considerations on the Function and Character of Sunnī Legal Theory". Journal of the American Oriental Society, vol. 104, no. 4 (1984), p. 680
87. Zubaida (n 65), p. 14
88. Hallaq (n 91), p. 680
89. Zubaida (n 65), p. 14
90. See Hallaq (n 83), p. 88f, for an analysis of the logical tools employed for determining the ʿilla.
91. Hallaq (n 91), p. 680

this difference should not be overemphasized, since "the values upheld by natural law and the divine law are substantially concurrent."[92] John Makdisi has shown how *istihsan* should be seen as a "reasoned distinction of *qiyas*",[93] because "the use of *istihsan* in Islamic legal reasoning may [...] be identified as a rational method for the determination of decisions when conflicting principles compete for consideration. The basis for decision-making through *istihsan* rests on a valid recognized source of Islamic law; *istihsan* merely determines the choice of that source, and it does so either through a system of priorities or through a logical analysis of meaning in concepts."[94]

While Islamic legal *mentalité* does not recognise the concept of natural law,[95] it does allow for consideration of *maslahah* (or *istislah*) which can be translated as "welfare", "public utility" or "the common good".[96] According to Kamali, "*[i]stiṣlāh* derives its validity from the norm that the basic purpose of legislation (*tashrīʿ*) in Islam is to secure the welfare of the people by promoting their benefit or by protecting them against harm" and the "ways and means [hereto] are virtually endless."[97] Be that as it may, as opposed to rational and utilitarian legal orders, "law in Islam is conceived not as a means employed in the service of society, but, rather, in the service of God, who alone knows what is best for society. Islamic law delineates the dictates of divine will, and it is perceived as the ideal way in which man can worship his Creator."[98] In this connection it should also be mentioned that no matter how rational the various methods of *ijtihad* may be, they cannot override clear textual or sunnaic rules.[99]

It has been widely assumed that the so-called "gate of *ijtihad*" was closed somewhere around the third or fourth century (AH).[100] Hallaq shows how even such acknowledged scholars as J. N. D. Anderson and H. A. R. Gibb asserted this notion, and also Joseph Schacht was an early proponent of this coinage. The idea of the closed "gate of *ijtihad*" builds on the assumption that around the third or fourth century (AH) all possible legal topics had been derived from the sources

92. Kamali (n 71), p. 323
93. Makdisi (n 73), p. 92
94. Makdisi (n 73), p. 90
95. Ibid., p. 91
96. Afsaruddin, Asma. "Maslahah as a Political Concept". In Mirror for the Muslim Prince: Islam and the Theory of Statecraft, pp. 16–44. Ed. by Mehrzad Boroujerdi. Syracuse, New York: Syracuse University Press, 2013, p. 16
97. Kamali (n 71), p. 352
98. Hallaq (n 83), p. 81
99. Zubaida (n 65), p. 15
100. Ibid., p. 24

by the founding fathers of the four schools of Sunni Islamic legal thought with the consequence that it was no longer desirable to interpret the sources through human reason and that Islamic jurists instead had to follow *taqlid*.[101] In other words: the worldly influence on Islamic law was now a *fait accompli*.

However, this point of view is not shared by more recent scholars. Most prominently has Hallaq disputed the claim that the infamous "gate of *ijtihad*" was ever closed. He systematically refutes the various assumptions about the concept of *ijtihad* and the closing of its gate. The first claim is that the gate closed because no one could fulfil the requirements for being a *mujtahid* (a jurist of such a calibre as to perform *ijtihad*). But with reference to the writings of the classical Islamic legal scholars, he can conclude "with a fair amount of confidence that legal theory, including the qualifications required for the practice of ijtihad, [hardly can] be held responsible for narrowing the scope of ijtihad's activity, much less closing its gate."[102] After that preliminary conclusion, Hallaq turns to an investigation of how anti-*ijtihad* trends ultimately were excluded from Sunnism. Throughout the third, fourth and fifth centuries (AH) different extreme legal and theo-political groups condemned the use of *qiyās* but as the juristic schools were shaped, these elements either had to assimilate and thereby adopt the methods of *ijtihad* (including *qiyās*) or see themselves excluded from the legal development.[103] However, this naturally leads to next question of whether the establishment of these juristic schools had the effect of closing the gate of *ijtihad*. To answer this question Hallaq examines in length the practice and theory of *ijtihad* in the centuries following the supposed closing of its gate. The particularities of the argument should not be repeated here, but on the basis of overwhelming historical evidence Hallaq can conclude "that in practice and in theory the activity of ijtihad during the period under discussion was uninterrupted. Furthermore, mujtahids proved to have existed at all times, a fact which finds full support in the ample material available from the period itself."[104] Furthermore, Hallaq finds that even though there since the sixth century (AH) have been controversies about *ijtihad* and the existence of *mujtahids*, it has been impossible to reach a consensus about the closure of its gates which is ascribed to three different factors:

