

Defining Shari'a  
The Politics of Islamic Judicial Review

By

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## Abstract

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Since the Islamic resurgence of the 1970s, many Muslim postcolonial countries have established and empowered constitutional courts to declare laws conflicting with shari'a as unconstitutional. The central question explored in this dissertation is whether and to what extent constitutional doctrine developed in shari'a review is contingent on the ruling regime or represents lasting trends in interpretations of shari'a. Using the case of Pakistan, this dissertation contends that the long-term discursive trends in shari'a are determined in the religio-political space and only reflected in state law through the interaction of shari'a politics, regime politics, and judicial politics. The research is based on materials gathered during fieldwork in Pakistan and datasets of Federal Shariat Court and Supreme Court cases and judges.

In particular, the dissertation offers a political-institutional framework to study shari'a review in a British postcolonial court system through exploring the role of professional and scholar judges, the discretion of the chief justice, the system of judicial appointments and tenure, and the political structure of appeal that combine to make courts agents of the political regime. Using this framework, the dissertation undertakes historical-interpretive case studies involving two puzzles. First, why the Federal Shariat Court declared the (largely symbolic) punishment of stoning for unlawful sex as un-Islamic in 1981, and why the Court reversed its ruling upon review in 1982. Second, why the Federal Shariat Court declared interest in banking, finance, and fiscal laws as un-Islamic in 1991, and why the Supreme Court upheld the ruling in 1999 but then overturned its ruling and remanded the case back to the Federal Shariat Court in 2002.

The project shows how competing approaches to shari'a interact with the evolving judicial politics and regime politics in authoritarian and democratic periods. While the institutional structure of constitutional courts gives the ruling regime considerable control over the direction of shari'a review, ruling regimes often depend on religio-political forces for legitimacy. When the regime draws upon conservative religio-political movements, representatives of such movements are appointed to courts and allowed to assert traditional doctrines of shari'a. But when the regime draws its legitimacy from a broader group of religio-political and intellectual forces, a more

diverse set of judges is appointed and enabled to rethink the tradition. The study questions approaches that consider shari'a review in post-colonial states either as a liberal or as a conservative phenomenon. In contrast, the project shows how courts are agents of the political regime and judicial outcomes are products of authoritarian and democratic political processes. The dissertation also invites scholars of shari'a review in Arab constitutional courts to study courts as political institutions and judges as political actors.

To  
Amria, Fatima, and Nour

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## **Transliteration Convention**

The text of this work does not include diacritics, with the exception of ‘ayn and hamza, but the parentheticals and footnotes use diacritics. For Arabic, Urdu, and Persian words and names, I use the convention for Arabic consonants used by the *International Journal of Middle East Studies*, with occasional exceptions for Urdu and Persian words. In general, plurals are constructed using the letter “s” at the end of the word. Unless noted otherwise, the translations from Arabic, Urdu and the occasional Persian sources are my own, except for the translations of hadiths where I have often drawn from sunnah.com but with substantial editing.

## **Glossary of Untranslated Terms**

hadd (pl. hudud)	a category of punishments, not based on the state's discretion
hadith	a report about Prophetic practice
ijtihad	deriving rules directly from the Qur'an and hadiths
madhhab	school of law
madrasa	religious school or university
muqallid	a follower of the doctrine of a school of law
taqlid	to follow the doctrine of a school of law
ta'zir	a category of punishments, based on the state's discretion
Qur'an (also Quran)	a book, considered God's revelation to Prophet Muhammad
riba	lending money on interest (contested)
shari'a (also shariat)	the Islamic system of ethical, ritual, and legal norms
sunna (also sunnah)	Prophetic practice
'ulama (also ulema)	religious scholars
zina	unlawful sexual intercourse

## Glossary of Translated Terms

abrogation	naskh (contested)
companions	ṣaḥāba
qualification	takhṣīṣ
recurrent	mutawātir
recurrent-in-meaning	mutawātir bi'l-ma'nā
recurrent-in-words	mutawātir bi'l-lafz
solitary	āḥād or khabr wāḥid
stoning	rajm
supplementation	iḍāfa
widespread	mashhūr

Muhammad, son of Khalf, son of Hayyan, Waki' (d. 918) reports in Akhbar al-Qudat:  
'Abdullah, son of Zakariyya, son of Yahya told me:  
he said, the son of Waki' told me:  
he said, the son of Fudayl told us,  
who learned from his father,  
who learned from Muharab, son of Dithar,  
who learned from the son of 'Umar,  
and in another book, the son of 'Umar is not mentioned,  
the Messenger of God, peace and blessings of God be upon him, said:

Judges are of three types, two in hell and one in heaven: the judge who ruled based on the Truth is in heaven; the judge who ruled based on his desires is in hell; and the judge who ruled without knowledge is in hell.

# Introduction

## 1. Islamic Judicial Review

Since decolonization, many Muslim polities have struggled to reconcile their colonial legacy with their Islamic heritage in law, politics, and society. In the realm of constitutional law, many Muslim countries have shari'a as *a* principal or *the* principal source of law. In the early postcolonial moment, such constitutional provisions were largely aspirational. But starting from the so-called Islamic resurgence of the 1970s,<sup>1</sup> authoritarian regimes in Muslim countries such as Pakistan, Iran, Egypt, Sudan, and Kuwait empowered constitutional courts to review existing codes based on shari'a. The phenomenon has continued in the recent constitutions of Afghanistan, Iraq and Egypt. These courts are considered to have played an important role in negotiating law and religion under authoritarian as well as democratic politics. The subject of this study is judicial review of legislation based on shari'a (Islamic judicial review or shari'a review).

The central question explored in this dissertation is whether and to what extent constitutional doctrine in shari'a review is contingent on the ruling regime or represents lasting trends in the judicial interpretations of shari'a? Using Pakistan as a case study, I explore this question and contribute to existing theories on religion and constitutional politics, courts in authoritarian regimes, and authority in contemporary Islam.<sup>2</sup> Instead of presuming the reach of law and courts, I take an institutional approach in the sense of making judicial power and authority the object of inquiry.<sup>3</sup> The institutional approach in courts and politics can be traced to Martin Shapiro.<sup>4</sup> In 1964, Shapiro recognized and articulated a new "madhhab" (school) that he named political jurisprudence. "The core of political jurisprudence," according to Shapiro, was "a vision of courts as political agencies and judges as political actors."<sup>5</sup> There is a long tradition of political science literature on the U.S. Supreme Court that uses this lens to explain why judicial outcomes support or challenge the interests of the ruling regime. In recent decades, scholars have used this framework to study constitutional courts in democratic as well as authoritarian

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<sup>1</sup> Ira M. Lapidus, *A History of Islamic Societies*, 2nd ed. (New York, N.Y.: Cambridge University Press, 2002), 823.

<sup>2</sup> For an introduction to and defense of the case study method, see Bent Flyvbjerg, "Five Misunderstandings About Case Study Research," *Qualitative Inquiry* 12, no. 2 (2006).

<sup>3</sup> Tamir Moustafa and Tom Ginsburg, "The Functions of Courts in Authoritarian Politics," in *Rule by Law: The Politics of Courts in Authoritarian Regimes*, ed. Tom Ginsburg and Tamir Moustafa (New York: Cambridge University Press, 2008), 2; see also Tom Ginsburg and Robert A. Kagan, eds., *Institutions & Public Law: Comparative Approaches* (Peter Lang, 2005).

<sup>4</sup> Howard Gillman, "Martin Shapiro and the Movement from "Old" to "New" Institutional Studies in Public Law Scholarship," *Annual Review of Political Science* 7 (2004).

<sup>5</sup> Martin Shapiro, "Political Jurisprudence," *Kentucky Law Journal* 52 (1964): 296.

regimes in comparative perspectives. My work draws on this tradition to study shari‘a review in the Federal Shariat Court and the Supreme Court of Pakistan.

But why study Pakistan to understand judicial politics and Islam? Pakistan is an excellent case to study judicial politics in authoritarian as well as democratic regimes. Since independence, the country’s courts have remained an important site of authoritarian politics, most notably under the Zia regime (1977-1988) and the Musharraf regime (1999-2008). But the country has also seen periods of democratization, such as the democratic decade (1988-1999) and the post-Musharraf period (2008-present). Pakistan is also an important country to study Islam. The traditions of Islam in Pakistan are part of the rich traditions of Islam in South Asia.<sup>6</sup> However, Islam in South Asia is not isolated from the Arab world. From traditional maddhabs to modern intellectual movements, South Asian religious elites have interacted with their Arab counterparts in shaping the contours of contemporary Islam. Moreover, in a study of Islamic judicial review, Pakistan provides an important advantage over Arab states. The courts in Pakistan have a marginally longer history of judicial review based on shari‘a, but they have produced a significantly larger number and greater variety of cases than Arab constitutional courts. Therefore, shari‘a review cases in Pakistan allow us to build quantitative datasets to understand judicial behavior in addition to using historical-interpretive analysis to understand regime politics.

My basic argument in this dissertation is that courts are agents of the political regime and shari‘a review is a product of regime politics. The institutional structure of constitutional courts gives the ruling regime considerable control over the direction of shari‘a review. But ruling regimes often depend on religio-political forces for legitimacy. When the regime draws upon conservative religio-political movements for legitimacy, representatives of such movements are appointed to courts and allowed to assert traditional doctrines of shari‘a. But when the regime draws its legitimacy from a broader group of religio-political and intellectual forces, a more diverse set of judges is appointed and enabled to rethink the tradition. In this way, the long-term discursive trends in shari‘a are determined in the religio-political space and are only reflected in the judicial domain through the political process. To develop this argument, I focus on three core themes: shari‘a politics, regime politics, and judicial politics.<sup>7</sup>

First, I study shari‘a politics through the 20th-century debates on shari‘a in the context of colonial and postcolonial transformations. I stress the discursive channels – fatwas, conferences, and networks – that placed the debates in South Asia in conversation with the debates on shari‘a in the Arab world. I underscore the period’s emerging religious and intellectual trends that questioned the substantive doctrines as well as the foundational sources of shari‘a. I also emphasize the religio-political movements that

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<sup>6</sup> The combined Muslim population of South Asia, including Pakistan, India, and Bangladesh, is nearly half a billion, which exceeds the combined Muslim population of the Arab states.

<sup>7</sup> For the concept of shari‘a politics, see Robert W. Hefner, ed. *Shari‘a Politics: Islamic Law and Society in the Modern World* (Bloomington: Indiana University Press, 2011).

resisted colonialism and postcolonial modernity through a reassertion of the premodern tradition. The success of the competing religio-political trends in postcolonial politics in this context depended on their relationship with the ruling regime.

Second, I undertake a careful analysis of regime politics under authoritarian and democratic periods in Pakistan. I show that the legitimacy of a ruling regime depended on its purported democratic, legal, and Islamic credentials. When a ruling regime's democratic and legal bases were weak or conflicted, the regime drew upon its Islamic credentials through alliances with religio-political parties. In contrast, when the regime's democratic and legal credentials were strong, the regime demonstrated a greater degree of autonomy from religio-political forces. The relationship of the ruling regime to religio-political forces then explains the appointments, extensions, and dismissals of judges responsible for shari'a review and thereby determines the direction of shari'a review.

Third, I focus on the judicial process and judicial politics based on a biographical analysis of judges and an institutional analysis of courts. I argue that courts are agents of the political regime due to their British colonial structures, but individual judges are often agents of the religio-political forces or trends that they represent on the bench. Using colonial court structures that were not designed for judicial review, the political regime retains considerable constitutional (and often extra-constitutional) control over courts and judges that makes shari'a review contingent on regime politics. However, judges are also able to assert themselves when the regime is weak or conflicted. These three themes – shari'a politics, regime politics, and judicial politics – are explored in-depth in the following six chapters.

In chapter 1, "Sovereignty of God," I provide a historical, doctrinal and political overview of Islam and Pakistan. The chapter defines shari'a as a discursive tradition and outlines the early formation of Islamic orthodoxy, the development of schools of law, the relationship between Indian scholars and their Arab counterparts, the political and religious structures in precolonial India, the social and intellectual transformations under colonialism, and the constitutional and ideological conflicts in the postcolonial Pakistani state. The purpose of this overview is to present the origins and significance of legal and political tensions that are manifested in contemporary Pakistan.

In chapter 2, "The Least Dangerous Branch," I evaluate why and when political regimes establish shari'a review. I trace the demand for shari'a review since Pakistan's independence in 1947 and its establishment under the Zia regime to argue that political regimes establish shari'a review in order to enhance the regime's religious legitimacy when the regime's legal and democratic legitimacy are challenged. But can shari'a bind the regime? I conceptually describe and empirically evaluate five features of British postcolonial courts – in comparison with American and European models of judicial review – that make the Federal Shariat Court an agent of the political regime: (1) the discretion of the chief justice; (2) the role of professional and scholar judges; (3) the scope of shari'a review; (4) the system of judicial appointments and tenure; and (5) the political structure of appeal. However, I also argue that shari'a review asserts itself when there is a crisis of legitimacy in authoritarian periods or conflict between the president and the prime minister in democratic periods. To illustrate how shari'a review works in

extreme cases, I undertake in-depth case studies of finance and penal laws in the following chapters.

In chapter 3, “Rethinking Tradition,” I explore why the newly established Federal Shariat Court declared the recently enacted (but largely symbolic) punishment of stoning as un-Islamic under the Zia regime in 1981. This case is especially interesting because it challenges my thesis that courts are agents of the political regime. To understand the dynamics behind the decision, I trace the evolution of an anxiety over stoning in the postcolonial period as jurists and intellectuals debated the codification of shari‘a in Muslim states. In particular, I describe how the positions of the traditional Egyptian scholar Muhammad Abu Zahra, the Salafi Syrian scholar Mustafa al-Zarqa, the ex-Jama‘ati Pakistani scholar Amin Ahsan Islahi, and the Ahl-i Qur’an Pakistani intellectual Ghulam Ahmad Parwez against the traditional doctrine on stoning emerged and were represented in the Zia regime. Through a biographical analysis of judges and a textual analysis of their opinions, I show that the Federal Shariat Court’s decision to declare stoning un-Islamic drew upon these emerging opinions against stoning and unmasked the Zia regime’s internal struggle over the codification of shari‘a. I also argue that as a reflection of an internal conflict, the authoritarian regime did not penalize the Federal Shariat Court judges because of the decision, though the regime eventually included ‘ulama on the bench to overturn the judgment.

In chapter 4, “Reasserting Tradition,” I evaluate why Zia appointed ‘ulama to the Federal Shariat Court and how the ‘ulama reversed the prior ruling on stoning. This case is significant since political regimes, including the Zia regime, resisted the ‘ulama’s demands for inclusion in the judiciary from 1947 to 1981. By studying the shifting political coalitions of the moment, I argue that the regime’s goal in acceding to the ‘ulama in 1981 was not to re-declare stoning Islamic per se, but to retain the support of three religio-political parties at a time when other political parties were forming a coalition against the regime. I reinforce this point based on a biographical analysis of the ‘ulama appointed to the Federal Shariat Court as scholar judges – namely, the Deobandi scholar Muhammad Taqi Usmani, the Barelawi scholar Muhammad Karam Shah, and Sayyid Abu al-‘la Mawdudi’s personal assistant Malik Ghulam Ali – each of whom represented one of the three religio-political parties that the Zia regime wanted to co-opt in a period of growing opposition to the regime. In contrast to theories of the demise of the hermeneutical foundations of shari‘a, I also show how the ‘ulama used the premodern tradition to reassert the Hanafi doctrine on stoning. While I argue that the ‘ulama’s judgments as constitutional doctrine ultimately remain contingent on the future authoritarian and democratic politics of judicial appointments and retention, I suggest that the judgments become part of the ‘ulama’s discursive tradition on shari‘a and that Islamic law thereby remains jurist’s law.

In chapter 5, “Defining Riba,” I evaluate why the Federal Shariat Court declared interest in banking and finance (riba) as un-Islamic. This case is important as it demonstrates how shari‘a review asserts itself when the political regime is divided or ambivalent. I trace the history and politics of debates on riba as Muslim jurists in the colonial and postcolonial periods confronted capitalism. In particular, I describe how the Salafi Egyptian scholar Rashid Rida, the Pakistani scholar Ja‘far Shah Phulwarwi, and

the Pakistani academic Fazlur Rahman made efforts to narrow the definition of *riba*, but faced strong resistance from traditional scholars such as Ashraf ‘Ali Thanawi, Muhammad Taqi Usmani, and Sayyid Abu al-A‘la Mawdudi. Owing to the influence of traditional scholars and the emergence of so-called Islamic economics, the Zia regime could neither reorient the concept of *riba*, nor implement the traditional doctrine due to pragmatic concerns. Therefore, upon the establishment of the Federal Shariat Court in 1980, the Zia regime excluded banking and finance laws from the Court’s jurisdiction for ten years. But as soon as the exclusion ended in 1990, the Federal Shariat Court ordered the replacement of conventional banking with Islamic banking. Instead of focusing on judicial activism, I argue that the decision was an outcome of a political struggle between the prime minister and the president who appointed and backed an activist judge, Chief Justice Tanzil-ur Rahman. While the president eventually withdrew his support for the judge, I contend that Chief Justice Rahman was abandoned only when he extended the Federal Shariat Court’s reach to the country’s international borrowing agreements.

In chapter 6, “Things Fall Apart,” I analyze why the Supreme Court affirmed the Federal Shariat Court’s judgment against interest in banking and finance in 1999, but reversed its own ruling in 2002 and sent the case back to the Federal Shariat Court. This case is significant since it shows that shari‘a review asserts itself when authoritarian regimes depend on scholar judges for legitimacy but authoritarian regimes also assert control over shari‘a review when religious scholars are conflicted. I trace the transformation of Islamic economics into Islamic finance in the early 1990s based on how the scholar judge Muhammad Taqi Usmani reconciled the aims of conventional finance with the forms of Islamic contracts. But Justice Usmani’s efforts produced resistance among a significant portion of religious scholars who declared his model of Islamic finance un-Islamic. I show how Justice Usmani (and two other judges) in the Supreme Court affirmed the Federal Shariat Court’s position on interest in 1999 when the Musharraf regime was consolidating power and depended on religious scholars for legitimacy. I also demonstrate how the regime exploited the internal differences among the religious scholars and reconstituted the Supreme Court in 2002 with scholar judges that either considered conventional banking Islamic or considered even Islamic banking un-Islamic. The regime thus drew upon juristic disagreements among religio-political movements on the issue of interest to overturn the ruling.

To sum up, each chapter gives thick descriptions of the interplay between shari‘a politics, regime politics, and judicial politics to explain the contours of shari‘a review. The study challenges approaches that consider shari‘a review in post-colonial states either as a liberal or as a conservative phenomenon. In contrast, I show that courts are agents of the political regime and judicial outcomes are products of regime politics. I thus conclude that shari‘a is negotiated in the political sphere in relation to regime politics and only manifested in the judicial sphere. The next section describes the project’s interventions in the literature on courts in authoritarian regimes, religion and constitutional politics, and authority in contemporary Islam.

## 2. Courts, Politics, and Islam

This study draws upon and contributes to the wave of scholarship on courts and politics in authoritarian regimes.<sup>8</sup> In public law literature, scholars have long argued that courts are agents of the political regime.<sup>9</sup> Even when courts are considered independent, the regime maintains significant control over them through judicial appointments, tenures, patronage, and legal and constitutional change. Therefore, in order to explain the global expansion of judicial power, scholars have focused on two questions.<sup>10</sup> First, why do political regimes empower courts? Second, whether and under what circumstances courts constrain political regimes? In democratic and democratizing regimes, the answers are found in the role of political parties,<sup>11</sup> the endurance of hegemonic interests,<sup>12</sup> and the fragmentation of power coupled with long time horizons.<sup>13</sup> In authoritarian contexts, scholars have focused on the functions of courts that expand judicial power and independence.<sup>14</sup> In a synthesis of this scholarship, Tom Ginsburg and Tamir Moustafa describe how courts play the important functions of regime legitimization, economic growth, social control, bureaucratic management, and strategic delegation in authoritarian politics.

The scholarship on courts in authoritarian regimes is driven by a concern to study the evolution of rule of law and rights in authoritarian contexts.<sup>15</sup> But more recently, Ran Hirschl has explored how constitutional politics has responded to the global resurgence of

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<sup>8</sup> Tom Ginsburg and Tamir Moustafa, eds., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008); Shoaib A. Ghias, "Miscarriage of *Chief Justice*: Judicial Power and the Legal Complex in Pakistan under Musharraf," *Law & Social Inquiry* 35, no. 4 (2010); Mark Fathi Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan* (New York, N.Y.: Cambridge University Press, 2014); Nick Cheesman, "How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence," *Law & Society Review* 45, no. 4 (2011).

<sup>9</sup> Robert Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policymaker," *Journal of Public Law* 6 (1957); Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago & London: University of Chicago Press, 1981).

<sup>10</sup> C. Neal Tate and Torbjorn Vallinder, eds., *The Global Expansion of Judicial Power* (New York: New York University Press, 1995).

<sup>11</sup> Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (New York: Oxford University Press, 2002).

<sup>12</sup> Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

<sup>13</sup> Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge & New York: Cambridge University Press, 2003).

<sup>14</sup> Ginsburg and Moustafa, *Rule by Law*; Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009).

<sup>15</sup> Gordon Silverstein, "Globalization and the Rule of Law: 'A Machine That Runs of Itself?'," *International Journal of Constitutional Law* 1, no. 3 (2003).

religion.<sup>16</sup> Hirschl expands on the scholarship on courts in authoritarian regimes and posits the constitutional theocracy thesis: the enshrinement of religion in constitutional politics is a strategy of ruling regimes to constrain religious forces. He suggests that secularists use constitutional structures to restrain religion through co-optation, jurisdictional advantages, strategic delegation, the epistemology of constitutional law, delegitimation of radical forces, and political control of constitutional courts and judges.<sup>17</sup> From Hirschl's perspective, the use of constitutional mechanisms to constrain religion is not coincidental. He argues that constitutional structures inherently tend to favor secular interests when faced with the rising tide of religion.

While Hirschl provides important insights into the patterns of constitutional enshrinement of religion across a range of countries, the notion of shari'a review in constitutional courts as a secular phenomenon oversimplifies the relationship between courts and politics and does not explain the range of judicial outcomes in shari'a review. The case of Pakistan demonstrates that the constitutional structures that are assumed to favor secular interests are also useful as tools to advance traditional dogma: jurisdictional carve-outs preserve secular laws from religious encroachment (see chapter 5), but jurisdictional constraints also preserve religious codes from secular reformulations (see chapter 4); co-optation of religious structures imposes state's control over religion (see chapter 6), but the state also cedes authority to religious forces over important issues (see chapters 4 and 5); the epistemology of constitutional law favors rights discourses, but theocratic constitutions also reinforce religious dogma (see chapter 4 and 5); and political control of constitutional courts and judges protect secular interests but political control also protects religious doctrine (see chapters 3 and 4). In other words, just as secular forces use constitutional politics to constrain religion, religious forces also use constitutional politics to constrain secularism.

Hirschl charts an ambitious agenda for a comparative study of constitutional politics and religion. However, this agenda is presently constrained by a dearth of systematic country studies on the subject.<sup>18</sup> To be sure, there is an emerging body of scholarship in Islamic legal studies on judicial review based on shari'a in the Muslim world. This scholarship includes Clark Lombardi and Baber Johanson's works on Egypt, Intisar Rabb and Haider Ala Hamoudi's works on Iraq, and Martin Lau and Tahir Wasti's

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<sup>16</sup> Ran Hirschl, *Constitutional Theocracy* (Cambridge, MA: Harvard University Press, 2010).

<sup>17</sup> *Ibid.*, 17-18.

<sup>18</sup> I should mention that Charles Kennedy has produced excellent studies on the politics of Islamic judicial review in Pakistan. However, in addition to being dated, his work does not engage in conversations with the broader literature on courts and politics. As a result, while the South Asian politics literature has greatly benefited from Kennedy's work, the comparative courts and politics literature has largely been unaware of it. See Charles H. Kennedy, "Islamization and Legal Reform in Pakistan, 1979-1989," *Pacific Affairs* 63, no. 1 (1990); Charles H. Kennedy, "Repugnancy to Islam - Who Decides? Islam and Legal Reform in Pakistan," *International and Comparative Law Quarterly* 4 (1992); Charles H. Kennedy, "Pakistan's Superior Courts and the Prohibition of Riba," in *Islamization and the Pakistani Economy*, ed. Robert M. Hathaway and Wilson Lee (Washington, D.C.: Woodrow Wilson International Center for Scholars, 2004).

works on Pakistan, to name a few.<sup>19</sup> But legal scholars have placed greater emphasis on doctrinal trajectories or lack thereof. This does not mean that legal scholars are oblivious to the political context of courts. However, they have insufficiently theorized courts as political institutions and judges as political actors. Therefore, they have not studied the relationship between judicial appointments, strategic behavior, judicial decision-making and regime politics in a methodical way. For example, in his work on Pakistan, Lau states in his concluding chapter that the “role of Islam in the legal system of Pakistan is marked by diversity, complexity and uncertainty.”<sup>20</sup> In a sense, explaining this diversity, complexity and uncertainty marks the research agenda of this work.

To make sense of doctrinal trajectories, I closely focus on judges using the following questions. What is the religio-political orientation of judges? Why does the ruling regime appoint them? Why does the ruling regime remove them? Drawing from judicial behavior research, I assume that a judge’s political ideology or “attitudes” matter.<sup>21</sup> From this perspective, the most salient factor explaining a judicial decision is the religio-political orientation of a judge, rather than the law’s textual sources. But instead of categorizing judges as conservatives or liberals, Islamists or secularists, I situate them in a more nuanced framework that captures the diverse landscape of the religio-political elite in South Asia. I then trace the relationship between the ruling regime and the religio-political movements that judges represent to understand judicial appointments and removals, and thereby judicial outcomes. But the extent to which attitudes matter depends on the strategic options of judges based on the institutional context.<sup>22</sup> Therefore, I explore how attitudes and strategy interact with each other in the British colonial High Court structures of Pakistan.

However, this work does not focus on judicial politics alone. I am also interested in the doctrinal contours, sources of authority, and evolving trends in Islamic jurisprudence in the postcolonial period. Islamic legal studies has explored these themes in recent years to investigate whether constitutional courts empowered to definitively

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<sup>19</sup> Clark B. Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari’a into Egyptian Constitutional Law* (Leiden and Boston: Brill, 2006); Baber Johansen, "The Relationship between the Constitution, the *Shari’a* and the *Fiqh*: The Jurisprudence of Egypt's Supreme Constitutional Court," *Zeitschrift fuer auslaendisches oeffentliches Recht und Voelkerrecht (Heidelberg Journal of International Law)* 64, no. 4 (2004); Intisar Rabb, "'We the Jurists': Islamic Constitutionalism in Iraq," *University of Pennsylvania Journal of Constitutional Law* 10, no. 3 (2008); Haider Ala Hamoudi, "Ornamental Repugnancy: Identitarian Islam and the Iraqi Constitution," *University of St. Thomas Law Journal* 7, no. 3 (2010); Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden & Boston: Martinus Nijhoff, 2006); Tahir Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice* (Leiden, The Netherlands: Brill, 2009).

<sup>20</sup> Lau, *The Role of Islam in the Legal System of Pakistan*, 209. To be fair, Lau’s broader conclusion is that judges have used the vocabulary of Islam to expand their authority.

<sup>21</sup> See, e.g. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York, NY: Cambridge University Press, 2002).

<sup>22</sup> See, e.g. Jack Knight and Lee Epstein, *The Choices Justices Make* (CQ Press, 1997).

interpret shari‘a can resolve the crisis of authority in contemporary Islam.<sup>23</sup> In the premodern period of Muslim history, four Sunni and one Shi‘a guilds or schools of law guarded the doctrinal boundaries of shari‘a and served as the official law.<sup>24</sup> But the introduction of colonial law and colonial education in the Muslim world displaced the authority of the schools. While the postcolonial states have claimed Islamic norms as the basis of their legitimacy, they have given authority to state institutions instead of the traditional schools. In this context, can the modern constitutional courts assume the role undertaken by the premodern schools of law to authoritatively interpret shari‘a?

The case of Pakistan demonstrates that the Islamic law scholarship that views constitutional courts as uniquely capable of responding to the crisis of authority in contemporary Islam overestimates the capacity of courts to resolve doctrinal controversies. While courts can give judgments on complex doctrinal questions, the judgments are unlikely to resolve contested doctrinal issues endemic to shari‘a in the contemporary period (see chapters 3 and 5). The endurance of a certain constitutional doctrine thus depends on the appointment and retention of judges who support the doctrine. Therefore, religio-political forces in Pakistan have focused on placing religious scholars as judges on the bench to make doctrinal decisions consistent with the Hanafi school of Islamic law (see chapter 4). Furthermore, they have cooperated with various authoritarian regimes as well as democratic governments to retain such judges on the bench to guard the existing doctrine, even when they are unable to expand the doctrine of the Hanafi school to other areas of public law (see chapters 4-6).

The study of judicial politics and judicial doctrine is not just convenient, but inextricable in this dissertation. My emphasis on judicial politics places the study of doctrinal development in perspective. Taking a nuanced approach to religio-political movements and regime politics, my work shows whether and to what extent judicial doctrine is contingent on the ruling regime or represents lasting trends. Similarly, my examination of judicial opinions frames my study of judicial politics. As Martin Shapiro notes, “it is often in the doctrinal realm that the Justices shape the political role of the Supreme Court.”<sup>25</sup> Therefore, a textual analysis of judicial opinions is essential to understanding the complex religio-political landscape and doctrinal debates at play in judicial politics. The next section describes the sources and methods used to develop these themes.

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<sup>23</sup> Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari‘a into Egyptian Constitutional Law*; Johansen, "The Relationship between the Constitution, the *Shari‘a* and the *Fiqh*: The Jurisprudence of Egypt's Supreme Constitutional Court"; Noah Feldman, *The Fall and Rise of the Islamic State* (Princeton: Princeton University Press, 2008).

<sup>24</sup> Wael B. Hallaq, *Shari‘a: Theory, Practice, Transformations* (New York, N.Y.: Cambridge University Press, 2009).

<sup>25</sup> Martin Shapiro, *Law and Politics in the Supreme Court: New Approaches to Political Jurisprudence* (New York, N.Y.: Free Press, 1964), 40.

### **3. Sources and Methods**

This dissertation draws upon quantitative datasets, historical-interpretive case studies, and doctrinal analysis to understand the contours of shari‘a review in Pakistan. Many of these sources are drawn from fieldwork conducted in Pakistan during 2009-10. In this section, I describe the sources and elaborate my methods to understand shari‘a review in the Federal Shariat Court and the Supreme Court.

#### **3.1 Court Structure and Procedure**

In general, scholars describe the structure of the Federal Shariat Court and the shariat appellate bench of the Supreme Court using Chapter 3A of the Constitution. However, an approach focused on the Constitution produces an incomplete picture. To understand shari‘a review, especially why and how courts decide or delay certain cases at certain moments, we need to understand how courts function. Therefore, I move the focus to the Federal Shariat Court (Procedure) Rules and the Supreme Court Rules to explain each court’s internal judicial dynamics. To understand the origins of these dynamics, I look at the British colonial structure of courts going back to the Indian High Courts Act of 1861. Nevertheless, deductions from legal rules and procedures only describe the theoretical contours of these dynamics. To understand the dimensions of these issues in practice, we need to take an empirical approach.

#### **3.2 Quantitative Datasets**

The empirical approach includes a qualitative and a quantitative part. The quantitative part is based on political-biographical datasets of judges, opinion-wise datasets of cases, and disposition-based datasets of petitions. I describe the variables of each dataset as well as my coding methods below.

##### ***Judges Datasets***

The Federal Shariat Court judges dataset covers each professional judge and scholar judge (n=53) who has served on the Court from 1980 to 2011. The Supreme Court judges dataset covers each professional judge and scholar judge (n=25) who has served on the shariat appellate bench from 1979 to 2011. For each judge, I have coded the appointing president, pre-appointment court or office, pre-appointment active or retired status (in the case of Federal Shariat Court only), professional or scholar status, religious orientation (in the case of scholar judges), appointment date, termination or retirement date, service duration, and post-appointment office. This data is gathered from a range of sources including, but not limited to, biographical dictionaries and monographs, the Gazette of Pakistan, the PLD Journal section, and the annual reports of the High Courts, the Federal Shariat Court, and the Supreme Court.

##### ***Cases Datasets***

The Federal Shariat Court cases dataset covers each shariat petition, shariat review petition, and shariat suo motu action (n=135) reported in the Federal Shariat Court volumes of PLD from 1980 to 2011. The Supreme Court cases dataset covers each shariat

appeal, shariat review appeal, and shariat suo motu action of the shariat appellate bench (n=43) reported in the Supreme Court volumes of PLD from 1979 to 2011.<sup>26</sup> For each case, I have coded the petition number (earliest petition if more than one), year filed (earliest petition if more than one), year decided, bench size, chief justice, bench members, outcome (acceptance or dismissal), judgment's author, concurring judges, dissenting judges, PLD citation, and description.

Owing to the scope of this project, this data only includes shariat review decisions and does not include criminal appeals under the Hudud Ordinances decided by the Federal Shariat Court and the Supreme Court. However, the exclusion of criminal appeals should not be taken as a statement on the insignificance of the appeals in judicial lawmaking. Furthermore, a binary coding of outcomes (acceptance or dismissal) and opinions (concurring or dissenting) introduces a subjective element to the case data. For example, a court may dismiss a petition's primary demand, but may accept a secondary or tertiary demand. Similarly, a judge may concur in part, and dissent in part. I have made these subjective determinations after a close reading of the court orders and opinions. The coding is based on the PLD hardcopy volumes since the PLD electronic database ([www.pakistanlawsite.com](http://www.pakistanlawsite.com)) is often unreliable and generally does not include opinions with Urdu, Arabic, and Persian text. However, using the hardcopy volumes introduces the chance of human error – e.g. since there is no index of reported shariat cases, some reported cases may have remained unnoticed in reading the header of each case in the 32 volumes of PLD Federal Shariat Court (1980-2011) and the 33 volumes of PLD Supreme Court (1979-2011).

### *Petitions Datasets*

As a secondary resource, I also use a decided shariat petitions dataset and a pending shariat petitions dataset compiled by the Federal Shariat Court.<sup>27</sup> The decided petitions dataset covers each shariat petition, reported or unreported, decided by the shariat benches of the High Courts or the Federal Shariat Court (n=1317) from 1979 to 2009, though I cannot confirm the completeness of the dataset. For each shariat petition, the dataset includes the petition number, year filed, date decided, laws challenged, outcome, appeal status, date decided, and appeal outcome. However, the dataset does not include data on bench size, chief justice, bench members, judgment's author, concurring judges, and dissenting judges. The pending shariat petitions dataset includes each shariat petition pending in the Federal Shariat Court (n=263) in 2012. For each petition, the dataset includes the petition number, year filed, and laws challenged. I use the pending

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<sup>26</sup> This dataset excludes four orders reported in PLD Supreme Court that are either provisional or clarificatory: *Nisar v. Government of Pakistan*, 1984 PLD SC 373; *In re: Suo Motu Shariat Review Petition No. 1-R of 1989*, 1990 PLD SC 865; *Federation of Pakistan v. N.-W.F.P. Government*, 1990 PLD SC 1172; *Federation of Pakistan v. Mahmood-ur-Rehman Faisal*, 2000 PLD SC 770.

<sup>27</sup> The datasets are available in HTML and Microsoft Word formats on <http://federalshariatcourt.gov.pk/> and are not set-up for quantitative analysis. I have imported and cleaned the data in Microsoft Excel with some success.

shariat petitions dataset for pendency data in the Federal Shariat Court, and the decided shariat petitions dataset for pendency data in the Supreme Court (based on appeal status).

The Federal Shariat Court's decided shariat petitions (1,317) are nearly ten times the reported cases (135) for two reasons: the reported cases often decide overlapping petitions together (e.g. 119 petitions in the single riba case); and unreported decisions are invariably dismissed on preliminary grounds, such as in limine, withdrawal, non-prosecution, no jurisdiction, already decided, incompetent, or personal matter. My analysis generally ignores the unreported decisions since I assume that every decided shariat petition, whether accepted or dismissed, of any significance would be reported in PLD. Furthermore, the unreported decisions do not include the bench or opinion-level data that is crucial in my analysis. Nevertheless, I use unreported decisions to understand (1) the early moments of shari'a review using petitions filed before the shariat benches of the High Courts; and (2) judicial activity in periods when there are no reported decisions.

In short, the datasets allow us to confirm or reject hypotheses about shari'a review that cannot be tested by the qualitative analysis of cases alone. I use the datasets in chapter 2 to map out the structure of judicial review in the Federal Shariat Court and the Supreme Court. The analysis in this chapter, however, only begins to take advantage of the hypothesis-testing capacity of the datasets. I also use the datasets in chapters 3 to 6 to place the in-depth case studies in the context of general trends in the Federal Shariat Court and the Supreme Court.

### **3.3 Historical-Interpretive Case Studies**

In chapters 3 to 6, I use in-depth historical-interpretive case studies of judicial moments to see how constitutional and procedural structures work in extreme cases. As I noted earlier, the Federal Shariat Court has 135 reported judgments and the Supreme Court has 43 reported judgments. These judgments cover property rights (overturning land redistribution), religious freedoms (upholding the criminalization of Ahmadiyya practices), substantive due process (developing Islamic due process), speech (expanding blasphemy punishments), personal status (overturning provisions of the Muslim Family Laws Ordinance), and right to bear arms (upholding governmental regulation of firearms) to name a few areas. While each case may provide important insights into the political and doctrinal developments in Islamic judicial review, an in-depth study of every case would be impractical. Therefore, this dissertation evaluates two hard cases. First, the Federal Shariat Court's decision in 1981 declaring the punishment of stoning for "zina" (unlawful sex) as un-Islamic, and the Court's review in 1982 overturning the decision and declaring stoning Islamic. Second, the Federal Shariat Court's decision in 1991 declaring interest in bank lending and finance as the prohibited "riba" in the Qur'an, the Supreme Court's decision in 1999 upholding the Federal Shariat Court, and then the Supreme Court's review in 2002 setting aside its own judgment.

The two case studies are hard cases of shari'a discourse in the cultural domain of unlawful sex (zina) and the economic domain of interest (riba) in banking and finance. The two case studies are also extreme cases of regime and party politics, judicial appointments and appointees, and religious and intellectual trends at significant moments

over three decades covering authoritarian and democratic periods. Using primary historical sources about the political context, I unearth aspects of Islamic judicial review that are not apparent from quantitative datasets. Many of these sources were collected during fieldwork in Pakistan in 2009-2010. Originally, I embarked on this project with the goal of interviewing the professional judges and the scholar judges (‘ulama) of the Federal Shariat Court and the Supreme Court who were central characters in my case studies. But these actors were often unavailable, unable, or unwilling to talk.<sup>28</sup> However, I was guided by other judges and ‘ulama to sources that would help answer many of my questions about these political actors and moments.<sup>29</sup> The primary sources and methods of interpretation used in the research are described below.

### *Annual Reports of Courts*

My research employs the annual reports of the High Courts, the Federal Shariat Court, and the Supreme Court for basic data. These courts have regularly published such reports for the last decade. The annual reports include biographical outlines of serving judges, the court’s historical narrative, and a table of former judges including their appointment and retirement dates. This information is useful to understand the tenures of High Court and Supreme Court judges who have a constitutional retirement age. However, many judges were removed through extra-constitutional measures during authoritarian and sometimes democratic periods in Pakistan. Moreover, prior to the Eighteenth Amendment in 2010, the president exercised the power to appoint Federal Shariat Court judges for a term of *up to* three years as well as to modify or renew these terms.<sup>30</sup> Therefore, data on the appointment and termination dates in the annual reports of the Federal Shariat Court is insufficient to provide the complete picture of the role of the president in judicial appointments. Nevertheless, the annual reports are an important starting point to map out a court’s structure.

### *Gazette of Pakistan*

The Gazette of Pakistan is the official journal of the Government of Pakistan that records each order and notification issued by the ministries, the prime minister’s secretariat, and the president. The Gazette is a rich source of information that has been underutilized in studying Pakistan’s history in general, and legal history in particular. The

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<sup>28</sup> For example, important judges such as Justice Aftab Hussain and Justice Muhammad Karam Shah had passed away. The aging Justice Tanzil-ur Rahman excused himself due to health issues. Justice Fida Muhamamd Khan as I learned was living in Canada when I was in Pakistan, and moved back to Pakistan when I returned to North America. Justice Muhammad Taqi Usmani declined to grant an interview after inquiring about the scope of my research. And the late Justice Mahmood Ahmad Ghazi was happy to talk in general but excused himself from discussing sensitive questions regarding sub-judice matters as a serving judge on the Federal Shariat Court at the time.

<sup>29</sup> I have expressed my gratitude to many of these people in the Acknowledgement section.

<sup>30</sup> For example, Justice Muhammad Shafi Muhammadi served for five months whereas Justice Fida Muhammad Khan served for over two decades.

Gazette includes a Weekly edition consisting of six parts,<sup>31</sup> and an Extraordinary edition consisting of three parts.<sup>32</sup> Part III of the Extraordinary edition includes notifications issued by the Ministry of Law and Parliamentary Affairs each time a president appoints, renews, or modifies the term of a judge, whether under the Constitution or using extra-constitutional measures. In other words, the Gazette is a complete record of the exercise of state power.

I pay close attention to the Gazette as much of my argument depends on a microanalysis of judicial appointments and tenure. For example, a two-year term of a Federal Shariat Court judge could mean that he served a single two-year term which was not renewed; or he served a one-year term which was renewed for another year but not renewed again; or he served two years of a three-year term which was ended prematurely. Each scenario would produce a different interpretation based on the political context, such as a change in the political regime or change in the opportunity structure of the existing regime.<sup>33</sup> This information is more important for the chief justice than other professional or scholar judges. A president may keep a problematic judge on the bench or even appoint one to the bench to satisfy a political or religious interest group if he is confident that the chief justice would not place any sensitive case before the judge. However, the president would be much more careful about appointing and renewing the term of a chief justice. I analyzed presidential notifications in the Gazette from 1977 to 2011 at the Sindh High Court's Judges Library and the microfilm collections at the University of California's Northern Regional Library Facility (up to 1985) and the Library of Congress (1985 to 2011).

### ***Council of Islamic Ideology and Ministry of Religious Affairs***

Apart from official sources on courts, I also use sources from the Council of Islamic Ideology, and the Ministry of Religious and Minority Affairs. The Council of Islamic Ideology consists of 'ulama, lawyers, and judges, appointed by the president. The Council's periodic reports provide the official opinion of the Council on legal reforms based on Islam. Serving at the pleasure of the president, the Council's positions depend on the ruling regime, but are nevertheless useful in providing the historical context to the topic. The Ministry of Religious Affairs occasionally conducts conferences and seminars and publishes the proceedings of these events. The proceedings of the 'Ulama

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<sup>31</sup> Part I includes notifications from federal ministries except for the Ministry of Defense; Part II includes notifications from the Ministry of Defense; Part III includes notifications from the High Courts, the Comptroller, the Auditor General, and the Federal Public Service Commission; Part IV includes notifications not included in other parts; Part V includes notifications from the Patent Office; and Part VI includes paid advertisements.

<sup>32</sup> Part I includes acts, ordinances, president's orders, and regulations; Part II includes statutory regulatory orders (SROs); and Part III includes other notifications and orders.

<sup>33</sup> While the president's power to renew or terminate a judge's term means that judges effectively serve at the pleasure of the president, there is a difference in the political cost of termination (direct intervention) and non-renewal (indirect intervention).

Convention, the Masha'ikh Convention, and the Shari'at Conference conducted during the Zia period give important insights into the period's political and legal landscape.

### ***Judicial Opinions***

I have done a careful textual analysis of the decisions in the case studies on riba and zina. The study of judicial decisions is important for understanding judicial politics as well as doctrine. The decisions contain considerable procedural history that is often mundane at the outset, but essential for a deeper political analysis. The decisions also provide important clues about the religio-political orientation of judges when such information is otherwise not easily available. Moreover, the decisions are essential to understanding the doctrinal contours of Islamic judicial review. In analyzing these decisions, I have explored the sources of authority employed in the opinions, which include premodern Islamic literature as well as modern writings of 'ulama and intellectuals from South Asia and the Arab world. I have also evaluated how these 'ulama and intellectuals fit into the larger religio-political trends at stake in South Asia. In general, decisions of the High Courts and the Supreme Court of Pakistan are in English. However, the scholar judges on the Federal Shariat Court and the shariat appellate bench of the Supreme Court write in Urdu, and quote material in Arabic and to a lesser extent Persian.

### ***PLD Journal***

The PLD includes a Journal section that publishes articles by legal professionals. Many of the judges studied in this dissertation have been prolific contributors to the PLD Journal. The PLD Journal also includes biographical introductions upon appointments and occasionally includes proceedings of farewell meetings upon retirements of High Court and Supreme Court judges. These articles, biographies, and proceedings provide a rich texture to the intellectual formation and political orientation of judges. Unfortunately, this biographical material is an understudied source of social history since legal scholars have not been as interested in judges as they are in cases. For this project, I have analyzed the PLD Journal from 1970 to 2011 for biographical clues. The purpose of covering the period prior to 1977 is to understand the background of judges who were in office at the eve of Zia's coup.

### ***Biographical Dictionaries***

While the PLD Journal gives biographical information about judges appointed to the High Courts and the Supreme Court, it does not include biographical information about judges appointed to the Federal Shariat Court or the shariat appellate bench of the Supreme Court.<sup>34</sup> This is not a problem for judges who have previously served on a High

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<sup>34</sup> The reason seems to be that appointments to the Federal Shariat Court are not considered elevations. In fact, Federal Shariat Court appointments are comparable to bench assignments. As for the shariat appellate bench of the Supreme Court, the appointments of professional judges to the bench are bench assignments, and the appointment of scholar judges is on an ad hoc basis. These fine distinctions are explained in chapter 2.

Court or the Supreme Court. But for scholar judges appointed from among the ‘ulama, the PLD Journal does not provide adequate coverage. However, there is no dearth of sources on ‘ulama’s biographies. Students of Near Eastern history have long used the biographical dictionaries (ṭabaqāt) produced throughout Islamic history to understand social history and scholarly networks.<sup>35</sup> Such dictionaries often rank and categorize scholars based on the scholar’s authority in the tradition. The practice of producing biographical dictionaries continues in the contemporary period. In South Asia, the dictionaries are divided along religio-political groups such as Deobandis, Barelawis, Ahl-i Hadith, and Shi‘as. There has also been a proliferation of hagiographical monographs and dissertations on scholars done by their students and devotees.<sup>36</sup> Together, these sources help us in contextualizing the religious and political pedigree of the ‘ulama.

### *‘Ulama’s Literature*

I also draw upon the rich literature produced by the ‘ulama on Islam and politics. I embarked on this research with a general understanding of the premodern fiqh tradition. During the course of my research, I focused considerably on the contemporary ‘ulama’s writing on law, politics, and society. Since the inception of the technology of print, an important medium of disseminating such scholarship has been the monthly magazines published by the major madrasas.<sup>37</sup> While religious studies scholars have recognized the importance of these sources, legal scholars have often ignored the ‘ulama’s writings, depriving themselves of a rich source of material.<sup>38</sup> I have also consulted ‘ulama’s monographs on Islamic legal reform in the modern state. While a portion of this literature makes its way into Western libraries, some of it is only available in the bookstores and libraries of madrasas. I gathered these sources during fieldwork in Pakistan.

### *U.S. Diplomatic Cables*

U.S. diplomatic cables are an important source of studying Pakistani politics. Starting from Ayesha Jalal’s pioneering work on Pakistan’s early history using declassified cables, scholars have used U.S. diplomatic cables to understand civil-military relations in Pakistan.<sup>39</sup> The declassified cables from the 1970s and 1980s focus on Cold

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<sup>35</sup> See, e.g. Wael B. Hallaq, *Authority, Continuity, and Change in Islamic Law* (New York: Cambridge University Press, 2001).

<sup>36</sup> The purpose of these monographs is to celebrate the teacher as well as to defend the teacher’s legacy in cases of controversial fatwas.

<sup>37</sup> In this dissertation, I have focused on *al-Balagh* published by Dar al-‘Ulum, Karachi, *Bayyināt* published by Jami‘a ‘Ulum al-Islamiyya, Banuri Town, *al-Shari‘a* published by the Shari‘a Academy, Gujranwala, and *Diya-i Haram* published by Dar al-‘Ulum Muhammadiyya Ghawthiyya, Bhera, among others.

<sup>38</sup> See, e.g. Irfan Moeen Khan, "The Construction of Deobandi ‘Ulamā’s Religious Authority in Pakistan: A Study of Their Journal, Bayyināt, 1962-1977" (McGill University, 2004).

<sup>39</sup> Ayesha Jalal, *The State of Martial Rule: The Origins of Pakistan's Political Economy of Defence* (New York: Cambridge University Press, 1990). According to Jalal, "By far the most interesting and illuminating sources for the period up to 1958 were located in British and American archives in London and

War politics but do not provide much insight into Pakistan's internal and legal affairs. However, the recently leaked U.S. diplomatic cables – the so-called WikiLeaks – provide candid exchanges between the embassy's political counselors and top Pakistani officials, legislators, and members of the Council of Islamic Ideology on the Enforcement of Shari'ah Act of 1991, and the Protection of Women (Amendment of Laws) Act of 2006. However, considering the political context of the relationship between Pakistani officials and U.S. diplomats, the cables should be interpreted with great care.<sup>40</sup> U.S. diplomatic cables are either unclassified or classified as confidential, confidential/no-foreign-nationals, secret, secret/no-foreign-nationals, or top secret. The cables used in this research are generally categorized as confidential/no-foreign-nationals.

#### **4. Conclusion**

To sum up, the central question of this dissertation is whether and to what extent shari'a review is contingent on regime politics or represents long-term trends in the interpretation of shari'a. My answer is that shari'a review is a product of regime politics. Therefore, to understand the contours and direction of shari'a review, I argue that we need to understand the interplay between shari'a politics, regime politics, and judicial politics. The next chapter provides the necessary historical and doctrinal context to explain the long-standing issues in Islamic legal and political history that reappear in somewhat different forms in the post-colonial period.

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Washington, DC. Rich in information, these sources are quite indispensable for a thorough analysis of the complex interplay of domestic, regional and international factors in moulding developments in strategically important post-colonial states such as Pakistan. British officials had continued to serve in the Pakistani military and bureaucracy well into the nineteen-fifties while the Americans took a keen interest in Pakistani affairs for their own geopolitical reasons. While being sceptical of the interpretations of British and American diplomats the study has sought to make full critical use of the information and insights obtained from these sources – unlikely to be surpassed in the near future.”

<sup>40</sup> For example, after describing a conversation with Benazir Bhutto, the political counselor in a cable remarked, “Her comments were clearly calculated to go down well with an American audience and she clearly seems to be positioning herself as a moderate, secular, more western-oriented alternative to the current government and its even more fundamentalist foes... As for whether Benazir believes what she is saying, that is hard to say.” U.S. Embassy, "Pakistan: A Conversation with Benazir Bhutto," Confidential, Islamabad, August 31, 1998, <http://wikileaks.org/cable/1998/08/98ISLAMABAD6509.html>.

# Chapter 1.

## Sovereignty of God: Islam in Pakistan

### 1. Introduction

In order to understand how Islamic law and politics have unfolded in Pakistan, one must understand socio-legal developments in Islam and South Asia during pre-colonial, colonial, and early statehood periods. This chapter presents early developments in Islam, the evolution of the Islamic legal tradition, the role of religious leaders, and the relationship between religion and state in Muslim history which place the ideological fervor with which social and legal issues are understood by various religio-political groups in contemporary Pakistan in perspective. However, I should note that Islam is a complex religious, political, social, and economic phenomenon covering more than fourteen centuries. This chapter introduces Islam only to the extent necessary to explain themes later developed in this dissertation.<sup>1</sup>

### 2. Early Developments in Islam

Muslims accept Muhammad (570-632) as the Prophet of the God of Abraham. The Prophet's teachings consist of a holy book called the Qur'an and the Prophet's practice called the sunna. After the Prophet's death, Abu Bakr, 'Umar, 'Uthman, and 'Ali successively became the political leaders or caliphs of the Muslim community. The interpretation of the early caliphal history has divided Muslims into Sunni and Shi'a sects. The Sunnis accept the political legitimacy of the first four caliphs, considering them "the rightly guided." The Shi'as deny the political legitimacy of the first *three* caliphs, considering them usurpers of the fourth caliph 'Ali's right. According to Shi'a doctrine, God granted political as well as spiritual authority after the Prophet to 'Ali, the Prophet's cousin and son-in-law, and 'Ali's progeny, the imams.

While the Qur'an existed as a standard book in the period of the third caliph 'Uthman, the sunna existed largely (but not exclusively) as an oral tradition during early Muslim history. During the second Islamic century, Muslims expanded efforts to systemize the ritual, legal, and ethical guidance called shari'a from the Qur'an and sunna. The contributions of four Sunni learned men – Abu Hanifa, Malik, al-Shafi'i, and Ibn Hanbal – evolved into enduring schools of law (madhhabs).<sup>2</sup> The genre of literature produced by the schools to explain the shari'a is called fiqh.

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<sup>1</sup> As this dissertation is about religious, political and legal elites, the description of Islam produced below should not be used to draw conclusions beyond this scope.

<sup>2</sup> On the evolution of the schools, see Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge, U.K.: Cambridge University Press, 2005).

As fiqh matured, the Sunni schools of law developed the doctrine of taqlid, i.e. to follow the authority of the school's past ranking jurists, and constrained the practice of ijtihad, i.e. reasoning directly from the Qur'an and sunna as original sources. Each Sunni school considered the taqlid of only the other three legitimate, though less accurate than itself. Collectively, they considered ijtihad in matters of law that early jurists have agreed upon as misguided. The notion of taqlid not only served the legal function of producing doctrinal coherence in fatwas, but also served the social function of providing the school's authority to the jurists, even when they were developing novel interpretations.<sup>3</sup> I should note, however, that ijtihad was not dead in Islam. In each generation, certain scholars continued to assert the authority to exercise ijtihad.<sup>4</sup>

Among the Shi'as, the contributions of the imams in general, and the sixth imam Ja'far in particular, evolved into the Ja'fari school of law. The Shi'as did not develop the doctrine of taqlid. A learned Shi'a jurist reaching the rank of mujtahid could engage with the original sources, and ordinary Shi'as were expected to follow a living mujtahid. However, in practical terms, the Shi'a legal discourse developed in conversation with and remained remarkably close to the Sunni discourse.

As the developing schools of law placed an emphasis on sunna as a source of legal authority, the historical authenticity of the oral tradition became important.<sup>5</sup> During the third Islamic century, Sunni Muslims systematically collected the oral tradition on the sunna to separate authentic narrations from weak and forged narrations. A hadith is a recorded narration consisting of the chain of narrators from the Prophet to the recorder (sanad, pl. isnād) and the text of the narration (matn).

The Sunni hadith collectors and scholars graded each hadith based on its level of authenticity according to the completeness of the chain, and the credibility and reliability of the narrators. As the compilations were produced in the third Islamic century, each hadith's chain of narrators consists of more or less six generations. The Sunni doctrine takes the credibility of the first generation – the Prophet's companions, particularly the early caliphs – as unimpeachable. Among the Sunnis, the hadith compilations of six collectors are called the authentic six (al-ṣiḥaḥ al-sitta), namely al-Bukhari, Muslim, al-

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<sup>3</sup> Sherman Jackson, "Taqlid, Legal Scaffolding and the Scope of Legal Injunctions in Post-Formative Theory: *Mutlaq* and *'Amm* in the Jurisprudence of Shihab Al-Din Al-Qarafi," *Islamic Law and Society* 3, no. 2 (1996). See also Baber Johansen, "Legal Literature and the Problem of Change: The Case of the Land Rent," in *Contingency in a Sacred Law: Ethical and Legal Norms in the Muslim Fiqh*, ed. Baber Johansen (Leiden: Brill, 1999).

<sup>4</sup> Wael B. Hallaq, "Was the Gate of Ijtihad Closed?," *International Journal of Middle Eastern Studies* 16, no. 1 (1984).

<sup>5</sup> For an introduction to hadith, see Jonathan A. C. Brown, *Hadith: Muhammad's Life and His Legacy* (Oneworld, 2007).

Nasa'i, al-Tirmidhi, Abu Dawud, and Ibn Majah. The first two are considered more authentic and called the authentic two (al-ṣaḥīḥayn).<sup>6</sup>

In order to ascribe legal authority to hadiths, the Sunni jurists graded the hadiths based on the number of chains and divided them into three categories. First, a hadith coming from one or two chains was called solitary (āḥād). Second, a hadith based on at least three chains in the first generation that spread widely in the second or third generation was called widespread (mashhūr). Third, a hadith based on enough chains of narrators such that it would be inconceivable for so many sources to agree on a falsehood was called recurrent (mutawātir). The scholars disagreed about how many chains make a hadith recurrent, and therefore disagreed about what hadiths were recurrent. Since each chain would describe the same event, statement, or phenomenon differently, the scholars further developed the categories of recurrent-in-meaning (mutawātir al-ma'nā) and recurrent-in-words (mutawātir al-lafz).

Since the Shi'as consider the early caliphs and their supporters – the first generation of Sunni hadith narrators – as usurpers, they do not accept the Sunni hadith canon. The Shi'as draw spiritual guidance from the imams and therefore accept hadiths narrated by the imams and their family as authentic. They evaluate a recorder's chain of narration from an imam, but presume the imam's chain from the Prophet infallible. Among the Shi'as, four hadith compilations of three collectors comprise the authentic four books (al-kutub al-arba'a).

Shari'a is therefore based on diverse opinions and sources. But the diversity of opinion does not mean that the law is a series of equally authoritative opinions. The diversity is managed through fundamental agreements and disagreements that define sects and schools. For example, certain fundamental agreements and disagreements about early Muslim history extending into the hadith corpus mark the boundary between the Sunnis and the Shi'as. Among Sunnis, certain less fundamental agreements and disagreements in legal doctrine (fiqh) and principles of interpretation (uṣūl al-fiqh) mark the boundaries among the four schools of law. The next subsection conceptualizes shari'a as a social phenomenon.

### 3. Conceptualizing Shari'a

Shari'a is often translated as, or reduced to, "Islamic law." More accurately, shari'a is the Islamic normative order guiding ethics, law, and rituals.<sup>7</sup> Islamic shari'a can be seen as a particular form of social field, characterized by a discursive tradition.<sup>8</sup> This

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<sup>6</sup> See Jonathan A. C. Brown, *The Canonization of al-Bukhārī and Muslim: The Formation and Function of the Sunnī Ḥadīth Canon* (Leiden, The Netherlands: Brill, 2007).

<sup>7</sup> See Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Leiden: Brill, 1999).

<sup>8</sup> Talal Asad, *The Idea of an Anthropology of Islam* (Washington, D.C.: Center for Contemporary Arab Studies, Georgetown University, 1986); Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Princeton: Princeton University Press, 2002).

concept of tradition, originally developed by Alasdair MacIntyre, is defined as “an argument extended through time in which certain fundamental agreements are defined and redefined” based on internal and external conflicts.<sup>9</sup> External conflicts are arguments with critics external to the tradition who reject the fundamental agreements, while internal conflicts are interpretive debates that express the meaning and rationale of the fundamental agreements and constitute the progress of the tradition. (In this sense, shari‘a is analogous to MacIntyre’s notion of liberalism as a tradition.)

Conceptualizing shari‘a as a discursive tradition is a response to two trends in the study of Islam. On the one hand, Orientalism has searched for Islamic orthodoxy by essentializing scriptures. On the other hand, anthropology has defined Islamic orthodoxy by focusing on local *islams*. While the former approach is unable to account for change, the latter approach is unable to account for continuity. The notion of Islam as a discursive tradition is a response to this dilemma. Talal Asad argues that any developed tradition of discourses has its own styles of reasoning. As Ovamir Anjum explains:

[A]rguments and claims, such as definitions of orthodoxy, and claims of exclusion and inclusion, must be evaluated based on their success in the discursive process. Rather than the “thick descriptions” of theatrical subjects who simply “behave” in accordance with the roles determined for them by either their material structure or culture, it is the arguments and discourses of the *thinking* subjects with their specific styles of reasoning couched in their historical and material context that become the focus of this analysis.<sup>10</sup>

Before the 20th century, the discursive field of shari‘a was the school of law (madhhab), which existed semi-autonomous of the ruler’s power. The madhhab, according to Hallaq, was a methodological and interpretive institution constituted of theoretical and substantive principles:

The school was defined by its substantive boundaries, namely, by a certain body of positive doctrine that clearly identified the outer limits of the school, limits beyond which the jurist ventured only at the risk of being considered to have abandoned his madhhab.<sup>11</sup>

The genre of the madhhab’s literature consisting of the positive doctrine (rules) on ethics and law was called fiqh (understanding – of shari‘a). The methodology of deriving the rules of fiqh from Islamic normative sources – Qur’an and sunna – was called usul (or uṣūl al-fiqh, i.e. the roots of understanding). In the precolonial period, the fiqh literature

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<sup>9</sup> Alasdir MacIntyre, *After Virtue*, 2nd ed. (Notre Dame: University of Notre Dame Press, 1984), 204.

<sup>10</sup> Ovamir Anjum, "Islam as a Discursive Tradition: Talal Asad and His Interlocutors," *Comparative Studies of South Asia, Africa and the Middle East* 27, no. 3 (2007): 662.

<sup>11</sup> Wael B. Hallaq, "Can the Shari‘a Be Restored?," in *Islamic Law and the Challenges of Modernity*, ed. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (New York: AltaMira Press, 2004), 27.

was the only means by which shari‘a could be understood, and the fiqh rules were generally acknowledged as official law and applied by judges appointed by Muslim rulers.

The encounter of Muslim societies with modernity through the mediating power of European colonialism transformed the relationship between shari‘a, fiqh, and the school of law. The political context of the modern nation state makes the concept of shari‘a, embodied in the fiqh books of a school, anachronistic. As a result, the social and intellectual bases of shari‘a have been contested since the 20th century. As Baber Johansen notes, the “modern distinction between fiqh and shari‘a treats the fiqh as a historical interpretation of the shari‘a, and the shari‘a as a metahistorical source of guidance in legal and ethical as well as other matters.”<sup>12</sup> But as fiqh rules of madhhabs are marginalized as historical, the modern states have to articulate a new body of legal rules and legal methodology to uphold these rules as Islamic. The concept of shari‘a as a discursive tradition enables the study of the state’s legal rules and legal methodology in this framework.

#### 4. Islam in South Asia

Prior to the British colonial period, the Indian subcontinent was ruled by the Mughal Empire (1526-1857). Emanating from Central Asia, the Mughals used Sunni Islam as the official religion, the Hanafi school as the official law, and Persian as the official language.<sup>13</sup> Nevertheless, the Empire was marked by legal pluralism and princely kingdoms under Shi‘a nawabs and Hindu rajas prospered under the Mughals. While Persian was the language of the Empire, Arabic remained the language of high Muslim religious discourse, and Urdu developed as the language of common people in the heart of the Empire.<sup>14</sup> However, the Empire’s peripheries continued to use a range of local languages.

The ‘ulama played an important role in the Mughal Empire. In general, the term ‘ulama (singular ‘ālim; literally, a person of knowledge) is used to describe a profession consisting of men educated at a madrasa (or educational institution) in the rational disciplines of Greek logic, mathematics, astronomy, and Arabic linguistics, and the religious disciplines of theology, exegesis, fiqh, usul, and hadith.<sup>15</sup> In South Asia, the

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<sup>12</sup> Johansen, "The Relationship between the Constitution, the *Shari'a* and the *Fiqh*: The Jurisprudence of Egypt's Supreme Constitutional Court," 881 (italics removed).

<sup>13</sup> Emperor Akbar (r. 1556-1601) made efforts to syncretize Islam and Hinduism but his efforts did not outlive him for long.

<sup>14</sup> Sugata Bose and Ayesha Jalal, *Modern South Asia: History, Culture, Political Economy*, 2nd ed. (New York, N.Y.: Routledge, 2004), 35-36.

<sup>15</sup> For an overview of madrasas in South Asia, see Ebrahim Moosa, *What Is a Madrasa?* (Chapel Hill, N.C.: University of North Carolina Press, 2015). A woman educated in a madrasa’s curriculum could be considered a member of the ‘ulama’s profession, but that would be an exception, not the norm. Nevertheless, there are instances of countless women over Islamic history who have been notable scholars. Recently, Mohammad Akram Nadwi has compiled a 40-volume biographical dictionary of women scholars

‘ulama developed a curriculum called dars-i nizami to systematize entry into the profession. Graduates of dars-i nizami could become members of the Mughal bureaucracy and judiciary, among other vocations. The profession included a group of elite members who pursued advanced studies in law to become muftis or jurisconsults, authorized by the profession to issue opinions (fatwas) on complex questions of law, ethics, and rituals. In effect, the ‘ulama constituted the legal profession in the precolonial period. To be sure, this legal profession used an inquisitorial model to resolve legal disputes, unlike the adversarial model that the British would introduce.<sup>16</sup> In other words, the ‘ulama were legal professionals in the sense of being experts in law and legal procedure, not advocates for clients.

#### 4.1 Sunni ‘Ulama and Religio-Political Activism

The last hundred years of the Mughals were nominal rule under the British East India Company. In the uprising of 1857, the British deposed the last Mughal emperor and crushed the Muslim religious and political elite, hanging hundreds of ‘ulama in Delhi and exiling many to the notorious Kalapani prison.<sup>17</sup> Except where Muslim princely kingdoms survived under British rule, the colonial administration dismantled religious endowments and ended the princely patronage that supported the madrasas. As the British introduced colonial law and administration, they disenfranchised the precolonial legal profession. In this turbulent period, several movements emerged among the Sunni ‘ulama based on internal and external Muslim politics but focusing on resistance to colonialism as well as religious and moral reform. Of these movements, four currents are relevant in this study.

First, the Deobandis emerged largely as a reaction to colonialism. They rejected the English-based colonial education and established a madrasa called Dar al-‘Ulum in the town of Deoband (India) in 1866.<sup>18</sup> When the ‘ulama’s political subversions against the British were repeatedly crushed, a group of primarily, but not exclusively, Deobandi ‘ulama restructured their strategy and formed the Jami‘at-i ‘Ulama-i Hind (JUH) for non-violent resistance against colonialism. During the late colonial period, the JUH worked with the Indian National Congress for the independence of India and opposed the demand for Pakistan. However, a group of Deobandi ‘ulama formed the Jami‘at-i ‘Ulama-i Islam

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in Islamic history containing more than 8,000 entries. While the dictionary remains unpublished, its introduction has been published as Mohammad Akram Nadwi, *Al-Muḥaddithāt: The Women Scholars in Islam*, 2nd ed. (Oxford, U.K.: Interface Publications, 2013).

<sup>16</sup> On the distinction between adversary and inquisitorial systems, see Malcolm M. Feeley, "The Adversary System," ed. Robert J. Janosik, *Encyclopedia of the American Judicial System* (New York, N.Y.: Scribners, 1987).

<sup>17</sup> For the role of ‘ulama in the uprising of 1857, see Ayesha Jalal, *Partisans of Allah: Jihad in South Asia* (Cambridge, M.A.: Harvard University Press, 2008).

<sup>18</sup> However, the madrasa employed the colonial system of mass education in classrooms with segmented schooldays. See Barbara D. Metcalf, *Islamic Revival in British India: Deoband, 1860-1900* (New York, N.Y.: Oxford University Press, 2004).

(JUI) in 1945 to support the Muslim League's demand for Pakistan.<sup>19</sup> After the partition in 1947, many of the JUI leaders migrated to Pakistan and established madrasas in Karachi, the country's capital at the time. They engaged in constitutional drafting in the early period of independence, and entered electoral politics in the 1970s. However, the Deobandi movement is not reducible to any of the conflicting political projects, most recently the Taliban in Afghanistan and Pakistan, which emerged from the movement. The movement's defining core remained an adherence to Hanafi law, an emphasis on hadith in response to challenges posed by the Ahl-i Hadith, and the reform of Sufi practices in response to the so-called Barelawis.<sup>20</sup>

Second, the Ahl-i Hadith (the Partisans of Hadith) emerged in Delhi in opposition to the concept of taqlid in general, and the taqlid of Hanafi law in particular. They urged that instead of following the doctrine of the schools, every Muslim should read the Qur'an and the hadith collections to understand shari'a. In practice, the Ahl-i Hadith rejected the oral tradition of Sufism and a handful of Hanafi rules in the daily prayer rituals and other aspects of law. While the movement empowered ordinary Muslims to access the Qur'an and hadith, without mediation from doctors of law, its influence understandably remained limited to a sector of the reading public. In Pakistan, the Ahl-i Hadith remained a vocal but marginally successful intellectual movement and never directly engaged in electoral politics.

Third, the Barelawis emerged as the followers of Ahmad Raza Khan of the town of Bareli (1856-1921) in response to the Deobandis and the Ahl-i Hadith. The Barelawis disagreed with the Deobandis on the metaphysical nature of the Prophet and the mediating power of Sufi saints. Claiming the mantle of true Sunnism, Ahmad Raza Khan declared the founders of the Deobandi school disbelievers based on such theological disagreements.<sup>21</sup> On matters of law, however, the Barelawis and the Deobandis shared the adherence to and the defense of the Hanafi law from challenges posed by the Ahl-i Hadith. A group of Barelawi 'ulama in Pakistan formed the Jami'at-i 'Ulama-i Pakistan (JUP) in 1948, and reorganized the party in 1970 to enter electoral politics.<sup>22</sup>

Fourth, the Jama'at-i Islami (the Jama'at) was founded as a vanguard party in 1941 by the 20th-century religious scholar and political thinker Sayyid Abu al-A'la Mawdudi (1903-1979).<sup>23</sup> Mawdudi started his education at a madrasa, but withdrew to

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<sup>19</sup> Notable among this group were Shabbir Ahmad 'Uthmani, Ashraf 'Ali Thanawi, and Muhammad Shafi.

<sup>20</sup> The most prominent Deobandi scholar in this dissertation and perhaps in this age is Muhammad Taqi Usmani. I discuss Usmani in each of chapters 2-6, but I introduce him formally in chapter 3.

<sup>21</sup> The most important Barelawi scholar in this dissertation, Muhammad Karam Shah, disagreed with Ahmad Raza Khan on this point. I introduce Shah formally in chapter 3.

<sup>22</sup> Leonard Binder, *Religion and Politics in Pakistan* (Berkeley: University of California Press, 1963), 31; Craig Baxter, "Pakistan Votes -- 1970," *Asian Survey* 11, no. 3 (1971): 206.

<sup>23</sup> Seyed Vali Reza Nasr, *Mawdudi and the Making of Islamic Revivalism* (New York, N.Y.: Oxford University Press, 1996).

work as a journalist. A prolific writer, Mawdudi inspired Islamic revivalist movements throughout the Muslim world, most notably the Muslim Brotherhood in Egypt. Mawdudi did not support a separate Muslim state in India under the Muslim League's leadership. However, once Pakistan was established, Mawdudi moved his party's headquarters to Pakistan and developed the concept of a state under the "sovereignty of God."<sup>24</sup> While Mawdudi worked with the 'ulama in Pakistan's early constitutional struggles, he criticized the 'ulama's ability to understand modernity:

The old-fashioned schools are steeped in conservatism to such an extent that they have lost touch with the modern world. Their education has lost all contact with the practical problems of life and has become barren and lifeless. It cannot, therefore, produce people who might be able to serve, for instance, as judges and magistrates...<sup>25</sup>

Unsurprisingly, the 'ulama questioned Mawdudi's authority to interpret Islam, raising concerns about his incomplete madrasa education. On questions of law, Mawdudi's conflict with the 'ulama was based on his rejection of the doctrine of taqlid despite his deference to the early jurists, and his openness to bend or suspend rules of shari'a in pursuit of the higher goal of an Islamic state. As Mawdudi's vanguard party embraced electoral politics in Pakistan during the 1950s and 60s, many of the co-founders of the Jama'at parted ways with him.<sup>26</sup>

#### 4.2 Sunni 'Ulama in the Arab Context

The Sunni 'ulama in South Asia must be seen in the context of and in relation to the Sunni 'ulama in the Arab world. For centuries, the Azhar University in Cairo, Egypt (est. circa 970) was the center of intellectual excellence in the Sunni world. While the Azhar provided instruction in each of the four Sunni schools, the Hanafis were ascendant at the university and the Egyptian state since the late 19th-century.<sup>27</sup> During this period, a group of 'ulama called the Salafis emerged in Egypt under the leadership of Muhammad 'Abduh (1849-1905) and Rashid Rida (1865-1935). The Salafi 'ulama questioned the doctrine of taqlid and asserted the authority to undertake ijithad.<sup>28</sup> They considered the decline of Muslims to be the product of intellectual ossification of the traditional 'ulama

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<sup>24</sup> For a critical analysis of the concept, see Fazlur Rahman, "Islam and the Constitutional Problem of Pakistan," *Studia Islamica* 32 (1970).

<sup>25</sup> Sayyid Abu al-A'la Mawdudi, *The Islamic Law and Constitution*, trans. Khurshid Ahmad (Lahore, Pakistan: Islamic Publications, 1960), 98.

<sup>26</sup> Notable people who left the Jama'at in this period include Dr. Israr Ahmad and Amin Ahsan Islahi. The latter is discussed in chapter 3.

<sup>27</sup> Jacob Skovgaard-Peterson, *Defining Islam for the Egyptian State: Muftis & Fatwas of the Dar al-Ifta* (Leiden & New York: E.J. Brill, 1997), 63.

<sup>28</sup> This should not be confused with the present day Salafis in Egypt who are closer to the Ahl-i Hadith in South Asia, but do not figure prominently in this dissertation.

and argued that an unadulterated and rational approach to the Qur'an and sunna would produce an Islamic renaissance.<sup>29</sup> During the 20th-century, many Salafi 'ulama gained appointments as the grand imam of the Azhar or the grand mufti of Egypt, but they continued to face resistance from the traditional 'ulama in Egypt as well as South Asia. However, the Salafi 'ulama shared common ground with the Jama'at in South Asia and Mawdudi occasionally drew upon Salafi scholars such as Rida.

While the Salafi 'ulama turned to ijithad in response to the challenges of modernity, the traditional 'ulama searched for answers to modernity within the doctrines of the schools. For this purpose, the traditional 'ulama increasingly resorted to juristic discretion (*takhayyur*) that allowed using a legitimate opinion from one of the four schools when the dominant doctrine of the established school could not respond to a general public concern; or the use of doctrinal combination (*talfiq*) that consisted of a patchwork of rules of more than one school in a single doctrine.<sup>30</sup> While juristic discretion and doctrinal combination were accepted in Hanafi law under certain circumstances, the Deobandi 'ulama in South Asia were concerned that such principles would be used as expedient tools to legitimize colonial codes without regard to the integrity of shari'a. Therefore, the Deobandis argued that juristic discretion and doctrinal combination must be highly regulated in giving fatwas as well as in drafting codes.<sup>31</sup>

Furthermore, the Deobandi 'ulama developed madrasas in South Asia that could rival the Azhar in terms of intellectual rigor and prestige.<sup>32</sup> The Deobandi madrasas also enforced strict standards of pious observances that were not enforced on the Azhar campus.<sup>33</sup> While the Deobandis respected the millennium-old tradition of learning at the Azhar, they questioned the authority of the Azhar on many issues and did not consider it worthwhile to travel to Cairo for higher learning. However, the Barelawis could not

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<sup>29</sup> See Malcolm H. Kerr, *Islamic Reform: The Political and Legal Theories of Muḥammad 'Abduh and Rashīd Riḍā* (Berkeley, CA: University of California, 1966).

<sup>30</sup> Aharon Layish, "The Transformation of the Shari'a from Jurists' Law to Statutory Law in the Contemporary Muslim World," *Die Welts Des Islam* 44, no. 1 (2004).

<sup>31</sup> For example, the influential Deobandi scholar Muhammad Yusuf Banuri proposed the formation of an assembly of 'ulama and jurists to resolve contemporary problems in postcolonial Pakistan. Banuri argued that individual jurists, no matter how accomplished, should not be allowed to draw upon *ijithad*, *takhayyur*, or *talfiq* without developing consensus with the broader community of jurists. He also outlined the strict circumstances under which any divergence from the Hanafi school should be allowed and described the methods to be used in the process. See Muḥammad Yūsuf Banūrī, "Qadīm Fiqh-i Islāmī kī Rawshanī mayn Jadīd Masā'il kā Ḥāl," *Bayyināt* 2, no. 3 (1963); Muḥammad Yūsuf Banūrī, "Jadīd Fiqhī Masā'il awr Chand Rahnumā Uṣūl," *Bayyināt* 2, no. 4 (1963). See also Fareeha Khan, "Traditionalist Approaches to *Shari'ah* Reform: Mawlana Ashraf 'Ali Thānawi's Fatwa on Women's Rights to Divorce" (University of Michigan, 2008).

<sup>32</sup> Apart from the Dar al-'Ulum in Deoband (est. 1866), notable Deoband-oriented madrasas included Nadwa al-'Ulama in Lucknow (est. 1894), Dar al-'Ulum in Karachi (est. 1951), Jami'a 'Ulum-i Islamiyya in Karachi (est. 1954), and Jami'a Ashrafiyya in Lahore (est. 1947).

<sup>33</sup> For example, the Deobandi madrasas required fist-length beards and prevented "vices" such as smoking.

develop madrasas in South Asia that could compete with the Deobandi madrasas. Therefore, the Barelawis continued to draw upon the Azhar for religious authority and continued to travel to Cairo for higher studies.

### 4.3 Shi‘a ‘Ulama and Doctrinal Preservation

The Shi‘as were a significant Muslim minority in South Asia, estimated to range from 10 to 20 percent in Pakistan today. The Shi‘as in South Asia included many subsects, but as in Iran and Iraq, the dominant sect remained the Twelvers who followed the Ja‘fari law. During the 1950s, the Shi‘a ‘ulama worked with their Sunni counterparts in Pakistan during constitutional dialogues to demand shari‘a on the one hand, and retain sectarian neutrality on the other. But unlike the Deobandis and the Barelawis, the Shi‘a ‘ulama never formed a political party to engage in electoral politics. However, when the Zia regime in the 1980s used the Sunni doctrine of zakat to collect alms, an obligation owed but not to the state under Ja‘fari doctrine, the Shi‘a ‘ulama formed the “movement for the implementation of Ja‘fari law” to preserve the Shi‘a doctrinal space.

**Table 1. Religio-Political Movements in South Asia**

<b>Movement</b>	<b>Law</b>	<b>Political Party</b>
Deobandi	Hanafi	JUI (est. 1945)
Barelawi	Hanafi	JUP (est. 1948)
Jama‘at	Ijtihad in public law	Jama‘at (est. 1941)
Ahl-i Hadith	Qur’an and hadith	-
Shi‘a	Ja‘fari	-
Aligarh movement	Ijtihad and modernism	Muslim League (est. 1906)

### 4.4 The Aligarh Movement and the Making of Pakistan

While the ‘ulama were rooted in the Islamic intellectual tradition, the most influential intellectual trend that emerged among the Muslims in South Asia in the 19th century was rooted in colonial knowledge. Instead of resisting colonialism through focusing on establishing sectarian madrasas, certain Muslim elites embraced colonial education and established schools for Muslims on nonsectarian grounds. Most notably, the Mohammedan Anglo-Oriental College in Aligarh, India (est. 1875), which became Aligarh Muslim University, was established by Sayyid Ahmad Khan and funded by the colonial government. These schools emphasized Muslim identity but trained students for entry into the colonial bureaucracy and professions. Muslims who studied law at such schools entered the colonial legal profession that had replaced the pre-colonial legal profession (i.e. the ‘ulama). In the postcolonial period, the ‘ulama would seek to regain their status in the legal profession.

The intellectual elite that emerged from the Aligarh movement organized the All-India Muslim League in 1906, a political party with the aim of representing Muslim interests in the colonial state. The Muslim League was a response to a perceived lack of representation of Muslim interests in the Indian National Congress. Originally, the

Muslim League wanted a consociational system in India, with constitutional guarantees for Muslims in government jobs and political institutions.<sup>34</sup> But in 1940, under the leadership of one of the most successful lawyers in India, Muhammad Ali Jinnah, the party demanded a separate homeland for Muslims in the Muslim-majority eastern and western regions of India.<sup>35</sup> Born into a Shi'a subsect, Jinnah was a non-religious person with English mannerism. The 'ulama were reluctant to support his leadership, but eventually he convinced a good portion of them to join the Muslim League's cause to establish Pakistan. When the British left the Indian subcontinent in 1947, they divided the land into Pakistan and India.

The debate on the place of Islam in Pakistan inevitably traces back to Jinnah, celebrated as the father of the nation. But Jinnah promised many things to many people. On the one hand, in his speech to the Constituent Assembly upon the partition of India in 1947, Jinnah advocated the vision of a secular Pakistan:

You are free; you are free to go to your temples, you are free to go to your mosques or to any other place of worship in this State of Pakistan. You may belong to any religion or caste or creed – that has nothing to do with the business of the State...

[Y]ou will find that in course of time Hindus would cease to be Hindus and Muslims would cease to be Muslims, not in the religious sense, because that is the personal faith of each individual, but in the political sense as citizens of the State.<sup>36</sup>

On the other hand, in a speech to the Karachi Bar Association, Jinnah endorsed a greater role for religion in constitutional development and even economics:

The Prophet (PBUH) was a great teacher. He was a great law-giver. He was a great statesman and he was a great Sovereign who ruled. No doubt, there are people who do not quite appreciate when we talk of Islam... Islam is not only a set of rituals, traditions and spiritual doctrines. Islam is a code for every Muslim which regulates his life and his conduct in even politics and economics and the like.

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<sup>34</sup> On consociationalism, see Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (New Haven, C.T.: Yale University Press, 1977).

<sup>35</sup> See Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan* (New York, N.Y.: Cambridge University Press, 1994).

<sup>36</sup> Muhammad Ali Jinnah, "Muhammad Ali Jinnah's First Presidential Address to the Constituent Assembly of Pakistan (August 11, 1947)," in *Pakistan Movement Historical Documents*, ed. G. Allana (Karachi, Pakistan: Department of International Relations, University of Karachi, 1969).

Why this feeling of nervousness that the future constitution of Pakistan is going to be in conflict with Shariat Laws? Islamic principles today are as applicable to life as they were 1,300 years ago.<sup>37</sup>

Jinnah died in 1948, before a constitution was drafted. The first Constitution of Pakistan was enacted in 1956, which declared the country as the “Islamic Republic of Pakistan” and included aspirational provisions to transform its laws based on Islamic principles. The Constitution of 1956 was abrogated two years later when General Ayub Khan (r. 1958-1969) took power in a coup. Ayub Khan enacted the second Constitution of Pakistan in 1962, which no longer declared the country as an “Islamic Republic” and excluded many of the aspirational provisions concerning Islam. However, he was forced to include such aspirational provisions in 1963. The Constitution of 1962 was abrogated in 1969 when Ayub Khan resigned amid widespread protests. The third Constitution of Pakistan was enacted in 1973, which remains in force to this day after having been suspended and amended under the military regimes of General Muhammad Zia ul-Haq (r. 1977-1988) and General Pervez Musharraf (r. 1999-2008). The Constitution of 1973 established the Council of Islamic Ideology with an advisory role to the parliament, but did not provide for Islamic judicial review.

Only when Zia took power in 1977, after removing Prime Minister Zulfikar Ali Bhutto (r. 1971-1977) in a coup, did the state undertake a serious Islamization project. As I elaborate in this dissertation, the evolving crisis of legitimacy faced by the military rule gave the various religio-political parties an opportunity, and the Zia regime an incentive, to push a series of constitutional amendments to Islamize the legal system. Most importantly, Zia created the Federal Shariat Court and the shariat appellate bench of the Supreme Court to hear challenges to laws on the touchstone of Qur’an and sunna. Zia also brought substantive fiqh norms into the penal system through the Hudud Ordinances but did not substantially change other portions of law. In practice, the Pakistani legal system remained an amalgamation of secular and religious, colonial and post-colonial codes.

## 5. Conclusion

This work does not cover the entire process and politics of Islamization under Zia’s regime, which encompassed legislative, executive, and judicial aspects. My focus is on judicial politics and doctrine to understand the role of courts in engaging with the Islamic legal and religious tradition in an authoritarian and later democratic context. The next chapter argues that political regimes establish shari‘a review in order to enhance the regime’s religious legitimacy. But can shari‘a bind the ruling regime? The next chapter

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<sup>37</sup> S. M. Burke, ed. *Jinnah: Speeches and Statements 1947-1948* (Karachi, Pakistan: Oxford University Press, 2000), 97-98. However, Muhammad Qasim Zaman argues that Jinnah was sincere in his support of “Shariat Laws” but his concept of shari‘a was the Anglo-Mohammedan law that existed in India during the colonial period, not the shari‘a that the ‘ulama imagined. Muhammad Qasim Zaman, “Islamic Modernism and the Shari‘a in Pakistan,” in *Occasional Papers, Paper 8* (New Haven, C.T.: Yale Law School, 2014).

answers this question through an evaluation of the features of British postcolonial courts that make the Federal Shariat Court and the Supreme Court agents of the political regime.

## **Chapter 2.**

### **The Least Dangerous Branch: Origins and Structure of Islamic Judicial Review**

#### **1. Introduction**

This chapter explores the origins and structure of Islamic judicial review (shari‘a review) focusing on two questions. First, why do political regimes in authoritarian contexts delegate decision-making to the judiciary? The literature on courts in authoritarian regimes shows that autocrats often use courts to provide legal legitimacy for their regime’s extra-constitutional actions. To explain the institutional design of shari‘a review under General Muhammad Zia ul-Haq (r. 1977-88), I disaggregate the notions of religious, legal, and democratic legitimacy and explore the interplay between them. I argue that the Zia regime established a separate Federal Shariat Court to bolster its religious legitimacy when the High Courts refused to extend legal legitimacy to military rule and the political parties refused to accept the regime’s claims of democratic legitimacy after repeated delays in elections.

Second, while authoritarian regimes establish shari‘a review as a source of religious legitimacy, does shari‘a bind the regime? I conceptually describe and empirically evaluate five explanatory factors to understand shari‘a review in British postcolonial state and court structures: (1) the discretion of the chief justice; (2) the constraints on jurisdiction and the sources of interpretation; (3) the role of professional and scholar judges; (4) the system of judicial appointments and tenure; and (5) the political structure of appeal. These factors illustrate the nonobvious (and the obvious) features of courts that make shari‘a review subservient to the political regime. I argue that neither authoritarian regimes nor democratic governments honor shari‘a review when the regime’s core interests are at stake, though authoritarian regimes are able to exercise greater control over courts due to the lack of formal constraints on their power. The political control over shari‘a review confirm that courts are “the least dangerous branch” as political regimes retain high-ranking ‘ulama as judges on the bench in order to maintain the regime’s religious legitimacy without delegating much control over decision-making to them.<sup>1</sup> However, such judges assert themselves when there are crises of legitimacy in authoritarian periods or when there are political conflicts in democratic periods.

#### **2. The Origins of Shari‘a Review**

Why do authoritarian regimes establish shari‘a review? I answer this question by tracing the ‘ulama’s demand for shari‘a review in Pakistan from 1947 to 1973, describing the establishment of shari‘a review in the High Courts and the Supreme Court from 1978

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<sup>1</sup> See Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*, 2nd ed. (New York, N.Y.: Yale University Press, 1986).

to 1979, and evaluating the creation of the Federal Shariat Court in 1980. The primary documents that I consider include the reports, comments, and drafts produced in writing the Constitution of 1956, the Constitution of 1962, and the Constitution of 1973. While shari‘a review was not introduced in any of these constitutions, I show how the ‘ulama envisioned and advocated for the concept of shari‘a review. To understand the constitutional orders that introduced shari‘a review under Zia without much public debate, I use the contemporaneous and retrospective writings of the ‘ulama and judges participating in the process as primary sources. I also use secondary sources that place the events in perspective. To explain the institutional design of shari‘a review, the analysis focuses on two themes: how Zia used shari‘a review in his evolving effort to legitimize the military regime; and how Zia balanced the interests of the judiciary, the ‘ulama, and his regime in the process.

## 2.1 The Historical Demand for Shari‘a Review (1947-1978)

The idea of Islamic judicial review goes back to Pakistan’s early constitutional debates.<sup>2</sup> The first person to introduce the idea in Pakistan was Muhammad Asad (1900-92). Born Leopold Weiss, Asad was an Austro-Hungarian Jewish convert to Islam who served as the director of the Department of Islamic Reconstruction in Punjab. In his 1948 article, “Islamic Constitution Making,” Asad proposed that a “Supreme Tribunal” should guard the Islamic constitution with the power to veto legislation based on the Qur’an and sunna.<sup>3</sup> While the notion of a separate court for judicial review was based on the Kelsenian model of the Austrian Constitutional Court, Asad’s concept of electing its members through the legislature on the advice of the executive was based on the American model of the Supreme Court.<sup>4</sup>

The chief of Jama‘at, Sayyid Abu al-A‘la Mawdudi, resisted the separation of powers inherent in the idea of a Supreme Tribunal in a debate with Asad in Lahore.