"First, and most important, is the continual existence of renowned mujtahids

101. Weiss (n 85), p. 208
102. Hallaq (n 91), p. 7
103. Ibid., p. 7ff
104. Ibid., p. 20

> up to the tenth/sixteenth century. Though the number of mujtahids drastically diminished after this period, the call for ijtihad was vigorously resumed by premodern reformists. Second is the Muslim practice of choosing a mujaddid at the turn of each century. Though this practice may not have had the full support of the entire community of jurists, it proved that at least one mujtahid was in existence each century. Third, the opposition of the Hanbali school which was supported by influential Shafi'i jurists who, by their support, not only added substantial weight to the Hanbali claim that mujtahids existed at all times but also weakened the coalition in which Hanafis and Malikis took part."[105]

Hallaq's analysis has subsequently found resonance with other scholars.

Two points about the Islamic legal *mentalité* should be kept in mind when turning to the following sections of the article: 1) The sources of Islamic law are believed to be divinely revealed and therefore unalterable and uncriticizable, which in Weberian terminology makes the whole legal system procedurally irrational; 2) the methods of Islamic jurisprudence (*ijtihad*) are various which the system flexible and adaptable but also severely limits the possibility of meaningful codification of the law. While earlier scholars maintained that the "gates of ijtihad" had been closed more than a millennium ago, more recent research has shown that this was in no way the case. Rather Islamic law has found its place in numerous historical and geographic settings, and there is no reason to believe that this will not continue to be the case.

These two points may seem as a paradox. However, in Islamic legal *mentalité* the different nature of the sources and the methods should rather be seen as complementing each other in a way that makes Islamic law practically applicable while maintaining a religious foundation for it. How this dogmatic ideal - fundamentally different from a positive, rational legal order as it is - affects the positive legal order will be considered in the following examination of a selection of Pakistani case law from the shariat courts.

4. Enforcing the Islamic repugnancy clause in Pakistan

4.1. The Pakistani constitution of 1973 and the shariat courts

Before turning the case law of the Pakistani shariat courts, it may be useful to give a quick introduction to the Islamic repugnancy clause in the current constitution

105. Ibid., p. 33

of Pakistan and the shariat court system.

The independence of East Pakistan (Bangladesh) in 1971 required a new constitution to be drafted for the remaining territories. This meant that

> "the 'secular oriented' Bengalis were no longer present in the Constituent Assembly and the orthodox elements in the western part of the country, though defeated in the general elections of 1970, gathered together to put up a brave fight to preserve cherished Islamic values and traditions."[106]

To appease this reinvigorated Islamist wing, President Zulfikar Ali Bhutto did as his predecessors had done and put the usual Islamic provisions in the constitution,[107] including the following Islamic repugnancy clause:

> "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." (Art. 227 (1))

However, no mechanisms were put in place to actually enforce the clause. As G.W. Choudhury puts it:

> "While such a [repugnancy clause] appears to have far-reaching implications and might be expected to engender radical reforms in legal and social systems in Pakistan in pursuance thereof, Pakistan has long been accustomed in actual practice to such high sounding constitutional phrases without any change either in its legal system or in socio-religious spheres."[108]

Though the constitution of Pakistan since then has "been amended so many times that one can hardly refer to it as still being the same constitution as it was at its inception",[109] Part IX of the 1973 Constitution, which contains the so-called Islamic provisions, has remained largely unchanged. However, the way these provisions have been implemented has developed dramatically due to a change in political will and the introduction of new enforcement mechanisms.