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<sup>2</sup> Shortly before the partition, the British conducted elections for Provincial Assemblies in India in 1946. The provincial assemblies elected delegates to the Constituent Assembly of India to draft a constitution of India. However, the delegates of Muslim majority provinces (East Bengal, West Punjab, Sindh, Baluchistan, and the North West Frontier Province) withdrew in 1947 and convened as the Constituent Assembly of Pakistan.

<sup>3</sup> “The guardianship of the Constitution is vested in the Supreme Tribunal, the members of which shall be elected by the Majlis ash-Shūra [legislature] on the advice of the Amir [executive]. This Tribunal shall have the right (a) to arbitrate, on the basis of the naṣṣ ordinances of the Qur‘ān and Sunnah in all cases of disagreement between the Amir and the Majlis ash-Shūra referred to the Tribunal by either of the two parties, (b) *to veto on the Tribunal’s own accord, any legislative act passed by the Majlis ash-Shūra or any administrative act on the part of the Amir which, in Tribunal’s considered opinion, offends against a naṣṣ ordinance of Qur‘ān or Sunnah*, and (c) to order the holding of a referendum on the question of the Amir’s deposition from office in case the Majlis ash-Shūra prefers, by a two-thirds majority, an impeachment against him to the effect that he governs in flagrant contravention of the Shari‘ah.” Muhammad Asad, “Islamic Constitution Making,” *Arafāt* 1948; Quoted in Binder, *Religion and Politics in Pakistan*, 105 (emphasis mine).

<sup>4</sup> See Hans Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution,” *The Journal of Politics* 4, no. 2 (1942).

Mawdudi considered that an Islamic state should have a strong executive responsible for enforcing the shari‘a. However, the ‘ulama and Mawdudi embraced the idea as a compromise when their maximal demands about the enforcement of shari‘a were not taken seriously.<sup>5</sup> But instead of using Asad’s idea along with its institutional features, the ‘ulama proposed the establishment of a shariat bench in the existing British court structure. The ‘ulama either did not understand the importance of institutional design or did not consider the demand for a separate court attainable.

In 1951, a group of ‘ulama (consisting of Deobandis, Barelawis, Jama‘atis, Shi‘as, and Ahl-i Hadith) convened in Karachi to give a constitutional agenda to the Constituent Assembly.<sup>6</sup> The unanimous 22-point agenda covered civil, political, social, and economic matters but the provisions concerning the role of Islam are noteworthy here.<sup>7</sup> The ‘ulama demanded that the law should be based on the Qur’an and sunna, provided that the personal law of the “recognized Muslim schools” was administered according to their schools and by their qadis. Based on the participants of the convention, the recognized Muslim schools of thought presumably meant the Ja‘fari law for the Shi‘as, and the Hanafi law and the Ahl-i Hadith orientation for the Sunnis.

In 1952, the Basic Principles Committee of the Constituent Assembly produced a report. Section 3 of the report recommended that, “No Legislature should enact any law which is repugnant to the Holy Quran and the Sunnah.”<sup>8</sup> However, the report did not recommend any binding mechanism to enforce the section. The ‘ulama reconvened in 1953 to comment on the Committee’s report and demanded the extension of judicial review to section 3 in the following words:

We fail to understand why the very same method which has been adopted to check legislation in contravention of the various provisions of the constitution, *i.e.*, empowering the Supreme Court to interpret [the]

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<sup>5</sup> Binder, *Religion and Politics in Pakistan*, 238.

<sup>6</sup> The 31 ‘ulama included Sayyid Sulayman Nadwi, Sayyid Abu al-A‘la Mawdudi, Shams al-Haq Afghani, Badar ‘Alam, Ihtisham al-Haq Thanawi, Muhammad Abd al-Hamid Qadri, Muhammad Shafi‘, Muhammad Idris Kandihalwi, Khayr Muhammad, Muhammad Hasan, Muhammad Amin al-Hasanat, Muhammad Yusuf Banuri, Muhammad Amin, Abdul Samad Sarbazi, Athar ‘Ali, Abu Ja‘far Muhammad Salih, Raghay Hasan, Muhammad Habib al-Rahman, Muhammad ‘Ali Jalandhari, Dawud Ghaznawi, Ja‘far Husayn, Kifayat Husayn, Muhammad Isma‘il, Habibullah, Ahmad ‘Ali, Muhammad Sadiq, Abd al-Khalid, Shams al-Haq Faridpuri, Sahab Dad, Zafar Ahmad Ansari, Muhammad Hashim Mujaddidi.

<sup>7</sup> "Basic Principles of the Islamic State by the ‘Ulamā of Pakistan," in *The Islamic Law and Constitution*, ed. Sayyid Abu al-A‘la Mawdudi (Lahore, Pakistan: Islamic Publications, 1960), Appendix I, 331-336.

<sup>8</sup> Constituent Assembly, *Report of the Basic Principles Committee* (Karachi, Pakistan: Government of Pakistan Press, 1952), 4.

constitution should not be adopted in regard to the provisions of Section 3 as well.<sup>9</sup>

However, empowering the Supreme Court did not mean that the 'ulama trusted the colonial legal profession to interpret the Qur'an and sunna. They demanded a clear institutional structure in the Supreme Court: a bench consisting of one professional judge and five 'ulama to undertake shari'a review.<sup>10</sup> Presumably, the five 'ulama would correspond to the five major religious forces – Deobandis, Barelawis, Jama'atis, Shi'as, and Ahl-i Hadith – represented in the 'ulama's convention. They also provided criteria for the appointment of the 'ulama to the Supreme Court based on experience as a mufti, qadi, or teacher at a madrasa.

In 1956, Pakistan enacted its first Constitution, which empowered the Supreme Court to engage in judicial review.<sup>11</sup> Article 198 of the Constitution stated that:

(1) No law shall be enacted which is repugnant to the Injunctions of Islam as laid down in the Holy Quran and Sunnah, hereinafter referred to as Injunctions of Islam, and existing law shall be brought into conformity with such Injunctions.

(2) Effect shall be given to the provisions of clause (1) only in the manner provided in clause (3).<sup>12</sup>

Clause 3 created an advisory body, which would make recommendations to the Parliament to bring laws in conformity with the Qur'an and sunna, but the Parliament would not be bound to enact such recommendations into law. In other words, Article 198(2) prevented the Supreme Court from conducting judicial review using the injunctions of Islam. Needless to say, the Constitution did not provide for a Supreme Court bench consisting of 'ulama.

The Constitution of 1956 was abrogated in 1958 when General Mohammad Ayub Khan enforced martial law. When the regime drafted a new constitution, the 'ulama reasserted themselves. According to Ayub Khan, the 'ulama's "demand was that the government should agree to adopt an Islamic Constitution, leaving it to the *ulema* to

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<sup>9</sup> "'Ulamā's Amendments to the Basic Principles Committee's Report," in *The Islamic Law and Constitution*, ed. Sayyid Abu al-A'la Mawdudi (Lahore, Pakistan: Islamic Publications, 1960), Appendix II, 347.

<sup>10</sup> *Ibid.*, Appendix II, 347-348; See also Muhammad Taqi Usmani, *Nifādh-i Sharī'at awr us kay Masā'il* (Karachi, Pakistan: Maktaba-i Dār al-'Ulūm, 1990), 26.

<sup>11</sup> The Supreme Court was given original jurisdiction over disputes between provinces involving "any question as to the interpretation of the Constitution" (Article 156) and appellate jurisdiction over matters involving "a substantial question of law as to the interpretation of the Constitution" (Article 157). See Hamid Khan, *Constitutional and Political History of Pakistan* (Karachi, Pakistan: Oxford University Press, 2009), 108.

<sup>12</sup> *Constitution of Pakistan*, 1956.

decide whether any law or measure was Islamic or not.”<sup>13</sup> The autocratic leader rejected the idea, ironically on democratic grounds:

... A Constitution could be regarded [for the ‘ulama] as Islamic only if it were drafted by the *ulema* and conceded them the authority to judge and govern the people. This was a position which neither the people nor I was prepared to accept, opposed as it was to the fundamental democratic principle that all authority must vest in the people.<sup>14</sup>

Four years after taking power, Ayub Khan enacted the Constitution of 1962. This Constitution withdrew the power of judicial review altogether, declaring clearly that, “The validity of a law shall not be called in question on the ground that the legislature by which it was made had no power to make the law.”<sup>15</sup> The Constitution provided that, “No law should be repugnant to Islam.”<sup>16</sup> But the provision remained non-justiciable once again, particularly in the absence of judicial review. The Supreme Court also affirmed the non-justiciability of the provision in 1968, stating that, “The responsibility has been laid on the Legislature to see that no law repugnant to the Islamic law is brought on the statute book. The grievance, if any, therefore should be ventilated in a different forum and not in this court.”<sup>17</sup>

The Constitution of 1962 was abrogated in 1969 when Ayub Khan handed power to General Yahya Khan after a national protest movement against Ayub Khan’s rule. Under Yahya Khan, the Province of East Pakistan seceded as Bangladesh in 1971, and the Province of West Pakistan became today’s Pakistan. After the division of Pakistan, Yahya Khan handed power to Zulfikar Ali Bhutto who ruled as the chief martial law administrator until the Constitution of 1973 was enacted. When the draft of the Constitution of 1973 was circulated, the ‘ulama reasserted their demands of binding shari‘a review.<sup>18</sup> Article 227 of the draft (and later the Constitution) stated:

(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.

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<sup>13</sup> Mohammad Ayub Khan, *Friends Not Masters: A Political Autobiography* (New York: Oxford University Press, 1967), 200.

<sup>14</sup> *Ibid.*, 203-04.

<sup>15</sup> *Constitution of Pakistan*, 1962, Article 133(2).

<sup>16</sup> *Ibid.*, Article 6(2)(1).

<sup>17</sup> *Chaudhary Tanbir Ahmad Siddiky v. Province of East Pakistan*, 1968 PLD SC 185; See also Lau, *The Role of Islam in the Legal System of Pakistan*, 31.

<sup>18</sup> Usmani, *Nifādh-i Sharī‘at awr us kay Masā’il*, 42-43.

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

Once more, the 'ulama demanded that section 2 should be deleted and the Article should ensure that any law enacted against Islamic injunctions may be challenged in the Supreme Court.<sup>19</sup> They expressed their lack of confidence in the ability of judges to interpret the Qur'an and sunna, and reiterated the 'ulama's 1953 demand to establish a Supreme Court bench including five 'ulama to undertake shari'a review in such cases.<sup>20</sup> However, the demand was ignored once again.

## 2.2 The Establishment of Shariat Benches of High Courts

When Zia deposed the elected government of Zulfikar Ali Bhutto in the July 1977 coup, shari'a review was considered once more. The pretext for the coup was a national protest movement, organized by the Pakistan National Alliance (PNA), against the outcome of the 1977 elections under Bhutto. The PNA included nine parties covering the political spectrum but under the leadership of the three religious parties (JUI, JUP, and Jama'at) and the neologistic banner of Nizam-i Mustafa (The System of the Prophet). Upon taking power, Zia made the Constitution subject to the authority of martial law,<sup>21</sup> and co-opted the judiciary by appointing the chief justices of the four High Courts as acting provincial governors.<sup>22</sup> The Supreme Court also gave legal legitimacy to the regime by validating the martial law and authorizing Zia as the chief martial law administrator to amend the Constitution by decree.<sup>23</sup> Zia also assumed the office of president in September 1978. The general would use his authority as the chief martial law administrator and the president in the coming years to transform Pakistan's laws and remake the Constitution of 1973.<sup>24</sup>

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<sup>19</sup> Here, I impute Usmani's opinion to the 'ulama in general. *Ibid.*, 44.

<sup>20</sup> *Ibid.*, 45.

<sup>21</sup> *Laws (Continuance in Force) Order*, 1977 PLD CS 327, §2(1) (stating that "Notwithstanding the abeyance of the provisions of the Constitution..., Pakistan, shall, subject to this Order and any Order made by the President and any Martial Law Regulation or Martial Law Order made by the Chief Martial Law Administrator be governed as nearly as may be, in accordance with the Constitution.").

<sup>22</sup> Khan, *Constitutional and Political History of Pakistan*, 323.

<sup>23</sup> *Begum Nusrat Bhutto v. Chief of the Army Staff*, 1977 PLD SC 657. The judiciary's cooperation with the martial law regime in 1977 should be seen in the context of the institution's conflict with Bhutto's elected government in 1976.

<sup>24</sup> While legal scholars often work under the premise that Zia did not abrogate the Constitution of 1973, Charles Kennedy convincingly argues, based on the scope of Zia's amendments, that Zia installed a new Constitution in 1985. See Charles H. Kennedy, "Constitutional and Political Change in Pakistan: The Military-Governance Paradigm," in *Prospects for Peace in South Asia*, ed. Rafiq Dossani and Henry Rowen (Palo Alto: Stanford University Press, 2005).

Zia used the banner of Nizam-i Mustafa to legitimize and extend his rule. Shortly after taking power, he reconstituted the Council of Islamic Ideology and started his Islamization program. A year after the coup, Zia formed a cabinet that the PNA joined on the condition of implementing the Nizam-i Mustafa and conducting elections soon. Even though three parties (Tehrik-i Istiqlal, JUP, NDP) parted ways with the PNA, the coalition's support along with Zia's promise of elections gave a quasi-democratic legitimacy to the regime.

To introduce shari'a review, the regime assembled a group of lawyers, judges, and 'ulama who disagreed about two aspects of the institutional design. First, the 'ulama demanded that the Supreme Court should have original and exclusive jurisdiction over shari'a review, whereas the judiciary wanted the High Courts to have original jurisdiction and the Supreme Court to retain appellate jurisdiction.<sup>25</sup> Second, the 'ulama wanted to serve as members of the shari'a review bench, whereas the judiciary was ready to allow the 'ulama to serve as jurisconsults to the judges – a practice having origins in the early colonial period – but not as judges.<sup>26</sup> The 'ulama zealously asserted their longstanding demands, while the judiciary jealously guarded its territory.

In the end, Zia sided with the judiciary when he issued the Shariat Benches of Superior Courts Order in December 1978 to establish shariat benches in the four High Courts and the shariat appellate bench in the Supreme Court. Consisting of any three Muslim judges:

A Shariat Bench may, either on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government or of its own motion; examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet...<sup>27</sup>

The order provided for abstract review that could be initiated by a shariat bench or anyone else (as opposed to concrete review that could only be initiated by parties to a case or controversy). Notably, the order did not make the 'ulama members of the shariat benches. Instead, the order provided that the shariat benches would maintain a panel of jurisconsults, consisting of 'ulama and experienced Muslim advocates.<sup>28</sup> In short, while

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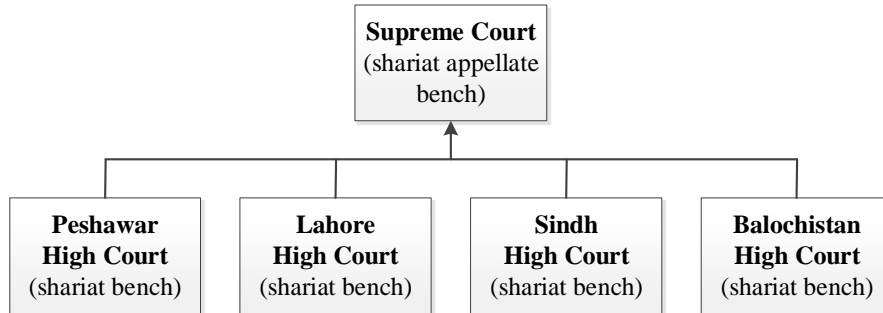
<sup>25</sup> Mahmood Ahmad Ghazi, "Islām kā Fawjdārī Qānūn: Ifitāhī Khiṭāb," in *Pākistān mayn Hudūd Qawānīn*, ed. Shahzād Iqbāl Shām (Islamabad, Pakistan: Shariah Academy, International Islamic University, 2005), 21. The chief justice of the Supreme Court, S. Anwarul Haq, reportedly did not favor entrusting the Supreme Court with the task. Furthermore, A. K. Brohi proposed the idea of a shariat commission with the power to invalidate existing laws as well as draft new laws. The concept was supported by Tanzil-ur Rahman but apparently was not taken seriously in the end.

<sup>26</sup> Tanzil-ur-Rahman, *Islamization of Pakistan Law* (Karachi, Pakistan: Hamdard National Foundation, 1978), 4. Tanzil-ur Rahman expressed his concerns about the impotence of the measure.

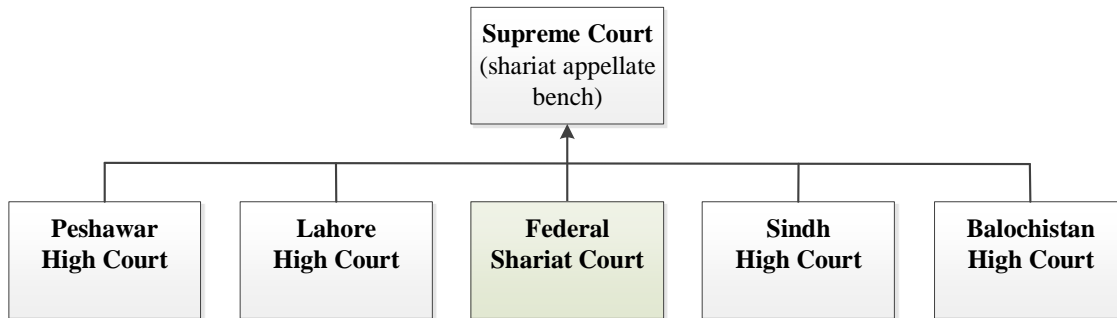
<sup>27</sup> *Shariat Benches of Superior Courts Order*, 1978, 1979 PLD CS 6, §6.

<sup>28</sup> *Ibid.*, §7(6).

shari‘a review was established to enhance the regime’s Islamic legitimacy, the choice of its structure was based on balancing the ‘ulama’s concerns about the judicial interpretations of shari‘a and the judiciary’s interest in professional independence from the ‘ulama.



**Figure 1. Introduction of Shariat Benches in the High Courts and the Supreme Court, 1978.**



**Figure 2. Consolidation of Shariat Benches of the High Courts into the Federal Shariat Court, 1980.**

To provide a more enduring legal basis for shari‘a review, Zia made shariat benches of the High Courts and the shariat appellate bench of the Supreme Court part of the constitutional structure of the judiciary through the Constitution (Amendment) Order of 1979.<sup>29</sup> But the experiment with the shariat benches of the High Courts ended shortly with the Constitution (Amendment) Order of 1980 that combined the four shariat benches into a new court called the Federal Shariat Court. However, the order retained the shariat appellate bench of the Supreme Court to hear appeals, now from the Federal Shariat Court.<sup>30</sup> The next section explains the institutional evolution from shariat benches of High Courts to a single Federal Shariat Court.

<sup>29</sup> *Constitution (Amendment) Order*, 1979 PLD CS 31.

<sup>30</sup> *Constitution (Amendment) Order*, 1980 PLD CS 89.

### 2.3 The Establishment of the Federal Shariat Court

There are several theories that attempt to explain the establishment of the Federal Shariat Court. First, according to Aftab Hussain (the acting chief justice of the Federal Shariat Court from 1982 to 1984),<sup>31</sup> the High Courts could not focus on shari‘a review under the burden of their existing caseload.<sup>32</sup> Therefore, the regime established a separate court, after consulting the ‘ulama and the judges, dedicated to hearing petitions challenging laws on the basis of shari‘a. The theory is supported by the fact that only the Peshawar High Court declared laws un-Islamic.<sup>33</sup> The Lahore High Court dismissed some petitions and heard one high-profile petition but the chief justice disrupted the bench by reassigning some judges.<sup>34</sup> The Sindh High Court also dismissed some petitions, while the Balochistan High Court did not consider any petition.<sup>35</sup> However, High Courts are always overloaded with cases, but they do not dispose of them in filing order. In fact, the chief justices of High Courts have considerable, essentially arbitrary, discretion over the time and manner of case disposal (as I elaborate in the next section). Therefore, the caseload of High Courts itself does not provide a satisfactory explanation for the establishment of the Federal Shariat Court.

Second, according to Martin Lau, one of the reasons why the Federal Shariat Court was established is that the shariat benches of the four High Courts produced the prospect of conflicting decisions on shari‘a.<sup>36</sup> As Lau explains:

Conflicting decisions in an area of law which was to be the main legitimisation to General Zia’s otherwise unconstitutional claim to power would have weakened the credibility of his regime: what was the point in having a martial law dictator willing to make Pakistan a truly Islamic

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<sup>31</sup> Aftab Hussain was also the acting chairman of the of the Federal Shariat Court from 1981 to 1982. I describe Aftab Hussain as the *acting* chairman and *acting* chief justice based on his appointment, extension, and retirement notifications from the Ministry of Law and Parliamentary Affairs. See chapter 4.

<sup>32</sup> Aftab Hussain, "Shariat Bill and Its Implications," 1986 PLD Journal 327, 329.

<sup>33</sup> *Naimatullah Khan v. Government of Pakistan*, 1979 PLD Peshawar 104; *Gul Hassan Khan v. Government of Pakistan*, 1980 PLD Peshawar 1; *Farishta v. Federation of Pakistan*, 1980 PLD Peshawar 47; *Mumtaz Khan v. Government of Pakistan*, 1980 PLD Peshawar 154; *Qasim Shah v. Government of Pakistan*, 1980 PLD Peshawar 239.

<sup>34</sup> *B. Z. Kaikaus v. Federal Government of Pakistan*, 1981 PLD FSC 1, (discussing the Lahore High Court proceedings in Shariat Petition 41 of 1979).

<sup>35</sup> *H. I. Sheikh v. Mahmood A. Haroon*, 1981 PLD SC 334, (on appeal from Sindh High Court dismissal in Shariat Petition 17 of 1980 on pilgrimage policy); *Saeedullah Kazmi v. Government of Pakistan*, 1981 PLD SC 42, (on appeal from Sindh High Court dismissal of Shariat Petition 29 of 1979 on the fajr prayer time); *Habib-ur-Rehman v. Government of Pakistan*, 1981 PLD SC 17, (on appeal from Sindh High Court dismissal of Shariat Petition 5 of 1980 on women’s sports). To be sure, according to the Federal Shariat Court dataset of decided shariat cases, there was only one petition filed in the Balochistan High Court, Shariat Petition No. 4/Q of 1979.

<sup>36</sup> Lau, *The Role of Islam in the Legal System of Pakistan*, 143.

republic if even the country's judiciary could not decide on the content of Islamic law?<sup>37</sup>

While the shariat appellate bench of the Supreme Court could resolve the conflicting decisions and bring uniformity to judicial interpretations of Islam, the regime's legitimacy would have been damaged in the process. But this theory has two shortcomings: (1) conflicting decisions were largely a theoretical concern since the shariat benches never existed long enough to produce any conflicting interpretations; and (2) the Federal Shariat Court may have reduced, but certainly retained, the prospect of conflicting decisions. In fact, appeals from the Federal Shariat Court to the Supreme Court and review of Federal Shariat Court decisions by itself could and did produce conflicting interpretations that undermined the Zia regime (see chapters 3-6).

Third, according to Tanzil-ur Rahman (the chief justice of the Federal Shariat Court from 1990 to 1992), the establishment of the Court was part of the regime's strategy to remove certain judges from the High Courts. He states that:

General Zia was undoubtedly not sincere in his goal. He knew that the members of the judiciary, with some exceptions, do not have the qualification or the capacity to [interpret] shari'a. His original purpose [in creating the Federal Shariat Court] was to remove some judges from their High Courts since they had been deemed problematic from the martial law's perspective. The purpose was fully expressed by the Provisional Constitution Order of 1981 that came out nine months after the Federal Shariat Court. Under this Order, two dozen judges of our superior courts including the chief justice [of the Supreme Court] were forcibly retired from their positions.<sup>38</sup>

The appointment of the chief justice of the Sindh High Court, Agha Ali Hyder, to the Federal Shariat Court supports this theory. As I elaborate in the next section, the chief justice of the Supreme Court and chief justices of the High Courts control case disposal as they form benches of judges and assign cases to each bench. Using this power, in the spring of 1980, Chief Justice Hyder was reviewing the regime's placement of military courts and tribunals outside the appellate jurisdiction of the High Courts.<sup>39</sup> In this context,

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<sup>37</sup> Ibid., 126.

<sup>38</sup> Tanzil-ur-Rahman, "Wafaqī Sharī' Adālat kay Qayām kā Pas-i Manzar awr Darūriyyāt," *al-Sharī'a* 13, no. 9 (2002).

<sup>39</sup> The military courts were given retroactive effect from the date of the coup in 1977. See *Constitution (Second Amendment) Order*, 1979 PLD CS 567 (stating, "Notwithstanding anything herein before contained, where any Military Court or Tribunal is established, no other Court, including a High Court, shall grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of the Military Court or Tribunal extends and of which cognizance has been taken by, or which has been transferred to, the Military Court or Tribunal and all proceedings in respect of any such matter which may be pending before such other Court, other than an appeal pending before the Supreme Court shall abate.")

Zia's Constitution (Amendment) Order of 1980 served two purposes: section 2 placed the orders of martial law authorities and the military courts and tribunals outside the jurisdiction of High Courts; and section 3 established the Federal Shariat Court, providing that, "[a] Judge of a High Court who does not accept appointment as a member shall be deemed to have retired from his office[.]"<sup>40</sup> So when the regime appointed Chief Justice Hyder to the Federal Shariat Court for one year, he could not decline without losing his job.<sup>41</sup>

However, Chief Justice Hyder's appointment is an incomplete explanation for the establishment of the Federal Shariat Court. Zia did not need to establish a new court just to remove Chief Justice Hyder. He could have appointed Chief Justice Hyder to the Supreme Court under the Fifth Amendment to the Constitution that Bhutto introduced in 1976 to remove undesirable High Court judges, providing that, "[a] Judge of High Court who does not accept appointment as a Judge of the Supreme Court shall be deemed to have retired from his office[.]"<sup>42</sup> Chief Justice Hyder would have been just as powerless as a regular judge of the Supreme Court as he was as a member of the Federal Shariat Court, as the chief justice of the Supreme Court would have determined what cases would be placed before Justice Hyder.

Furthermore, the theory does not explain the appointment of the other four judges of the Federal Shariat Court. Even when Zia removed two dozen or so judges under the Provisional Constitution Order of 1981,<sup>43</sup> he elevated one judge of the Federal Shariat Court as the acting chief justice of the Balochistan High Court and retained the remaining four judges of the Federal Shariat Court on the bench. In short, the Federal Shariat Court was not necessary for manipulating the High Courts, even though Zia used the

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<sup>40</sup> See also *Constitution (Amendment) Order*, 1980 PLD CS 89, §2 (stating, "(3A) Notwithstanding any judgment of any Court, including any judgment in respect of the powers of Courts relating to judicial review, a High Court shall not, under this Article, (a) make an order relating to the validity or effect of, any Martial Law Regulation made by the Chief Martial Law Administrator or any Martial Law Order made by the Chief Martial Law Administrator or a Martial Law Administrator or of anything done, or action taken, or intended to be done or taken, thereunder; (b) make an order relating to the validity or effect of any judgment or sentence passed by a Military Court or Tribunal; (c) grant an injunction, make any order or entertain any proceedings in respect of any matter to which the jurisdiction of a Military Court or Tribunal extends and of which cognizance has been taken by a Military Court or Tribunal; or (d) issue any process against the Chief Martial Law Administrator or a Martial Law Administrator or any person acting under the authority of either.")

<sup>41</sup> Hyder adjourned the case on May 15, 1980 until the end of summer on August 7, 1980. But Zia established the Federal Shariat Court on May 27, 1980 and appointed Hyder to the Court on May 28, 1980 to prevent him from returning to the case. Ajmal Mian, *A Judge Speaks Out* (Oxford: Oxford University Press, 2004), 51-52.

<sup>42</sup> *Constitution (Fifth Amendment) Act*, 1976 PLD CS 538. Zia used the provision to appoint the chief justice of Lahore High Court, Moulvi Mushtaq Hussain, to the Supreme Court. But Zia suspended parts of the Fifth Amendment, excluding Article 206(2), through *Laws (Continuance in Force) (Fifth Amendment) Order*, 1977 PLD CS 441. See Khan, *Constitutional and Political History of Pakistan*, 297-300, 326.

<sup>43</sup> *Provisional Constitution Order*, 1981 PLD CS 183.

opportunity towards that end with respect to the chief justice of the Sindh High Court. In other words, Tanzil-ur Rahman's theory explains the Court's appointment structure but not its establishment.

Nevertheless, we can use these insights to develop an explanation for the origins of the Federal Shariat Court. In doing so, we must focus on how the evolving political context of 1979-80 affected the regime's quasi-democratic, legal, and Islamic legitimacy. First, the Zia regime's quasi-democratic legitimacy was based on its alliance with the PNA and Zia's promise of elections. On March 23, 1979, the regime scheduled elections for November 1979. The next month, the regime hanged Bhutto after the Supreme Court affirmed the deposed prime minister's conviction on murder charges. With Bhutto gone and elections scheduled, the PNA no longer considered it necessary to remain in the Zia cabinet. So the PNA left the Zia cabinet in April 1979, but Zia cancelled the elections in October 1979, compromising his quasi-democratic legitimacy.

Second, the regime's legal legitimacy was based on the support of the chief justices of the High Courts and the validation by the Supreme Court. But after the execution of Bhutto and the cancellation of elections, the chief justices of the High Courts began to resist the regime's intensifying authoritarianism: Chief Justice Moulvi Mushtaq Hussain of the Lahore High Court conducted hearings on the disqualification of Tehrik-i Istiqlal as a political party; Chief Justice Hyder of the Sindh High Court conducted hearings on the exclusion of military tribunals from the jurisdiction of the High Courts; and Chief Justice Mir Khuda Bakhsh Marri of the Balochistan High Court stayed executions ordered by the military tribunals. The chief justices could have delayed these cases or denied the petitions altogether. But instead of providing legal cover to the regime's methods of social control, the High Courts were now undermining the regime.

Third, the regime's religious legitimacy was based on the Islamization program. The shariat benches of the High Courts were cornerstones of this program. Therefore, as the High Courts were questioning the regime's legal actions, Zia gave up on obtaining legal legitimacy through the High Courts and focused on the regime's Islamic legitimacy. To this end, the regime curbed the authority of the High Courts and established the Federal Shariat Court. On May 26, 1980, Zia (1) enacted the Constitution (Amendment) Order of 1980 establishing the Federal Shariat Court and placing martial law orders outside the jurisdiction of the High Courts; (2) removed Chief Justice Hussain from the Lahore High Court by appointing him to the Supreme Court; and (3) removed Chief Justice Hyder from the Sindh High Court by appointing him to the Federal Shariat Court. The High Courts could not review martial law orders on the basis of the Constitution, but the Federal Shariat Court could review them on the basis of the Qur'an and sunna.

In conclusion, the Zia regime abandoned the pursuit of legal and democratic legitimacy but focused on Islamic legitimacy. This dynamic offers a more convincing explanation of the establishment of the Federal Shariat Court to replace the shariat benches of the High Courts. However, even when Zia established the Federal Shariat Court, he did not appoint any 'ulama to the bench. In chapter 4, I show that the 'ulama were appointed to the Federal Shariat Court only when the Zia regime further alienated the judiciary and the political parties. The basic institutional features of the Federal

Shariat Court and the shariat appellate bench of the Supreme Court evolved until 1985. The structure remained stable afterward until the Eighteenth Amendment in 2010.<sup>44</sup> The next section explores the structure of shari‘a review from a theoretical and empirical perspective.

### **3. The Structure of Shari‘a Review**

In comparison with the American and European models of judicial review, shari‘a review in Pakistan contains many counterintuitive features. Some of these features are South Asia’s colonial legacy and some are post-colonial political designs; some are general to courts in Pakistan and some are particular to shari‘a review. The models – such as the attitudinal or the strategic court – developed to understand the internal dynamics of American courts cannot be exported easily to these structures. This section begins to develop a framework to study shari‘a review in Pakistan. I focus on the discretion of the chief justice, the evolving scope and grounds of shari‘a review, the role of professional and scholar judges, the system of judicial appointments and tenure, and the political structure of appeal. This section emphasizes the importance of judicial procedure to understand institutional structures, uses quantitative datasets to understand their empirical dimensions, and employs historical-interpretive case studies (from chapters 3 to 6) to provide illustrations.

#### **3.1 The Role of a Chief Justice: Bench Formation and Case Assignment**

The concept of judicial review in the High Courts and the Supreme Court of Pakistan is based on the American and the European models of judicial review. However, while the chief justice of the U.S. Supreme Court or the president of the French Constitutional Council does not control bench formation or case assignment, the chief justices of the High Courts and the Supreme Court in Pakistan arbitrarily control these functions, owing to the structural legacy of the High Courts and the Federal Court established under British rule.<sup>45</sup>

Under the British, courts in India did not have the power of judicial review based on the doctrine of parliamentary sovereignty. The judicial system was an organ of the colonial administration, used for the social control of the subject population.<sup>46</sup> When the

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<sup>44</sup> *Constitution (Eighteenth Amendment) Act, 2010*, 74(iv).

<sup>45</sup> The U.S. Supreme Court has nine judges who work as a single bench, select cases each term based on four votes, and decide the cases by the end of the term based on a majority. The chief justice has certain prerogatives in agenda setting and opinion writing, but his vote in selecting or deciding cases is equal to the other judges. While scholars periodize the U.S. Supreme Court based on the chief justice in office and these periods represent general trends (e.g. the liberal Warren Court or the conservative Rehnquist Court), the trends are not based on the formal power of the chief justice. The French Constitutional Council consists of nine members appointed for nine years each and former presidents of France appointed for life. The members sit in plenary form and decide every case within three months. The president of the Council can break a tie, but his vote is otherwise equal to the other members.

<sup>46</sup> However, the courts had the power of judicial review of administrative actions, which produced tensions between the colonial administration and the judiciary during the late colonial period. Rohit De,

British parliament established the High Courts in India, it gave the power over bench formation and case assignment to the chief justice who served at the pleasure of the crown. The Indian High Courts Act of 1861 provided that “[t]he chief justice of each High Court shall from time to time determine what judge in each case shall sit alone, and what judges of the Court, whether with or without the chief justice, shall constitute the several division courts[.]”<sup>47</sup> Similarly, the British gave the power over bench formation and case assignment to the chief justice of the Federal Court in New Delhi (est. 1937). According to the Government of India Act of 1935, “the Chief Justice of India shall determine what judges are to constitute any division of the court and what judges are to sit for any purpose.”<sup>48</sup> However, without the power of judicial review that could challenge the parliament, concentration of power in a chief justice was not a source of tension between the parliament and the courts.

The structure of the Federal Court in Karachi (est. 1948) that became the Supreme Court (est. 1956) was based on the colonial Federal Court in New Delhi. The structure of the Federal Shariat Court (est. 1980) was based on the colonial High Courts (est. 1862).<sup>49</sup> However, unlike the courts in colonial India, the courts in post-colonial Pakistan (and India) were given the power of judicial review under the Constitution of 1956 and the Constitution of 1973.<sup>50</sup> The power of judicial review was extended to shari‘a review in 1978. With the power of judicial review, concentration of power in a chief justice makes the role of the chief justices of the Federal Shariat Court and the Supreme Court particularly interesting. I explore this role in the following pages.

According to the Constitution, the Federal Shariat Court has 8 judges, consisting of the chief justice, four professional judges, and three ‘ulama as scholar judges. The Constitution presently defines scholar judges as ‘ulama “having at least fifteen years

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"Emasculating the Executive: The Federal Court and Civil Liberties in Late Colonial India: 1942-1944," in *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex*, ed. Terence C. Halliday, Lucien Karpik, and Malcolm M. Feeley (New York, NY: Cambridge University Press, 2012).

<sup>47</sup> *Indian High Courts Act*, 1861, 24 & 25 Vict. c. 104, §14. More or less the same language was used in *Government of India Act*, 1915, 5 & 6 Geo. 5 c. 61.

<sup>48</sup> *Government of India Act*, 1935, 26 Geo. 5 c. 2, §214-4.

<sup>49</sup> The Bengal High Court was established in 1862 at Fort William in Calcutta.

<sup>50</sup> We can perhaps explain the inclusion of judicial review in South Asian constitutions using the Federalism-English hypothesis. According to Martin Shapiro, “Judicial review is caused by a peculiarly English allegiance to the rule of law plus the peculiar evolution of the British Empire in the eighteenth and nineteenth centuries. Because of the firmly held beliefs in judicial independence, neutrality, and fidelity to law prevalent in English-speaking cultures, citizens were prepared to vest the enormous power of constitutional review in courts, and/or member States were willing to allow a court nominally a part of the central government with which it was disputing to resolve the dispute.” Martin Shapiro, “The Success of Judicial Review and Democracy,” in *On Law, Politics, and Judicialization*, ed. Martin Shapiro and Alec Stone Sweet (New York: Oxford University Press, 2002), 150.

experience in Islamic law, research or instruction.”<sup>51</sup> The 8 judges work in benches formed by the chief justice.<sup>52</sup> Under the Federal Shariat Court (Procedure) Rules, a shariat review bench consists of three or more judges,<sup>53</sup> at least one of whom is a scholar judge.<sup>54</sup> In practice, the shariat review bench has ranged from 3 to 7 members, but the median bench size is 4 members. Mathematically, when drawing a shariat review bench from five professional judges and three scholar judges on the Court under this rule, the chief justice has 46 combinations of three-member benches, 65 combinations of four-member benches, 55 combinations of five-member benches and so on.<sup>55</sup> If we assume that judges are strategic actors, then each combination would produce distinct strategic interactions. Furthermore, if the bench is equally divided, the chief justice can nominate another judge to the bench.<sup>56</sup> In short, the chief justice of the Federal Shariat Court can affect the outcome of a case by including or excluding certain judges from the shariat review bench.

In the absence of a systematic study of how the chief justice uses this power, the following example illustrates the point. In a period when a seven-member bench usually decided shariat petitions, Chief Justice Aftab Hussain formed a three-member bench to hear and dismiss a shariat petition that challenged the appointment of women as judges.<sup>57</sup>

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<sup>51</sup> Article 203C(3A). Before the Eighteenth Amendment in 2010, the Article defined ‘ulama as persons “who are well-versed in Islamic law.”

<sup>52</sup> *Constitution of Pakistan, 1973, Article 203C.*

<sup>53</sup> I use the term “shariat review bench” to describe a bench that reviews shariat petitions under *Federal Shariat Court (Procedure) Rules, 1981, §4(2)(a) and §2(g)*. Rule 4(2)(a) states that, “A petition, reference, appeal or revision against a judgment imposing a sentence of Hadd or death shall be heard by a Bench consisting of not less than three judges, one of whom shall be an Aalim Judge[.]” Rule 2(g) defines a petition under Article 203D of the Constitution, i.e. to “examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam[.]”

<sup>54</sup> The Constitution uses the singular of ‘ulama, “Aalim” (or ‘ālim) but defines it as anyone “well-versed” in the Qur’an and sunna. In practice, the ‘ulama would accept most but not all of the judges appointed as scholar judges at least as members of their profession, though in some cases such members would be considered non-mainstream.

<sup>55</sup> To continue, the chief justice has 28 combinations of six-member bench, 8 combinations of seven-member benches, and one combination of eight-member bench – giving the chief justice 203 ways to compose a shariat review bench in total. Mathematically, given the number of professional judges on the Court ( $n_p \leq 5$ ), the number of scholar judges on the Court ( $n_a \leq 3$ ), the number of scholar judges on the shariat review bench ( $k_a \geq 1$ ), and the size of the shariat review bench ( $b \geq 3$ ), the combination ( $C_b$ ) for the bench size ( $b$ ) can be calculated using the following expression:

$$C_b = \sum_{k_a=1}^{n_a} \binom{n_a}{k_a} \cdot \binom{n_p}{b - k_a}$$

<sup>56</sup> *Federal Shariat Court (Procedure) Rules, 1981, §30(4), §4(5).*

<sup>57</sup> *Ansar Burney v. Federation of Pakistan, 1983 PLD FSC 73*; see also Shahbaz Ahmad Cheema, “Federal Shariat Court as a Vehicle of Progressive Trends in Islamic Scholarship in Pakistan,” *al-Aḍwa* 28, no. 39 (2013).

The bench notably excluded the two Hanafi scholar judges, Justice Muhammad Taqi Usmani and Justice Muhammad Karam Shah. Since the Hanafi doctrine prevents women from acting as judges in certain categories of cases, we can expect that the two 'ulama would have voted to restrict the appointment of women as judges in those cases. Chief Justice Hussain included the Jama'ati scholar judge, Justice Malik Ghulam Ali, whose position could be more open to compromise.<sup>58</sup> Instead of excluding the two Hanafi scholar judges, Chief Justice Hussain could also have indefinitely delayed the review of this petition. But based on his (later) writings in support of women in public life, we can conclude that he wanted the Federal Shariat Court to review and dismiss this petition, and excluding the two Hanafi scholar judges was the only path to do so.<sup>59</sup> Though this case was about the appointment of women as judges in general, thirty years after this case was reported, the first woman judge was appointed to the Federal Shariat Court.<sup>60</sup>

Furthermore, shari'a review cannot work unless the chief justice of the Federal Shariat Court forms the bench under the Federal Shariat Court (Procedure) Rules and assigns it shariat petitions to dispose. So the chief justice can effectively suspend shari'a review by either not forming the bench or not assigning any shariat petition to the bench. For example, the Federal Shariat Court decided only three reported shariat petitions from 1993 to 2003. This period included the tenures of chief justices Nazir Ahmed Bhatti (1994 to 1997) and Fazal Ilahi Khan (1997 to 2003) when no shariat petition was decided (see Figure 3). Moreover, the chief justice of the Federal Shariat Court has the power to control when a shariat petition comes up before the shariat review bench. This means that the chief justice determines if and when a certain petition will come up for review during his tenure. In effect, a petition may be decided right away or may remain pending for decades. In 2012, there were 146 shariat petitions pending in the Federal Shariat Court, some going back to the 1980s (see **Table 2**).

Turning to the Supreme Court, the shariat appellate bench constitutionally consists of three Muslim judges and up to two 'ulama as ad hoc scholar judges. The 'ulama are appointed by the president from the Federal Shariat Court or from a panel drawn up by the president in consultation with the chief justice of the Supreme Court.<sup>61</sup> According to the Supreme Court Rules, the chief justice selects the three Muslim judges from the judges of the Supreme Court.<sup>62</sup> Drawing from 17 professional judges on the Supreme Court,<sup>63</sup> the chief justice has 680 combinations of a three-member bench.<sup>64</sup> Since

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<sup>58</sup> Justice Ali's mentor, Mawdudi, had supported the candidacy of a woman (Fatima Jinnah) for presidency.

<sup>59</sup> See Aftab Hussain, *Status of Women in Islam* (Lahore, Pakistan: Law Publishing Company, 1987).

<sup>60</sup> AFP, "Pakistan Appoints First Female Judge to Sharia Court," *Dawn*, December 30, 2013.

<sup>61</sup> *Constitution of Pakistan*, 1973, Article 203F(3).

<sup>62</sup> *The Supreme Court Rules*, 1980, XXXV(3).

<sup>63</sup> See *Supreme Court (Number of Judges) Act*, 1997 PLD CS 23. The Finance Act of 2008 raised the number to 29 but the Supreme Court declared the provision unconstitutional. *Sindh High Court Bar Association v. Federation of Pakistan*, 2009 PLD SC 879. However, non-Muslim judges, if any, would be excluded from the pool of 17.

the president can appoint any two ‘ulama as ad hoc scholar judges in consultation with the chief justice, the combinations of shariat appellate bench members consisting of professional judges and scholar judges could be endless.<sup>65</sup>

**Table 2. Pending Shariat Cases, 2012<sup>66</sup>**

<b>Filed</b>	<b>Federal Shariat Court</b>	<b>Supreme Court</b>
1980s	4	0
1990s	53	6
2000s	74	5
2010s	14	1
<b>Total</b>	<b>146</b>	<b>12</b>

Furthermore, the shariat appellate bench cannot function unless the chief justice assigns three Muslim judges of the Supreme Court to the bench as required by the Constitution. So the chief justice of the Supreme Court can effectively suspend the shariat appellate bench by either not assigning three Muslim judges or not assigning any shariat case to the bench. This was the case under chief justices Sajjad Ali Shah, Ajmal Mian, Irshad Hassan Khan, and Iftikhar M. Chaudhry as shown in **Figure 5** when the PLD reports no shariat case decided by the Supreme Court.<sup>67</sup> And even when the chief justice has formed the shariat appellate bench and assigned some cases for review, he can withhold sensitive cases from review. A case may be decided in a few months or may remain pending indefinitely. When an appeal is filed against a Federal Shariat Court judgment invalidating a law, the judgment remains ineffective until the appeal is decided. Therefore, the chief justice of the Supreme Court can single-handedly keep a Federal Shariat Court judgment ineffective by not placing it before the shariat appellate bench. In 2012, there were 12 shariat appeals pending in the Supreme Court, 6 of them from 1992.

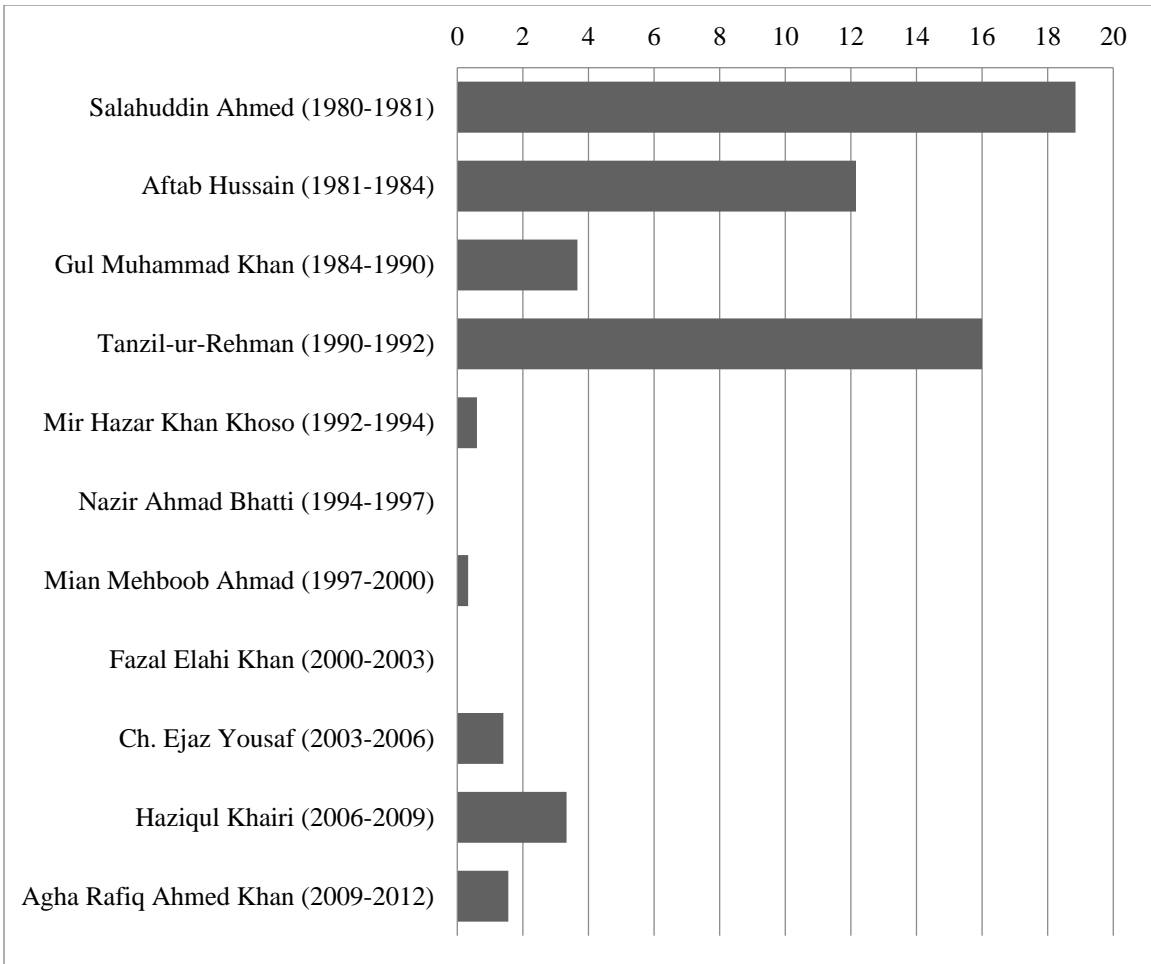
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<sup>64</sup> Given the number of professional Muslim judges on the Supreme Court ( $n \leq 17$ ), the number of professional judges on the Supreme Court ( $k = 3$ ), we can calculate the combinations of professional judges on the shariat appellate bench ( $C$ ) using the basic combinations formula  $\binom{n}{k}$ .

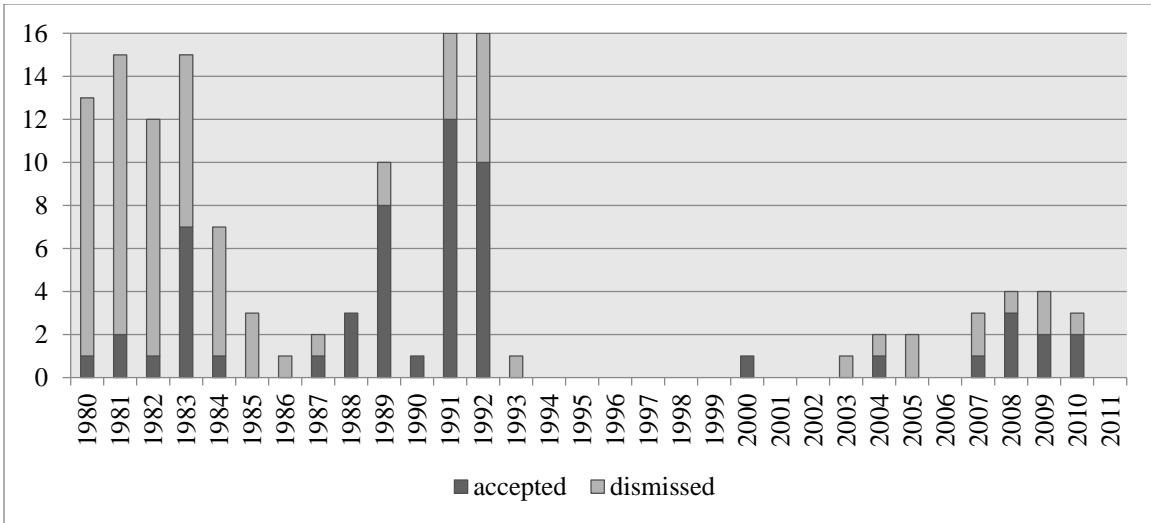
<sup>65</sup> The ad hoc scholar judges appointed to the shariat appellate bench, according to the Constitution, “hold office for such period as the President may determine” under Article 203F(4).

<sup>66</sup> The Federal Shariat Court data is compiled from the Federal Shariat Court records on pending petitions. While I count each shariat petition as one, I combine the 119 shariat petitions in the riba case also as one. The Supreme Court data is compiled from the Federal Shariat Court records on decided petitions. I count multiple shariat appeals from a single Federal Shariat Court decision as one unit.

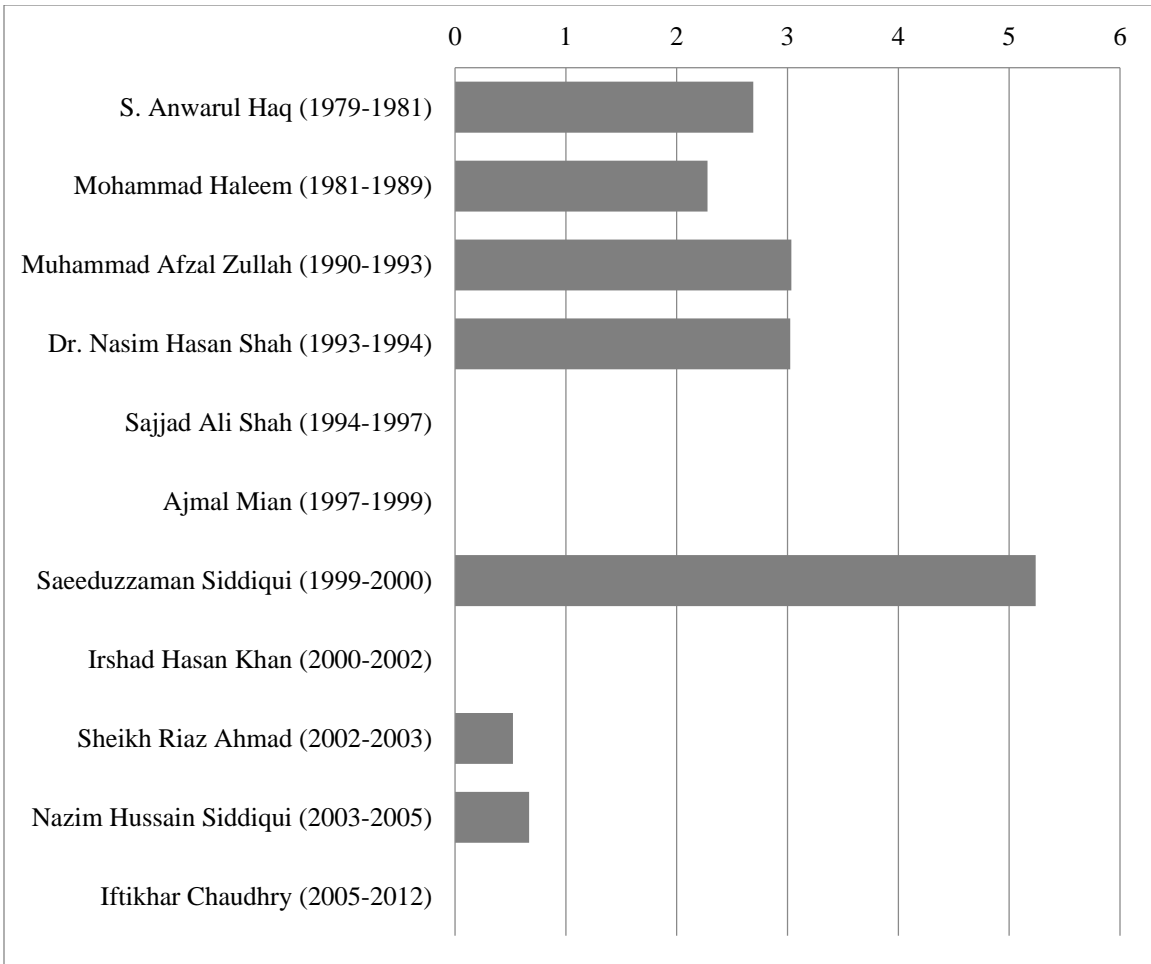
<sup>67</sup> To be precise, Chief Justice Shah formed the shariat appellate bench shortly before he was forced out of office in 1997. Chief Justice Mian also formed the shariat appellate bench in 1998 that decided two unreported appeals arising from Shariat Petitions 15/I/1992 and 13/I/1990.



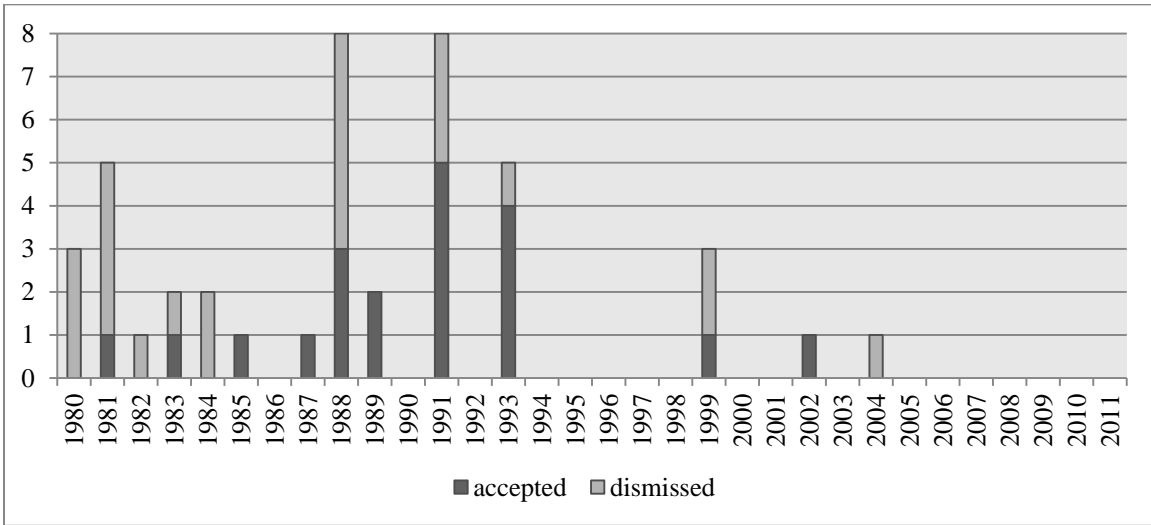
**Figure 3. The Federal Shariat Court's Reported Shariat Cases for each Chief Justice per Year (compiled by the author using the Federal Shariat Court cases dataset).**



**Figure 4. The Federal Shariat Court's Reported Shariat Cases by Year (compiled by the author using the Federal Shariat Court cases dataset).**



**Figure 5. The Supreme Court’s Reported Shariat Cases for each Chief Justice per Year (compiled by the author using the Supreme Court cases dataset).**



**Figure 6. The Supreme Court’s Reported Shariat Cases by Year (compiled by the author using the Supreme Court cases dataset).**

So what do judges of the Federal Shariat Court and the shariat appellate bench of the Supreme Court do when their chief justice does not assign any shariat cases for hearing? The judges of the Federal Shariat Court hear criminal appeals under the Hudud Ordinances. The judges of the shariat appellate bench of the Supreme Court do not have that many criminal appeals. While the professional judges on the shariat appellate bench hear regular Supreme Court cases, the scholar judges do nothing. In the words of a former chief justice of the Federal Shariat Court, "If the Registrar of the Supreme Court is required to submit a chart of the actual sitting days of the Ulema members of the Shariat Appellate Bench, I am sure it will not exceed two to three weeks a year."<sup>1</sup> This insight explains how the scholar judges such as Muhammad Taqi Usmani could be such prolific authors and editors as well as madrasa administrators and teachers while serving on the Supreme Court.

Not surprisingly, the so-called "undisputed privilege and duty" of a chief justice of a High Court, the Federal Shariat Court, and the Supreme Court in bench formation and case assignment is often questioned.<sup>2</sup> According to the Supreme Court:

[T]his Court not once but on a number of occasions has laid down that it is the sole prerogative of the Chief Justice of Pakistan to constitute a Bench of any number of Judges to hear any particular case and neither an objection can be raised nor is any party entitled to ask for condition of a Bench of its own choice.<sup>3</sup>

The fact that the Court "not once but on a number of occasions" has defended the chief justice's prerogative shows that the myth of the chief justice's neutrality is often exposed. The power of a chief justice is a blessing and a curse for the ruling regime.<sup>4</sup> On the one hand, a cooperative chief justice can help the ruling regime's interests by either delaying cases or deciding cases using a favorable bench. For example, Chief Justice Sajjad Ali Shah of the Supreme Court delayed shariat appeals in general, and the shariat appeals

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<sup>1</sup> Tanzil-ur-Rahman, "Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What More Is Required?," 2000 PLD Journal 66, 83.

<sup>2</sup> *Zulfikar Ali Bhutto v. State*, 1978 PLD SC 125; *Malik Hamid Sarfaraz v. Federation of Pakistan*, 1979 PLD SC 991; *In re: M.A. No. 657 of 1996 in References Nos. 1 and 2 of 1996*, 1997 PLD SC 80. For a conventional perspective considering the chief justice's powers as a matter of judicial "independence," see Amanullah Shah, "Critical Study of the Factors Undermining Independence of the Superior Judiciary in Pakistan" (Gomal University, 2008), 76-77.

<sup>3</sup> *Supreme Court Bar Association v. Federation of Pakistan*, 2002 PLD SC 939, ¶14.

<sup>4</sup> General Ayub Khan's withdrawal of judicial review in 1962, Zulfikar Ali Bhutto's Fifth Amendment in 1976, General Zia's Provisional Constitution Order in 1981, Benazir Bhutto's confrontation with the judiciary in 1995, and Nawaz Sharif's storming of the Supreme Court in 1997 involved the bench formation and case assignment powers of High Court and Supreme Court chief justices. See also International Crisis Group, "Building Judicial Independence in Pakistan," in *ICG Asia Report* (Islamabad, Pakistan 2004).

against the Federal Shariat Court’s judgment in the riba case in particular, from 1994 to 1997.<sup>5</sup> On the other hand, a confrontational chief justice can hurt the ruling regime by accelerating cases and placing them before an unfavorable bench. When Chief Justice Shah came into conflict with the Sharif government in 1997, he accelerated the appeals in the riba case that were pending since 1992 and formed a shariat appellate bench almost certain to uphold the Federal Shariat Court judgment in the riba case.

The assertiveness of a chief justice in the Federal Shariat Court and the Supreme Court depends on the political context of authoritarianism and democracy (see Figure 7). In authoritarian periods, power is concentrated in the chief of army staff who assumes the office of the president through extra-constitutional means and uses extra-constitutional measures against a noncompliant chief justice. In practice, a chief justice generally asserts himself against an authoritarian regime during its consolidating or declining phases. However, during most of an authoritarian period, the regime manages to appoint a compliant chief justice in the Federal Shariat Court and the Supreme Court. For example, Chief Justice Saeduzzaman Siddiqui of the Supreme Court allowed the shariat appellate bench to declare its decision in the riba case in December 1999 when Musharraf was consolidating his power after overthrowing the elected Sharif government in October 1999. However, when Chief Justice Siddiqui refused to extend an indefinite and blanket legitimacy to Musharraf’s coup (an issue unrelated to shari’a review), Musharraf removed him and appointed a compliant chief justice in January 2000.<sup>6</sup>



**Figure 7. Structure of Power under Democratic and Authoritarian Periods.**

<sup>5</sup> Furthermore, Sh. Riaz Ahmed, chief justice of the Supreme Court, accelerated the review against *Aslam Khaki* (1999) on riba, and formed a shariat appellate bench almost certain to overturn the prior shariat appellate bench judgment.

<sup>6</sup> Similarly, Iftikhar M. Chaudhry, the chief justice of the Supreme Court, asserted himself against the Musharraf regime in 2006-07 when the declining regime was negotiating with the opposition PPP over a power-sharing agreement.

In democratic periods, the power is divided between the prime minister as the chief executive and the president as the head of state (while the army remains in the background, backing one or the other). In practice, a chief justice asserts himself when the president supports him. For example, President Ghulam Ishaq Khan backed Chief Justice Rahman of the Federal Shariat Court in 1991 when he placed Prime Minister Nawaz Sharif in a tough position by deciding the *riba* case.<sup>7</sup> Similarly, President Farooq Leghari supported Chief Justice Shah of the Supreme Court in 1997 when he charged Prime Minister Sharif for contempt of court (in a case unrelated to shari‘a review) and formed the shariat appellate bench to hear the appeals in the *riba* case to force the Sharif government to take a position on *riba*.

As the office of chief justice in Pakistan is part of the South Asian colonial experience, we can see parallels to Pakistan in India as well. Based on an empirical study of the “constitution bench” decisions, Robinson et al. show the dominant role of the chief justice in the Indian Supreme Court, and recommend that, “constitution benches could be selected randomly to ensure that the chief justice does not have too much power in picking which judges sit on these benches. The chief justice’s discretion in deciding when constitution benches are heard could also be reduced.”<sup>8</sup> In conclusion, a British colonial judicial structure in Pakistan, concentrating powers in the chief justice, takes judicial review from the American and European models but not the judicial structures from these models. The structure interacts with the postcolonial cycles of democracy and authoritarianism to produce a highly politicized office of chief justice. The rest of the structural features of shari‘a review must be understood through this lens.

### **3.2 The Scope and Grounds for Shari‘a Review**

The Federal Shariat Court was given original jurisdiction over shari‘a review, appellate jurisdiction over criminal appeals arising from the Hudud Ordinances, and review jurisdiction over its own decisions. Original jurisdiction, the focus of this work, is described in Article 203D(1) of the Constitution:

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[.]

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<sup>7</sup> In 1992, he also invalidated provisions of the Enforcement of Shari‘ah Act enacted by the Sharif government.

<sup>8</sup> Nick Robinson et al., "Interpreting the Constitution: Supreme Court Constitution Benches since Independence," *Economic & Political Weekly* XLVI, no. 9 (2011): 31; see also Nick Robinson, "Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts," *American Journal of Comparative Law* 61, no. 1 (2012).

In defining the injunctions of Islam as the Qur'an and sunna, the regime balanced the competing religio-political conceptions of shari'a.<sup>9</sup> The Qur'an and sunna were overinclusive in determining the injunctions of Islam from the perspective of the Ahl-i Qur'an, who accepted the Qur'an but not the sunna as the basis of shari'a. However, the Ahl-i Qur'an were in political decline after Ayub Khan's regime. In contrast, the sources were underinclusive from Deobandi and Barelawi standpoints who wanted the Qur'an and sunna as understood through Hanafi law as the grounds for judicial review. However, the Ahl-i Hadith and the Jama'at did not want to give formal recognition to the Hanafi school. The ex-Jama'ati scholar Amin Ahsan Islahi articulated this position as follows:

The governments established on the principle of following a particular school of law in the past or present, they are not the examples of authentic Islamic governments... the basic condition for an Islamic state is that its foundation should be directly upon the book and sunna, and ijihad and consultation.<sup>10</sup>

In response to such remarks, the Barelawi scholar Muhammad Karam Shah articulated the Hanafi position in the following way:

We follow Abu Hanifa because we consider that the elegant manner in which the great imam has interpreted the Qur'an and sunna is not found in other schools... If he does not have any personal and individual standing, then has the majority that has been following the Hanafi law so far been wandering pointlessly?<sup>11</sup>

However, not adopting the Hanafi doctrine did not mean that the Hanafis were marginalized. A Hanafi judge could use the Hanafi doctrine as persuasive authority even if he did not acknowledge its binding authority. Therefore, the Deobandis and the Barelawis focused on and largely succeeded in placing Hanafi 'ulama as scholar judges in the Federal Shariat Court (see Table 3 and Table 4). However, what cases are placed before such scholar judges and when was in the hands of the chief justice of the court.

Furthermore, the notion of sunna as a source of law remained undefined. While the Qur'an is a book, the sunna is a concept that is manifested in hadith collections. The Sunnis and the Shi'as do not consider each other's hadith collections authoritative. While defining sunna as the Sunni or Shi'a canon would have given an official status to the sect, not defining sunna meant that the Sunni canon would govern – not in terms of law per se

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<sup>9</sup> In comparison, the Egyptian constitutions of 1971 and 2012 use the term "principles of the rules of shari'a" (mabadi' al-ahkam al-shari'a).

<sup>10</sup> Amin Ahsan Islahi, *Islami Riyasat mayn Fiqhi Ikhtilafat ka Hal* (Lahore, Pakistan: Faraan Foundation, 1998), 80. Islahi authored this book while he was in the Jama'at and republished it in the early Zia period.

<sup>11</sup> Pir Muhammad Karam Shah's speech in Ministry of Religious Affairs, *Ulamā Convention: Taqarir wa Tajawiz* (Islamabad, Pakistan: Government of Pakistan, 1980), 76-77.

but due to the political dominance of the Sunni majority over the Shi'a minority.<sup>12</sup> To resist the Sunni dominance, the Shi'as organized the Ja'fari school movement in 1980.<sup>13</sup> The movement forced Zia to make a constitutional amendment that in matters of personal law of any Muslim sect, Qur'an and sunna means the "Quran and Sunnah interpreted by that sect."<sup>14</sup> As expected, no Shi'a scholar was ever appointed to the Federal Shariat Court or the Supreme Court as a scholar judge, though some Shi'a judges were appointed as professional judges.

**Table 3. Scholar Judges of the Federal Shariat Court, 1980-2011**

Name	Tenure	Education	Influences
Muhammad Karam Shah	1981-1982	Barelawi madrasa, Azhar	
Malik Ghulam Ali	1981-1985	University (drop out)	Mawdudi
Muhammad Taqi Usmani	1981-1982	Deobandi madrasa, University	
Abdul Quddus Qasmi	1983-1986	Deobandi madrasa	
Syed Shujaat Ali Qadri	1983-1989	Barelawi madrasa, University	
Fida Muhammad Khan	1988-present	University (Islamic studies)	
Abdul Waheed Siddiqui	1996-1999	University (Islamic studies)	
Shahzado Sheikh	2010-present	University (accounting)	Islam and science
Mahmood Ahmed Ghazi	2008-2010	Deobandi madrasa, University	Mawdudi

**Table 4. Scholar Judges of the Supreme Court, 1982-2012**

Name	Tenure	Education	Influences
Muhammad Karam Shah	1982-1998	Barelawi madrasa, Azhar	
Muhammad Taqi Usmani	1982-2002	Deobandi madrasa, University	
Mahmood Ahmed Ghazi	1998-1999	Deobandi madrasa, University	Mawdudi
Zafar Ishaq Ansari	2000-2002	University, McGill	Mawdudi
Rashid Ahmed Jalandhari	2002-2009	University, Azhar	Phulwarwi
Khalid Mahmud	2002-2009	Deobandi madrasa, Birmingham	
Muhammad al-Ghazali	2010-	Deobandi madrasa, University	Mawdudi
Khalid Masud	2012-	University, McGill	Fazlur Rahman

In terms of standing, any citizen could access shari'a review based on the expansive language of Article 203D(1). But in fact, the chief justice determined when and if a shariat petition will be heard on merits. The judicial empowerment under shari'a review came with the "hegemonic preservation" of the core interests of the state,

<sup>12</sup> The Constitutional Commission appointed by Ayub Khan recommended that, "the legal system of Pakistan should only be subject to any Islamization if different schools of Islamic law 'could evolve unanimity with regards to fundamentals of Islam as far as traditions are concerned.'" Lau, *The Role of Islam in the Legal System of Pakistan*, 7, quoting "Report of the Constitutional Commission," in *Constitutional Foundations of Pakistan*, ed. Safdar Mahmood (Lahore).

<sup>13</sup> The movement was called the Movement for the Implementation of the Ja'farī Law (Tihrik-i Nifadh-i Fiqh-i Ja'fariyya). To be precise, the movement was organized initially to resist the implementation of the Sunni doctrine on zakat. See Zaman, *The Ulama in Contemporary Islam: Custodians of Change*, 111-143.

<sup>14</sup> *Constitution (Third Amendment) Order*, 1980, 1981 PLD CS 83.

women's rights groups, the legal profession, and the financial system.<sup>15</sup> In defining the term "law," Article 203B stated:

"law" includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law, any law relating to the procedure of any Court or tribunal or, until the expiration of [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

However, hegemonic interests always remained unstable and subject to judicial scrutiny. For example, the exclusion of Muslim Personal Law preserved the Muslim Family Laws Ordinance of 1961 (MFLO) that represented the social reform agenda of women's rights groups at the time.<sup>16</sup> The shariat bench of the Peshawar High Court avoided the MFLO exclusion in 1979 by interpreting Muslim Personal Law narrowly,<sup>17</sup> but the Supreme Court under Chief Justice Anwarul Haq reaffirmed the exclusion in 1981 by defining Muslim Personal Law as any law that applies only to Muslims.<sup>18</sup> However, the contestation over the MFLO exclusion did not end. The shariat appellate bench of the Supreme Court under Chief Justice Nasim Hassan Shah in 1993 redefined Muslim Personal Law narrowly as laws that vary based on Muslim sects, placing the MFLO within the Federal Shariat Court's jurisdiction.<sup>19</sup>

The exclusion of procedural law preserved colonial codes such as the Civil Procedure Code of 1908 and the Criminal Procedure Code of 1898 that formed the expertise of the legal profession. The 'ulama considered the adversarial legal system un-Islamic and advocated for an inquisitorial model. In particular, they considered that the legal profession is complicit in the procedural delays and appeals that defer and deny justice. To preserve the legal profession from displacement, the Federal Shariat Court's jurisdiction excluded the structure of colonial law from shari'a review.

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<sup>15</sup> The "hegemonic preservation" theory holds that courts are often empowered to entrench hegemonic interest. In this case, however, certain interests were excluded from the jurisdiction of courts in the process of judicial empowerment. See Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*.

<sup>16</sup> Justice Malik Ghulam Ali indicates that Zia was responding to the pressure from the women's groups in excluding the MFLO. When Justice Ali questioned Zia about the exclusion, he reportedly said, "Actually, there are some women who are very allergic to these issues. Regardless, you come along. God willing everything will be sorted out in time." Ra'ūf Ṭāhir, "*Wifāqī Shar'ī 'Adālat, President Zia-ul-Haq awr mayn*," in *Malik Ghulam Ali: Hayāt wa Khidmāt*, ed. Nūrwar Jān (Lahore, Pakistan: Idara-i Ma'arif-i Islami, 2010), 174.

<sup>17</sup> *Farishta v. Federation of Pakistan*, 1980 PLD Peshawar 47.

<sup>18</sup> *Federation of Pakistan v. Farishta*, 1981 PLD SC 120.

<sup>19</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1994 PLD SC 607. In 1999, the Federal Shariat Court invalidated sections of the MFLO in *Allah Rakha v. Federation of Pakistan*, 2000 PLD FSC 1.

The exclusion of fiscal, tax, banking, and insurance law was meant to protect the economic and financial system from shari‘a review. The ‘ulama wanted to declare interest in areas such as contracts, damages, banking, and government un-Islamic based on the equation of any interest on lending money with the Qur‘anic prohibition of riba. However, while the exclusion of the Constitution, legal procedure, and Muslim Personal Law was absolute, the exclusion of fiscal, tax, banking, and insurance law was meant to expire in three years. The authoritarian regime extended the exclusion until 1990 through constitutional amendment orders, but the democratic regimes after 1988 were unable to pass constitutional amendment bills to extend the exclusion any further.

The exclusion of the Constitution ensured that shari‘a review shall not be used to challenge the state’s constitutional structure. Nevertheless, Justice Tanzil-ur Rahman in the Sindh High Court declared that Article 2A of the Constitution empowers High Courts to invalidate even constitutional provisions based on Islam.<sup>20</sup> The High Courts used Article 2A in the judicial review of interest-based contracts and the MFLO until 1992 when the Supreme Court under Chief Justice Afzal Zullah rejected this interpretation.<sup>21</sup> However, the judgment came after the exclusion of riba from shari‘a review expired in 1990, and shortly before the exclusion of MFLO from shari‘a review ended in 1993 when the shariat appellate bench redefined Muslim Personal Law narrowly.

### **3.3 Judicial Appointments and Tenure**

The system of judicial appointments and tenure is an important factor in understanding the power of judicial review in any country. Appointments can be made using a professional mechanism where the judiciary inducts its own members, a cooperative mechanism where two or more branches appoint the judges together, or a representative mechanism where each branch appoints a portion of the judges.<sup>22</sup> The tenure can consist of a life term, a fixed term, or a fixed retirement age. In general, longer terms are associated with greater judicial autonomy. But factors such as appointment age, renewal options, and post-term opportunities affect the political meaning of appointments and tenure in any system. This section evaluates the scope of two claims in the literature about the Federal Shariat Court: the tenure of the Federal Shariat Court judges was insecure; and the appointment of High Court judges to the Federal Shariat Court was a penalty.

Owing to the colonial legacy, judicial appointments in Pakistan have been based on a president-centric mechanism. Under the British, the crown appointed judges to the High Courts and the Federal Court in consultation with the chief justice. As the crown and the chief justice were not co-equals, the consultation served to identify candidates, not to constrain the crown’s power. In Pakistan, the president appointed judges to the

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<sup>20</sup> Lau, *The Role of Islam in the Legal System of Pakistan*, 47-74; see also Nasim Hassan Shah, "The Ineffectiveness of Article 2-A," 1990 PLD Journal 50.

<sup>21</sup> *Hakim Khan v. State*, 1992 PLD SC 595, Justice Nasim Hassan Shah’s opinion.

<sup>22</sup> Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, 42-46.

High Courts and the Supreme Court in consultation with the chief justice. Again, the consultation was nominal, particularly under authoritarian regimes.<sup>23</sup> Once appointed, the judges served in the High Courts until the retirement age of 62 and in the Supreme Court until the retirement age of 65.

The appointments and tenure in the Federal Shariat Court made a departure from this system. The president appointed the Federal Shariat Court judges without any consultation and the judges served for a period determined by the president. According to Article 203C(4):

The Chairman and a member shall hold office for a period not exceeding three years but may be appointed for such further term or terms as the President may determine:

Provided that a Judge of a High Court shall not be appointed to be a member for a period exceeding one year except with his consent and after consultation by the President with the Chief Justice of the High Court.

This provision has been misunderstood in the existing literature. According to Lau, “[a] judge of the High Court could only be appointed to be a member of the Federal Shariat Court for a period not exceeding one year. This period could only be extended with his consent and the consent of the President in consultation with the Chief Justice.”<sup>24</sup> Lau therefore concludes that the one-year term was a “probation” on the Federal Shariat Court. However, neither the language of the provision nor the practice of appointments supports this interpretation. The one-year period was a constitutional constraint, however nominal, on the president for appointments without the consent of the judge or consultation with the chief justice. For appointment with the consent of the judge and consultation with the chief justice, the duration could be up to three years. In fact, a review of the Ministry of Law’s appointment notifications shows that Zia routinely appointed serving judges of High Courts directly for two-year terms.<sup>25</sup>

Furthermore, Article 203C(5) stated that, “[a] Judge of a High Court who does not accept appointment as a member shall be deemed to have retired from his office.” According to Lau, whether the judge accepted or declined, “[a]n appointment to the Federal Shariat Court therefore meant immediate removal from the High Court.”<sup>26</sup> While

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<sup>23</sup> In 1996, the Supreme Court in the *Judges Case* declared that the consultation entails that the president must accept the nominee of the chief justice, or give reasons for his rejection, which would be justiciable by a Supreme Court bench, formed of course by the chief justice. In other words, the decision converted the president-centric mechanism into a chief justice-centric mechanism. However, the Eighteenth Amendment in 2010 introduced a professional-cooperative mechanism.

<sup>24</sup> Lau, *The Role of Islam in the Legal System of Pakistan*, 128.

<sup>25</sup> For example, see Ministry of Law and Parliamentary Affairs, No. F. 50(1)/80-AII(1) (Islamabad, May 31, 1981), *Gazette of Pakistan, Extraordinary*, June 1, 1981, III, 249.

<sup>26</sup> Lau, *The Role of Islam in the Legal System of Pakistan*, 128.

the language of the provision makes such an interpretation possible, the practice of appointments demonstrates that accepting an appointment to the Federal Shariat Court did not mean removal from the High Court. A judge retained his High Court position during his tenure on the Federal Shariat Court, and returned to the High Court after the tenure unless he reached the High Court retirement age of 62. An examination of the Ministry of Law's appointment notifications shows that serving High Court judges appointed to the Federal Shariat Court were considered High Court judges during their Federal Shariat Court tenure.<sup>27</sup> However, declining an appointment did mean removal from the High Court. But as I have argued, this provision was not extraordinary in the context of Bhutto's Fifth Amendment, whereby judges could be dismissed for declining appointments to the Supreme Court. Nevertheless, the power of appointing High Court judges without their consent came to an end with the Supreme Court's ruling in the 1996 judges case.<sup>28</sup>

Once appointed, the tenure of a Federal Shariat Court judge was de jure secure for its duration. Therefore, Zia started appointing judges "until further notice" or as acting judges so that the duration of the tenure would remain undefined and the term could be ended at Zia's pleasure. In 1984, Zia issued an order empowering the president to transfer Federal Shariat Court judges to any other government position,<sup>29</sup> and used the order to transfer the acting Chief Justice Aftab Hussain to the Ministry of Religious Affairs.<sup>30</sup> When Zia revived a pseudo-constitutional order in 1985, he made the power to dismiss Federal Shariat Court judges part of a constitutional amendment package termed the Revival of the Constitution of 1973 Order.<sup>31</sup> Article 203C(4B) of the Constitution now stated:

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<sup>27</sup> For example, Justice Zakaullah Lodhi of Balochistan High Court was appointed to the Federal Shariat Court in May 1980. However, when Zia issued the PCO of 1981, he elevated Justice Lodhi to the chief justice of Balochistan High Court. The appointment notification read "the President is pleased to appoint Mr. Justice Zakaullah Lodhi, Judge of the Baluchistan High Court, to act as Chief Justice of that Court with effect from the 26th March, 1981." Moreover, under the PCO, Zia expressly removed Chief Justice Agha Ali Hyder from Sindh High Court and Justice Karimullah Durrani from Peshawar High Court, while retaining the two judges on the Federal Shariat Court, which confirms that they were considered members of their respective High Courts.

<sup>28</sup> *Al-Jehad Trust v. Federation of Pakistan*, 1996 PLD SC 324.

<sup>29</sup> *Judges of the Shariat Court (Assignment of Function) Order*, 1984, 1985 PLD CS 1.

<sup>30</sup> The general had issued an ordinance banning the Islamic practices of the Ahmadiyya community, a sect that had been declared non-Muslim in the Constitution a decade earlier under Zulfikar Ali Bhutto. *Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance Anti-Islamic Activities of the Qadiani Group*, 1984 PLD CS 102. The ban was challenged in the Federal Shariat Court based on the grounds that the shari'a does not prevent even non-Muslims from Islamic practices. While the bench upheld Zia's ordinance, Chief Justice Aftab Hussain's position was not entirely predictable. In the end, Chief Justice Aftab Hussain resigned from the Federal Shariat Court. Sadia Saeed, "Politics of Exclusion: Muslim Nationalism, State Formation and Legal Representations of the Ahmadiyya Community in Pakistan" (University of Michigan, 2010), 331-33.

<sup>31</sup> *Revival of the Constitution of 1973 Order*, 1985 PLD CS 456.

The President may, at any time, by order in writing, (a) modify the term of appointment of a Judge; (b) assign to a Judge any other office; and (c) require a Judge to perform such other functions as the President may deem fit; and pass such other order as he may consider appropriate.

In short, the Federal Shariat Court judges served at the pleasure of the president in de facto terms from 1980 to 1985, and in de jure terms as well from 1985 to 2010.

From the above analysis, I suggest that the Federal Shariat Court placement was not an appointment to another court, but comparable to an assignment to another High Court bench. The serving High Court judges essentially remained High Court judges while serving as “members” of the Federal Shariat Court. The retired High Court judges essentially became comparable to additional judges, a category used to appoint judges to the High Courts temporarily for one or two year terms, often with an expectation but not a guarantee of a permanent appointment. This perspective means that the Federal Shariat Court was understood as a single “Federal Shariat Bench” in place of the shariat bench in each of the four High Courts.

From this standpoint, we can explain some of the unusual features of the Federal Shariat Court. First, the Federal Shariat Court judges were originally called “members” and the chief justice was called the “chairman,” just as the judges on the shariat benches of High Courts were called “members” and the senior most judge was called the “chairman.” Second, tenure in the Federal Shariat Court was based on the pleasure of the president, just as bench assignments in a High Court were (and are) based on the pleasure of the chief justice of the High Court. In this way, a Federal Shariat Court appointment was as secure as a bench assignment on the High Court. However, while the chief justice of a High Court made regular bench assignments, the president directly made Federal Shariat Court appointments.

The president’s intervention in assignments and appointments was slowly introduced. In the beginning, the president was empowered to assign members to the shariat benches of the High Courts in consultation with the chief justice. Later, the president was empowered to appoint members to the Federal Shariat Court, without the consultation of the chief justice for less than one-year terms, and with the consultation for longer terms. In short, the Federal Shariat Court does not measure up when evaluated from an ideal of judicial independence, but the Court fits in when compared to the practice of judicial independence in the High Courts and the Supreme Court.

Studies on judicial appointments in Pakistan, using anecdotal evidence, suggest that the appointment of High Court judges to an insecure Federal Shariat Court position was a penalty.<sup>32</sup> However, as I have shown, appointments to the Federal Shariat Court did not mean removal from the High Court altogether. Therefore, such appointments should

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<sup>32</sup> Aziz Z. Huq, "Mechanisms of Political Capture in Pakistan's Superior Courts," *Yearbook of Islamic and Middle Eastern Law* 10 (2003-2004); Tanzil-ur-Rahman, "Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What More Is Required?."

be presumed neutral. But the appointment of a chief justice of a High Court as a member of the Federal Shariat Court was certainly a penalty, even if the appointment could only be for less than one year without his consent.<sup>33</sup> The appointment stripped the chief justice from his position of prestige and power as a chief justice of a High Court and made him an ordinary member of a bench. Similarly, the appointment of a judge who expected to become the chief justice of his High Court under the conventionally respected principle of seniority was also a penalty.<sup>34</sup> These appointments gave a new meaning to the saying attributed to the Prophet, “the one who is appointed as a qadi is slaughtered without a knife.”<sup>35</sup>

In contrast, the appointment of the ‘ulama, advocates, subordinate court judges, and retired judges of the High Courts or the Supreme Court was a form of patronage. However, such patronage should not be considered extraordinary as the advocates and subordinate court judges could be appointed to the High Courts, the retired judges of the High Courts could be appointed to the Supreme Court, and the retired judges of the Supreme Court could be appointed as ad hoc judges to the Supreme Court. The only extraordinary category, from the perspective of patronage, was the ‘ulama who could not serve on the judiciary, but even they could be appointed to the Council of Islamic Ideology.

We can evaluate the scope of patronage and penalty in practice based on the Federal Shariat Court judges dataset, focusing on the period between 1980 to 1996, since the penalty appointments came to an end after the 1996 judges case. Of the 32 judges appointed to the Federal Shariat Court in this period, 18 were not serving High Court judges.<sup>36</sup> They included six ‘ulama, one civil servant, one retired Supreme Court judge, and ten retired High Court judges. These 18 appointments should be considered patronage since the appointees did not stand to lose anything.

Of the 14 serving High Court judges appointed to the Federal Shariat Court, two were serving chief justices of High Courts,<sup>37</sup> and two expected to become chief justices.<sup>38</sup>

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<sup>33</sup> In theory, the president could allow such a High Court chief justice to return to his position as the chief justice and then appoint him again to the Federal Shariat Court, thus making two appointments but each for less than one year.

<sup>34</sup> The principle of seniority was judicialized in *Al-Jihad Trust* (1996), and constitutionalized in the Eighteenth Amendment (2010).

<sup>35</sup> Muḥammad b. Khalf b. Ḥayyān Wakī’, *Akhbār al-Quḍāt*, ed. Sa‘īd Muḥammad al-Laḥḥām (Cairo, Egypt: ‘Ālam al-Kutub, n.d.), 19.

<sup>36</sup> Note that this data is constructed from the judges who served on the Federal Shariat Court and does not include judges who accepted retirement instead of the appointment to the Federal Shariat Court.

<sup>37</sup> Chief Justice Agha Ali Hyder of the Sindh High Court appointed by Zia, and Chief Justice Nasir Aslam Zahid of the Sindh High Court appointed by President Leghari.

<sup>38</sup> Justice Muhammad Ilyas of the Lahore High Court appointed by President Ghulam Ishaq Khan, and Justice Khalil-ur-Rahman Khan of the Lahore High Court appointed by President Leghari.

These four appointments were a penalty since the appointees lost the prestige and power of a chief justice and gained the status of a regular judge. To this group of four, we can also include at least one more chief justice of a High Court who declined his appointment to the Federal Shariat Court and accepted retirement.<sup>39</sup> Interestingly, three of the five penalty-appointments in the Federal Shariat Court were made under the democratic government of Benazir Bhutto and President Farooq Leghari (belonging to her party), leading to the 1996 judges case.<sup>40</sup>

The most interesting category remains the 10 serving High Court judges who were neither chief justices nor next in line for the position (see Table 5). One was directly appointed as the chief justice of the Federal Shariat Court, two became chief justices of the Federal Shariat Court, two became chief justices of their High Courts, two remained judges of their High Court upon return, one became a judge of the Supreme Court, one died in office, and one resigned. These career trajectories show that after their Federal Shariat Court term, serving High Court judges resumed their High Court positions and were often elevated as a High Court or Federal Shariat Court chief justice or appointed as a Supreme Court judge. In short, these neutral appointments were often precursors to patronage appointments.