On 5 July 1977, General Zia ul-Haq assumed power in a *coup d'état*.[110] With

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106. Choudhury, G. W. ""New" Pakistan's Constitution, 1973". Middle East Journal, vol. 28, no. 1 (1974), p. 11
107. Ibid.
108. Ibid.
109. Lau, Martin. "Sharia and national law in Pakistan". In Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present, pp. 373-432. Ed. by Jan Michiel Otto. Leiden: Leiden University Press, 2010, p. 407
110. Ibid., p. 397f

Zia ul-Haq in front, the first serious attempts of fulfilling the lofty promises about Islamization in the Pakistani constitutions were made. According to Martin Lau, Zia ul-Haq's motivation for this was two-fold:

> "Firstly, it provided a justification for his coup and his failure to hold elections: according to Zia, successive governments had failed to make Pakistan an Islamic state. Assuming the role as the saviour of Pakistan's destiny, Zia resolved to return the country to democracy only as and when it had been turned into a truly Islamic state. Secondly, by taking command of the Islamisation project, Zia was able to sideline Islamic parties and take control of the Islamic discourse. By adopting the agenda of the Islamists, Zia effectively silenced them."[111]

So although

> "Zia ul-Haq eagerly presented himself as the saviour of Islam, opted for a strict, conservative interpretation of Islam, and indeed made this interpretation the backbone of his political leadership[, m]any historians retrospectively see Zia's policy as an ill-disguised attempt at legitimising his *coup d ė tat* [...]"[112]

Zia ul-Haq's regime ended suddenly when he died in an air crash in August 1988, but his efforts to Islamize the Pakistani society have left a deep mark on the legal system.[113] Most importantly for the subject of this article was the introduction of the Federal Shariat Court (FSC):

> "For the first time a special court was set up with the express purpose of judicially reviewing certain parts of the legal system to determine whether those parts were in accordance with Islamic law."[114]

The FSC was instituted by Chapter 3A in 1980 by presidential ordinance but the specific provisions were changed several times in the following years. The powers and, jurisdiction of the FSC are laid down in Article 203D and can be summed up as follows: 1) The Court can either of its own motion or on petition from a citizen or the federal or provincial government review whether or not any law or provision of law is repugnant to the injunctions of Islam; 2) If the Court decides that a law or provision is repugnant to the injunctions of Islam, the court

111. Ibid., p. 398
112. Ibid., p. 423
113. Ibid., p. 399
114. Lau, Martin. "Islam and the Constitutional Foundations of Pakistan" In Constitutionalism in Islamic Countries: Between Upheaval and Continuity, pp. 171-199. Ed. by Rainer Grote & Tilmann J. Röder. New York: Oxford University Press, 2012, p. 196

shall give its reasons for that opinion, specify to what extent the law or provision is repugnant, and specify the date on which the decision shall take effect; 3) If the Court decides that a law or provision is repugnant to the injunctions of Islam, the executive shall take steps to bring the law or provision into conformity with the injunctions of Islam, and the law or provision ceases to have effect.

Naturally, the repugnancy clause and the Islamic Council[115] were strengthened considerably with the establishment of the FSC, and whenever the latter deemed a law to be contrary to Islam, it was the task of the former to draft an Islamic alternative for the legislature.[116] Jeffrey A. Redding puts the role of the Court in perspective:

> "It would be easy, and not entirely wrong, to think of the Shariat judicial system as an occasionally undemocratic check on the democratic exercise of power by Pakistan's parliament. Such a 'criticism,' however, would have to explain how this role is different than the role a judiciary may play - and is often expected to actually play - in almost any other society. It is true that Pakistan's Shariat judicial system is different than many other judicial systems in that the 1973 constitution requires it to examine laws only on the basis of "the injunctions of Islam, as laid down in the Holy Qur'an and Sunnah of the Holy Prophet.... Thus it might be true - given a certain view of Islam - that the Shariat judicial system plays an especially undemocratic role in Pakistan."[117]

He follows up with the question, "what is the actual situation on the ground, and how truly interested is this system in interfering with the operation of democratic legislative processes in Pakistan?"[118] This question will the subject of investigation in the following examination of a selection of case law from the FSC.