**Table 5. High Court Judges Appointed to the Federal Shariat Court, 1980-1996**

Name	Preceding High Court	Position	Term	Succeeding Position
Gul Muhammad Khan	Lahore	Chief Justice	6	-
Aftab Hussain	Lahore	Judge	1	Acting Chief Justice, Federal Shariat Court
Nazir Ahmad Bhatti	Peshawar	Judge	3	Chief Justice, Federal Shariat Court
Zakaullah Lodhi	Balochistan	Judge	1	Acting Chief Justice, Balochistan
Abdul Karim Kundi	Peshawar	Judge	2	Judge, Chief Justice, Peshawar
Ali Hussain Qazilbash	Peshawar	Judge	2	Judge, Peshawar; Judge, Supreme Court
Zahoor-ul-Haq	Sindh	Judge	2	Judge, Sindh
Fakhre Alam	Peshawar	Judge	2	Judge, Peshawar
Karimullah Durrani	Peshawar	Judge	2	Deceased
Shafi Muhammadi	Sindh	Judge	0	Resigned

### 3.4 The Voting Behavior of Professional and Scholar Judges

The political science literature contends that the voting behavior of judges in the U.S. Supreme Court depends on the politics of the appointing president as opposed to

<sup>39</sup> Chief Justice Mian Mehboob Ahmad of Lahore High Court declined his appointment to the Federal Shariat Court and accepted retirement. We can explore any other such resignations by evaluating the Ministry of Law’s appointment notifications for the Federal Shariat Court from 1980 to 1996.

<sup>40</sup> Benazir Bhutto’s manipulation of judges is not surprising. She considered her father’s death sentence ordered by the Lahore High Court and affirmed by the Supreme Court a “judicial murder.” Furthermore, Zia packed the High Courts and the Supreme Court with anti-PPP judges between 1977 and 1988. Since appointments to the Supreme Court were made from the High Courts, future governments were forced to elevate Zia appointees from the High Courts to the Supreme Court for a generation.

some notion of legal reasoning.<sup>41</sup> But the U.S. Supreme Court has a unified bench consisting of nine judges with life tenures. How can we understand the voting behavior of professional and scholar judges in the Federal Shariat Court and the Supreme Court where the chief justice forms benches from a pool of judges with precarious tenures? Originally, the Federal Shariat Court consisted of a chairman qualified to be a Supreme Court judge, and four members qualified to be High Court judges.<sup>42</sup> Since judicial appointments require 10 to 15 years of experience in the legal profession, the system effectively excluded the 'ulama, as the few 'ulama who had earned LL.B.s were still non-practicing lawyers. However, when the 'ulama protested the Federal Shariat Court decision in the 1981 stoning case, Zia included positions for three 'ulama as scholar members on the Federal Shariat Court in 1981 and positions for up to two 'ulama as ad hoc judges on the Supreme Court in 1982.<sup>43</sup> He also changed the title of the Federal Shariat Court's chairman to chief justice and members to judges.<sup>44</sup>

At present, the Federal Shariat Court consists of five professional judges and three scholar judges, and the shariat appellate bench of the Supreme Court consists of three professional judges and up to two (and usually two) ad hoc scholar judges. The imbalance between the professional and scholar judges can be understood in two ways. First, the five professional judges outnumber the three scholar judges on the Federal Shariat Court, and the three professional judges outnumber the two ad hoc scholar judges on the shariat appellate bench of the Supreme Court.<sup>45</sup> From this perspective, the professional judges can vote as a strategic bloc to prevent the scholar judges from advancing conservative causes. Second, despite being outnumbered, the scholar judges exercise disproportionate influence owing to their religious learning and authority. From this perspective, the scholar judges can vote as a strategic bloc and advance conservative causes if they convince some of the professional judges to join them.

However, the empirical data on dissenting opinions in the Federal Shariat Court and the Supreme Court demonstrates that the imbalance between professional and scholar judges does not matter in the end. If the professional judges determine the outcome, we

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<sup>41</sup> See Knight and Epstein, *The Choices Justices Make*; Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*.

<sup>42</sup> On qualifications of a High Court judge and a Supreme Court judge, see Articles 177 and 193. Zia ensured that the five members would be Muslims. *Constitution (Second Amendment) Order*, 1980 PLD CS 124. Notably, Pakistan has had one Christian chief justice, A. R. Cornelius, and one Hindu acting chief justice, Rana Bhagwandas.

<sup>43</sup> *Constitution (Amendment) Order*, 1981 PLD CS 251; *Constitution (Third Amendment) Order*, 1982 PLD CS 344.

<sup>44</sup> *Constitution (Second Amendment) Order*, 1982 PLD CS 155.

<sup>45</sup> For example, Martin Lau, "Sharia and National Law in Pakistan," in *Sharia Incorporated: A Comparative Overview of the Legal System of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto (Leiden University Press, 2011), 411 (stating, "[i]t must be emphasized that the ulama constitute a numerical minority in both courts, and legally qualified judges the majority.")

would expect the scholar judges to write dissenting opinions, particularly since the scholar judges tend to be remarkably prolific as ‘ulama.<sup>46</sup> We can evaluate the subset of reported cases since the scholar judges have been on the Federal Shariat Court (116 out of 135) and the Supreme Court (34 out of 43) to see the dissent patterns. The scholar judges have dissented only twice on the Federal Shariat Court,<sup>47</sup> and only once on the Supreme Court.<sup>48</sup> In contrast, if the scholar judges determine the outcome, we would expect at least some professional judges to dissent. The professional judges have dissented only twice on the Federal Shariat Court,<sup>49</sup> and only thrice on the Supreme Court.<sup>50</sup>

The data shows that the decisions of the Federal Shariat Court and the Supreme Court are unanimous to a remarkable extent. However, the lack of dissent does not mean jurisprudential agreement among and between the professional and scholar judges. The agreement is a product of two factors. First, as the president managed judicial appointments until 2010, he could reconstitute the Federal Shariat Court in democratic and authoritarian periods, and even the Supreme Court in authoritarian periods. For example, Zia reconstituted the Federal Shariat Court to review the 1981 stoning case, and Musharraf reconstituted the shariat appellate bench of the Supreme Court to review the 1999 riba case. While reconstituting the bench delegitimizes shari‘a review to some extent, having someone among the ‘ulama supporting the regime’s position on the bench at least demonstrates that the ‘ulama are divided on the question.

Second, as the chief justice manages bench formation and case assignment, he can delay the cases that would generate dissent or exclude the judges who would dissent from the bench. Chief Justice Aftab Hussain’s exclusion of the two Hanafi ‘ulama from the bench to uphold the appointment of women as judges illustrates this point. Managing dissent is particularly important since shari‘a review serves the political function of

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<sup>46</sup> To be sure, many shariat cases do not involve questions on which the ‘ulama hold uncompromising positions.

<sup>47</sup> *Muhammad Sadiq Khan v. Federation of Pakistan*, 1983 PLD SC 43, Justice Usmani dissenting; *Islamuddin Asad v. Islamic Republic of Pakistan*, 1983 PLD SC 140, Justice Shah and Justice Ali dissenting.

<sup>48</sup> *Federation of Pakistan v. Mushtaq Ali*, 1992 PLD SC 153, Justice Shah dissenting. In this case, Justice Usmani declared that prize bonds are un-Islamic whereas Justice Shah found that they are not un-Islamic. A prize bond is a government sponsored savings certificate that does not pay interest. However, the government randomly selects “winners” who get cash “prizes.” In this way, the “interest” on the bonds is randomly distributed.

<sup>49</sup> *In re: N.-W.F.P. Provincial Assembly Act of 1988*, 1991 PLD FSC 283, Justice Ibadat Yar Khan dissenting; *Ashfaq Ahmad v. Government of Pakistan*, 1992 PLD FSC 286, Chief Justice Tanzil-ur Rahman dissenting on technical grounds.

<sup>50</sup> *Government of N.-W.F.P. v. Said Kamal Shah*, 1986 PLD SC 360, Justice Shafi-ur-Rehman and Justice Quraishi dissenting; *Pakistan v. Public at Large*, 1987 PLD SC 304, Justice Nasim Hasan Shah dissenting; *Qazalbash Waqf v. Chief Land Commissioner of Punjab*, 1990 PLD SC 99, Justice Shafi-ur-Rehman and Justice Nasim Hasan Shah dissenting.

Islamic legitimacy. If every scholar judge dissents in a case, the opinion of the professional judges upholding or invalidating a law would not enjoy religious credibility. In conclusion, the proceedings are an elaborate and interesting legal theatre, but the placement of the scholar judges on the court by the president and on the bench by the chief justice pre-determines the outcome.

### **3.5 The Political Function of Appeal**

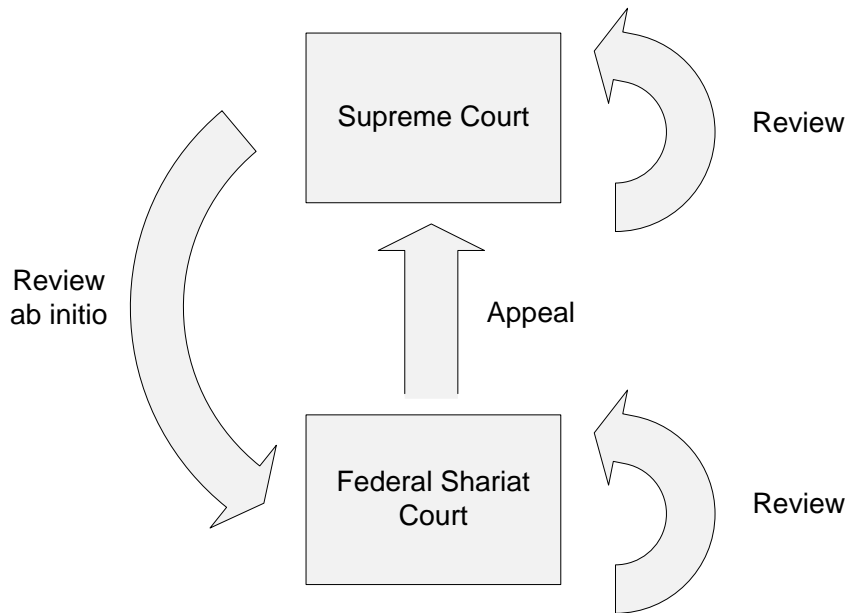
The American model of judicial review works in a hierarchical structure, where courts engage in judicial review at each level. There are two conventional functions of appeal in this context. From an individual rights perspective, appeal gives the loser the benefit of another day in court. From a rule of law perspective, appeal ensures uniformity of law across courts with territorial jurisdiction. But as Martin Shapiro notes, “[a]ppel has flourished in regimes that have displayed little or no respect for individual rights or even for the rule of law in any conventional sense.”<sup>51</sup> Shapiro’s approach to understanding appeal is based on political loyalty and integration. As losers go up the appellate ladder, they place themselves at the mercy of the central government. In this way, appeal enhances the loyalty of citizens to the central power and integrates provinces.

In contrast, the European model of judicial review consists of a separate, federal constitutional court with exclusive jurisdiction over judicial review. The constitutional court is often empowered to engage in concrete as well as abstract review. As the constitutional court at the center has exclusive jurisdiction, the court is not concerned with the errors of lower courts, or ensuring uniformity of laws across jurisdictional territories, or enhancing political integration across provinces. In other words, appeal serves no political function, and is therefore generally absent in European models such as the French Constitutional Council.

Zia’s establishment of shariat benches in the High Courts and the Supreme Court followed the American model. An appeal from a High Court to the Supreme Court could serve the losing party, the uniformity of law, and the center’s authority. But this system survived for less than a year and did not produce much jurisprudence. When Zia consolidated the shariat benches of the four High Courts in the separate Federal Shariat Court with the exclusive original jurisdiction over shari‘a review, the structure became closer to the European-style constitutional courts. However, appeal to the Supreme Court, which served no obvious function in the European model, continued to exist. Instead of using hierarchical appeal, the system embraced vertical appeal (see Figure 8).

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<sup>51</sup> Martin Shapiro, "Appeal," *Law and Society Review* 14, no. 3 (1980): 631; see also Shapiro, *Courts: A Comparative and Political Analysis*, 49-56.



**Figure 8. The Appellate Structure of Islamic Judicial Review**

Zia also granted review jurisdiction to the Federal Shariat Court in 1982, i.e. allowing the Court to reconsider and overturn its own decisions. While the Supreme Court and the High Courts also have review jurisdiction, the standard for review is “error apparent on the face of the record.” In other words, review in High Courts and the Supreme Court is meant to address glaring errors of fact. In practice, however, the High Courts and the Supreme Court review matters of law as well. But review in the Federal Shariat Court was designed to reconsider matters of law, i.e. judicial review based on the Qur’an and sunna.

As the Supreme Court already had review jurisdiction under Article 188, the shariat appellate bench also asserted review jurisdiction in 1990 as a bench of the Supreme Court.<sup>52</sup> Now the Supreme Court could reconsider a case after already deciding the case once on appeal from the Federal Shariat Court. Furthermore, the Supreme Court was not bound to resolve the matters of law in a case upon appeal or review. The Court could decide the entire matter or send the case back to Federal Shariat Court for reconsideration with some basic guidance.<sup>53</sup>

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<sup>52</sup> *In re: Suo Motu Shariat Review Petition No. 1-R of 1989*, 1990 PLD SC 865; see also Lau, *The Role of Islam in the Legal System of Pakistan*, 166-168.

<sup>53</sup> The system uses the term “remand” to describe the process. However, I use “review ab initio,” since remand generally means reconsideration of the facts by the trial court based on guidance on matters of law or procedure from the appellate court. In the case of shari’a review, the case is “remanded” for reconsideration on matters of law since there are no facts belonging to a case or controversy at issue.

Together the system of vertical appeal and review becomes rather circular (see Figure 8). So what is the function of appeal in shari‘a review? The ruling regime uses appeal for political control over the outcome in shari‘a review. But since a regime already has considerable political control over the outcome through judicial appointments, there are two circumstances in which appeal remains useful. First, if the ruling regime miscalculates the court, the regime can reconstitute the bench and file an appeal or review petition to get a favorable outcome. Second, when the ruling regime changes, the successor regime can use appeal to reconsider or suspend a judgment. While this structure of successor review has roots in post-colonial judicial structures, the structure can be compared to successor review in Islamic legal history as well.

As David Powers has described, a successor qadi reserved the power to reopen cases upon the death or removal of his predecessor in certain periods in Muslim history.<sup>54</sup> While a qadi’s decisions were binding on the parties, his decisions were not binding as precedents. Therefore, a qadi did not perform the lawmaking function of judicial review. Nevertheless, we can see parallels between a qadi and a judge as political decision-makers. A successor Federal Shariat Court or Supreme Court bench reserves the power to reopen shariat cases.

The classic illustration of this appellate process is the *riba* case – about the judicial review of interest provisions in banking, finance, insurance, and fiscal laws (see chapters 5 and 6). The Federal Shariat Court under Chief Justice Rahman decided the case in 1991 by declaring conventional finance and banking un-Islamic, but the case went up to the Supreme Court on appeal in 1992, where it was not touched for 5 years.<sup>55</sup> When the Supreme Court under Chief Justice Shah heard the appeal in 1997, the Sharif government filed a review petition in the Federal Shariat Court then under Chief Justice Mian Mehboob Ahmed. However, the Federal Shariat Court dismissed the review petition.<sup>56</sup> In the meantime, Chief Justice Shah was forced out of the Supreme Court, and the case remained unresolved. Finally, the Supreme Court under Chief Justice Siddiqui decided the appeal in December 1999, affirming the Federal Shariat Court judgment, at a moment when General Pervez Musharraf was consolidating his power after his October 1999 coup.<sup>57</sup> Once the Musharraf regime was relatively stable, Chief Justice Siddiqui was forced out of the Supreme Court in early 2000. In 2002, when the shariat appellate bench of the Supreme Court refused an extension for the implementation of the 1999 decision,

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<sup>54</sup> David S. Powers, "On Judicial Review in Islamic Law," *Law & Society Review* 26, no. 2 (1992); see also Muhammad Khalid Masud, Brinkley Messick, and David S. Powers, "Muftis, Fatwas, and Islamic Legal Interpretation," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (Karachi, Pakistan: Oxford University Press, 2005).

<sup>55</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1.

<sup>56</sup> I have been unable to find a record of this petition in the Federal Shariat Court’s decided petitions dataset. Nevertheless, Charles Kennedy provides the following description: *Government of Pakistan v. Mahmood-ur-Rahman Faisal*, Shariat Review Petition, June 30, 1997.

<sup>57</sup> *Aslam Khaki v. Syed Muhammad Hashim*, 2000 PLD SC 225.

Musharraf replaced the ‘ulama on the shariat appellate bench and then Chief Justice Sheikh Riaz Ahmed immediately formed a new shariat appellate bench to hear a review petition in the riba case. The reconstituted shariat appellate bench of the Supreme Court set-aside its 1999 judgment, but instead of resolving the matter, sent the case to the Federal Shariat Court for fresh reconsideration.<sup>58</sup> The case remains in the Federal Shariat Court as of this writing. To sum up, there have been four judgments in the case but the case is still pending in the Federal Shariat Court after more than two decades.

#### 4. Conclusion

This chapter makes two arguments. First, the origin and institutional design of the Federal Shariat Court and the shariat appellate bench of the Supreme Court can be traced to the regime’s evolving concern for legitimacy – legal, democratic, and religious – between 1978 and 1980. In making choices about the institutional design, the regime balanced the interests of the ‘ulama and the judiciary based on what each class could offer the regime. Second, due to the structure of British colonial courts, I argue that shari‘a review is unable not bind the ruling regime – at least not for long. In particular, the office of the chief justice that controls bench formation and case assignment also manages the nature and direction of shari‘a review in the Federal Shariat Court and the Supreme Court. Grasping the role of a chief justice and his relationship to the regime helps us in understanding the scope of shari‘a review, judicial appointments and tenure, the voting behavior of professional and scholar judges, and the function of appeal. In fact, these factors show a huge redundancy in the political regime’s capacity to control shari‘a review.

While this chapter is based on shari‘a review in Pakistan, the analysis contributes to studies of judicial structures in the British post-colonies in general. From India to Israel, the chief justice plays an important role in bench formation and case assignment. Focusing on how this power is used can generate important insights into judicial decision-making. Moreover, this chapter invites scholars of Arab constitutional courts to study shari‘a review in the context of regime politics. From Iraq to Egypt, there is often a tension between the legal profession and the ‘ulama over the interpretation of shari‘a. Understanding how judges, ‘ulama, and the political regime interact with each other, even when the ‘ulama are not on the bench, can help explain the trajectory of shari‘a review. To conclude, the case of Pakistan confirms what public law scholars would predict, but is often ignored in the scholarship on shari‘a in the contemporary context: outcomes in shari‘a review cases are products of the political process and regime politics, instead of an inherently conservative or an inherently liberal nature of a reified shari‘a. To illustrate this point, I undertake historical-interpretive analysis of cases in the Federal Shariat Court and the Supreme Court in the next four chapters.

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<sup>58</sup> *United Bank Ltd. v. Farooq Brothers*, 2002 PLD SC 800.

## Chapter 3.

### Rethinking Tradition: Judicial Review of the Zina Ordinance

#### 1. Introduction

In this chapter, I embark on my first historical-interpretive case study of shari‘a review. In an effort to legitimize his rule based on Islam, General Muhammad Zia ul-Haq enacted the Zina Ordinance in 1979, consisting of punishments for unlawful sex including stoning (rajm). He also created the Federal Shariat Court in 1980, with the power of judicial review based on the Qur‘an and sunna (shari‘a review). However, the Federal Shariat Court declared the stoning provisions of the Zina Ordinance un-Islamic in the 1981 case, *Hazoor Bakhsh v. Federation of Pakistan*. The case is one of the most significant legal and political moments in the history of the Federal Shariat Court, culminating in the unprecedented appointment of ‘ulama to the Federal Shariat Court and the Supreme Court. More than a dozen scholars including historians, anthropologists, Islamicists, and political scientists have noted the importance of the episode, but none have explored its legal and political dimensions in-depth.<sup>1</sup>

This chapter answers two questions arising from the shari‘a review of the Zina Ordinance. First, why would a religious court established by an authoritarian regime hold provisions of the regime’s signature religious law unconstitutional? In his seminal work on the Supreme Court and national policymaking in the United States, the late Robert Dahl argued that the process of judicial appointments ensures that the Supreme Court rarely invalidates laws when the enacting president and/or Congress are in power.<sup>2</sup> Since the process of judicial appointments in the Federal Shariat Court was under Zia’s control,

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<sup>1</sup> Lucy Carroll, "Nizam-i-Islam: Processes and Conflicts in Pakistan's Programme of Islamisation, with Special Reference to the Position of Women," *Journal of Commonwealth and Comparative Politics* 20, no. 1 (1982): 71-73; Rashida Patel, *Islamisation of Laws in Pakistan?* (Karachi, Pakistan: Faiza Publishers, 1986), 116-119; Mohammad Amin, *Islamization of Laws in Pakistan* (Lahore, Pakistan: Sang-e-Meel 1989), 74; Ann Elizabeth Mayer, "Islam and the State," *Cardozo Law Review* 12 (1990-1991): 1045; Rubya Mehdi, *The Islamization of the Law in Pakistan* (Surrey, U.K.: Curzon Press, 1994), 118; Daniel W. Brown, *Rethinking Tradition in Modern Islamic Thought* (New York, NY: Cambridge University Press, 1996), 136-138; Ian Talbot, *Pakistan: A Modern History* (London, U.K.: Hurst & Company, 1998), 273-274; Chris Jones-Pauly, "Use of the Qur‘an in Key Pakistani Court Decisions on Zinā‘ and Qaḍf," *Arabica* 47, no. 3 (2000): 540-546; Asma Jahangir and Hina Jilani, *The Hudood Ordinance: A Divine Sanction?* (Lahore, Pakistan: Sang-e-Meel Publications, 2003), 25-30; Rudolph Peters, *Crime and Punishment in Islamic Law: Theory and Practice from the Sixteenth to the Twenty-First Century* (Cambridge, U.K.: Cambridge University Press, 2005), 159; Lau, *The Role of Islam in the Legal System of Pakistan*, 148, 166; Khan, *Constitutional and Political History of Pakistan*, 355; Elisa Giunchi, "The Reinvention of Shari‘a under the British Raj: In Search of Authenticity and Certainty," *The Journal of Asian Studies* 69, no. 4 (2010): 1136; Moeen H. Cheema, "Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Laws," *American Journal of Comparative Law* LX, no. 4 (2012): 880-881.

<sup>2</sup> Dahl, "Decision Making in a Democracy: The Supreme Court as a National Policymaker." Dahl argued when the Supreme Court invalidates laws older than four years, the Court overturns the will of "dead majorities." To the extent that shari‘a review was meant to invalidate colonial laws, the purpose was to overturn the will of dead majorities.

how can we explain the invalidation of provisions of the Zina Ordinance when the Zia regime was still in power? This chapter shows that the grounds for declaring stoning un-Islamic in *Hazoor Bakhsh* emerged from certain 20th-century Islamic intellectual movements that characterized the regime's internal struggle over defining and codifying shari'a.

Second, how do postcolonial judges articulate shari'a in an era marked by a crisis of religious authority? The encounter of Muslim societies with modernity through the mediating power of colonialism has transformed the relationship between shari'a, fiqh, and madhhab. As a result, the social and intellectual bases of shari'a are being redefined since at least the 20th century. But as fiqh rules are marginalized as historical and dated, modern states have to articulate a new body of legal rules and an interpretive framework to defend these rules as Islamic. This chapter shows that the Federal Shariat Court judges drew upon a range of religious trends emerging in Egypt and Pakistan that questioned the legal authority, historical authenticity, and canonical interpretations of the hadith literature to declare that stoning is un-Islamic.

The chapter is organized as follows. Section 2 provides a drafting history of the Hudud Ordinances and explains the basic features of the Zina Ordinance. The drafting history emphasizes the contributions of the judges and the 'ulama who would later play an important role in the judicial construction of the Ordinance. Section 3 introduces the 20th-century Islamic intellectual movements that questioned the basis of stoning in shari'a, and places them in the legal and political context of the Zia regime. Section 4 focuses on the challenge to the stoning provision of the Zina Ordinance in the Federal Shariat Court. I provide a biographical note on each judge focusing on his relationship to the regime's Islamization project. Then, based on a doctrinal exposition of the four concurring opinions, I show how the judges drew upon strands of Islamic jurisprudence inside the regime's Islamization project. Section 5 analyzes the authority of the Federal Shariat Court judges in interpreting the Qur'an and sunna. Section 6 argues that the absence of an immediate political backlash against the Court affirms that *Hazoor Bakhsh* represented the regime's internal struggles.

## **2. Political and Legal Context**

In 1977, the elected prime minister, Zulfikar Ali Bhutto, founding leader of the Pakistan Peoples Party (PPP), called for early elections to renew his mandate. To compete against the ruling PPP, the opposition parties formed an electoral coalition called the Pakistan National Alliance (PNA). The PNA consisted of nine political parties from the religious right to the secular left under the leadership of the three religio-political parties: the JUI, the JUP, and the Jama'at.<sup>3</sup> The PNA campaigned under the

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<sup>3</sup> In 1977, Mufti Mahmud was leading the JUI, Shah Ahmad Noorani was leading the JUP, and Mian Tufail Muhammad was leading the Jama'at.

neologistic banner of Nizam-i Mustafa (the Prophet's system).<sup>4</sup> When the PPP won 155 out of 200 seats (excluding the reserved seats), the PNA accused the government of rigging the election and started a protest campaign. Bhutto's government cracked down on the protests while also negotiating with the PNA. In this context, on July 4, 1977, Zia took power in a coup, suspending the Constitution and imposing martial law.

## 2.1 Drafting the Hudud Ordinances in the Council of Islamic Ideology

After taking power, Zia drew upon the Nizam-i Mustafa banner to extend his rule. He reconstituted the Council of Islamic Ideology – an advisory body – on September 26, 1977, and entrusted the Council to produce a blueprint for the Islamization of laws and society.<sup>5</sup> The Council formed a committee to Islamize the law, starting with the introduction of hudud (s. hadd) – a category of crimes and punishments in fiqh literature. The committee consisted of three 'ulama, namely Muhammad Taqi Usmani, Muhammad Karam Shah, and Mahmood Ahmad Ghazi, each of whom would serve as a jurisconsult as well as a scholar judge on the Federal Shariat Court and defend the stoning provisions of the Zina Ordinance. The committee also included four constitutional lawyers and three judges, notably Justice Salahuddin Ahmed, a retired judge of the Supreme Court who would serve as the chairman of the Federal Shariat Court and invalidate the stoning provisions of the Zina Ordinance.<sup>6</sup> The committee also invited Mustafa al-Zarqa (1904-99), a Syrian professor of fiqh and French law, counted among the leading Arab 'ulama and notable for his support for ijthad.<sup>7</sup> His position against stoning as a hadd, expressed

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<sup>4</sup> There were several efforts to define the term. See, e.g. Muhammad Tahir-ul-Qadri, *Nizām-i Muṣṭafā: Ayk Īmān Afrōz Iṣṭilāḥ* (Lahore, Pakistan: Minhaj-ul-Quran Publications, 1977); Asad Gilani, *Nizām-i Muṣṭafā* (Lahore, Pakistan: Maktaba-i Ta'mīr-i Fikr, 1977).

<sup>5</sup> Zia appointed two former judges, two lawyers, and eleven 'ulama, and to the Council of Islamic Ideology, namely Justice Muhammad Afzal Cheema, Justice Salahuddin Ahmad, A. K. Brohi, Khalid M. Ishaque, Mawlana Muhammad Yusuf Banuri, Khwaja Qamaruddin, Mufti Sayahuddin Kakakhel, Mufti Muhammad Husain Na'imi, Mawlana Zafar Ahmad Ansari, Mawlana Muhammad Taqi Usmani, Mufti Ja'far Husayn Mujtahid, Mawlana Muhammad Hanif Nadwi, Dr. Ziauddin Ahmad, Tajammul Husayn Hashimi, S. M. A. Ashraf, I. A. Imtiaz, Mawlana Shamsul Haq Afghani, Allama Sayyid Muhammad Razi, and Dr. Khawar Khan Chishti. See Council of Islamic Ideology, "Report on Hudood Ordinance," (Islamabad, Pakistan: Council of Islamic Ideology, 2006), 11.

<sup>6</sup> The constitutional lawyers included Zafar Ahmad Ansari, Khalid M. Ishaque, Sharifuddin Pirzada, and A. K. Brohi, and the judges included K. Samdani and Afzal Cheema. See Abdur Rehman, "Hudood's Ordeal (1979-2006)," *Critic Magazine*, no. 1 (2008): 45.

<sup>7</sup> Mustafa al-Zarqa was famous for stating that "commitment to a school of law is a dark and narrow prison in the expansive heaven of shari'a." Majd Ahmad Makkī, ed. *Fatāwā Muṣṭafā al-Zarqā*, 4th ed. (Damascus, Syria: Dār al-Qalam, 2010), 47. He made several visits to Pakistan to participate in the drafting process. See Ghazi, "Islām kā Fawjdārī Qānūn: Ifṭitāḥī Khiṭāb," 17-22. On al-Zarqa, see 'Abd al-Nāṣir Abū al-Baṣāl, *Muṣṭafā Aḥmad al-Zarqā: Faqīh al-'Aṣr wa Shaykh al-Ḥuqūqīyyīn*, 'Ulamā wa Mufakkirūn Mu'āṣirūn (Damascus, Syria: Dār al-Qalam, 2010). The committee also invited Ma'ruf al-Dawalibi (1907-2004), a former Syrian prime minister and legal adviser to Saudi kings during his exile after the Ba'ath coup. On al-Dawalibi, see 'Abd al-Qaddūs Abū Ṣāliḥ and Muḥammad 'Alī Hāshimī, *Mudhakkirāt al-Duktūr Ma'ruf al-Dawālībī* (Riyadh, Saudi Arabia: Maktabat al-'Ubaykān, 2005).

in 1972 while drafting the hudud code in Libya, would be used as one of the rationales to invalidate the stoning provisions in the Federal Shariat Court.

Introducing fiqh in colonial legal structures produced some challenges. After independence, the Indian Penal Code of 1860, drafted by Lord Thomas Macaulay (1800-59) juxtaposing Victorian morality and Bentham's philosophy, served as the Pakistan Penal Code.<sup>8</sup> According to accounts of the committee's debates, the drafters considered three structural questions in introducing fiqh.<sup>9</sup> First, whether fiqh should be converted into a penal code or whether shari'a should be declared the source of penal law, empowering the postcolonial judges to draw from fiqh in the same way the pre-colonial qadis drew from fiqh.<sup>10</sup> Second, whether the penal code should amend Macaulay's Code or whether hudud should be enacted as a parallel Islamic penal code after voiding the corresponding provisions of Macaulay's Code.<sup>11</sup> Third, whether the Islamic penal code should consist of the basic rules of fiqh and leave their elaboration to judges, or whether the code should include an elaborate commentary based on the cases and exceptions found in the fiqh literature.<sup>12</sup> In the end, the drafters decided to introduce a code, parallel to Macaulay's Code, based on basic rules of fiqh leaving their elaboration up to the courts. Whether, and to what extent, the Council debated the inclusion of the stoning provisions is not found in the sources used in this project, but in the end, the Zina Ordinance included the provisions.<sup>13</sup>

The code was drafted in Arabic and then translated into English.<sup>14</sup> On February 10, 1979, corresponding to Rabi' al-Awwal 12, 1399, celebrated as the Prophet's birthday

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<sup>8</sup> The Indian Penal Code was enacted in 1860, was supposed to come into effect in 1861, but actually came into effect in 1862. David Skuy, "Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century," *Modern Asian Studies* 32, no. 3 (1998): 518, footnote 18. On the intellectual influences on Macaulay's Code, see Thomas R. Metcalf, *Imperial Connections: India in the Indian Ocean Arena, 1860-1920* (Berkeley, CA: University of California Press, 2007), 18-20.

<sup>9</sup> Ghazi, "Islām kā Fawjdārī Qānūn: Ifitāhī Khiṭāb," 20-23.

<sup>10</sup> Tanzil-ur Rahman, Muhammad Taqi Usmani, and Badi-uz-Zaman Kaikaus wanted to declare shari'a as the law and empower judges to draw upon the fiqh literature, whereas Afzal Cheema, Salahuddin Ahmed, Muhammad Karam Shah, and A. K. Brohi wanted to introduce a penal code based on fiqh. See Usmani, *Nifādh-i Sharī'at awr us kay Masā'il*, 49-69.

<sup>11</sup> Aftab Hussain, Tanzil-ur Rahman, and A. K. Brohi wanted to amend Macaulay's Code, whereas others wanted to introduce a parallel Islamic penal code. See Tanzil-ur-Rahman, *Islamization of Pakistan Law*.

<sup>12</sup> An enduring objection to the hudud laws has been that they were enacted without deliberation. The drafting history, however, indicates that there was at least some level of deliberation. The real issue is who participated in that deliberation. While Zia included several judges and lawyers in the process, the more liberal judges and lawyers were excluded.

<sup>13</sup> This record may be available in the official records of the Council of Islamic Ideology in Islamabad, Pakistan.

<sup>14</sup> Council of Islamic Ideology, "Report on Hudood Ordinance," 13.

in the Islamic calendar, Zia issued the code as four ordinances: Offense of Zina (Enforcement of Hudood) Ordinance,<sup>15</sup> Offense of Qazf (Enforcement of Hadd) Ordinance,<sup>16</sup> Prohibition (Enforcement of Hadd) Order,<sup>17</sup> and Offenses against Property (Enforcement of Hudood) Ordinance.<sup>18</sup> These ordinances are collectively called the Hudud Ordinances. The focus of this chapter is the judicial politics over the Offense of Zina (Enforcement of Hudood) Ordinance (henceforth the Zina Ordinance).

## 2.2 The Zina Ordinance

Prior to the Zina Ordinance, section 375 of Macaulay's Code made rape punishable by imprisonment for up to ten years and a fine, and section 497 made adultery punishable by imprisonment for up to five years or a fine or both.<sup>19</sup> The Zina Ordinance repealed the two sections in Macaulay's Code, and included zina and rape (*zinā bi'l-jabr*) in the Ordinance.<sup>20</sup> The act of zina was defined as willful sexual intercourse in the absence of a valid marriage.<sup>21</sup> The act of rape was defined as sexual intercourse against the will, without the consent, in fear of death or hurt, or under false pretenses of marriage.<sup>22</sup>

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<sup>15</sup> *Offence of Zina (Enforcement Of Hudood) Ordinance*, 1979 PLD CS 51.

<sup>16</sup> *Offence of Qazf (Enforcement Of Hadd) Ordinance*, 1979 PLD CS 56.

<sup>17</sup> *Prohibition Order*, 1979 PLD CS 33.

<sup>18</sup> *Offences against Property (Enforcement of Hudood) Ordinance*, 1979 PLD CS 44.

<sup>19</sup> Macaulay's Code allowed only for the prosecution of the man (not the woman) based only on a complaint by the woman's husband. W. Morgan and A. G. Macpherson, eds., *The Indian Penal Code (Act XLV of 1860) with Notes* (Calcutta, India: G. C. Hay & Co., 1861), 437-438. (On the absence of punishment for the wife, the Indian Law Commissioners, balancing their civilizing mission based on Victorian mores with the Orientalist gaze, observed: "Though we well know that the dearest interests of the human race are closely connected with the chastity of women, and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state or society in this country, which may well lead a humane man to pause, before he determines to punish the infidelity of wives. The condition of the women of this country is unhappily very different from that of the women of England and France. They are married while still children. They are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course which we are most reluctant to adopt.")

<sup>20</sup> *Offence of Zina (Enforcement Of Hudood) Ordinance*, 1979 PLD CS 51, §19 (repealing §375 and §497 of Macaulay's Code). The Zina Ordinance also defined the following crimes: kidnapping, abducting or inducing women to compel for marriage (§11), kidnapping or abducting on order to subject person to unnatural lust (§12), selling or buying a person for purposes of prostitution (§13-14), cohabiting caused by a man deceitfully inducing a belief of lawful marriage (§15), enticing or taking away or detaining with criminal intent a woman (§16). See *ibid.*

<sup>21</sup> *Ibid.*, §4.

<sup>22</sup> *Ibid.*, §6.

Based on fiqh literature, the Zina Ordinance made a distinction between hadd punishments and ta‘zir punishments.<sup>23</sup> The offenses of zina and rape were subject to hadd punishments when either the accused confessed before a court, or four Muslim adult male witnesses gave evidence as eye witnesses to the act of penetration.<sup>24</sup> The eye witnesses were subject to impeachment (tazkiya al-shuhūd) to establish that they are truthful persons and abstain from major sins. When neither burden of proof was met, zina and rape were subject to ta‘zir punishments based on circumstantial evidence.

Furthermore, the hadd punishments made a distinction between a muhsan and a non-muhsan offender in a manner consistent with the Sunni doctrine. A muhsan was defined as a Muslim man or woman who had consummated a marriage (i.e. enjoyed lawful sexual intercourse), whether married, divorced, or widowed, at the time of the commission of the offense, while a non-muhsan was defined as a Muslim who had never consummated a marriage.<sup>25</sup> The hadd punishment for a muhsan committing either zina or rape was stoning to death at a public place.<sup>26</sup> The hadd punishment for a non-muhsan committing zina was 100 stripes at a public place.<sup>27</sup> And the hadd punishment for a non-muhsan committing rape was 100 stripes at a public place and any other punishment including death at the court’s discretion.<sup>28</sup> The ta‘zir punishments did not make any distinction between a muhsan and a non-muhsan. The ta‘zir punishment for a person committing zina was 30 stripes and imprisonment for four to ten years.<sup>29</sup> And the ta‘zir punishment for a person committing rape was 30 stripes and imprisonment for up to 25 years.<sup>30</sup>

### 3. 20th-Century Debates on Stoning

While the details of hadd punishments in the Zina Ordinance were based on the Hanafi doctrine, the whole notion of hadd punishments in general and stoning in particular was undergoing contestation in the 20th-century. In order to place *Hazoor Bakhsh* in perspective, this section describes the movements that questioned stoning,

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<sup>23</sup> The next subsection elaborates the concepts of hadd and ta‘zir.

<sup>24</sup> *Offence of Zina (Enforcement Of Hudood) Ordinance*, 1979 PLD CS 51, §8.

<sup>25</sup> To be precise, the Zina Ordinance defines muḥṣan as a “Muslim adult man [or woman] who is not insane and has had sexual intercourse with a Muslim adult who, at the time he [or she] had sexual intercourse with her [or him], was married to him [or her] and was not insane[.]” The concepts of muhsan and non-muhsan do not correspond to married (subject to adultery) and unmarried (subject to fornication) in English.

<sup>26</sup> *Offence of Zina (Enforcement Of Hudood) Ordinance*, 1979 PLD CS 51, §5(2)(a), §6(3)(a).

<sup>27</sup> *Ibid.*, §5(2)(b).

<sup>28</sup> *Ibid.*, §6(3)(b).

<sup>29</sup> *Ibid.*, §10(2).

<sup>30</sup> *Ibid.*, §10(3). The ta‘zir punishments were not awarded when the punishment of false accusation (qadhf) had been awarded to the complainant. *Ibid.*, §10.

focusing on their doctrinal positions as well as their political influence under the Zia regime. I show how the reconsideration of stoning was based on deeper questions about the sources of shari‘a and the very nature of Islam as a religion. The themes developed in this section explain the debate over stoning in Federal Shariat Court in the next section.

The premodern jurists defined hadd (pl. hudud) punishments as a category of punishments in the penal law of Islam for certain offenses such as theft, zina, false accusation of zina, and drinking. According to the jurists, the hadd offenses, standards of proof, and punishments were fixed by God and a Muslim ruler was bound to enforce them. The punishments were severe, but the standards of proof were also extremely high, making convictions rare.<sup>31</sup> Therefore, the jurists developed a broader category of discretionary punishments called ta‘zir with lower standards of proof. A qadi appointed by a Muslim ruler could punish any unlawful act under the category of ta‘zir, including an act covered under hadd offenses, based on circumstantial evidence. The ta‘zir punishments were based on the qadi’s or the ruler’s discretion, who could even forego punishment based on the circumstances.

While there is a dearth of systematic studies of courts in precolonial India, we know that Muslim rulers routinely appointed qadis who enforced shari‘a, including its penal law, based on the Hanafi school.<sup>32</sup> After obtaining administrative control of Bengal in 1764, the East India Company appointed English judges who enforced shari‘a based on the advice of qadis.<sup>33</sup> However, Company regulations transformed the penal law of shari‘a beyond recognition by 1807, including abolishing punishments such as amputation and stoning.<sup>34</sup> After the war of resistance of 1857, the last Mughal emperor was deposed and the British dominion over India was complete. In 1860, the English parliament enacted the Indian Penal Code that was enforced in 1862 across the regions under direct rule.

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<sup>31</sup> In premodern fiqh, the standard of proof for hadd punishment for zina was repeated uncoerced confessions or four male adult witnesses with unimpeachable character and religious observance who have seen the penetration at the same time. But the Maliki school also included unwed pregnancy as an acceptable prima facie proof of zina, shifting the burden to the accused pregnant woman to prove her innocence. In order to avoid unfair prosecutions in this context, the Malikis allowed the accused pregnant woman to raise the so called sleeping fetus defense, attributing the pregnancy to her husband or ex-husband, based on a gestation period of up to seven years. If the accused pregnant woman was a maiden, she could not raise the sleeping fetus defense. But she could raise the unexplained pregnancy defense, claiming that some unknown person may have engaged in sexual intercourse with her while she was in deep sleep or she may have become pregnant by coming in contact with sperm at a public bath. (I am particularly thankful to Asifa Quraishi-Landes for clarifying my understanding on this point.)

<sup>32</sup> Noor Ahmed Shahtaz, *Tārīkh-i Nifādh-i Hudūd* (Karachi, Pakistan: Fazli Sons, 1998), 242-275.

<sup>33</sup> Peters, *Crime and Punishment in Islamic Law*, 109-119.

<sup>34</sup> See James Edward Colebrooke, ed. *Digest of the Regulations and Laws, Enacted by the Governor-General in Council for the Civil Government of the Territories under the Presidency of Bengal*, 2 vols. (Calcutta: n.p., 1807).

In the post-colonial “age of codification,” most Muslim countries including Pakistan did not enact hudud (s. hadd) codes. The modernizing social sensibilities disfavored corporal punishments in general, and stoning in particular. But the absence of hudud codes posed a challenge to the claim of Islamic legitimacy of the modern states. Therefore, in debates over hudud, some Sunnis questioned the status of stoning as a hadd punishment, and argued that stoning is a ta‘zir punishment. If stoning could be recategorized as a ta‘zir punishment, then a hudud code could exclude stoning since ta‘zir punishments were discretionary, thereby making stoning a historical punishment that is no longer enforced. The ensuing subsections describe how the people and ideas associated with these movements emerged in South Asia or traveled across the geographic barrier between North Africa (Egypt, Libya) and South Asia (Pakistan), and the linguistic barrier between Arabic and Urdu.

### 3.1 Between Taqlid and Ijtihad: Abu Zahra and al-Zarqa

When the early 20th-century Salafi scholars used ijithad to reinterpret the corpus of shari‘a, they also examined aspects of hudud.<sup>35</sup> The Syro-Egyptian jurist Rashid Rida (1865-1935) disagreed with the concept of muhsan in Sunni law as a person who has enjoyed lawful sexual intercourse at least once, whether married, divorced, or widowed at the time of the zina. He redefined muhsan closer to the Shi‘a doctrine as a person who could enjoy lawful sexual intercourse at the time of the zina, i.e. a married person. While Rida did not challenge the status of stoning as a hadd, his student Mahmud Shaltut (1893-1963), who became the grand imam of the Azhar, reportedly considered stoning as a ta‘zir.<sup>36</sup>

Whether stoning must be categorized as a hadd or a ta‘zir was debated in 1954 in Egypt between a certain Professor Kamil al-Banna and the noted Cairo University professor and Hanafi jurist Muhammad Abu Zahra (1898-1974) at a conference organized by the journal *Liwa al-Islam*.<sup>37</sup> al-Banna argued that the Qur’an provides the punishment of whipping in general terms, regardless of any distinction between muhsans and non-muhsans. So what were the grounds for qualifying (takhṣīṣ) the Qur’an’s general command? Abu Zahra answered within the framework of taqlid, i.e. adherence to the doctrine of the schools of law. First, since the source of stoning was the sunna, Abu Zahra articulated the relationship between the Qur’an and sunna in Sunni principles of

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<sup>35</sup> The Salafi movement emerged in Egypt in the late 19th-century under the intellectual leadership of Jamal al-Din al-Afghani (1838-1897), Muhammad Abduh (1849-1905), and Rashid Rida (1865-1935). The Salafis stood against the doctrine of taqlid and claimed the mantle of ijithad. They considered that Muslim political decline was the product of intellectual ossification and argued that an unadulterated and rational approach to the Qur’an and sunna would produce an Islamic renaissance.

<sup>36</sup> Makkī, *Fatāwā Muṣṭafā al-Zarqā*, 394. Al-Zarqā attributes the position to Shaltūt, but admits that he is not sure if he heard this from Shaltūt or read this about him or may have read somewhere.

<sup>37</sup> Muḥammad ‘Uthmān Shubayr, ed. *Fatāwā al-Shaykh Muḥammad Abū Zahra*, 2nd ed. (Damascus, Syria: Dār al-Qalam, 2010), 670-674. As a jurist, Abu Zahra identified with the Hanafi school, though he also gave fatwas based on other Sunni schools. *Ibid.*, 64.

interpretation. He stated that the Sunni jurists agree that a sunna can qualify the Qur'an's general command if the sunna is recurrent or widespread.<sup>38</sup> Abu Zahra elaborated a semantic distinction made by the Hanafis: when the qualifying sunna is contemporaneous to the qualified Qur'anic verse, Hanafis consider the qualification as an explanation (*bayān*), and when it is subsequent to the verse, they consider it as an abrogation. He then emphasized that the Shafi'is, Malikis, and Hanbalis consider such a sunna as an explanation either way. However, if the sunna is based on solitary reports, Abu Zahra explained, Shafi'is and Hanbalis accept the sunna as an explanation, Malikis accept the sunna as an explanation if it accords with the practice in 8th-century Medina, but the Hanafis do not accept such a qualifying report as sunna.

Next, Abu Zahra explained the issue of stoning based on the above framework. He argued that while some Kharijis (a 7th-century sect) rejected stoning, the Sunni jurists agree that stoning is an established rule in Islam. The matter is simple, he explained, for Shafi'is, Malikis, and Hanbalis, who allow Qur'an's qualification even with solitary reports on sunna. But the matter is complex, he noted, for Hanafis who do not allow such qualification. Without completely explaining how Hanafis explain stoning, Abu Zahra appealed to the authority of the tradition, stating that he is unable to stand across the consensus of the earliest Sunni jurists, who had the reports of the Prophet's companions among them on stoning as a hadd, and declare that stoning is not a hadd but a matter based on policy (*siyāsa*). He stated that those who say that stoning is a matter of policy in fact "are the ones who placed the matter of stoning where they intended to lock it up."<sup>39</sup> In other words, Abu Zahra perceptively observed that the effort behind the argument for stoning as a *ta'zir* is to end stoning in the modern context.

Lastly, Abu Zahra questioned al-Banna's employment of the principle that "hudud are not established except through arguments from definitively authentic sources" to argue against stoning.<sup>40</sup> He noted that this principle has been developed by the Hanafi, Maliki, Shafi'i, and Hanbali jurists (*'ulamā al-uṣūl*) who agree that the hadd of stoning exists alongside the hadd of stripes. How can we, Abu Zahra asked, take one position from them but ignore the other? He concluded that if the early jurists held the principle that the hudud come from definitively authentic sources, then for them to agree upon stoning as a hadd means that they considered its sources definitively authentic. However, Abu Zahra emphasized that stoning is a hypothetical problem since none of the Islamic countries implement the hadd for zina.<sup>41</sup> Abu Zahra explained the basis of stoning as a hadd again in his 1963 collection of lectures "The Philosophy of Punishment in

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<sup>38</sup> For the concepts of recurrent, widespread, and solitary, see chapter 1, subsection on "Early Developments in Islam."

<sup>39</sup> Shubayr, *Fatāwā al-Shaykh Muḥammad Abū Zahra*, 673. Stating "yakūnūn qad dakhalū bāb al-rajm min ḥayth arādū an yaghluqūh."

<sup>40</sup> *Ibid.*, 674. Stating "al-ḥudūd lā tuthbit illā bi'l-adilla al-qaṭ'iyya."

<sup>41</sup> I am not sure why Abu Zahra did not consider Saudi Arabia as a country that continued to implement hudud.

Islamic Jurisprudence” (*Falsafa al-‘Uqūba fī al-Fiqh al-Islāmī*).<sup>42</sup> However, Abu Zahra would publically reverse his position in 1972, perhaps due to his anxiety over stoning as well as the complexity of reconciling the hadiths on stoning under the Hanafi principles of interpretation.

When Mu‘ammar al-Gaddafi (r. 1969-2011) came to power in Libya, he declared his plans to implement a hudud code, giving the debate over stoning a practical dimension. He tasked the chief justice of Egypt’s Supreme Administrative Court, ‘Ali ‘Ali Mansur, to convene a conference on Islamic lawmaking. In the conference, the Syrian jurist al-Zarqa expressed his opinion that stoning is a ta‘zir, attributing the position to his teacher Shaltut.<sup>43</sup> However, instead of defending stoning based on the doctrine of taqlid once again, Abu Zahra gave an entirely unexpected paper. Yusuf al-Qaradawi describes the event in his autobiography as follows:

At this conference, Shaykh Abu Zahra exploded a jurisprudential bomb agitating the conference participants, when he surprised them with his opinion... The Shaykh paused in the conference, and said: “I have concealed a jurisprudential opinion to myself for twenty years... the moment has come to share what I have concealed before I meet Allah (upon death) and He asks me: why did you conceal what you possessed in knowledge and did not explain it to the people? This opinion concerns the issue of stoning as the hadd for a muhsan’s zina.” He gave the opinion that stoning was Jewish law, the Prophet approved it in the first place, then it was abrogated by stripes as the hadd...<sup>44</sup>

In short, Abu Zahra declared that stoning is completely un-Islamic. After the presentation, al-Qaradawi went up to Abu Zahra to insist that stoning may not be a hadd, but it can still be a ta‘zir. But Abu Zahra responded that the Prophet was the source of blessing to the humanity. How could such a person, Abu Zahra asked, ordain stoning? He told al-Qaradawi that stoning was God’s law for the Jewish people owing to the “mercilessness of the Jews” (qiswā al-yahūd).<sup>45</sup> In other words, stoning was un-Islamic not just because of the historical concern of determining whether the Prophet did or did not ordain stoning, but also because of the very nature of stoning as a merciless punishment that the Prophet *could not* ordain.

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<sup>42</sup> See Muḥammad Abū Zahra, *Falsafa al-‘Uqūba fī al-Fiqh al-Islāmī* (Cairo, Egypt: Ma‘had al-Dirāsāt al-‘Arabiyya al-‘Āliya, 1963), 102-116.

<sup>43</sup> Makkī, *Fatāwā Muṣṭafā al-Zarqā*, 391-95.

<sup>44</sup> Yūsuf al-Qaradāwī, *Ibn al-Qarya wa al-Kuttāb: Malāmiḥ Sīra Masīra*, 3 vols. (Cairo, Egypt: Dār al-Shurūq, 2002), 3:253; On al-Qaradāwī, see ‘Iṣām Talīmah, *Yūsuf al-Qaradāwī: Faqīh al-Du‘āt wa Dā‘iyat al-Fuqahā*, ‘Ulamā wa Mufakkirūn Mu‘āṣirūn (Damascus, Syria: Dār al-Qalam, 2006).

<sup>45</sup> al-Qaradāwī, *Ibn al-Qarya wa al-Kuttāb: Malāmiḥ Sīra Masīra*, 3:255.

Abu Zahra died in 1974 without developing this position in writing but his opinion in the Libyan conference was published along with al-Zarqa's opinion in Chief Justice Mansur's 1976 book "The System of Criminalization and Penalization in Islam" (*Niẓām al-Tajrīm wa al-'Iqāb fī al-Islām*).<sup>46</sup> While the South Asian Hanafis could dismiss Mustafa al-Zarqa as a Salafi, Abu Zahra was one of the most respected traditional Hanafi scholars in the 20th-century, who was highly regarded among the Deobandi and Barelawi Hanafis in South Asia, particularly for his understanding of the historical sources of early Islam.<sup>47</sup> In the end, the Libyan hudud code did not include stoning as Gaddafi objected to the authenticity and authority of sunna.<sup>48</sup> Nevertheless, the opinions expressed in the Libyan codification process would come up in the Federal Shariat Court in Pakistan nearly a decade later.

### 3.2 Rethinking the Tradition: Ahl-i Qur'an in Egypt and Pakistan

While the Salafis reinterpreted the hadith literature, they accepted the legal authority (*ḥujjiyya*) and the overall historical authenticity (*ṣiḥḥa*) of the hadith corpus. However, certain 20th-century Muslims expressed deep skepticism and sometimes outright denial of the historical reliability of the hadith literature, which formed the basis of stoning in fiqh. The source of this attitude in Egypt was the writings of the Hungarian Jewish Orientalist Ignaz Goldziher (1850-1921) who argued that the hadith corpus represents the doctrinal controversies of the third Islamic century. In particular, two Egyptian scholars wrote books based on Goldziher's ideas.

First, Ahmad Amin (1886-1954), educated at the Azhar University and the dean of the Faculty of Arts at Cairo University, authored a three-part history of Islam: "The Dawn of Islam" (*Fajr al-Islām*), "The Noon of Islam" (*Ḍuhā al-Islām*), and "The Afternoon of Islam" (*Zuhr al-Islām*).<sup>49</sup> While Amin used a softer tone than Goldziher, his description of the evolution of the hadith canon drew "unmistakably" from the Orientalist scholarship.<sup>50</sup> Second, Mahmud Abu Rayya (1889-1970) questioned the hadith literature in two books. The first book, "Lights upon Muhammad's Sunna" (*Aḍwā' alā al-Sunna al-Muḥammadiyya*), targeted the hadith literature in general. The second book, "The

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<sup>46</sup> 'Alī 'Alī Maṣṣūr, *Niẓām al-Tajrīm wa al-'Iqāb fī al-Islām*, 2 vols. (Medina, Saudi Arabia: Mu'assasa al-Zahrā lī al-'Imān wa al-Khayr, 1976), 1:179-183.

<sup>47</sup> For example, the biographers of the Barelawi scholar Muhammad Karam Shah use Abu Zahra's opinion on Shah to describe Shah's reputation. Furthermore, Abu Zahra's works are referenced in the *Fayḍ al-Bārī*, a hadith commentary by a leading Deobandi scholar Anwar Shah Kashmiri.

<sup>48</sup> al-Qaradāwī, *Ibn al-Qarya wa al-Kuttāb: Malāmiḥ Sīra Masīra*, 3:257; Ghazi, "Islām kā Fawjdārī Qānūn: Ifṭitāḥī Kḥiṭāb," 16-18.

<sup>49</sup> See G. H. A. Juynboll, *The Authenticity of the Tradition Literature: Discussions in Modern Egypt* (Leiden, The Netherlands: E. J. Brill, 1969), 33-34.

<sup>50</sup> *Ibid.*, 33.

Gluttonous Abu Hurayra” (*Shaykh al-Maḍīra Abu Hurayra*), targeted Abu Hurayra, the most prolific narrator in the Sunni hadith canon.<sup>51</sup>

As Goldziher’s ideas spread into the Azhar University, they also produced a reaction.<sup>52</sup> In 1939, Professor ‘Ali Hasan ‘Abd al-Qadir, who had obtained a doctorate from Germany, was using a translation of Goldziher’s book, *Muhammedanische Studien: First Part*, as a textbook at the Azhar to teach the history of sunna.<sup>53</sup> When al-Qadir gave a lecture on a famous hadith scholar of the Umayyad period, a Syrian student, Mustafa al-Siba‘i (1915-64), obtained the complete translation of Goldziher’s work.<sup>54</sup> al-Siba‘i later presented a paper in defense of the hadith scholar and challenged al-Qadir, who was in the audience, to refute his arguments. al-Qadir stood up and recanted his views in public and decided to write a refutation of Goldziher with al-Siba‘i. The work, “The Sunna and its Status in Islamic Legislation” (*al-Sunna wa al-Makānatuha fī al-Tashrī‘ al-Islāmī*), was later completed by al-Siba‘i alone and included a response to Amin, Abu Rayya, and the broader Orientalist scholarship. In his zeal to defend the complex relationship between the Qur’an and sunna, al-Siba‘i stated that, “the dominant majority [al-jumhūr] holds that the abrogation of the Qur’an with sunna is not allowed, whether it is recurrent, widespread, or solitary.”<sup>55</sup> But this was somewhat of an overstatement, especially considering the Hanafī position, which al-Siba‘i recognized. This statement would be exaggerated and used in the Federal Shariat Court against the traditional doctrine on stoning.

The Egyptian debates on the historical authenticity of hadith literature intersected with certain South Asian debates about the legal authority (hujjiyya) of sunna altogether.<sup>56</sup> Before the partition of India, Ghulam Ahmad Parwez (1903-85) started a movement in Punjab called the Ahl-i Qur’an that emphasized the normative nature of the Qur’an and rejected the normative nature of sunna. The Ahl-i Qur’an argued that the so called sunna was just the Prophet’s use of the Qur’an in the Arab tribal context, and therefore, every society must use the Qur’an according to its own context. The movement established the magazine *Tulu‘-i Islam* in 1938 and organized study circles among

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<sup>51</sup> The word “maḍīra” means a dish that was popular among the Umayyad elites.

<sup>52</sup> Juynboll, *The Authenticity of the Tradition Literature: Discussions in Modern Egypt*, 35-36.

<sup>53</sup> See Ignaz Goldziher, *Muhammedanische Studien: Erster Theil* (Halle a. S., Prussia: Max Neimeyer, 1889).

<sup>54</sup> The paper concerned Ibn Shihāb al-Zuhrī (d. 741/742).

<sup>55</sup> Muṣṭafā al-Sibā‘ī, *al-Sunna wa Makānatuhā fī al-Tashrī‘ al-Islāmī*, 2nd ed. (Damascus, Syria: al-Maktab al-Isāmī, 2000), 431-432. Stating “wa qāla al-jumhūr: lā yajūzu naskh al-kitāb bi al-sunna: sawā’ kānat mutawātira aw mashhūra aw āḥād.”

<sup>56</sup> For an in-depth exploration of this phenomenon in Egypt and Pakistan, see Brown, *Rethinking Tradition in Modern Islamic Thought*; See also Juynboll, *The Authenticity of the Tradition Literature: Discussions in Modern Egypt*.

Pakistan's bureaucratic elites.<sup>57</sup> General Ayub Khan's regime (r. 1958-1969) drew upon the Ahl-i Qur'an to legitimize its cultural modernization project. The movement's political influence declined when its state patronage ended with Ayub Khan's fall in 1969, but Ahl-i Qur'an scholars continued to spark polemical discourse in Pakistan during the 1970s and beyond.

The Ahl-i Qur'an also questioned the authenticity of the hadith literature. In this effort, they drew upon the Egyptian hadith skeptics. The notable Ahl-i Qur'an scholar 'Umar Ahmad 'Uthmani (d. 1991) translated Amin's books on Islamic history – questioning the evolution of hadith literature – into Urdu.<sup>58</sup> Ironically, 'Uthmani was educated in the Deobandi tradition by his father Zafar Ahmad 'Uthmani (1893-1974) and uncle Ashraf 'Ali Thanawi (1863-1943), two of the most significant Deobandi scholars and the authors of the 22-volume *I'la al-Sunan* in defense of Hanafi law from the Ahl-i Hadith challenge.<sup>59</sup>

Furthermore, owing to the age-old Shi'a criticism of the Sunni hadith canon in general and the narrator Abu Hurayra in particular, certain Shi'a scholars also published an Urdu translation of Abu Rayya's book targeting Abu Hurayra in 1977.<sup>60</sup> In the context of these discursive challenges to the hadith literature, the Deobandi 'ulama published a translation of al-Siba'i's book in defense of sunna against Amin and Abu Rayya into Urdu in 1976.<sup>61</sup> As the Federal Shariat Court would question the authenticity of sunna in reviewing stoning a few years later, the judges would draw upon these debates.

Because they rejected the authority of sunna, the Ahl-i Qur'an also rejected stoning (which is based only on sunna) as an Islamic punishment. In his book "Qur'anic Laws" (*Qur'anī Qawānīn*), Parwez developed a general theory of punishment based on a pathological approach to crime and a rehabilitative approach to punishment.<sup>62</sup> He ignored

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<sup>57</sup> Manzooruddin Ahmad, "The Political Role of the 'Ulamā' in the Indo-Pakistan Sub-Continent," *Islamic Studies* 6, no. 4 (1967): 340-342.

<sup>58</sup> Ahmad Amīn, *Fajr al-Islām: Islām kay Sunihri Dawr ki Tārīkh*, trans. 'Umar Ahmad 'Uthmānī (Lahore, Pakistan: Dost Associates, 2003); Ahmad Amīn, *Duḥā al-Islām: Islām par Kiyā Guzrī*, trans. 'Umar Ahmad 'Uthmānī, vol. 1 (Lahore, Pakistan: Dost Associates, 2003).

<sup>59</sup> See Ali Usman Qasmi, *Questioning the Authority of the Past: The Ahl al-Qur'an Movements in the Punjab* (Karachi, Pakistan: Oxford University Press, 2011); Zafar Ahmad 'Uthmānī, *I'la al-Sunan*, ed. Muhammad Taqi Usmani, 22 vols. (Karachi, Pakistan: Idāra al-Qur'an wa al-'Ulūm al-Islāmiyya, 1997).

<sup>60</sup> Mahmūd Abū Rayya, *Shaykh al-Maḍīra: Abū Hurayra Tārīkh kay Ā'inay mayn*, trans. Muḥammad Mūsā Ridwī and Sayyid Ḥusayn Murtaḍā (Karachi, Pakistan: Idāra-i 'Aẓmat-i Insāniyyat, 1977). The names of the two translators create a reasonable presumption that they were Shī'ī.

<sup>61</sup> Muṣṭafā al-Sibā'ī, *Dīn-i Islām mayn Sunnat wa Hadīth kā Maqām: Tarjuma-i Kitāb al-Sunna wa Makānatuhā fī al-Tashrī' al-Islāmī* (Karachi, Pakistan: Madarsa 'Arabiyya Islāmiyya, 1976). The book was published by a madrasa run by Muḥammad Yūsuf Banūrī, a notable Deobandi hadīth scholar given the title of muḥaddīth al-'aṣr (the hadīth scholar of the age). The madrasa is now called Jāmi'a al-'Ulūm al-Islāmiyya, Banūrī Town.

<sup>62</sup> Ghulam Ahmad Parwez, *Qur'anī Qawānīn* (Lahore, Pakistan: Dost Associates, 1967), 100, 169.

the distinction between hadd and ta'zir in fiqh literature, and used the term ta'zir for Qur'anic punishments. Parwez argued that the punishments for zina and theft stated in the Qur'an are only ceilings.<sup>63</sup> Under this theory, the actual punishment in each case of zina or theft should be proportional to the crime and forgiveness should be an option if punishment is not necessary.

To support his claim, Parwez used Qur'an 42:40, "[t]he recompense for any injury is an injury equal thereto (in degree): but if a person forgives and makes reconciliation, his reward is due from Allah; for (Allah) loveth not those who do wrong."<sup>64</sup> The orthodox interpretation restricted this verse to *lex talionis* and monetary damages, but Parwez distinctively extended the verse to punishment in general. For Parwez, zina was a pathology and its punishment should be proportional to the intensity of the disease, with the Qur'anic punishment of one hundred stripes being the absolute maximum. While not crediting Parwez, one of the Federal Shariat Court judges would use Parwez's theory on sunna and his concept of Qur'anic punishments to declare stoning un-Islamic.<sup>65</sup>

### 3.3 Amin Ahsan Islahi and the Qur'an-centric Jurisprudence

The challenge to the traditional notion of sunna also came from the Jama'at's founding member and former vice president, Amin Ahsan Islahi (1904-98). Islahi graduated in 1922 from Madrasa al-Islah in Azamgarh, India, a madrasa established by notable 'ulama such as Hamiduddin Farahi (1863-1930), Shibli Nu'mani (1857-1914) and Sayyid Sulayman Nadwi (1884-1953).<sup>66</sup> Afterwards, Islahi undertook advanced studies in Qur'an with Farahi, who had studied Arabic and Hebrew at Aligarh under the German Jewish Orientalist Markus Horovitz (1874-1931),<sup>67</sup> and was working on a theory of linguistic structure and thematic coherence (nazm) in the Qur'an. Islahi stayed at the madrasa after Farahi's death in 1930, but joined the Jama'at in 1941 as a founding member, and moved to Pathankot as the party's vice president. He gave lectures on the Qur'an to the party's cadres, despite his disagreements with the Jama'at's president, Mawdudi, over the nature of sunna in general and the issue of stoning in particular.

Following Farahi, Islahi did not challenge the authority of sunna, but redefined the concept of sunna, decoupling it from hadith literature. According to Islahi, sunna was not based on hadiths, which had an inherent prospect of either being right or wrong. In

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<sup>63</sup> Ibid.

<sup>64</sup> I use Abdullah Yusuf Ali's translation here since one of the Federal Shariat Court judges would use this argument with Ali's translation.

<sup>65</sup> I demonstrate this point in my analysis of Justice Zakauallah Lodhi's opinion in the next section.

<sup>66</sup> Abdul Rauf, "Life and Works of Mawlana Amin Ahsan Islahi (1904-1997)," *Pakistan Journal of History and Culture* XXX, no. 1 (2009): 182.

<sup>67</sup> Horovitz was later a member of the board of trustees of the Hebrew University of Jerusalem and the founding director of its Department of Oriental Studies.

contrast, sunna was based on the recurrent practice of the Muslim community.<sup>68</sup> Drawing from Farahi, Islahi also argued that stoning conflicts with the Qur'an's clear and unambiguous command of one hundred stripes as punishment for zina. He did not deny that the Prophet awarded stoning in his lifetime, but he argued that the cases involved prostitution and sexual harassment instead of just zina.

Islahi parted ways with the Jama'at in 1958 after developing differences with Mawdudi on the party's structure and electoral politics, but the ruling elites from Ayub Khan (r. 1958-1969) to Bhutto (r. 1971-77) continued to court and consult him as an intellectual counterweight to Mawdud.<sup>69</sup> While historians have emphasized Zia's fascination with Mawdudi to explain the autocrat's religious commitments, they have not paid as much attention to Zia's relationship to Islahi.<sup>70</sup> When Zia reconstituted the Council of Islamic Ideology in 1977, he offered Islahi a seat on the Council. However, Islahi excused himself to complete his Qur'anic commentary.<sup>71</sup> Zia then offered Islahi to deliver lectures on Qur'an on state television (PTV). But Islahi refused, saying that the television station could not telecast his controversial views without editing them. Zia also came to Islahi's home on one occasion and offered him a public office. Still, Islahi did not accept Zia's offer.<sup>72</sup>

Unlike the Deobandis, the Barelawis, and the Jama'atis, Islahi did not have a political party that he could mobilize in support of the Zia regime, though he did have a cadre of students and followers in Lahore. Therefore, Zia's persistent efforts to include Islahi in his regime can only be interpreted as a measure of Islahi's intellectual importance to Zia and his regime. Islahi's refusal to join the regime was, in essence, his refusal to legitimize Zia and thereby delegitimize himself as a scholar. But had Islahi joined the Council of Islamic Ideology in 1977, he could have had considerable influence

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<sup>68</sup> See Amin Ahsan Islahi, *Mabādī-i Tadabbur-i Hadīth*, ed. Mājīd Khāwar (New Delhi: Qur'ān wa Sunnat Academy, 2007).

<sup>69</sup> In particular, Governor Abdur Rab Nishtar appreciated Islahi's views on the citizenship of non-Muslims based on social compact (mu'āhidī) with the newly established Muslim state; President Iskander Mirza appointed him to the Islamic Law Commission in 1956; General Ayub Khan drew upon Islahi's position against women as heads of an Islamic state in his 1965 presidential contest with Muhammad Ali Jinnah's sister, Fatima Jinnah – Mawdudi supported Fatima Jinnah; and Prime Minister Zulfikar Ali Bhutto offered Islahi government benefits and a civil award that Islahi refused. See Abdul Rauf, "Life and Works of Mawlana Amin Ahsan Islahi (1904-1997)."

<sup>70</sup> See, e.g. Seyed Vali Reza Nasr, *The Vanguard of the Islamic Revolution: The Jama'at-i Islami of Pakistan* (Berkeley, CA: University of California Press, 1994), 172. Nasr describes that, "Zia had long been sympathetic to the Jama'at. He had been greatly impressed with Mawdudi's works, and following his investiture as chief of staff, used the powers vested in his office to distribute the party's literature among his soldiers and officers."

<sup>71</sup> Abdul Rauf, "Life and Works of Mawlana Amin Ahsan Islahi (1904-1997)," 196.

<sup>72</sup> See *ibid.* Ironically, Islahi's protégé, Javed Ahmad Ghamidi, would accept a position in the Council of Islamic Ideology during Musharraf's regime and deliver lectures on a private television working to dismantle Zia's Hudud Ordinances.

on the Zia regime in general and the Zina Ordinance in particular. Nevertheless, the chairman of the Federal Shariat Court would use Islahi's commentary to argue against stoning as a hadd.<sup>73</sup>

To sum up, this section presented the evolution, migration, and influence of certain religious and intellectual trends in the 20th-century that rejected the notion of stoning as an integral part of shari'a. The next section shows how the Federal Shariat Court judges drew upon these movements to declare stoning un-Islamic in the 1981 case, *Hazoor Bakhsh v. Federation of Pakistan* (see Table 6).

**Table 6. 20th-Century Juristic Positions on Stoning**

Name	Orientation	Position on Stoning	Position on Sunna	Hadiths on Stoning	Political and Religious Influence	Referencing Judge
al-Zarqa	Salafi	ta'zir	Binding	Reinterpret	Zia brought al-Zarqa to Pakistan to advise on the Islamization project	Justice Hussain, Justice Hyder
Abu Zahra	Hanafi	un-Islamic	Binding	Reinterpret, reject	Deobandis and Barelawis considered Abu Zahra an eminent jurist	Justice Lodhi, Justice Hyder
Parwez	Ahl-i Qur'an	un-Islamic	Non-binding	Reject	Ahl-i Qur'an judges collaborated with the Zia regime	Justice Lodhi
Islahi	Farahi	ta'zir	Binding, but not based on hadiths	Reinterpret, reject	Zia deeply respected Islahi and offered him political office several times	Justice Ahmed

#### 4. Hazoor Bakhsh v. Federation of Pakistan (1981)

This section analyzes the shari'a review of the Zina Ordinance in *Hazoor Bakhsh v. Federation of Pakistan* in the context of the debates on sunna and stoning. Shortly after the enactment of the Zina Ordinance, before anyone was sentenced to stoning, two shariat petitions before the shariat bench of Lahore High Court challenged sections 5(2)(a) and 6(3)(a) providing for the hadd punishment of stoning for a muhsan in the Ordinance.<sup>74</sup> The petitioners used citizen standing under Article 203D(1) to demand abstract review of the provisions under the repugnancy clause. When the Federal Shariat Court was created in 1980, the petitions were transferred from the shariat bench of Lahore High Court to the Federal Shariat Court.

<sup>73</sup> See Amin Ahsan Islahi, *Tadabbur-i Qur'an*, 2nd ed., 9 vols. (Lahore, Pakistan: Fārān Foundation, 1983). During *Hazoor Bakhsh* proceedings, Islahi did not go before the Federal Shariat Court to present his views. However, his student Ghamidi reportedly told Justice Aftab Hussain to base his opinion on the position accepted by the majority of the people – not the 'ulama per se. Islahi recognized that he held a dissenting position in Pakistan's religious landscape dominated by Deobandi and Barelawi 'ulama and revivalist parties such as the Jama'at. In this context, he considered that the law should be based on the scholarly opinion trusted by the people so long as the 'ulama have the freedom to express their opinions freely. See Khūrshīd Aḥmad Nadīm, "Tawḍīḥāt," in *Jāwēd Aḥmad Ghāmīdī kay Ḥalqa-i Fikr kay Sāth Ayk 'Ilmī awr Fikrī Mukālama* (Gūjṛānwālā, Pakistan: al-Sharī'a Academy, 2007), 24-25.

<sup>74</sup> Shariat Petition No. 59 of 1979 was filed by a certain Hazoor Bakhsh, and Shariat Petition No. 62 of 1979 was filed by a certain M. I. Chaudhry.

Upon the establishment of the Federal Shariat Court, Zia appointed a former Supreme Court judge (Salahuddin Ahmed) as the chairman, and one judge from each of the four High Courts (Agha Ali Hyder, Aftab Hussain, Zakaullah Lodhi, and Karimullah Durrani) as members. The chairman and each member were given a one-year tenure, but as I argued in chapter 2, the tenure was no less secure than a bench assignment in a High Court or the Supreme Court.<sup>75</sup> The following biographical notes introduce the judges focusing on their diverse religious backgrounds that should have been in the regime's notice, if not Zia's personal knowledge. For this purpose, I draw mainly from sources that existed prior to their appointment.

For the chairman of the Federal Shariat Court, Zia selected Salahuddin Ahmed (1912-n.d.), who was a retired judge of the Supreme Court.<sup>76</sup> An ethnic Bengali, he was educated at Calcutta University and enrolled to practice before the Calcutta High Court.<sup>77</sup> Justice Ahmed moved to Dhaka upon the partition of Bengal during independence in 1947. He served as the president of the governing body of Madrasa-i 'Aliya in Dhaka, a nonsectarian government madrasa providing education in Arabic. However, Justice Ahmed did not have a formal background in religious studies. He was proficient in Persian but not in Arabic, just as most of the other judges in the period.<sup>78</sup> He was appointed to the Supreme Court in 1970. Upon the partition of Pakistan in 1971, Justice Ahmed stayed in Pakistan (former West Pakistan) instead returning to his native Bangladesh (former East Pakistan). We can get a glimpse of Justice Ahmed's position on state law and shari'a from his 1976 speech upon his retirement from the Supreme Court:

The Constitution has given [the legislator] almost unfettered liberty [to make law]. I said 'almost' because he, too, is bound by certain fundamental principles laid down in the Holy Qur'an and by the objectives solemnly affirmed in the preamble to our Constitution, and no Muslim worth his salt can overlook them...

... We Muslims are proud of our Holy Qur'an and the Shariat. If we aspire to be a progressive people we must no doubt march with the time, but we must do so only in the light of the guidance prescribed for us in the Holy Qur'an and shown in actual practice by our Holy Prophet (peace be upon Him). It will be at our own risk if we break from our Qur'anic moorings.<sup>79</sup>

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<sup>75</sup> Ministry of Law and Parliamentary Affairs, No. F. 50 (1)/80-AII (Islamabad, May 26, 1980), Gazette of Pakistan, Extraordinary, May 28, 1980, III, 146.

<sup>76</sup> Federal Shariat Court, "Mr. Justice Salahuddin Ahmed," [http://federalshariatcourt.gov.pk/FCJ\\_1\\_Profile.html](http://federalshariatcourt.gov.pk/FCJ_1_Profile.html) (last accessed December 14, 2012).

<sup>77</sup> Address by Abdul Samad Khan, 1977 PLD Journal 115.

<sup>78</sup> See Jamal Malik, *Colonization of Islam: Dissolution of Traditional Institutions in Pakistan* (New Delhi, India: Manohar Publishers, 1996), Appendix A, 312. The author notes that the data about the knowledge of languages has been taken from Hafiz Muhammad Latif, chief research officer at the Council of Ideology. See *ibid.*, 314.

<sup>79</sup> Address by Salahuddin Ahmed, 1977 PLD Journal 93, 95.

In 1977, Zia appointed Justice Ahmed to the Council of Islamic Ideology, where he served on the committee that drafted the Hudud Ordinances (see above). Since the chairman of the Federal Shariat Court enjoyed the powers of a chief justice, such as bench formation and case assignment, Justice Ahmed's appointment as the chairman represents the regime's extraordinary trust in him.<sup>80</sup>

For a member from the Sindh High Court, Zia appointed Justice Agha Ali Hyder (1919-n.d.).<sup>81</sup> Justice Hyder was appointed to the High Court of Sindh and Balochistan in 1971, and became the chief justice of Sindh High Court in 1979.<sup>82</sup> As the chief justice, he began to question the authority of the martial law regime to establish special courts in early 1980 (see chapter 2). In this context, Zia appointed him as a member of the Federal Shariat Court to remove him as the chief justice of the Sindh High Court where he could do more damage using his control over the bench. His name and aspects of his judgments point to his Shi'a heritage. Therefore, his appointment may have also served to place a Shi'a Muslim along with the four presumably Sunni Muslims on the Federal Shariat Court.

For a member from the Lahore High Court, Zia chose Justice Aftab Hussain (1920-n.d.). Born in Agra, Justice Hussain was educated at Bareilly College and migrated to Pakistan in 1947. He was appointed to the Lahore High Court in 1971, where he authored the judgment sentencing Zia's political nemesis Bhutto to death.<sup>83</sup> Justice Hussain was reportedly an "ardent member" of the Jama'at,<sup>84</sup> though his opinions are not reducible to Mawdudi's positions. While not a member of the Council of Islamic Ideology, he participated in the deliberations over the drafting of the Hudud Ordinances.<sup>85</sup> He was a prolific author whose writings and judgments demonstrate his command over comparative law, fiqh, and the Arabic language, unlike other judges.<sup>86</sup> He opposed the doctrine of taqlid and regarded much of fiqh as nonbinding Arab custom. Nevertheless, he recognized Qur'an, sunna, and juristic consensus as binding sources of shari'a.

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<sup>80</sup> But see Dorab Patel, *Testament of a Liberal* (Karachi, Pakistan: Oxford University Press, 2000).

<sup>81</sup> Federal Shariat Court, "Mr. Justice Agha Ali Haider," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed February 1, 2013). I have estimated Justice Hyder's birth year from his retirement year.

<sup>82</sup> The joint High Court of Sindh and Balochistan was divided into the Sindh High Court and the Balochistan High Court in 1976.

<sup>83</sup> *State v. Zulfikar Ali Bhutto and others*, 1978 PLD Lahore 523. Justice Aftab Hussain declared that, "I sentence Zulfikar Ali Bhutto, Mian Muhammad Abbas and Ghulam Mustafa accused under section 302 PPC read with sections 301, 109 and 11 PPC to death." See also Wasti, *The Application of Islamic Criminal Law in Pakistan: Sharia in Practice*, 77.

<sup>84</sup> Victoria Schofield, *Bhutto: Trial and Execution* (London, U.K.: Cassell, 1979), 56.

<sup>85</sup> See Ghazi, "Islām kā Fawjdārī Qānūn: Iftitāhī Kھیāb."

<sup>86</sup> See, e.g. Aftab Hussain, "New Tendencies in Law and Legal Institutions," 1977 PLD Journal 1.

Considering these factors, Justice Hussain's appointment appears to be based on his political loyalty as well as intellectual qualifications.<sup>87</sup>

For a member from Balochistan High Court, Zia appointed Justice Zakaullah Lodhi (1934-84).<sup>88</sup> A graduate of Sindh Muslim Law College, Justice Lodhi was appointed to the High Court of Sindh and Balochistan in 1974, and transferred to the Balochistan High Court upon its creation in 1976. Since there were only three judges on Balochistan High Court, and Zia probably did not want to displace the chief justice who had served the regime as the acting governor of Balochistan after the coup.<sup>89</sup> Justice Lodhi was the second most senior judge and an active participant in the regime's Islamization program. However, his positions on shari'a did not align with the 'ulama.<sup>90</sup> In a regime sponsored conference on the application of shari'a in August 1979, after the enactment of the Hudud Ordinances, Justice Lodhi read a paper arguing against the very concept of hudud found in fiqh literature.<sup>91</sup> As I shall elaborate later, his paper bore an unmistakable resemblance to Parwez's Qur'an-only jurisprudence, though Lodhi did not reference Parwez.

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<sup>87</sup> Federal Shariat Court, "Mr. Justice Shaikh Aftab Hussain," [http://federalshariatcourt.gov.pk/FCJ\\_2\\_Profile.html](http://federalshariatcourt.gov.pk/FCJ_2_Profile.html) (last accessed December 7, 2012).

<sup>88</sup> Federal Shariat Court, "Mr. Justice Zakaullah Lodhi," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed February 1, 2013); see also Law and Justice Commission of Pakistan, "High Court of Balochistan: Annual Report," (Islamabad, Pakistan: Law and Justice Commission of Pakistan, 2003), 5.

<sup>89</sup> Justice Khuda Bakhsh Marri served as the chief justice of Balochistan High Court from December 1, 1976 to July 7, 1977, when he became the acting governor of Balochistan. He returned to his position as the chief justice on September 18, 1978 and remained there until March 25, 1981, when he refused to take oath under the Provisional Constitution Order of 1981.

<sup>90</sup> Law and Justice Commission of Pakistan, "High Court of Balochistan: Annual Report," 143.

<sup>91</sup> See Zakaullah Lodhi, "Ijtihad in the Process of Islamisation of Law," in *International Seminar on the Application of Shari'a* (Islamabad, Pakistan: Ministry of Law and Parliamentary Affairs, 1979), 105-106. The article states, "The Holy Qur'an provides "Hudud", namely the limit or maximum punishment, for only some offences such as amputating of hand for theft etc.; a hundred stripes for adultery; and "Ta'zir" for such acts which may be regarded offence in a particular society in order to safeguard it from internal and external sabotage. Now it would depend upon particular circumstances of a society as to what act should be regarded offense and in doing so what maximum or minimum punishment should be prescribed for it. Similarly, in cases of "Hudud" the Holy Qur'an has provided maximum punishment and maximum punishment cannot be awarded in all cases as that would offend against the Qur'anic principle laid down in Verse (xlii. 40) directing that Ta'zir punishment should be proportionate to the gravity of the offense. Other Verses are also relevant on this point namely ii. 194, x. 27, xvi. 126, xxii. 60 and xl. 40. Proportionate punishment is always qualified with the social and mental conditions of the people living in particular society. Maximum punishment of 100 stripes has been fixed for adultery but in case of slaves it is reduced to half which is not a deviation from the principle, but a concession shown in appreciation of the social and mental condition of a particular class of society. In this respect reference may be made to Verse (iv. 25). Again, the Holy Qur'an laid down (xlii. 140) that in certain cases where it was believed that there was possibility of correction in case of an accused person he could also be forgiven. Again there can be such circumstances in which like Ḥaḍrat 'Umar suspension of a punishment may be necessary."

Lastly, for a member from Peshawar High Court, Zia selected Justice Karimullah Durrani (c. 1935-82).<sup>92</sup> A graduate of the University of Peshawar, Justice Durrani served as a joint secretary of the political party Council Muslim League and later joined the party Tehrik-i Istiqlal. However, he quit politics in 1973. Justice Durrani was appointed to the Peshawar High Court during the Zia regime in 1979. He served on the shariat bench of the Peshawar High Court, where his opinions were based on Hanafi law. Justice Durrani's relationship with the 'ulama can be observed in his obituary written by one of the leading 'ulama, Muhammad Taqi Usmani.<sup>93</sup> We can conclude that his appointment to the Federal Shariat Court was in consideration of his record on the shariat bench of the Peshawar High Court.<sup>94</sup>

The five-member bench conducted three hearings during October and November of 1980. During the proceedings, the bench invited five 'ulama to submit their answers to a questionnaire on stoning. The 'ulama consisted of Syed Muhammad Razi (Shi'a), Muhammad Hanif Nadwi (Ahl-i Hadith), Muhammad Karam Shah (Barelawi), Muhammad Taqi Usmani (Deobandi), and Najmul Hassan Kararwi (Jama'ati), covering the spectrum of the major organized religious movements in Pakistan.<sup>95</sup> The selection of 'ulama from each of Shi'a, Ahl-i Hadith, Barelawi, Deobandi, and Jama'ati orientations shows that the Federal Shariat Court judges imagined the landscape of Islam in Pakistan in these categories. Each of these 'ulama had also served on the Council of Islamic Ideology when the Hudud Ordinances were enacted. In particular, Shah and Usmani had even served on the committee drafting the Hudud Ordinances. However, only Razi, Nadwi, and Shah responded in writing, supporting stoning as a hadd, while Usmani and Kararwi did not respond.

On March 21, 1981, in *Hazoor Bakhsh v. Federation of Pakistan*, the Federal Shariat Court delivered the judgment that the Zina Ordinance's stoning provisions were repugnant to Islam. Specifically, the court order stated that,

By a majority of four to one both the petitions are allowed, and it is declared that the provision of sentence of [stoning] as Hadd in section 5

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<sup>92</sup> Federal Shariat Court, "Mr. Justice Karimullah Durrani," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed December 15, 2012). I have estimated Justice Durrani's birth year from the fact that he started practice in 1958, assuming at the age of 23.

<sup>93</sup> Usmani and Durrani served on the Federal Shariat Court as judges for a short period until Durrani's death. Usmani's glowing tribute to the memory of Durrani is particularly noteworthy since 'ulama rarely take non-'ulama seriously. Muhammad Taqi Usmani, *Nuqūsh-i Raftagān* (Karachi, Pakistan: Maktaba-i Ma'arif al-Qur'an, 2007), 174 (entry on Justice Karimullah Durrani).

<sup>94</sup> University of Peshawar, "Obituary - Mr. Justice Karimullah Durrani," *Journal of Law and Society* 1, no. 1 (1982): 149.

<sup>95</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 177-78. For a biographical outline of these scholars, see Malik, *Colonization of Islam: Dissolution of Traditional Institutions in Pakistan*, Appendix A, 310-319; see also 'Abd al-Rashid 'Irāqī, *Barr-i Şaghīr (Pāk wa Hind) mayn 'Ulamā-i Ahl-i Hadīth kay 'Ilmī Kārnāmay* (Lahore, Pakistan: 'Ilm wa 'Irfān Publishers, 2001), 247.

and 6 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979, are repugnant to the Injunctions of Islam and that the only Hadd is one hundred stripes. Necessary amendments [must] be made in the sections noted above by the 31st of July, 1981.<sup>96</sup>

In separate concurring opinions, Chairman Ahmed, Justice Hyder, and Justice Lodhi declared that stoning is neither a hadd nor a ta'zir in Islam, while Justice Hussain argued that stoning is not a hadd but could be a ta'zir. In a dissenting opinion, Justice Durrani affirmed the status of stoning as a hadd. As the source of stoning is the hadith literature, the opinions revolved around the relationship between Qur'an and sunna as well as the relationship between sunna and hadith. The following subsections analyze each of the four concurring opinions in detail.

#### 4.1 Justice Salahuddin Ahmed's Opinion

Justice Ahmed's opinion covered the concept of hudud, the Qur'anic verses, the Prophet's statements, the Prophet's decisions, and the early caliphs and jurists on stoning. In terms of style, the opinion was drafted in English but quoted Arabic, Urdu, and Persian text, with and without translation, and with and without context. For Qur'anic quotes in English, he used Abdullah Yusuf Ali's translation. In terms of substance, Justice Ahmed drew upon interpretive principles from pre-modern Qur'anic exegetes (who accepted that stoning is a hadd) to reject stoning. Furthermore, he based his hadith analysis on the cases of stoning almost entirely on Islahi's commentary. In the description of Justice Ahmed's opinion that follows, I quote the Qur'anic verses and the hadiths completely to set the stage for the discussion in the remaining three opinions in this chapter, and the six opinions in the next chapter.

##### *Concept of Hadd*

Justice Ahmed started his opinion by problematizing the concept of hudud, focusing on Hanafī jurists. He pointed out that the early jurist al-Sarakhsi (c. 1009-90) defines hadd as a fixed punishment, excluding unfixed punishments such as ta'zir and qisas.<sup>97</sup> However, he noted that the later Ibn 'Abidin (1783-1836) defines hadd as a punishment prescribed in the Qur'an, sunna or consensus.<sup>98</sup> Then, he quoted the contemporary jurist Abu Zahra who describes hadd as a punishment based on the Qur'anic text, not the sunna, except for drinking.<sup>99</sup> Before examining the "validity of the conflicted views" of the jurists, he quoted the hadith on the Prophet's appointment of

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<sup>96</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 243.

<sup>97</sup> Referencing al-Sarakhsī's *Kitāb al-Mabsūṭ*. Justice Ahmed also referenced the Yemeni jurist al-Shawkānī's *Nayl al-Awtār*.

<sup>98</sup> Referencing Ibn 'Ābidīn's *Radd al-Muhtār*.

<sup>99</sup> When Abu Zahra expressed this position, he considered the alleged verse as on rajm as a Qur'anic text, abrogated in recitation but not in terms of the rule (mansūkh al-tilāwa dūn al-hukm). Abū Zahra, *Falsafa al-'Uqūba fī al-Fiqh al-Islāmī*, 106-116.

Mu'adh b. Jabal as the governor of Yemen, whereby Mu'adh states that he would decide cases based on the Qur'an, and if he does not find any guidance in the Qur'an, then based on the sunna, and if he does not find an answer in the sunna, then based on his opinion.<sup>100</sup> Justice Ahmed used this hadith to indicate that he will follow the same method and to signify that the Qur'an is the primary source of law, whereas the sunna is the secondary source.

### ***Qur'an on Stoning***

Justice Ahmed quoted Qur'an 24:2 on the subject of zina:

The woman and the man  
Guilty of adultery or fornication,  
Flog each of them,  
With a hundred stripes;  
Let not compassion move you,  
In their case, in a matter,  
Prescribed by Allah, if ye believe,  
In Allah and the Last Day:  
And let a party,  
Of Believers  
Witness their punishment.