4.2. An examination of Pakistani case law

A natural starting point for this examination is the arguable most well-known case from the shariat courts, namely the so-called *Riba* case. Knowing about the Islamic rules regarding *riba* (literally meaning addition or growth, but commonly translated as usury or interest), it was inevitable that the financial sector would become subject of scrutiny by the FSC. Probably for this exact reason, "any

115. See 1973 Constitution of Pakistan, Arts. 228-231
116. Lau (n 119), p. 410
117. Redding, Jeffrey A. "Constitutionalizing Islam: Theory and Pakistan". Virginia Journal of International Law, vol. 44, no. 3 (2003-04), p. 784
118. Ibid.

law relating to [...] banking or insurance practice or procedure" was given a ten years exemption from the FSC's jurisdiction upon its institution in 1980.[119] Nonetheless, the banking system in Pakistan was officially Islamized in 1985 but "it made little real difference in the way they conducted their business" and "[a]ll that had happened was that there had been 'a shift in nomenclature'," [120] why "many Pakistani *ulema* and advocates of Islamic banking considered the post-Zia Pakistani form [...] to be seriously flawed."[121]

Thusly in 1991, promptly after the expiration of the exemption, 115 people filed a petition to the shariat court claiming that provisions found in 20 different financial laws[122] were repugnant to Islam due to their endorsement of *riba*.[123] The many petitions were together with three *suo moto* cases turned into a class-action suit before the FSC in November 1991.[124] Later the same month, the FSC gave a verdict that would shake the financial sector of Pakistan. In an extensive and scholarly document, the court gave its very detailed reasoning for declaring all 20 laws in question (i.e. the entire financial system of Pakistan) repugnant to the injunctions of Islam and therefore unconstitutional. The court gave the government until 30 June 1992 to bring the said laws into conformity with the injunctions of Islam; otherwise, they would be invalid from 1 July 1992.[125]

The FSC suggested a complete transformation to a *riba*-free, PLS[126]-based

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119. See 1973 Constitution of Pakistan, Art. 203B (c)

120. Khan, Feisal. "Islamic Banking by Judiciary: The 'Backdoor' for Islamism in Pakistan?" South Asia: Journal of South Asian Studies, vol. 31, no. 3 (2008), p. 543

121. Ibid., p. 546

122. I. Interest Act 1839; II. The Govt. Saving Banks Act, 1973; III. The negotiable Instruments Act, 1881; IV. The Land Acquisition Act, 1894; V. The Code of Civil Procedure, 1908; VI. The Co-operative Societies Act 1925; VII. The Co-operative Societies Rules, 1972; VIII. The Insurance Act, 1938; IX. The State Bank of Pakistan Act, 1956; X. The West Pakistan Money Lenders Ordinance, 1960; XI. The West Pakistan Money Lenders Rules, 1965; XII. The Punjab Money Lenders Ordinance, 1960; XIII.The Sindh Money Lenders Ordinance, 1960; XIV. The N.W.F.P. Money Lenders Ordinance, 1960; XV. The Baluchistan Money Lenders Ordinance, 1960; XVI. The Agricultural Development Bank of Pakistan Rules 1961; XVII. The Banking Companies Ordinance, 1963; XVIII. The Banking Companies Rules, 1963; XIX. The Ban (Nationalisation) (Payment of Compensation) Rules, 1974; XX. The Banking Companies (Recovery of Loans) Ordinance, 1979.

123. Khan (n 131), p. 546, n. 49

124. Ibid., p. 546

125. Ibid.

126. PLS stands for "profit and loss sharing" and encompasses essentially two different modes of financing: Mudarabah and Musharakah. Mudarabah consists of two parties where one contributes with money capital and the other with human capital and know-how. Each party takes an agreed (but not necessarily equal) share of the profit. In case of losses, the financier bears the financial loss while the other party gets no pay for his work and time. In a Musharakah arrangement "two or more persons contribute their funds and managerial skills to undertake a business enterprise on the basis of mutual risk-sharing." As with the Mudarabah partnership, the partners can agree on any ratio for profit sharing, but losses are shared in proportion to their investment. Rights and responsibilities to manage

financial system. While these modes of financing admittedly seem more fair than the Western, interest-based system, they are badly suited for society as the Pakistani which is "characterised by substantial information asymmetry (and hence moral hazard and adverse selection) problems, weak property rights and considerable expropriation risk" as well as "high levels of tax avoidance, unreliable accounting standards, and corruption [...]"[127] This makes "taking direct-equity stakes in enterprises an extremely risky and thus unappealing proposition."[128] Furthermore,