He argued that the plain and unambiguous reading of the verse supports the view that the verse applies to al-zani and al-zaniya (the Arabic terms for the male offender and the female offender used in the verse) regardless of their marital status. Since the preceding verse (24:1) stated that "clear signs" would follow, Justice Ahmed concluded that the command about the punishment of the offenders in the next verse (24:2) must therefore be plain and unambiguous.<sup>101</sup> He then interpreted 24:2 in relation to 4:25 that distinguishes the punishment for married slavegirls:

If any of you have not  
The means wherewith  
To wed free believing women,  
They may wed believing  
Girls from among those  
Whom your right hands possess...  
They should be  
Chaste, not lustful, nor taking  
Paramours: when they  
Are taken in wedlock,

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<sup>100</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 156. Quoting Abu Dawud's collection.

<sup>101</sup> Qur'an 24:1, "A sura which We have sent down and which We have ordained in it have We sent down Clear Signs, in order that ye may receive admonition."

If they fall into shame,  
Their punishment is half  
That for free women...

According to Justice Ahmed, 4:25 assumes that the punishment of zina for free women can be halved for married slavegirls, which makes sense if the punishment is stripes but not if the punishment is stoning.

Justice Ahmed then asserted that there is no hadith in which the Prophet restricted 24:2 to unmarried offenders. For him, the “trouble begins... when the plain meaning of the Qur’an is sought to be restricted or tried to be given a meaning not warranted by the language, on the basis of the [hadith literature] and statements of [the Prophet’s companions] that are not clear and are in conflict with one another.”<sup>102</sup> To emphasize Qur’an’s mandate of obedience to God, rather than the Prophet, Justice Ahmed quoted verses 5:47, 5:50, 6:106, 12:40, and 2:213. He also quoted the exegete al-Suyuti (1445-1505) to argue that no one has the authority to use ijtiḥād in what is stated clearly in the Qur’an.<sup>103</sup> Based on these arguments, Justice Ahmed concluded that the clear and plain meaning of 24:2 that the punishment for zina is 100 stripes must be used without hesitation.

### *Sunna on Stoning*

Before beginning his analysis of the examples from the sunna on stoning, Justice Ahmed described the role of the Prophet in Islam, quoting Qur’an 10:15:

But when Our Clear Signs  
Are rehearsed unto them,  
Those who rest not their hope  
On their meeting with Us,  
Say: Bring us a Reading  
Other than this, or Change this.  
Say: “It is not for me,  
Of my own accord,  
To change it: *I follow*  
*Naught but what is revealed*  
*Unto me: If I were*  
To disobey my Lord,  
I should myself fear the Penalty  
Of a Great Day (to come).”<sup>104</sup>

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<sup>102</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 158.

<sup>103</sup> Referencing al-Suyūṭī’s *al-Itqān fī ‘Ulūm al-Qur’ān*.

<sup>104</sup> Justice Ahmed’s emphasis. He also quoted 3:79 to reassert the point.

Then, Justice Ahmed presented his perspective on Qur'anic abrogation. He argued that, "the Sunnah or any other statement about it must not be repugnant to the precepts and teachings of the Holy Qur'an."<sup>105</sup> Framing his analysis, he stated that the general punishment for zina in 24:2 can be reconciled with stoning either on the basis of the Qur'anic text or on the basis of Qur'anic abrogation with sunna. From the standpoint of the Qur'anic text, the general words al-zani and al-zaniya in 24:2 could mean some zanis, i.e. non-muhsans. To foreclose this argument, he used Fakhr al-Din al-Razi's (1149-1209) logic, that if the verse were to apply to some zanis, then the verse would become indefinite (majhūl), unless those zanis were specified, precluding us from implementing the rule altogether.<sup>106</sup> In fact, al-Razi was arguing that 24:2 cannot be qualified to forgive some undefined category of people, while accepting that 24:2 is qualified by the sunna's defined category of muhsans.<sup>107</sup> Nevertheless, Justice Ahmed used al-Razi to argue that 24:2 cannot be qualified at all.

From the standpoint of Qur'anic abrogation, the general words al-zani and al-zaniya may have been later repealed by the sunna. To elaborate this argument, Justice Ahmed quoted two hadiths in Urdu translation. The first hadith came from *Tirmidhi*: "The blood of a Muslim man is not lawful, except for one of three (cases): zina after having been married (iḥṣān), or apostasy after Islam, or taking a life without right, for which he is killed." Justice Ahmed declared that this hadith is solitary and cannot be used to "add or alter the meaning of the Holy Qur'an."<sup>108</sup> He also underscored that this hadith is not stated in *Bukhari* and *Muslim*, the two more authentic Sunni hadith collections. The second hadith, narrated by 'Ubada b. al-Samit, came from *Muslim*: "Take from me. Verily Allah has ordained a way for them: (When) a non-virgin man (commits zina) with a non-virgin woman, and a virgin man with a virgin woman, then in case of the non-virgin, there is one hundred stripes and then stoning. And in case of the virgin, there is one hundred stripes and exile for one year." Justice Ahmed did not question the authenticity of this hadith but declared, based on the Hanafi scholar al-Jassas's (d. 981) opinion, that 'Ubada's hadith came before the revelation of 24:2, thereby 24:2 repealed the rule in the hadith.<sup>109</sup> However, he did not address the alternative historical argument that the hadith came after 24:2.

Justice Ahmed argued that the hadith could not have abrogated 24:2. In support, he quoted Islahi, "notice that this report from 'Ubada b. al-Samit has been used [by the jurists] to declare [24:2] abrogated, whereas nothing can abrogate Qur'an except the

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<sup>105</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 161.

<sup>106</sup> Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr*, 32 vols. (Beirut, Lebanon: Dār al-Fikr), 23:140. al-Razi states that, "anna al-murād min qawlihi *al-zāniya wa al-zānī* 'immā 'an yakūn kull al-zunāt 'aw al-ba'd, fa 'in kān al-thānī ṣārat al-āyah mujmala wa dhālika yamna'u min 'imkān al-'amal bihi."

<sup>107</sup> See *ibid.*, 23:135-136.

<sup>108</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 161.

<sup>109</sup> Referencing al-Jaṣṣas's *Aḥkām al-Qur'an*.

Qur'an itself."<sup>110</sup> Next, he quoted a hadith from Ibn Hanbal's *Musnad*: "My word does not repeal God's word, and God's word repeals my word, and parts of God's word repeal other parts of God's word."<sup>111</sup> Lastly, he quoted al-Siba'i, "According to all the Jurists [al-jumhūr] abrogation of the Qur'an is not allowed by Sunnah," though the term al-jumhūr means the dominant majority.<sup>112</sup>

To explain his position on Qur'anic abrogation, Justice Ahmed quoted Qur'an 10:15, "Say: It is not for me, of my own accord, to change it: *I follow naught but what is revealed unto me*," and Qur'an 2:106, "None of Our revelations do We abrogate or cause to be forgotten." He also asserted that there is no hadith that speaks of abrogation.<sup>113</sup> In conclusion, he articulated the relationship between hadith and sunna in a manner consistent with Islahi's views:

That the Holy Qur'an and Sunna constitute the Injunctions of Islam is not in dispute.... The [hadiths], however, must be considered in the light of the Holy Qur'an, and they do require careful scrutiny as to their authenticity, contents and context, and whether they are consistent with reason.<sup>114</sup>

### ***Cases of Stoning***

Justice Ahmed proceeded to scrutinize the hadiths on the four cases of stoning from the Prophet's life. First, in the case of a Jewish man and a Jewish woman sentenced to stoning by the Prophet, he referenced (without quoting) the following hadith in *Muslim*:

'Abdullah b. 'Umar reported that a Jewish man and a Jewish woman were brought to Allah's Messenger (may peace be upon him) who had committed zina. Allah's Messenger (may peace be upon him) came to the Jews and said: What do you find in the Torah for one who commits zina?

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<sup>110</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 162. Islahi goes on to say that "it is these aspects of our jurists that have created religious cynicism (bad-gumāniyān) among people." Islahi, *Tadabbur-i Qur'ān*, 5:366.

<sup>111</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 162.

<sup>112</sup> Ibid. (stating, "wa qāla al-jumhūr lā yajūzu naskh al-kitāb bi al-sunna sawā' kānat mutawātira, mashhūra aw āhād.")

<sup>113</sup> The complete verses that Justice Ahmed quotes are as follows: Qur'an 10:15, "But when Our Clear Signs are rehearsed unto them, those who rest not their hope on their meeting with Us, Say: "Bring us a reading other than this, or change this," Say: "It is not for me, of my own accord, to change it: *I follow naught but what is revealed unto me*: if I were to disobey my Lord, I should myself fear the penalty of a Great Day (to come)" (Justice Ahmed's emphasis). Qur'an 2:106, "None of Our revelations do We abrogate or cause to be forgotten, but We substitute something better or similar: Knowest thou not that Allah Hath power over all things?"

<sup>114</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 163.

They said: We darken their faces and make them ride on the donkey with their faces turned to the opposite direction, and then they are taken round (the city). He said: Bring the Torah if you are truthful. They brought it and recited it until when they came to the verse pertaining to stoning, the person who was reading placed his hand on the verse pertaining to stoning, and read (only that which was) between his hands and what was subsequent to that. ‘Abdullah b. Salam [a notable rabbi convert] who was at that time with the Messenger of Allah (may peace be upon him) said: Command him (the reciter) to lift his hand. He lifted it and there was, underneath that, the verse pertaining to stoning. Allah’s Messenger (may peace be upon him) pronounced judgment about both of them and they were stoned...

Justice Ahmed argued that the punishment was imposed on the Jews in compliance with the Torah, and concluded that the Torah is not relevant for Muslims.<sup>115</sup>

Second, in the case of ‘Asif, Justice Ahmed quoted the Urdu translation of the entire hadith from *Muslim*:

... Abu Hurayra and Zayd b. Khalid al-Juhaniyy reported that one of the desert tribesmen came to Allah's Messenger (may peace be upon him) and said: Messenger of Allah, I beg of you in the name of Allah that you pronounce judgment about me according to the Book of Allah. The second claimant who was wiser than him said: Well, decide amongst us according to the Book of Allah, but permit me (to say something). Thereupon Allah's Messenger (may peace be upon him) said: Say. He said: My son was a servant in the house of this person and he committed zina with his wife. I was informed that my son deserved stoning to death (as punishment for this offence). I gave one hundred goats and a slave girl as compensation for this. I asked the scholars (if this could serve as an expiation for this offence). They informed me that my son deserved one hundred lashes and exile for one year and this woman deserved stoning (as she was married). Thereupon Allah's Messenger (may peace be upon him) said: By Him in Whose Hand is my life, I will decide between you according to the Book of Allah. The slave-girl and the goats should be given back, and your son is to be punished with one hundred lashes and exile for one year. And, O Unays, go to this woman in the morning, and if she makes a confession, then stone her. He (the narrator) said: He went to her in the morning and she made a confession. And Allah's Messenger (may peace be upon him) made pronouncement about her and she was stoned to death.

Justice Ahmed noted that Abu Hanifa calls this report solitary and does not consider the report dispositive for expulsion along with stripes since expulsion is not mentioned in 24:2. Correspondingly, he argued that since stoning too is not mentioned in 24:2, the

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<sup>115</sup> Ibid.

report is not dispositive on stoning either. He also argued that according to al-Jassas, this hadith also came before 24:2, thereby 24:2 would repeal the rule in the hadith anyway.

Third, in the case of Ma'iz, Justice Ahmed described the variant reports about Ma'iz's confession to the Prophet before the Prophet ordered him to be stoned. Justice Ahmed then used Islahi's commentary to suggest that Ma'iz "was not a man of good character... and was perhaps in the habit of committing offences against women."<sup>116</sup> According to Islahi, Ma'iz's punishment was imposed for sexual harassment as a ta'zir (under *ḥirāba*), not for consensual sex as a hadd.

Fourth, in the case of the Ghamidiyya woman, Justice Ahmed referenced (without quoting) the following hadith in *Muslim* dealing with Ma'iz and the Ghamidiyya woman:

'Abdullah b. Burayda reported on the authority of his father that Ma'iz b. Malik al-Aslami came to Allah's Messenger (may peace be upon him) and said: Allah's Messenger, I have wronged myself; I have committed adultery and I earnestly desire that you should purify me. He turned him away. On the following day, he (Ma'iz) again came to him and said: Allah's Messenger, I have committed adultery. Allah's Messenger (may peace be upon him) turned him away for the second time, and sent him to his people saying: Do you know if there is anything wrong with his mind. They denied of any such thing in him and said: We do not know him but as a wise good man among us, so far as we can judge. He (Ma'iz) came for the third time, and he (the Holy Prophet) sent him as he had done before. He asked about him and they informed him that there was nothing wrong with him or with his mind. When it was the fourth time, a ditch was dug for him and he (the Holy Prophet) pronounced judgment about him and he was stoned. He (the narrator) said: There the Ghamidiyya woman came to him (the Holy Prophet) and said: Allah's Messenger, I have committed zina, so purify me. He (the Holy Prophet) turned her away. On the following day she said: Allah's Messenger, Why do you turn me away? Perhaps, you turn me away as you turned away Ma'iz. By Allah, I have become pregnant. He said: Well, if you insist upon it, then go away until you give birth to (the child). When she was delivered she came with the child (wrapped) in a rag and said: Here is the child whom I have given birth to. He said: Go away and suckle him until you wean him. When she had weaned him, she came to him (the Holy Prophet) with the child who was holding a piece of bread in his hand. She said: Allah's Apostle, here is he as I have weaned him and he eats food. He (the Holy Prophet) entrusted the child to one of the Muslims and then pronounced punishment...<sup>117</sup>

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<sup>116</sup> Ibid., 165.

<sup>117</sup> There are two hadiths about the Ghāmiyya woman in Muslim's collection. In the absence of access to the edition that Justice Ahmed references, I am using the hadith that illustrates his point.

Justice Ahmed commented that the woman asked the Prophet to purify her which indicates that “she might be a prostitute or addicted to vice.”<sup>118</sup> He used Islahi’s commentary once again to describe that pre-Islamic prostitution persisted during the Prophet’s reign and stoning was imposed for such professional zina as a ta‘zir or custom, not for personal zina as a hadd.

After describing the four cases, Justice Ahmed stated that they are all based on solitary reports, but acknowledged that the eponyms of the Shi‘a and the four Sunni legal schools consider the reports on stoning as widespread, which can qualify or abrogate part of a Qur’anic text. But he emphasized that, “I have already held that Qur’an cannot be changed or abrogated by Hadith.”<sup>119</sup>

### *Early Caliphs and Jurists*

Lastly, Justice Ahmed addressed the argument for stoning from two reports about the early caliphs. First, he quoted the second caliph ‘Umar’s sermon, from an Urdu translation of Muslim’s collection, on an alleged verse of stoning that is not found in the Qur’an but mentioned in the hadith collections:

‘Abdullah b. ‘Abbas reported that ‘Umar b. Khattab sat on the pulpit of Allah’s Messenger (may peace be upon him) and said: Verily Allah sent Muhammad (may peace be upon him) with truth and He sent down the Book upon him, and the verse of stoning was included in what was sent down to him. We recited it, retained it in our memory and understood it. Allah’s Messenger (may peace be upon him) awarded the punishment of stoning, and after him, we also awarded stoning, I am afraid that with the lapse of time, the people may say: We do not find stoning in the Book of Allah, and thus go astray by abandoning this duty prescribed by Allah. Verily, stoning is laid down in Allah’s Book for muhsan men and women who commit zina when proof is established, or if there is pregnancy, or a confession.

Next, Justice Ahmed quoted the alleged verse from Malik’s *Muwatta*, “the aged man and the aged woman if the two commit zina, stone the two absolutely.”<sup>120</sup> The jurists who accepted this verse as the source of stoning considered it abrogated from the Qur’an in recitation but not in rule (mansūkh al-tilāwa dūn al-ḥukm).<sup>121</sup> Following Islahi’s

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<sup>118</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 165.

<sup>119</sup> *Ibid.*, 166.

<sup>120</sup> *ibid.* (stating, “al-shaykh wa al-shaykha idhā zanayā farjimūhumā al-batta.”)

<sup>121</sup> John Burton, *The Sources of Islamic Law: Islamic Theories of Abrogation* (London, England: Edinburgh University Press, 1990), 122-164.

commentary, Justice Ahmed emphasized the Qur'an's completeness and rejected the alleged verse's authenticity.<sup>122</sup> He quoted Islahi's analysis of the alleged verse:

... If this were a Qur'anic verse, then who removed it when the punishment of stoning endures? What is the logic behind removing the verse and keeping the legal rule? If this were a Qur'anic verse and later removed, then this would prove that the rule of stoning existed earlier and was then abrogated. So what is the point of using the verse in favor of the argument for stoning?<sup>123</sup>

He also affirmed Islahi's argument that the alleged verse does not correspond to the fiqhi concept of muhsan. The verse is about an aged person, whereas a muhsan could be young or old.

Second, Justice Ahmed quoted 'Ali's statement from the Shi'a exegete Fathullah Kashani (d. 1580) in Persian:

Among the orders of the Leader of the Faithful ['Ali], God's blessings upon him, one day five persons were brought to him on zina charges based on witnesses. On his command, one was punished with stoning, one was punished with hadd, one was punished with half of the hadd, one was punished with ta'zir, and one was released. A person asked, O Leader of the Faithful, the case is one, but you gave five different orders? He responded that while the case is one, the circumstances are different. The person I gave stoning was a muhsan man, and for a muhsan is stoning based on consensus and sunna. And the one I gave the hadd was not a muhsan, and for a non-muhsan is stripes instead of stoning. And the one for whom I ordered half of the hadd was a slave, and for a slave is half of a free man's hadd. And the one I gave a ta'zir was a minor, and for him is not hadd but a warning. And the last who committed the same offense that I released was mentally disabled, and for the mentally disabled is no obligation.<sup>124</sup>

From this case, Justice Ahmed concluded that since stoning was based on the sunna according to 'Ali, the report on the alleged verse basing stoning in the Qur'an is false. Moreover, he also concluded that 'Ali regarded stripes as the only hadd punishment.

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<sup>122</sup> To emphasize the Qur'an's completeness, he quoted 15:19, "We have, without doubt, sent down the Message; and We will assuredly guard it (from corruption)."

<sup>123</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 166-167; Quoted from Islahi, *Tadabbur-i Qur'an*, 5:367.

<sup>124</sup> Referencing Kāshānī's *Manhaj al-Ṣādīqīn*. See *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 167.

Justice Ahmed acknowledged that the pre-modern jurists agree about stoning in the case of a muhsan, but also underscored that there is difference of opinion among them concerning whether stoning should be combined with stripes or not for a muhsan, and whether stripes should be combined with expulsion or not for a non-muhsan. To conclude, he stated,

... there is on the one hand the plain and unambiguous and definite Injunctions of the Holy Qur'an in 24:2 and there is [a] Hadith that says that there can be no alteration or abrogation of any verse of the Qur'an by Hadith, and, on the other, the (not so sure, discrepant, conflicting and indefinite) [hadiths], some of whose existence itself is doubtful... The opinions of Jurists, too, are inconsistent and not so sure. In these circumstances and for the reasons already stated, I consider myself bound and have no hesitation to rely on the Qur'an[.]

To sum up, Justice Ahmed's opinion was that stoning is not part of the injunctions of the Qur'an or sunna. Therefore, the stoning provisions of the Zina Ordinance are not Islamic.

#### **4.2 Justice Agha Ali Hyder's Opinion**

Justice Hyder's concurring opinion addressed the Qur'anic verses, the Prophet's statements, the Prophet's decisions, and the scope of stoning as a ta'zir. For Qur'anic quotes in English, he also used Abdullah Yusuf Ali's translation. While Justice Hyder did not employ Islahi, his opinion resonated with Islahi's language. He endorsed the Orientalist position on the historical authenticity of Sunni hadith literature using Amin and Abu Rayya. He singled out the narrator Abu Hurayra, signaling a presumably Shi'a bias against the Sunni canon, though he did not endorse the Shi'a canonical position either. Lastly, Justice Hyder drew upon the authority of Abu Zahra and al-Zarqa to support his argument that stoning is not a hadd, though he did not engage with al-Zarqa's argument that stoning is a ta'zir.

##### ***Qur'an on Zina***

To begin his opinion, Justice Hyder quoted 24:2 and stated that the chapter was revealed in the 5th or 6th year after Hijra "when the Islamic polity had taken a definite shape and form, and the affairs of the Believers were being administered in accordance with the code and injunction, as enunciated by Islam."<sup>125</sup> After suggesting that 24:2 reflects the last phase of the law on zina, instead of an evolutionary phase, he quoted the preceding verse (24:1) to emphasize the plain meaning of the verse.

Justice Hyder then explained the status of Qur'an in Islam quoting 3:79, 5:50, 6:106, 10:15, and 16:44 that emphasize God's revelation rather than the Prophet's practice per se. He described the concept of Qur'anic abrogation using the hadith in which the Prophet reportedly said, "my word does not abrogate God's word..." (see

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<sup>125</sup> Ibid., 169.

above).<sup>126</sup> Then he quoted 2:106 (see above) to argue that only the Qur'an can abrogate the Qur'an. Based on these references, Justice Hyder concluded that the "consensus" is that the hadiths are the second most important source of law, after the Qur'an.

### ***Sunna on Stoning***

Justice Hyder quoted 'Ubada's hadith and used al-Jassas's opinion to date the hadith prior to 24:2. Without engaging with the alternative historical argument that the event occurred after 24:2, Justice Hyder declared that such an event is improbable:

a commandment of such vital importance, with such serious consequences, would hardly be revealed only in half, and that too in an ambiguous way[.] The revelation, as can be seen, is in an unequivocal, and comprehensive terms, inclusive of all classes of men and women. The contention therefore is devoid of all merit and it will be idle to imagine that [muhsan] and [muhsana] had been dealt with elsewhere.<sup>127</sup>

Justice Hyder then examined 'Umar's sermon and the alleged verse on stoning. He described the sources of the report as Ibn Hanbal, Tirmidhi, and Abu Dawud, but stated that a number of jurists have rejected the authenticity of the reports. Justice Hyder then stated that, "the text of the alleged verse is a tawdry patch on the sonorous and sublime text of the Qur'an" – an expression resembling the Urdu idiom *Islahi* used to describe the alleged verse in his commentary (*makhmal mayn tāt kā paywand*).<sup>128</sup>

### ***Cases of Stoning***

In the case of the Jews, Justice Hyder stated that the case "need not detain us, because their clansmen and rabbis had asked the parties to be judged according to their own [J]udaic law. The [O]ld [T]estament prescribed the punishment by stoning to death which was awarded by the Prophet. The matter rests there."<sup>129</sup> In his analysis of the remaining three stoning cases, Justice Hyder raised questions but did not draw any clear conclusions. In the case of Ma'iz, he described the variant reports concerning the number and manner of his confessions and pointed out the Prophet was informed about Ma'iz's deeds prior to his confession, and the Prophet told the informant that, "he need not have removed [the] curtain from the dark deed."<sup>130</sup> Justice Hyder also used Mawdudi's Qur'anic commentary to note that upon learning that Ma'iz ran away but was captured and stoned to death, the Prophet said that he should have been brought before him (the

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<sup>126</sup> I have used my translation instead of Justice Hyder's translation.

<sup>127</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 172.

<sup>128</sup> *Islahi, Tadabbur-i Qur'an*, 5:367.

<sup>129</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 172-173.

<sup>130</sup> *Ibid.*, 173.

Prophet) and that, “Maybe God would have accepted his repentance.”<sup>131</sup> In the case of the Ghamidiyya woman, Justice Hyder emphasized that the Prophet delayed the sentence and sent her home until she gave birth, and then delayed again and sent her home until she weaned the child, and then ensured that someone takes responsibility for the child before executing the sentence. Lastly, in the case of ‘Asif, Justice Hyder noted that while the boy was punished with one hundred lashes, the hadith is not clear about whether the woman confessed before the Prophet.

Justice Hyder emphasized that the four cases are based on solitary hadiths and there is nothing to suggest that the events necessarily occurred after the revelation of 24:2. Then he questioned the entire corpus of hadith literature:

... the Prophet, and the first two Caliphs, were averse to the narration of traditions indiscriminately, lest these led to schisms and cleavage of opinions. It is also an admitted fact, that there were hundreds of thousands of traditions in circulation, when the narrators, especially the famous Six [in the Sunni canon], took to the compilation thereof... Imam Bukhari, after an indefatigable search during his lifetime accepted only four thousand traditions... and Imam Muslim reduced the number by about one-fourth. The highest number of traditions emanated from [Abu Hurayra] (2 out of the 4 relevant for our purpose are from that source). According to a considerable number of Jurists and writers, he had spent only a period of 2 to 3 years in the company of the Prophet and therefore could not remember and retain the exact words of the 5437 traditions that are attributed to him. Apart from some Orientalists, Muslims Scholars like [Professor Ahmad Amin] Misri and [Professor Mahmud Abu Rayya]... have written some pungent things about some of the prolix narrators, in which Abu [Hurayra] has been specially mentioned... All Jurists however agree that Qur’anic verses (unless symbolic in nature, which is not the case here) being definitive and clearcut are preferable to traditions as a class, which had been transmitted from generation to generation, till reduced in writing some 2 centuries later.<sup>132</sup>

Paradoxically, while endorsing Amin and Abu Rayya’s position drawn from Orientalist scholarship, Justice Hyder only referenced al-Siba’i’s book that refutes the two authors and the Orientalist scholarship. But the manner in which he appended Misri (as a nisba) to Amin’s name indicates that he was drawing from the Urdu translation of Amin’s book that uses the appendage.

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<sup>131</sup> Referencing Mawdūdī’s *Tafhīm al-Qur’ān*.

<sup>132</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 174. I have re-transliterated and corrected the following names in the quote for consistency: Abu Hurayra was “Hazrat Abu Huraira,” Professor Ahmad Amin was “Ustad Ahmed Ameen Misri,” and Professor Mahmud Abu Rayya was “Prof. Mohammad Abu Ruyya.”

### *Stoning as Ta'zir*

Justice Hyder noted that two modern jurists, Abu Zahra and al-Zarqa, hold the opinion that stoning is not hadd based on the logic of 4:25 (quoted above) that commands halving the punishment for married slavegirls, and the logic that the punishment for zina cannot be greater than the punishment for murder or banditry (*ḥirāba*). He concluded that, “I am clearly of the opinion that the Hadd for adultery by a married person is the one to be found in the Holy Book alone.”<sup>133</sup> However, al-Zarqa considered stoning as an acceptable ta'zir. Without noting this fact, Justice Hyder raised the question whether stoning can be an acceptable ta'zir and stated that, “[t]he answer is in the negative.”<sup>134</sup> He explained that,

The punishment by way of Hadd are for offences, which are serious and disruptive of social order. Allah in His Wisdom decided to prescribe punishments for perpetrators thereof, as He deemed fit and proper. Is it open to us, to say, if we want to follow His commandments that it is not enough, and we better add some thing of our own, for the purpose of deterrence? Such a step will be tantamount to flouting the dictates of Allah.

In short, Justice Hyder's opinion was in concert with Justice Ahmed's opinion. He concluded that since stoning is neither a hadd nor a ta'zir in Islam, the stoning provisions of the Zina Ordinance are un-Islamic.

#### **4.3 Justice Aftab Hussain's Opinion**

Justice Hussain's opinion addressed Qur'anic verses, the Prophet's statements, the Prophet's decisions, and the scope of stoning as a ta'zir. The opinion was drafted in English but quoted Arabic text with and without translation. In contrast with the other judges, he used Marmaduke Pickthall's translation for Qur'anic quotes in English. Justice Hussain's opinion was considerably more nuanced than the other judges in its engagement with the Sunni as well as Shi'a fiqh literature.<sup>135</sup> He used Abu Zahra's hadith analysis but concluded with al-Zarqa's opinion that stoning could be a ta'zir.

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<sup>133</sup> Ibid., 175.

<sup>134</sup> Ibid.

<sup>135</sup> Whereas Justice Ahmed reads the tradition through Islahi's eyes, Justice Lodhi reads the tradition through Parwezi eyes, and Justice Hyder reads the tradition through a Shi'a lens, Justice Hussain's opinion seriously engages with the tradition. He states everyone's position more or less accurately, describes how various schools have reconciled their positions, and even when he disagrees with the consensus, he uses two prominent authorities of the 20th century, instead of the straw men that the other justices construct – e.g. caricatures of 'ulama's positions, and questioning 'ulama's authority and legitimacy. Moreover, his position is not very far away from the 'ulama. Therefore, the 'ulama see him as a nuisance but not a threat to the tradition. This would explain why Zia appointed him as the acting chairman of the Federal Shariat Court.

### *Qur'an on Stoning*

Before going to 24:2, Justice Hussain started with a chronology of Qur'anic commands on zina. He quoted 17:32 providing the prohibition but no punishment, and dated the verse before the year of Hijra, the Prophet's migration to Medina marking the beginning of the Islamic calendar.<sup>136</sup> Then he quoted 4:15-16 providing confinement as a punishment, and dated the verse after the third year of Hijra.<sup>137</sup> Finally, he quoted 24:2 providing 100 stripes as the punishment, and dating the verse after 4:15-16. Justice Hussain noted the disagreement in fiqh literature on the evolution of the rule. He gave the arguments from hadiths on stoning before coming to the central question, whether the punishment of stoning is provided in the Holy Qur'an.

Justice Hussain considered the three ways raised by the state's counsel to understand the scope of the terms al-zani and al-zaniya in 24:2. The first argument was based on reading 24:2 with 24:3. Justice Hussain quoted 24:3, "The adulterer [al-zani] shall not marry save an adulteress [zaniya] or an idolatress, and the adulteress [al-zaniya] none shall marry save an adulterer [zani] or an idolater."<sup>138</sup> His choice of Pickthall's translation that prejudices the meaning of the verse by using the English terms "adulterer" and "adulteress" is curious. According to the state's counsel, since 24:3 talks about the marriage of al-zani and al-zaniya, 24:2 also talks about the unmarried zani and zaniya. After analyzing the grammatical ways to understand the definite article (ta'rif al-'ahd, ta'rif al-jins), he concluded that the fact that al-zani and al-zaniya in 24:2 can enter into a marriage does not mean that they have never been married. They could be divorced or widowed or in case of a man, married to less than four women at the moment. Justice Hussain then questioned the definition of muhsan in the Zina Ordinance based on the four Sunni schools. Drawing from Rida's concept of muhsan,<sup>139</sup> contrary to the four Sunni schools but conforming to the Shi'a-Ja'fari school,<sup>140</sup> he redefined muhsan to mean "a person who is properly married and who is in a position to enjoy the company of the spouse."<sup>141</sup>

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<sup>136</sup> Qur'an 17:32, "And come not near unto adultery. Lo! It is an abomination and an evil way."

<sup>137</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 178. "(15) As for those of your women who are guilty of lewdness, call to witness four of you against them. And if they testify (to the trust of the allegation) then confine them to the houses until death take them or (until) Allah appoint for them a way (through new legislation) (16) And as for the two of you who are guilty thereof, punish them both. And if they repent and improve, then let them be. Lo! Allah is relenting, Merciful." (I have removed the internal quotes.)

<sup>138</sup> *Ibid.*

<sup>139</sup> Justice Hussain spells the name as Rashid Raza.

<sup>140</sup> Drawing upon Fathullāh Kāshānī (d. 1580), Āyatullah Kāzīm Sharī'at-Madāri (1905-86), and Sayyid Muḥammad Raḍī.

<sup>141</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 182.

The second argument involved reading 24:2 in conjunction with 4:25.<sup>142</sup> Justice Hussain used Pickthall's translation for 4:25 (see Yusuf Ali's translation above):

And whoso is not able to afford to marry free [muḥṣināt], believing women, let them marry from the believing maids whom your right hands possess... And if when they are honourably married they commit lewdness they shall incur the half of the punishment (prescribed) for free women [muḥṣināt] (in that case)...

Justice Hussain noted that (according to Mawdudi, Daryabadi, Shah, al-Qurtabi, and al-Razi) the term muhsinat should not be interpreted as free women, but as “unmarried free women,” which would mean that 24:2 applies to unmarried free women as well.<sup>143</sup> Rejecting the interpretation, Justice Hussain argued that even if you accept that the first occurrence of muhsinat in 4:25 means unmarried free women in comparison with unmarried slavegirls, the term would include single women whether maidens, divorcees, or widows. Next, he argued that the second occurrence of muhsinat in 4:25 should mean married free women (corresponding to married slavegirls). He concluded that “[i]t would, therefore, be futile to interpret verse 24:2 in the light of the language of 4:25. The converse would, however, be true.”<sup>144</sup>

The third argument was based on reading 24:2 with 5:43 in the context of the Jewish case. Justice Hussain quoted 5:43, “[h]ow come they [the Jews] unto thee for judgment when they have the Torah wherein Allah hath delivered judgment [ḥukm Allāh] (for them)? Yet even after that they turn away. Such (folk) are not believers.” The argument, drawn from Shi'a sources, suggested that, “the punishment of stoning in Torah was never abrogated and remained enforceable in Islam.”<sup>145</sup> But Justice Hussain rejected the argument on two grounds: the Torah made no distinction based on the marital status

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<sup>142</sup> Justice Hussain had quoted Pickthall's translation of the verse: “And whoso is not able to afford to marry free, believing women [muḥṣināt], let them marry from the believing maids whom your right hands possess... And if when they are honourably married they commit lewdness they shall incur the half of the punishment (prescribed) for free women [muḥṣināt] (in that case)...”

<sup>143</sup> While Justice Hussain attributes the term “unmarried free women” to scholars such as Mawdudi, Pir Karam Shah, al-Qurtabi, and Daryabadi, they are more precise. For example, Shah interprets muḥṣināt as the “free virgins” (al-abkār al-ḥarā'ir) drawing from al-Qurtabi. See Pir Karam Shah, *Sunnat-i Khayr al-Anām* (Lahore, Pakistan: Diya al-Qur'ān Publications, 1977), 254. Mawdudi uses the phrase “unwed woman from a free family” (āzād khāndān kī bin biyāhī 'awrat). See Sayyid Abū al-A'lā Mawdūdī, *Tafhīm al-Qur'ān*, 6 vols. (Lahore, Pakistan: Maktaba-i Ta'mir-i Insāniyyat, 1966), 3:326.

<sup>144</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 183.

<sup>145</sup> According to Justice Hussain, the argument is made by Shi'a scholars such as Imām Muḥammad al-Bāqir (676-733) and Muḥammad Shahābī Khurāsānī. *Ibid.* This argument appears in Sunni fiqh in the works of the 20th-century scholar Anwar Shāh Kāshmirī. Later, Usmani would draw this argument in his judgment on *Hazoor Bakhsh* review.

of the adulterer,<sup>146</sup> and since the Jews came to the Prophet instead of the Prophet extending his jurisdiction over them, the law applies to Jews only.<sup>147</sup>

Next, Justice Hussain focused on the alleged verse on stoning. He endorsed Islahi's position on the alleged verse as forgery. But then he noted that al-Juzayri's (1882-1941) "The Book of Law based on the Four Schools" (*Kitāb al-Fiqh 'alā al-Madhāhib al-Arba'a*) attributes the words of the alleged verse to the Prophet, and emphasized the inconsistency between a few more narrations. Justice Hussain stated that, "[a]t least one thing is evident from these traditions that in the time of [ʿUmar] too when most of the Companions of the Holy Prophet were alive it was widely believed that Stoning was not provided for in the Holy Qur'an[.]"<sup>148</sup> Justice Hussain then produced a long excerpt on the Qur'an's compilation from Shibli Nu'mani's *al-Faruq* as well as arguments from Sunni and Shi'a sources that the authenticity of the alleged verse is conjectural. He concluded that, "stoning of a married person committing adultery is not proved from the Holy Qur'an nor does Verse 24:2 discriminate between a married and an unmarried person in respect of Hadd."<sup>149</sup>

### ***Sunna on Stoning***

To analyze the sources of stoning in the sunna, Justice Hussain started with ʿUbada's reported hadith (quoted above). While the other judges in the majority concluded that the hadith came before 24:2 without much analysis, Justice Hussain framed his analysis in the following manner:

There is a difference of opinion whether the words in the tradition of [ʿUbada] were uttered by the Messenger of Allah contemporaneously with the revelation of [chapter] (or soon after) or they were uttered before the revelation of [Sūra al-Nūr] (24:2). The question is important since in case of contemporaneousness the tradition may be an interpretation of the verse and the latter may be held applicable to unmarried persons only. But in case it is prior in time its order will be considered to have been abrogated by the order in the Verse (24:2) and the Hadd for married and unmarried both will be flogging.<sup>150</sup>

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<sup>146</sup> See *Holy Bible: King James Version*, (New York, N.Y.: American Bible Society, 1980), Leviticus 20:10 (stating, "And the man that committeth adultery with another man's wife, even he that committeth adultery with his neighbour's wife, the adulterer and the adulteress shall surely be put to death.")

<sup>147</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 183-84.

<sup>148</sup> *Ibid.*, 185.

<sup>149</sup> *Ibid.*, 188.

<sup>150</sup> *Ibid.*, 189.

After surveying the positions and arguments of a range of pre-modern and modern scholars, Justice Hussain concluded that the view that ‘Ubada’s report came before 24:2 is more reasonable.<sup>151</sup>

Next, Justice Hussain introduced Abu Zahra as one of the greatest jurists of the 14th Islamic century, and paraphrased his hadith analysis declaring stoning as un-Islamic from Mansur’s book:

(1) In spite of there being a provision for the expulsion of unmarried person in addition to his being flogged, [Malik] did not give a verdict in favour of the sentence regarding females.

(2) He considered all the traditions including that of [‘Umar] to be in the nature of [solitary].

(3) He relied upon the doubt created by the answer of [‘Abdullah b. ‘Awf] that he did not know whether all these incidents of stoning took place before or after the revelation of [chapter 24]

(4) He could not believe that the punishment of stoning being a much harsher punishment than even the punishment of [Qiṣāṣ] or punishment of [Ḥirāba] (Verse 5:33) which includes killing and execution by putting on the cross, should not be specified in the Qur’an or in [recurrent] sunna but should be based on [solitary report]. Even [Hanafis] did not agree with the order of expulsion of an unmarried person since it was not in [Sūra al-Nūr] and this reason is itself sufficient for his view as stoning is not in the Koran. The [Hanafis] thus repelled the incident of [‘Asīf] being something in excess of Qur’an. Moreover, in view of the doubt of the Companion of the Holy Prophet whether the incident of [Ma‘iz] and [Ghāmidīyya] preceded or followed [Sūra al-Nūr], the benefit of doubt should go to the accused against the harsher punishment.

(5) The punishment of a slave girl is half of the punishment of a free woman. It must mean the [muḥṣināt] in Verse 4:25 in the second place was used in the sense of married persons and undoubtedly stoning cannot be halved. He also relied upon the opinion of others including [Khārijīs], some [Shi‘as], and some [Mu‘tazila] in support of this.<sup>152</sup>

In contrast with the other judges in the majority, Justice Hussain recognized the traditional distinction between recurrent-in-words and recurrent-in-meaning and acknowledged that the ‘ulama say that the hadiths on stoning are recurrent-in-meaning. But assuming that recurrent-in-meaning is nothing more than solitary, he pointed out that according to the Hanafi jurist al-Sarakhsi, those who reject widespread hadiths – let alone

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<sup>151</sup> Ibid., 191. Justice Hussain described the opinions of Maḥmūd Shāhābī Khūrāsānī, al-Zamakhsharī, al-Jaṣṣāṣ, Ibn Qudāma, al-Sarakhsī, al-Zayla‘ī, al-Ālūsī, Ja‘far al-Ṣādiq, Mawdudi, and Daryabadi. Furthermore, Justice Hussain suggested that the Ghāmidīyya woman’s case was after the revelation of 24:2 based on when Abu Hurayra accepted Islam, but after surveying Sunni and Shia scholars, he declared that, “[i]t is not possible to answer this question with any amount of certainty.” Ibid., 193.

<sup>152</sup> Ibid., 197-98.

solitary ones – may not be considered heretics, implying that they should be considered mainstream Muslims.

Justice Hussain then surveyed the difference of opinion among the four Sunni schools on the “aggregation of two sentences of whipping and exile of an unmarried person and whipping and stoning of a married one[.]”<sup>153</sup> He emphasized that the Hanafi approach is not consistent since it treats exile as a ta‘zir due to the fact that it is based on solitary reports, but does not consider stoning as a ta‘zir which is also based on solitary reports according to Justice Hussain.<sup>154</sup>

### *Stoning as Ta‘zir*

To argue that stoning is a ta‘zir, Justice Hussain produced al-Zarqa’s opinion from Mansur’s book:

I see greater scope of the possibility that the Holy Prophet ordered stoning in these established incidents by way of Ta‘zir and not by way of Hadd. He saw that the [muhsan] (married) who should be content with a legal wife required at that age [or period] a stronger deterrent than the deterrent (required by) an unmarried [bikr]. By this the Holy Prophet wanted to exterminate the prostitution of the days of Ignorance and to make the offensiveness of this horrible crime deep-rooted in the minds and hearts of the Muslims. This is a matter whose appreciation depends on the discretion of the ruler as it depends in all similar cases which require deterrence, or Ta‘zir which is within the jurisdiction of the ruler. Now in respect of stoning we can say what is said in respect of every Ta‘zir: that it is in the discretion of the ruler: he can do what he deems fit according to public expediency. If he likes he can implement the punishment of stoning or he can punish only with stripes which is the only Hadd. If he likes he can administer both sentences by way of Hadd and by way of Ta‘zir and if he likes (considers it necessary) he can flog the [muhsan] (married) by way of Hadd and add to it some deterrent other than Rajm (stoning) because his Zina is more serious and more obnoxious than the Zina of an unmarried person. All this will depend upon the discretion (of the ruler) according to expediency, needs and requirements of time and the persons concerned in keeping with the principles of Ta‘zir. We see its parallels in our modern criminal laws relating to punishments in which the Judge is authorized to adopt one of the two limits, maximum and minimum; he can

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<sup>153</sup> Ibid., 199. The Sunni opinions were based on the distinction between muhsan and non-muhsan, not the distinction between married and unmarried. But Justice Hussain uses the married and unmarried categories to frame his analysis.

<sup>154</sup> Ibid., 200.

award punishment of fine and imprisonment or any one of these two. This rule is also acceptable to the principle of Ta'zir in Islam.<sup>155</sup>

Having already declared that 24:2 abrogated the rule in 'Ubada's report, Justice Hussain stated that, "This leaves us only with the opinion of [al-Zarqa]. As a principle I would agree with it."<sup>156</sup> To further support this conclusion, Justice Hussain gave examples of reports on punishments other than stoning such as beheading for incest and repeat offenses to argue that stoning was not mandatory. He also noted that Islahi's explanation of stoning as a ta'zir confirmed al-Zarqa's position, and stated that this position would make sense in the context of the Hanafi claim that the hudud come from the Qur'an.<sup>157</sup>

Lastly, Justice Hussain rejected the argument that there is consensus on stoning as a hadd. He pointed to the report that the fourth caliph 'Ali awarded stoning to the married person, hadd to the unmarried person, half of the hadd to the slave, ta'zir to the child, and acquitted the mentally disabled person. From this report, Justice Hussain drew the conclusion that 'Ali considered stoning as distinct from hadd.<sup>158</sup>

#### 4.4 Justice Zakaullah Lodhi's Opinion

Justice Lodhi's opinion addressed the Qur'anic verses and the Prophet's statements on stoning. The opinion was drafted in English but quoted Arabic and Urdu text with and without translation. For Qur'anic quotes in English, he used Abdullah Yusuf Ali's translation. Characteristic of Parwez and the Ahl-i Qur'an, Justice Lodhi's opinion included a scathing critique of the 'ulama, declared that the Qur'an provides the maximum – not mandatory – punishment for offenses, and rejected the historical authenticity of the entire hadith literature. He also quoted Abu Zahra's analysis to reject the hadiths on stoning. This opinion was hardly surprising given Justice Lodhi's paper in the 1979 shari'a conference.<sup>159</sup>

#### *Qur'an, Zina and the 'Ulama*

In a manner characteristic of Parwez, Justice Lodhi began his opinion targeting the 'ulama and their tradition. Comparing the 'ulama to the Qur'anic criticism of Jews and Christians, he stated that, "the Books revealed earlier... were subsequently modified indirected [sic] by their doctors of law and clergy in order to substitute their will to the

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<sup>155</sup> Mansūr, *Nizām al-Tajrīm wa al-'Iqāb*, 182-183; Makkī, *Fatāwā Muṣṭafā al-Zarqā*, 392-393.