> "the reluctance of many bank clients to pay a commensurate share of the profits in a successful venture versus their willingness to share the losses of an unsuccessful one makes PLS banking extremely unattractive to bankers."[129]

Adherence to a PLS-based system would thusly be highly inefficient and most likely lead to a financial collapse. This looming risk was also sensed by foreign investors and donors, who "were concerned about the structure of the Pakistani economy and banking sector and the status of interest after implementation of the FSC judgement" which led to "a sharp decline in the flow of foreign investment, aid and loans into Pakistan [...]"[130]

Since the government at the time depended on the parliamentary support from the Islamists and already had made public declarations in favor of further Islamization,[131] the FSC judgement put it in a difficult situation. On one hand, a financial collapse was approaching, but on the other, it had already made a firm promise to the Islamists that it would not appeal the FSC judgement to the Shariat Appellate Bench (SAB) of the Supreme Court.[132] Therefore, it encouraged the banks of Pakistan to appeal instead, which all 55 decided to do.[133] However, just two days before the expiration of the appeal limit of six months (Art. 203F) and about one month before the coming into force of the judgement, the government decided to also lodge an appeal against FSC judgement.[134]

Since the implementation was postponed due to the appeal, only few had an

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on the other hand are shared equally. (Khan & Bhatti (2008), pp. 45-48)

127. Khan (n 131), p. 544f

128. Ibid.

129. Ibid.

130. Khan, Mohammad Mansoor & M. Ishaq Bhatti. Developments in Islamic Banking: The Case of Pakistan. New York: Palgrave Macmillan, 2008, p. 131

131. Khan (n 131), p. 547

132. Khan & Bhatti (n 141), p. 132

133. Khan (n 131), p. 548

134. Khan & Bhatti (n 141), p. 132

interest in accelerating the appeal case.[135] However, on 22 February 1999 the SAB commenced the hearing of the appeals, which continued for almost six months.[136] The final judgement was presented in a 400-pages document where the SAB meticulously stated the reasons for its decision with testimonies from numerous experts on the topic and several direct references to the Quran. Besides upholding the FSC 1992 Judgment, the SAB went even further and ruled "that *all* transactions *must* be real: 'No purely monetary transactions should be made because such transactions lead to opening the door of Riba'."[137] This also included "any interest stipulated in the government borrowings, acquired from domestic or foreign sources."[138] The SAB gave the government until 30 June 2001 to make all the necessary changes.[139]

On 14 June 2001, the government appealed for extension of the time limit until 30 December 2005 on the grounds that it was not possible to implement the judgment within the original timeframe. However, the extension was granted only until 30 June 2002.[140] As the extended time limit approached, the attitude of the government changed - not even a month before the deadline the government filed a review petition at the SAB on its judgment of 1999.[141] In the meantime the government had used "a 'carrot and stick' approach to ensure that a favourable ruling was delivered [...]", including the forced retirement of some judges and a raise in salary for the remaining.[142] And a favorable ruling was what they got. Much unlike the FSC Judgment of 1991 and the SAB Judgment of 1999, the SAB Review of 2002 was only 22 pages long and gave the government exactly what it wanted.[143] However, since the judgment was merely sent back to the FSC,

135. Khan (n 131), p. 547

136. Khan, Khalil-ur-Rehman. The Supreme Court's Judgment on Riba. Islamabad: Shari'ah Academy, International Islamic University, 2008, p. xiv

137. Khan (n 131), p. 548

138. Khan (n 147), p. 358

139. Khan (n 131), p. 548

140. Khan & Bhatti (n 141), p. 166

141. Ibid., p. 167

142. Khan (n 131), p. 550f

143. Ibid., p. 551f: "It found that the earlier ruling had been fatally flawed in several key aspects: (i) that the SAB did not properly distinguish between 'usury', 'riba', and 'interest'; (ii) that the directives made by the SAB in the 1999 ruling were not 'practical' or 'feasible' and, if implemented, would 'pose [a] high degree of risk to the economic stability and security of Pakistan'; (iii) that the SAB had failed to distinguish between the 'legal and moral aspects' of riba; (iv) that the court had misread the commentary of various eminent jurists who had different views regarding the nature of riba; (v) that the SAB had wrongly applied its decision to non-Muslims; (vi) that indexation is not repugnant to Islam; (vii) that Tanzil ur Rahman had approached the 1991 case in a 'predetermined' state of mind and the SAB should have taken this into account when forming its decision in 1999; (viii) that the SAB did not fully consider all of the jurisdictional issues related to the implementation of its directives; and (ix) that the SAB did not make sufficient

"[t]here is nothing to prevent the FSC from coming back, after 'suitable' study, and reaffirming its original ruling; and for the SAB to uphold it."[144] Thus, the dogmatic ideal of a financial system in conformity with Islam had to give way to the interest-based system - at least for now.

The legal framework of the financial system in Pakistan was not the only area of law to become the object of scrutiny. In a series of cases beginning from 1986,[145] the FSC applied the Islamic repugnancy clause to deem parts of the Punjab Pre-emption Act of 1913[146] un-Islamic and therefore void. This created serious uncertainty about the parts of the law not mentioned specifically by the court and about the validity of the Pre-emption Act as a whole. In order to ensure the continued efficacy of the law, new legislation was passed.[147]

However, this passing legal confusion was not the gravest result of the assault of the FSC on the preemption legislation. More problematic was the question of whether The Pre-emption Act of 1913 would become *void ab initio* and thereby annul all the transactions, which had been based on the law since its inauguration.[148] In the case *Aziz Begum v. Federation of Pakistan*[149] this question was answered in the affirmative, which according to the counsel of the petitioners meant that "thousands of innocent parties who [had] invested all their life savings in prosecuting their suits for pre-emption, which were instituted on the strength of statutory provisions validly in force for decades, [were] ruined and their lifelong efforts reduced to nought for no fault of theirs."[150] This in turn meant that the "[t]housands of petitioners who had relied on the preemption laws to purchase the agricultural land they had been cultivating as landless tenants found themselves deprived of the one opportunity ever available to them to gain title to land."[151]

:In response to this social argument, Justice Nasim Hasan Shah held

> "[I] cannot overlook the glorious struggle waged by millions of Muslims to establish this Islamic State of Pakistan and the heart rending sacrifices

allowances for the effects of inflation in determining what constituted riba."

144. Ibid., p. 553

145. PLD 1986 SC 360, PLD 1989 SC 771, PLD 1989 SC 314

146. The Punjab Pre-emption Act of 1913 gave the landless tenants the right to "acquire agricultural land or village immovable property or urban immovable property in preference to other persons" (art. 4)

147. Lau, Martin. Unpublished PhD dissertation from the University of London (SOAS) entitled "The Role of Islam in the Legal System of Pakistan" 2002, p. 299f

148. Lau (n 158), p. 300

149. PLD 1990 SC 899

150. PLD 1990 SC 899, p. 913

151. Lau (n 158), p. 299

> made by them for bringing into being this great polity wherein they could fulfill their cherished wish of conducting their affairs in accordance with the Injunctions of Islam, as enshrined in the Holy Quran and the Sunnah. The price they are now called upon to pay on account of the overthrow of the un-Islamic provisions of the Punjab Pre-emption Act, 1913 to pave the way for the Islamic law of preemption is, I believe, one further sacrifice that they must make in the course of establishing this Islamic polity and for ensuring that the generations to follow will be governed by the laws of Islam and Islam alone."[152]

This quote illustrates how the well-being of the population and the will of the sovereign legislator are sacrificed in order to establish compliance with the court's interpretation of the injunctions of Islam.

Preemption was not the only tool, which had been applied by the state to limit the freedom of property rights in order to achieve more socially just objectives ensuring the functioning of the economy in especially the rural areas. Section 24 of the Land Reforms Regulation of 1972 restricted the possibility of dividing land into pieces too small for sustaining a family; in other words, every piece of land must have economic holding. This section was held to be un-Islamic in the case *Sajwara v. Federal Government of Pakistan*.[153] Several other pieces of legislation related to land reform and property rights were likewise held to be un-Islamic by the FSC.[154]

Martin Lau concludes that the current legislation on preemption and other land reform measures is a direct result of the work of the shariat courts, and that future attempts of land reform from the legislature will have to fit the judges' understanding of Islamic law. However, he also notes that the interpretation by the judges may change.[155] To this, one can add that we here see the legislators' ability to rationally adopt policies and legislation benefitting the rural population and the economy has been severely limited. Instead, the shariat court judges *de facto* have been able to lead the hand of the legislators to write legislation that follows their at times ambiguous interpretation of Islamic dogmas. That the judges' interpretation may change over time to allow for a more socially and economically conscious application of the Islamic repugnancy clause may sound comforting, but it does change the underlying problem of letting an ultimately

152. PLD 1990 SC 899, p. 913
153. PLD 1989 FSC 80; Lau (n 158), p. 303
154. See Lau (n 158), p. 303ff, for further examples
155. Lau (n 158), p. 304f

irrational way of law making overrule the power of the legislature.

5. Conclusion

This article has been an attempt to illuminate the possible negative consequences of enforcing Art. 3 of 2004 Constitution of Afghanistan through judicial review. The argumentation has been built on a historical survey of the origin and development of the Islamic repugnancy clause in Afghan legal history, a conceptual critique of the dogmatic ideal expressed in the Islamic repugnancy clause and a comparison with the Pakistani experience with enforcing a similar clause through judicial review. On that basis, the following can be concluded.

The Islamic repugnancy clause, which is now found in Art. 3 of the current constitution, has a history going back to the early decades of Afghan constitutional history. In fact, Afghanistan was the second country in the world to include such a clause in its constitution. Despite being a part of all Afghan constitutions since 1931, the Islamic repugnancy clause has rarely had a strong enforcement mechanism; usually it has only been implemented by grace of the king and only in very limited cases. This changed with the current constitution of 2004, where Art. 3 (like the rest of the constitution) can be enforced through judicial review performed by the Supreme Court. But according to Art. 121 only lower courts and the government may file a petition for the review of a law on the basis of Art. 3, and no case has been filed at the time of writing. Furthermore, there appears to be little scholarly consensus on how the clause shall be interpreted in such a case.

However, regardless of the exact interpretation of the Islamic repugnancy clause, it must be acknowledged that any Islamic repugnancy clause ultimately refers to the same dogmatic ideal, i.e. the Islamic legal *mentalité*. Two points became clear in the examination of Islamic legal *mentalité*: 1) The sources of Islamic law are believed to be divinely revealed and therefore unalterable and beyond critique which makes the whole legal system procedurally irrational; 2) the methods of Islamic jurisprudence (*ijtihad*) are various which makes the system flexible and adaptable but also severely limits the possibility of meaningful codification of the law.

The effect of this dogmatic ideal was examined with reference to the enforcement of the Islamic repugnancy clause in the Pakistani constitution. Through an admittedly selective examination of case law related to financial legislation and legislation on land reform including preemption laws, two things became

apparent: 1) the effect of enforcing the Islamic repugnancy clause may become so threatening to the state that it resorts to unconstitutional means to circumvent the court's decision; 2) the court may put so narrow restrictions on certain types of legislation that the judiciary *de facto* assumes legislative powers and thus violates the fundamental separation of powers necessary for a functional *Rechtsstaat*.[156]

One may choose, of course, to acknowledge and accept the risk of these functional deficiencies in order to achieve a legally irrational, but perhaps religiously legitimate goal. But by doing so, one might bring to the surface the gap between the rational, secular legal order and an irrational, religious legal order and thus threaten basic state functions. We saw how the introduction of an Islamic repugnancy clause has opened the door to what I choose to call a *supra*-constitutional level of law (the dogmatic ideal of the Islamic repugnancy clause). This level of law does not operate as a normal part of the constitution and is outside normal constitutional control. Instead, it works according to its own logic. Nonetheless, this *supra*-constitutional level is imposed on the legislature, severely limiting its means to make rational decisions to deal with a constantly changing reality. Furthermore, the way that this *supra*-constitutional legal order is enforced means that a small, unrepresentative group of people with their own vested interests is given the enormous power of being the gatekeepers.

156. Rechtstaat has no direct translation in English, but denotes a state which is governed by the rule of law.