<sup>156</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 202.

<sup>157</sup> The scholars who considered that the hudud come from Qur'an were not rejecting rajm. They either meant that the crimes subject to hudud are in the Qur'an even if the punishments are not, or they considered the alleged verse on rajm as the Quranic source of rajm.

<sup>158</sup> This argument assumes that 'Alī was using legal categories standardized much later by jurists and does not explain how rajm is also distinct from ta'zir.

<sup>159</sup> See note 91.

will of God... This class as a [v]ested interest is present in almost all religions and... have always defaced and polluted their religions...<sup>160</sup> Justice Lodhi stated:

More or less the same treatment was meted out to Islam following the pattern of earlier powerful clergy and also out of short sightedness and protection of vested interest during kingship in Islam. It can be seen from the stretching of meanings of Qur'anic verses, cancelling or substituting one verse by another or cancelling it by Hadith.<sup>161</sup>

Emphasizing the Qur'an's primacy and coherence, Justice Lodhi declared that neither the sunna nor even the Qur'an can abrogate a part of the Qur'an, "[o]nly its scheme should be logically appreciated and reasonably understood."<sup>162</sup>

Justice Lodhi articulated a theory of Islamic punishments with an unmistakable resemblance to Parwez's theory. He argued that the Qur'an has given us "laws of permanent nature on the subjects of Zina, thefts of various shades and Qazaf. It is for these offenses that maximum punishment has been provided by the Holy Qur'an."<sup>163</sup> He acknowledged that in juristic parlance, hadd is mandatory punishment whereas ta'zir is discretionary punishment, but emphasized that these are only juristic terms. He explained his theory of Islamic punishments as follows:

Now there are different shades of the offences with reference to varying degrees of gravity involved in the offence falling into these categories. It would be for the law makers to enact suitable laws to meet the situation, keeping in view the highest punishment provided by the Holy Qur'an for the gravest and the most heinous kind... Again it would lie in the discretion of the Judge to award maximum punishment provided for any category of sex offences or to award a lesser sentence or even pardon the offender if there were chances of his amend.<sup>164</sup>

In support of lesser sentences and pardons, Justice Lodhi quoted 42:40 (see above) and interpreted the verse in Parwez's distinctive manner, leading to the presumption that he was, in fact, drawing upon Parwez.

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<sup>160</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 204. To support this point, Justice Lodhi quoted Qur'an 5:47, 5:50, 6:106, 12:40, and 2:213.

<sup>161</sup> *Ibid.*, 206.

<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

### *Sunna on Stoning*

To address the argument for stoning from the sunna, Justice Lodhi raised the alleged verse on stoning and rejected the verse quoting an Urdu translation of Qur'an 12:9. According to him, the Prophet could never have awarded stoning to muhsans at least not after the clear injunction in the Qur'an. To say otherwise based on solitary hadiths, according to Justice Lodhi, is irresponsible:

Even an authentic "Hadith" cannot stand in a position superior to Holy Qur'an... It is true that "Hadith" is second big source of Islamic jurisprudence, but it occupies second position. A "Hadith" cannot lay down a positive law contrary or repugnant to Holy Qur'an, nor can it alter, amend or modify Holy Qur'an.<sup>165</sup>

For Justice Lodhi, any hadith that does not correspond to his Qur'anic interpretation is falsely attributed to the Prophet, stating that "we cannot imagine the Holy Prophet doing a thin[g] which is not to be found in the Holy Qur'an[.]"<sup>166</sup> To emphasize that the Prophet can only do what comes from God, he quoted a series of Qur'anic verses.<sup>167</sup> Justice Lodhi also rejected the reports that caliphs 'Umar and 'Alī awarded stoning, arguing that that these companions were the greatest followers of the Qur'an and therefore could not follow an un-Islamic practice.

To support his theory that "the Holy Prophet never prescribed or practiced any punishment other than the Qur'anic punishment" of one hundred stripes,<sup>168</sup> Justice Lodhi quoted Abu Zahra's opinion from Mansur's book:

(a) Indeed stoning is the extreme punishment and it is more extreme than death as punishment for murder and is also more extreme than the punishment of banditry (ḥirāba) forms of which are (punished by) death and crucifixion. So it is necessary that it must be proved by Qur'an or recurrent sunna. The reports of stoning were narrated as solitary without recurrence. So the doubt of falsehood is still present in (the rule of stoning), even if the possibility is not dominant.

(b) It is established among Hanafis that a general rule (ʿāmm) is definitive in its significance. So the verse of al-Nur (24:2) is general in its implication and includes the muhsan and the non-muhsan, and [therefore] definitive in its significance and cannot be qualified with a solitary report,

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<sup>165</sup> Ibid., 207.

<sup>166</sup> Ibid.

<sup>167</sup> 5:44, 3:79, 5:42, 10:15, 22:4, and 16:89 in Yusuf Ali's translation, and 5:48 and 6:15 in an unreferenced Urdu translation.

<sup>168</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 210.

even if a report's sources multiply, while in fact the sources (in this instance) did not multiply.

The Hanafis have rejected the report of 'Asif despite the fact that a group (of people) has narrated it, and (the Hanafis) said that there is an augmentation (ziyāda) of [the rule of] the Qur'an in (the report of 'Asif), and augmentation of the (rule of) Qur'an must be from a command definitive in its level (of authenticity).<sup>169</sup>

Justice Lodhi gave two reasons to explain the existence of stoning in Islamic sources: First, the Jewish and Arab tribes used to award stoning before Islam. The Qur'an outlawed the practice, but it came back due to the tendency of Arabs to revert back to ancestral practices. Second, the works of history and the hadith literature were produced 250 years after the Prophet's period, based on the oral tradition, not a written record.<sup>170</sup> Then he quoted a series of excerpts from Mawdudi to note that even a "staunch believer of hadith" such as Mawdudi accepts the possibility of human error in the hadith literature.<sup>171</sup> Justice Lodhi also noted that the facts of the cases allegedly decided are not clearly reported, and concluded that it is "impossible" to safely use the hadith literature in lawmaking.<sup>172</sup>

Since Justice Lodhi was more focused on questioning the entire hadith canon, he did not engage in interpreting the meaning of the four reported cases of stoning during the Prophet's lifetime. Before concluding his opinion, he turned to Justice Hussain's argument that stoning may be awarded as a ta'zir. Justice Lodhi rejected the argument based on his earlier point that hudud consist of maximum punishments, and therefore a ta'zir may not be more than one hundred stripes.

## 5. Islamic Law and Authority

What can we learn about the nature of Islamic legal interpretations in the Federal Shariat Court from *Hazoor Bakhsh*? The constitutional provision making the injunctions of the Qur'an and sunna the grounds for shari'a review in 1978 was a compromise. The provision ensured that the Qur'an as well as the sunna shall be considered sources of shari'a. However, the provision did not resolve the interpretive process or school that would give meaning to the injunctions of the Qur'an or determine the content of sunna. But constitutional and legislative compromises invariably give authority to judges who

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<sup>169</sup> I am substituting my own translation, instead of using the translation in Justice Lodhi's opinion. Quoted in *ibid*; see Manşūr, *Niẓām al-Tajrīm wa al-'Iqāb*, 1:181-182.

<sup>170</sup> As an example of the works of history, Justice Lodhi referenced *al-Tārīkh al-Ṭabarī*.

<sup>171</sup> Mawdudi was arguing against two extremes. On the one hand, the people who completely deny the historic authenticity of the hadith literature, and on the other hand, the people who completely accept the classifications in the hadith literature. Mawdudi's goal was to suggest that the present generation can continue to evaluate the hadith literature. See Abū al-A'lā Mawdūdī, *Tafhīmāt*, 2 vols. (Lahore, Pakistan: Islamic Publications, 1968), 1:355-57.

<sup>172</sup> *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 211.

construct the meaning of the terms. In the context of stoning, interpreting the meaning of a legal tradition, negotiated and contested over centuries, was not easy. In doing so, the judges ignored the authority of the pre-modern schools of law, even when there was considerable doctrinal agreement among the Sunni and Shi‘a schools on the nature of stoning as a hadd punishment. The judges also ignored the authority of the contemporary ‘ulama who defended the stoning provisions of the Zina Ordinance in answering the Court’s questionnaire. Some even questioned the authority of sunna as a binding source of shari‘a.

Instead, the judges asserted their own authority to interpret the Qur’an and sunna, and articulate the relationship between the two sources. They rejected the premodern theories of abrogation and qualification, and undertook their own analysis of the authenticity and the authority of the hadith canon on the subject and as a whole. But this claim of authority raised questions about their capacity to approach the Qur’an and sunna directly as the sources originally exist in Arabic. Unlike their Arab counterparts such as the judges of the Supreme Constitutional Court of Egypt, the Federal Shariat Court judges were not conversant in Arabic, with the exception perhaps of Justice Hussain. The judges partially overcame this barrier by using English and Urdu translations of the Qur’an and hadiths. Furthermore, the use of Persian text without translation served to partially counterbalance the lack of authority in their engagement with the Arabic sources – Persian is considered second only to Arabic as a language of high Islamic discourse.

However, as judges in the British tradition of adversarial law, the Federal Shariat Court judges did not have to be experts in the subject matter. The adversarial system places the burden of presenting legal authority and articulating legal arguments on the parties. A judge draws upon these arguments in deciding cases and writing legal opinions. This approach toward the process of judging, rooted in the colonial experience, may explain the confidence of the judges in asserting the authority to decide any question after hearing the parties and reading the ‘ulama’s responses. However, the adversarial system assumes a reasonably stable hierarchy of legal sources, which itself was at issue in this case.

Nevertheless, the ‘ulama’s argument that the judges declared stoning un-Islamic since they could not engage with the sources ignores the broader trends in the 20th-century Islamic discourse that these judges were drawing upon.<sup>173</sup> Furthermore, the

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<sup>173</sup> The Deobandi scholar Muhammad Taqi Usmani made this argument in general terms as follows: “The decision that such and such [a law] is repugnant to the Qur’an and sunna can only be made by a person who has expertise in the sciences of Qur’an and sunna. A person who does not know the Arabic language, a person who is unfamiliar with Qur’an and sunna, unfamiliar with fiqh, for him to decide that such and such a law is according to Qur’an and sunna is not feasible in any way. Insofar as the knowledge and standing of the present judges is concerned, they are unquestionably beyond any doubt in their fields [of law], but when... a new jurisdiction is being conferred upon them, the consideration of the extent to which they are familiar with the science of Qur’an and sunna should have been important. In the appointment of today’s judges, I think there is not even the condition whether they have ever recited the Qur’an (nāzira Qur’an parha hay yā nahīn). On top of that, giving them the authority to decide... that such a law is according to the Qur’an and sunna or not, I think this is a very big burden placed upon them that they cannot bear.” Ministry of Religious Affairs, *‘Ulamā Convention: Taqārīr wa Tajāwīz*, 89-90. In the review of *Hazoor*

objection does not explain the political question of why a group of judges appointed by the regime would rule against the regime's signature legislation.<sup>174</sup> In fact, the four positions in *Hazoor Bakhsh*, corresponding to Islahi, al-Zarqa, Abu Zahra, and even Parwez, represented the regime's internal struggle in the Council of Islamic Ideology and elsewhere over the content and meaning of shari'a.

To sum up the internal struggle, we can recount how each of the four positions was represented in the regime's Islamization project (see Table 6). First, the regime insisted upon Islahi to join the Council of Islamic Ideology that was drafting the Hudud Ordinances. Even though Islahi refused, Justice Ahmed, who based his analysis almost entirely on Islahi, was a member of the Council of Islamic Ideology and part of the legal committee drafting the Hudud Ordinances. Second, the regime selected al-Zarqa to participate in drafting the Hudud Ordinances, despite or perhaps because of his opinion on stoning expressed in Libya. Furthermore, Justice Hussain, who endorsed al-Zarqa's position, also participated in drafting the Hudud Ordinances. Third, Abu Zahra was a Hanafi jurist, respected among the Hanafi 'ulama in Pakistan, including the ones drafting the Hudud Ordinances. His position should be considered a dissenting opinion *inside* the Hanafi school. Fourth, the intellectual influence of Parwez persisted in Pakistan under Zia. The regime appointed Justice Lodhi to the Federal Shariat Court in 1980, despite his paper in the 'ulama's conference based on Parwez's ideas on hudud.

## 6. Courts and Authoritarian Politics

How do we expect Zia's authoritarian regime to respond in this case? Scholars used to consider authoritarian regimes uninteresting cases of judicial politics. The conventional wisdom considered it "hard to imagine a dictator, regardless of his or her uniform or ideological stripe, (1) inviting or allowing even nominally independent judges to increase their participation in the making of major public policies, or (2) tolerating decision-making processes that place adherence to legalistic procedural rules and rights above the rapid achievement of desired substantive outcomes."<sup>175</sup> However, the recent scholarship on courts in authoritarian regimes demonstrates that courts play important functions in authoritarian regimes and even enjoy policymaking powers.<sup>176</sup> Among other things, authoritarian regimes often use courts for economic liberalization, administrative

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*Bakhsh*, the Barelawi scholar Muhammad Karam Shah stated in *Hazoor Bakhsh* review, "I do not doubt the intelligence, erudition, or perceptiveness of the judges who have declared that rajm is not a hadd in shari'a. Reading their opinions shows the effort they have exerted in solving this puzzle." *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 377.

<sup>174</sup> This question is based on the assumption in public law literature that political regimes appoint judges whose political ideology is consistent with the regime's goals. Therefore, judges do not tend to invalidate laws enacted by the political regime that appointed them.

<sup>175</sup> Tate and Vallinder, *The Global Expansion of Judicial Power*, 28.

<sup>176</sup> See, e.g., Tamir Moustafa, "Law Versus the State: The Judicialization of Politics in Egypt," *Law & Social Inquiry* 28, no. 4 (2003); Ginsburg and Moustafa, *Rule by Law*; Ghias, "Miscarriage of Chief Justice."

control, unpopular policymaking, social control, and legal legitimation. In the process, judges participate in public policymaking.

The Zia regime's purpose in establishing the Federal Shariat Court was ideological legitimation. The Federal Shariat Court's judgments were not meant to provide legal cover to the regime's extra-constitutional measures. Rather, the very existence of the Court provided Islamic legitimacy to the regime. By declaring that any law that conflicts with the Qur'an and sunna can be challenged in the Federal Shariat Court, the regime sought to produce the impression that the entire legal system has become Islamic. The regime's reliance on the Court for legitimacy enabled the judges to scrutinize the regime's enactments with a degree of autonomy. So how did the regime respond to *Hazoor Bakhsh*?

Many scholars have argued that the Zia regime removed the Federal Shariat Court judges because of the *Hazoor Bakhsh* decision. However, this analysis oversimplifies the events after *Hazoor Bakhsh*. While the regime declared its intention to file an appeal in the Supreme Court, the regime neither targeted the Federal Shariat Court nor its judges when Zia reshuffled the entire judiciary four days after *Hazoor Bakhsh*.<sup>177</sup> On March 24, 1981, Zia introduced a Provisional Constitution Order (PCO) that placed Zia's orders as the chief martial law administrator outside the jurisdiction of the High Courts and the Supreme Court. However, the PCO did not constrain the jurisdiction of the Federal Shariat Court.

The PCO also forced the judges of the High Courts, the Federal Shariat Court, and the Supreme Court to take oaths reading that, "I will discharge my duties, and perform my functions honestly, to the best of my ability and faithfully in accordance with the Provisional Constitution Order, 1981, and the law."<sup>178</sup> However, the High Court and the Supreme Court's oath further stated that, "I will abide by the Provisional Constitution Order, 1981, and the code of conduct issued by the Supreme Judicial Council."<sup>179</sup> The last sentence was conspicuously missing from the Federal Shariat Court's oath, suggesting that the target of the PCO were the High Courts and the Supreme Court, not the Federal Shariat Court.

Furthermore, several High Court and Supreme Court judges were either not given oaths and forcibly retired, or were given oaths but they declined and accepted retirement.<sup>180</sup> When the chief justice of Balochistan High Court declined to take the oath, Zia elevated Justice Lodhi from the Federal Shariat Court as the acting chief justice of the Balochistan High Court.<sup>181</sup> Since the entire purpose of the PCO was to appoint chief

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<sup>177</sup> Dawn, "Rajm: Appeal to Be Filed in SC," *Dawn*, March 25, 1981.

<sup>178</sup> *Provisional Constitution Order*, 1981 PLD CS 183, 191.

<sup>179</sup> *Ibid.*

<sup>180</sup> Khan, *Constitutional and Political History of Pakistan*, 359.

<sup>181</sup> *Ibid.*, 360. See also Mir Khuda Bakhsh Marri, *A Judge May Speak* (Lahore, Pakistan: Ferozsons, 1990).

justices who would not challenge the regime's core interests, Justice Lodhi's appointment as a chief justice demonstrated the regime's trust in him, despite his opinion in *Hazoor Bakhsh*. The remaining four judges of the Federal Shariat Court were given the oath under the PCO which they took.<sup>182</sup> However, Zia was concerned about Justice Hyder's challenge to the regime's martial law powers as chief justice of the Sindh High Court, more so than his challenge to the regime's Islamization project in *Hazoor Bakhsh*. Therefore, Zia used the PCO to "retire" Justice Hyder from the Sindh High Court effective March 25, 1981,<sup>183</sup> but retained him on the Federal Shariat Court.

In other words, the *Hazoor Bakhsh* decision did not produce an immediate backlash against the Federal Shariat Court judges, even when the regime had the opportunity under the PCO. The regime's reaction suggests that targeting an institution representing the regime's Islamic legitimacy was not worthwhile, particularly when the regime's legal legitimacy was becoming more dubious. However, the next chapter shows that the regime would later respond to change the outcome of the case under pressure from the 'ulama.

## 7. Conclusion

This chapter explores why the Federal Shariat Court declared the punishment of stoning for unlawful sex as un-Islamic shortly after the enactment of the Zina Ordinance. I trace the evolution of an anxiety over stoning in the postcolonial period as jurists and intellectuals debated the codification of Islamic legal tradition in Muslim states. Through a biographical analysis of judges and textual analysis of their opinions, I show how the Federal Shariat Court's decision to declare stoning un-Islamic was a reflection of this anxiety in the Zia regime's internal struggle over the codification of shari'a. As the regime reconstituted the Federal Shariat Court to reverse the ruling, I argue in the next chapter that the regime's goal was not to declare stoning Islamic per se, but to retain the support of certain religio-political parties at a time when other political parties were forming a coalition against the regime. In conclusion, this chapter shows that shari'a remains a contested terrain, even in a conservative authoritarian regime. However, the contestation does not mean that legal reasoning is completely outcome determinative. The positions taken in *Hazoor Bakhsh* are traceable to broad intellectual currents in the Muslim world. The next chapter demonstrates how this contestation is resolved through the political process and how the resolution is expressed in the legal discourse.

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<sup>182</sup> Dawn, "SC and High Courts' Judges Sworn In," *Dawn*, March 26, 1981; See also Marri, *A Judge May Speak*, 143-44. (The ceremony was attended by Tanzil-ur Rahman, among others.)

<sup>183</sup> Ministry of Law and Parliamentary Affairs, No. F. 12(3)/81-AII(A) (Islamabad, April 7, 1981), *Gazette of Pakistan, Extraordinary*, April 7, 1981, III, 180.

## Chapter 4. Reasserting Tradition: The Review of *Hazoor Bakhsh*

### 1. Introduction

The Federal Shariat Court's judgment declaring stoning un-Islamic produced a strong reaction from the 'ulama. Shortly thereafter, General Muhammad Zia ul-Haq reconstituted the Federal Shariat Court and included three 'ulama on the bench. The bench overturned *Hazoor Bakhsh v. Federation of Pakistan* in its 1982 review, *Federation of Pakistan v. Hazoor Bakhsh*. The case reflects a constitutional and political moment in which the 'ulama or precolonial legal profession, excluded from judicial positions since the colonial period, were included in the judiciary after years of demanding a role in the postcolonial state. The case also marks the beginning of reasserting the 'ulama's tradition in the judiciary.

This chapter deals with two questions relating to the *Hazoor Bakhsh* review. First, what are the political and legal resources that religio-political movements use to influence constitutional jurisprudence? In explaining why secularists find constitutional law and constitutional courts so appealing, Ran Hirschl describes the role of rationales such as co-optation, jurisdictional advantages, the epistemology of constitutional law, constitutional delegitimation of religious association, and political control of constitutional courts and judges in constraining religion.<sup>1</sup> This chapter shows how these very rationales are also used in advancing the goals of religio-political movements.

Second, how have the 'ulama used the platform of constitutional courts to reassert the authority of the premodern tradition? The appointment of 'ulama to the Federal Shariat Court and the Supreme Court makes Pakistani courts stand apart from Arab constitutional courts. This chapter shows that the scholar judges in the Federal Shariat Court dismiss the distinction between fiqh and shari'a, and between hadith and sunna. The scholar judges unsurprisingly remain consistent with the Hanafi doctrine without insisting that the school's doctrine is binding. Resisting attempts to historicize law, the 'ulama present fiqh as an internally coherent structure of norms. The Federal Shariat Court emerges in sharp contrast to what Wael Hallaq has prematurely considered the demise of the hermeneutical foundations of shari'a.<sup>2</sup> Nevertheless, the assertion and continued defense of fiqh remains contingent on the political process through which 'ulama become judges.

This chapter is organized as follows. Section 2 describes how the evolving political dynamics in 1981, independent of *Hazoor Bakhsh*, enhanced the bargaining

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<sup>1</sup> Hirschl, *Constitutional Theocracy*, 51.

<sup>2</sup> Hallaq has developed this notion over the last decade in the following works: Hallaq, "Can the Shari'a Be Restored?"; Hallaq, *Shari'a: Theory, Practice, Transformations*; Wael B. Hallaq, *The Impossible State* (New York, N.Y.: Columbia University Press, 2012).

power of the ‘ulama who succeeded in forcing the Zia regime to appoint ‘ulama to the Federal Shariat Court. Section 3 focuses on the *Hazoor Bakhsh* review in the Federal Shariat Court and includes biographical notes on each judge, focusing on his positions on hadith and stoning. Then, based on an analysis of the six concurring opinions in *Hazoor Bakhsh* review, I show how the judges drew upon jurisdictional arguments, constitutional interpretation, common law principles of statutory construction, and the Sunni hadith canon to uphold the Zina Ordinance’s provisions on stoning. Section 4 engages with the scholarship on courts and politics to argue that state-religion jurisprudence not only serves to constrain religion, but can also serve to advance the interests of religio-political forces, depending on the relationship of the regime to religio-political parties vis-à-vis secular political parties. Section 5 analyzes the authority of the opinions in constructing the meaning of Quran and sunna as well as the authority of the Federal Shariat Court.

## 2. Bargaining under Authoritarianism

In the previous chapter, I argued that *Hazoor Bakhsh* did not produce an immediate backlash against the Federal Shariat Court judges. The Federal Shariat Court was not the regime’s focus when the regime cracked down on the judiciary using the PCO shortly after *Hazoor Bakhsh*. So why did the Zia regime reconstitute the Federal Shariat Court later on? In this section, I argue that *Hazoor Bakhsh* coincided with a regrouping of the political opposition and resistance of the judiciary against Zia that made the regime increasingly dependent on the ‘ulama for support, enhancing their bargaining power.

In response to *Hazoor Bakhsh*, the regime filed an appeal in the Supreme Court and obtained a stay order on the Federal Shariat Court judgment.<sup>3</sup> But the ‘ulama were not satisfied and argued that professional judges in the Federal Shariat Court or the Supreme Court without any expertise in fiqh cannot interpret the Qur’an and sunna. The ‘ulama’s patronizing attitude towards the professional judges and the ‘ulama’s demand to be appointed to the Federal Shariat Court and the Supreme Court was not new. Since 1953, the ‘ulama had called for a Supreme Court bench consisting of five ‘ulama and one professional judge to conduct shari‘a review (see chapter 2). When Zia did not include ‘ulama upon establishing the shariat benches, Ahmad Sa‘id Kazimi, the president of an umbrella Barelawi group, Jama‘at-i Ahl-i Sunnat, addressed Zia at a press conference and said, “the shariat benches should have been consisted of ‘ulama; [only] the opinion of ‘ulama can be authoritative.”<sup>4</sup> When Zia held an ‘ulama’s convention shortly after the establishment of the Federal Shariat Court in 1980, the Deobandi scholar Muhammad Taqi Usmani expressed his concerns in a speech before Zia:

... The decision that such and such [a law] is repugnant to the Qur’an and sunna can only be made by a person who has expertise in the sciences of

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<sup>3</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 277.

<sup>4</sup> Shākir Ḥusayn Khān, "Pīr Karam Shāh al-Azharī kī ‘Ilmī awr Dīnī Khidmāt" (University of Karachi, 2008), 333.

Qur'an and sunna. A person who does not know the Arabic language, a person who is unfamiliar with Qur'an and sunna, unfamiliar with fiqh, for him to decide that such and such a law is according to Qur'an and sunna is not feasible in any way. Insofar as the knowledge and standing of the present judges is concerned, they are unquestionably beyond any doubt in their fields [of law], but when... a new jurisdiction is being conferred upon them, the consideration of the extent to which they are familiar with the science of Qur'an and sunna should have been important. In the appointment of today's judges, I think there is not even the condition whether they have ever recited the Qur'an (*nāzira Qur'an parha hay yā nahīn*). On top of that, giving them the authority to decide... that such a law is according to the Qur'an and sunna or not, I think this is a very big burden placed upon them that they cannot bear.<sup>5</sup>

At the end of the convention, the 'ulama issued a declaration of demands. Section 9 of the declaration stated that, "the Federal Shariat Court that should have the authority to declare various laws Islamic or un-Islamic should consist of people whose knowledge, comprehension, honesty, and Godliness is trusted by the nation. They should include the 'ulama as well."<sup>6</sup> In his speech at the end of the convention, Zia promised to establish qadi courts (which he never did) and appoint 'ulama to them, but he did not commit to appoint 'ulama to the Federal Shariat Court or the Supreme Court.<sup>7</sup>

The 'ulama had been demanding the inclusion of scholar judges in the Federal Shariat Court but Zia had ignored these demands time and again. So why did Zia accede to appointing 'ulama to the Federal Shariat Court after *Hazoor Bakhsh*? The answer has less to do with *Hazoor Bakhsh*, than with the evolving political dynamics of the moment.<sup>8</sup> The political parties in the Pakistan National Alliance (PNA) had supported the 1977 coup as a response to the allegedly rigged elections under the PPP government. But when Zia repeatedly backed out of holding elections, these political parties started to withdraw

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<sup>5</sup> Ministry of Religious Affairs, *'Ulamā Convention: Taqārīr wa Tajāwīz*, 89-90. The regime also conducted a conference of *masha'ikh* (sufi masters) in September 1980. See Ministry of Religious Affairs, *Mashā'ikh Convention: Taqārīr wa Tajāwīz* (Islamabad, Pakistan: Government of Pakistan, 1980).

<sup>6</sup> Ministry of Religious Affairs, *'Ulamā Convention: Taqārīr wa Tajāwīz*, 225.

<sup>7</sup> Ibid., 227-245; W. Eric Gustafson and William L. Richter, "Pakistan in 1980: Weathering the Storm," *Asian Survey* 21, no. 2 (1981): 168. In September 1980, the religio-political parties reasserted the demand to appoint 'ulama to enforce hudud. See Mohammad Amin, *Aṣr-i Hāḍir awr Islām kā Niẓām-i Qānūn* (Lahore, Pakistan: Idāra-i Tarjumān al-Qur'ān, 1989), 202.

<sup>8</sup> As I stated in chapter 3, the *Hazoor Bakhsh* episode has not been studied in-depth. However, cursory descriptions of the case contend that Zia introduced 'ulama to the Federal Shariat Court in response to the Federal Shariat Court's invalidation of *rajm* in Zia's signature Hudud laws. For example, Hamid Khan argues that, "[*Hazoor Bakhsh*] raised a big furore in religious circles and the judges of the Federal Shariat Court were condemned for their lack of knowledge of Islam and for being western-educated and West-Oriented. There was an outcry that ['ulama] should be introduced into the Court, a demand to which Zia succumbed to appease the *mullahs*." Khan, *Constitutional and Political History of Pakistan*, 355. See also Lau, *The Role of Islam in the Legal System of Pakistan*, 148.

their support from the Zia regime, while still remaining at odds with the PPP. However, after nearly four years of Zia's broken promises about elections, the PPP in February 1981 managed to gather the opposition on a single platform called the Movement for the Restoration of Democracy (MRD). As most of the political parties in the PNA joined the MRD, the religio-political parties had to choose between continuing to support Zia or joining the MRD. The JUI decided to join the MRD despite internal disagreements.<sup>9</sup> These disagreements later divided the JUI into two factions: the JUI-F under Fazl-ur-Rahman inside the MRD and the JUI-S under Sami-ul-Haq outside the MRD.<sup>10</sup> The JUP remained on the fence, never joining the MRD but supporting the demand for elections. The Jama'at, however, opposed the MRD and tacitly supported the Zia regime.

**Table 7: Shifting Political Alliances<sup>11</sup>**

	<b>PNA with Zia in 1977</b>	<b>MRD against Zia in 1981</b>
<b>Religious Parties</b>	JUI JUP Jama'at	JUI-F
<b>Other Parties</b>	PML (Pir Pagaro) NDP PDP Tihrik-i Istiqlal Tihrik-i Khaksar Muslim Conference	PML (Khairuddin) NDP PDP Tehrik-i Istiqlal PPP QMA PMKP

The emergence of the MRD on the political scene in February 1981, and the resistance of the judiciary leading to the regime's crackdown on the High Courts and the Supreme Court under the PCO in March 1981, changed the bargaining power of the 'ulama. While consolidating his power once again, the Zia regime could not ignore the 'ulama anymore. The regime depended on tacit support from the JUP, the emerging JUI-S, and the Jama'at. The religious political parties and the Zia regime did not share every political goal, but they considered a cooperative relationship as mutually beneficial.<sup>12</sup> In this context, a group of forty-five 'ulama met Zia on April 7, 1981 to protest the *Hazoor Bakhsh* outcome and demand the appointment of 'ulama to the Federal Shariat Court to

<sup>9</sup> Hasan-Askari Rizvi, "The Paradox of Military Rule in Pakistan," *Asian Survey* 24, no. 5 (1984): footnote 32 at 551.

<sup>10</sup> Safdar Mahmood, *Pakistan: Political Roots and Development, 1947-1999* (Karachi, Pakistan: Oxford University Press, 2000), 156-159.

<sup>11</sup> Syed Mujawar Hussain Shah, *Religion and Politics in Pakistan (1972-88)* (Islamabad, Pakistan: Quaid-i-Azam University, 1996), 208, 259; Stephen Philip Cohen and Marvin G. Weinbaum, "Pakistan in 1981: Staying On," *Asian Survey* 22, no. 2 (1982): 138; Rizvi, "The Paradox of Military Rule in Pakistan," 551; Mahmood, *Pakistan: Political Roots and Development, 1947-1999*, 156-159.

<sup>12</sup> Nasr, *The Vanguard of the Islamic Revolution: The Jama'at-i Islami of Pakistan*, chapter 9. See also Rizvi, "The Paradox of Military Rule in Pakistan."

counterbalance the professional judges.<sup>13</sup> Considering this pressure, the next day Zia announced the decision to reorganize the Federal Shariat Court,<sup>14</sup> and ordered a constitutional amendment on April 13, 1981, providing that the Federal Shariat Court shall include up to three ‘ulama and expressly stating that the Court shall have the power to review its decisions.<sup>15</sup> In other words, the Zia regime included ‘ulama in the Federal Shariat Court not as the regime’s response to *Hazoor Bakhsh* per se, but to avoid alienating the religious political parties as one of the remaining few sources of support after having lost support from the other PNA parties and the judiciary.

The regime then proceeded to remake the Federal Shariat Court bench. The Ahmed Court consisted of five judges, each with a one-year term (see chapter 3). Zia had already sent Justice Lodhi back to the Balochistan High Court elevated to the position of acting chief justice under the PCO. Zia did not extend the one-year term of Chairman Ahmed. As Chairman Ahmed was already a retired judge of the Supreme Court, his Federal Shariat Court retirement was not an early retirement per se. But the Federal Shariat Court’s system of periodic tenure renewal enabled the regime to ease him out. Justice Hyder’s one-year term as a judge of the Federal Shariat Court was ending about six weeks prior to his normal retirement age from the Sindh High Court. Concerned with his activism as chief justice of the Sindh High Court, Zia had already removed Justice Hyder from the Sindh High Court under the PCO. However, he gave Justice Hyder an extension on the Federal Shariat Court for six weeks so that his term on the Federal Shariat Court would end when his term on the Sindh High Court would have ended.<sup>16</sup>

**Table 8: Ahmed Court**

<b>Name</b>	<b>Preceding Position</b>	<b>Start</b>	<b>End</b>	<b>Succeeding Position</b>
Salahuddin Ahmed	Retired, Supreme Ct.	28 May 1980	31 May 1981	Retired
Agha Ali Hyder	Chief Justice, Sindh	28 May 1980	14 July 1981	Retired; Labor Court
Aftab Hussain	Judge, Lahore	28 May 1980	31 May 1981	Chairman, Federal Shariat Ct.
Zakaullah Lodhi	Judge, Balochistan	28 May 1980	24 Mar. 1981	Chief Justice, Balochistan
Karimullah Durrani	Judge, Peshawar	28 May 1980	15 Feb. 1982	Death in a car accident

In this way, once the regime decided to reconstitute the Federal Shariat Court, Zia was able to complete the task using the Court’s precarious tenure system, which is no more insecure than the tenure of judge on a High Court bench, except in this case the president rather than the chief justice has the arbitrary power to include or exclude judges from a bench. Upon Chairman Ahmed’s retirement, Zia appointed Justice Hussain as the

<sup>13</sup> Amin, *Islamization of Laws in Pakistan*, 74. To be sure, *Hazoor Bakhsh* was not the only decision of the Ahmed Court that went against positions of the ‘ulama. However, *Hazoor Bakhsh* challenged the status of ḥadīth in shari‘a directly, mobilizing the ‘ulama.

<sup>14</sup> Dawn, "Shariat Court to Be Reorganized: Ulema to Be Taken on the Bench," *Dawn*, April 9, 1981.

<sup>15</sup> *Constitution (Amendment) Order*, 1981 PLD CS 251.

<sup>16</sup> Ministry of Law and Parliamentary Affairs, No. F. 50(1)/80-AII(2) (Islamabad, May 31, 1981), *Gazette of Pakistan, Extraordinary*, June 1, 1981, III, 250. The website of the Sindh High Court erroneously indicates July 14, 1981 as the end of Agha Ali Hyder’s tenure as the chief justice.

acting chairman of the Federal Shariat Court for a two-year term.<sup>17</sup> The acting appointment was consistent with Zia's pattern of appointing chief justices of High Courts to acting positions under the PCO. Considering their extraordinary bench formation and case assignment powers, the regime wanted the chief justices to internalize that they were serving at the pleasure of Zia. Justice Hussain would continue his tenure as the acting chief justice of the Federal Shariat Court upon the renaming of the office from chairman to chief justice.<sup>18</sup>

Zia also appointed five new judges to the Federal Shariat Court: two professional judges, Muhammad Zahoor-ul-Haq and Chaudhry Mohammad Siddique; and three scholar judges, Malik Ghulam Ali, Muhammad Karam Shah, and Muhammad Taqi Usmani.<sup>19</sup> As I elaborate below, the regime selected the three scholar judges carefully to represent the Jama'at, the Barelawis, and the Deobandis, and thereby consolidate his support among the Jama'at, the JUP, and the JUI.<sup>20</sup> Zia's reconstitution of the Federal Shariat Court bench upon pressure from the 'ulama raised questions about the Court's independence and prestige.<sup>21</sup> Furthermore, his appointment of 'ulama as members with no experience as professional lawyers or judges also raised questions about whether the Federal Shariat Court is a court or not. On March 25, 1982, Zia ordered a constitutional amendment to rename the Court's chairman as chief justice and members as judges,<sup>22</sup> in the words of the Justice Aftab Hussain, "to remove any misunderstanding about the superiority of the Court and its independence."<sup>23</sup>

To sum up, the three *Hazoor Bakhsh* majority judges (Ahmed, Hyder, and Lodhi) who declared stoning as un-Islamic were off the Federal Shariat Court, the concurring judge (Hussain) who declared stoning an acceptable ta'zir was elevated to the position of acting chairman, and the dissenting judge (Durrani) who upheld stoning remained in place. However, Justice Durrani passed away in a car accident shortly thereafter, leaving

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<sup>17</sup> Ministry of Law and Parliamentary Affairs, No. F. 50(1)/80-AII(1) (Islamabad, May 31, 1981), *Gazette of Pakistan, Extraordinary*, June 1, 1981, III, 249.

<sup>18</sup> Ministry of Law and Parliamentary Affairs, No. F. 1 (4)/82-AIII(1) (Islamabad, May 15, 1983), *Gazette of Pakistan, Extraordinary*, May 24, 1983, III, 126.

<sup>19</sup> Ministry of Law and Parliamentary Affairs, No. F. 50(1)/80-AII(1) (Islamabad, May 31, 1981), *Gazette of Pakistan, Extraordinary*, June 1, 1981, III, 249.

<sup>20</sup> The 'ulama were able to use the tenure system to their advantage, but once appointed, the 'ulama would object to their insecure tenure. See Ittihād-i Ummat Conference, "Nifādh-i Sharī'at kay Rahnumā Uşūlon kay Hawālay say 55 'Ulamā-i Karām kay Muttafiqa 15 Nukāt," *al-Shari'a* 23, no. 2 (2012); see also Tanzil-ur-Rahman, "Wafāqī Sharī' Adālat kay Qayām kā Pas-i Manzar awr Darūriyyāt."

<sup>21</sup> However, in this historical moment, the PCO had compromised the entire judiciary's independence anyway.

<sup>22</sup> *Constitution (Second Amendment) Order*, 1982 PLD CS 155.

<sup>23</sup> Aftab Hussain, *Federal Shariat Court in Pakistan*, ed. Federal Shariat Court (Islamabad, Pakistan: Pakistan Publications, 1982), 9-10.

behind only Justice Hussain from the *Hazoor Bakhsh* bench on the Federal Shariat Court. In the next section, I introduce the two new professional judges (Zahoor-ul-Haq and Siddique) and the three scholar judges (Ali, Usmani, and Shah) on the Hussain Court.

### 3. Federation of Pakistan v. Hazoor Bakhsh (1982)

The regime filed a review petition before the Federal Shariat Court on July 14, 1981 – the day Justice Hyder’s term ended.<sup>24</sup> The regime also got an adjournment from the *Hazoor Bakhsh* appeal in the Supreme Court on the grounds of the review petition in the Federal Shariat Court. Justice Hussain placed the petition before a bench consisting of the entire Court that included himself, Muhammad Zahoor-ul-Haq and Ch. Mohammad Siddique as professional judges, and Malik Ghulam Ali, Muhammad Taqi Usmani and Muhammad Karam Shah as scholar judges. I introduced the members of the Hussain Court below, focusing on their intellectual formation and political background.

Muhammad Zahoor-ul-Haq (b. 1925) was appointed to the Federal Shariat Court on June 1, 1981. He earned his M.A. (1945) and LL.B. (1946) from Delhi University and worked as a volunteer for the Muslim League for the partition of India. He started practicing in Lahore but soon moved to Karachi, where he became active in bar politics.<sup>25</sup> He was elected as the president of the Karachi Bar Association in 1964 and Sindh High Court Bar Association in 1973. Under the Zia regime, Justice Zahoor-ul-Haq was appointed the advocate general of Sindh in 1977, and a judge of the Sindh High Court in 1978. Justice Zahoor-ul-Haq was conversant in Persian but there is no evidence to suggest Arabic fluency.<sup>26</sup> In the 1980 shari‘a conference, he presented a paper on ijtiḥād, suggesting that he was closer to Mawḍūdī’s notion of ijtiḥād as opposed to the Deobandi and Bareilawī ‘ulama’s concept of taqlid.<sup>27</sup>

Chaudhry Mohammad Siddique (b. 1916) was also appointed to the Federal Shariat Court on June 1, 1981. He obtained his LL.B. (1943) from Punjab University and started practicing in Lahore in 1947.<sup>28</sup> As a Supreme Court advocate, he was involved in some notable Supreme Court cases. He was appointed as a judge of the Lahore High Court in 1971 under General Yahya Khan’s regime and retired in 1978. Under the Zia

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<sup>24</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 276.

<sup>25</sup> Federal Shariat Court, "Mr. Justice Zahoor-Ul-Haq," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed January 18, 2013).

<sup>26</sup> Legal 500, "Abraham & Sarwana," <http://www.legal500.com/firms/30258-abraham-sarwana/offices/30164-karachi/lawyers/80857> (last accessed April 13, 2014).

<sup>27</sup> Muhammad Zahoor-ul-Haq, "Qawānīn Kō Islāmī Uṣūlōn kay Muṭābiq Banānay mayn Ijtihād kī Darūrat," in *International Seminar on the Application of Shari‘a* (Islamabad, Pakistan: Ministry of Law and Parliamentary Affairs, 1979).

<sup>28</sup> Federal Shariat Court, "Mr. Justice Ch. Mohammad Siddique," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed January 18, 2013).

regime, Justice Siddique was appointed as chairman of the Punjab Election Authority at a time when Zia was still contemplating elections.

Malik Ghulam Ali (d. 1994) was a Jama‘ati scholar.<sup>29</sup> Upon taking a course with Mawdudi at Peshawar University, he dropped out and joined Mawdudi’s movement. When Mawdudi launched the Jama‘at in 1941, he became a founding member of the party and personal aide and research assistant to Mawdudi.<sup>30</sup> Fluent in English, Urdu, Arabic, and Persian, he translated Mawdudi’s works into English,<sup>31</sup> contributed to the party’s magazine, and responded to Mawdudi’s critics. He engaged in polemics with Muhammad Taqī Usmani in defense of Mawdudi’s controversial book on the early caliphate,<sup>32</sup> and with Ghulam Ahmad Parwez and his protégés on the status of sunna in Islam<sup>33</sup> In 1960, when a Lahore High Court judge refused to apply the Anglo-Mohammedan Law (Hanafi law as interpreted by colonial courts) in a child custody case,<sup>34</sup> based on a rejection of sunna as a binding source of shari‘a,<sup>35</sup> Ali assisted Mawdudi in writing a book in response, “The Constitutional Status of Sunna” (*Sunnat kī Ā’īnī Haythiyyat*).<sup>36</sup> After Mawdudi’s death in 1979, Ali could reasonably be considered

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<sup>29</sup> Federal Shariat Court, "Mr. Justice Maulana Malik Ghulam Ali," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed December 12, 2012).

<sup>30</sup> Nūrwar Jān, ed. *Malik Ghulam Ali: Hayāt wa Khidmāt* (Lahore, Pakistan: Idara-i Ma'arif-i Islami, 2010).

<sup>31</sup> Mawdudi was proficient in English (as well as Arabic and Persian) but authored most of his works in Urdu.

<sup>32</sup> See Malik Ghulām ‘Alī, *Khilāfat wa Malūkiyyat par I’tirādāt kā Jā’iza* (Lahore, Pakistan: Islamic Publications Limited, 1972); Abū al-A‘lā Mawdūdī, *Khilāfat wa Malūkiyyat*, 26th ed. (Lahore, Pakistan: Idāra-i Tarjumān al-Qur’ān, 2000).

<sup>33</sup> ‘Abd al-Ḥasīb A‘zamī, "Munkirīn-i Ḥadīth kay I’tirādāt awr Malik Ghulām ‘Alī kay Jawābat," in *Malik Ghulam Ali: Hayāt wa Khidmāt*, ed. Nūrwar Jān (Lahore, Pakistan: Idara-i Ma'arif-i Islami, 2010).

<sup>34</sup> Before General Ayub Khan enacted the Muslim Family Laws Ordinance, Pakistani courts used the so-called Anglo-Mohammedan jurisprudence, based on the Hanafi legal manual/commentary *al-Ḥidāya fī Sharḥ al-Bidāya al-Mubtadī*, translated into English in 1870 and interpreted by colonial courts. See ‘Alī b. Abī Bakr al-Marghīnānī, *The Hedaya, or Guide: A Commentary on the Mussulman Laws*, trans. Charles Hamilton, 2nd ed. (London: W. H. Allen & Company, 1870).

<sup>35</sup> See *Rashida Begum v. Shahab Din*, 1960 PLD Lahore High Court 1142. Justice Muhammad Shafi stated that “[Hanafi] rules were followed by the Judges and the jurists even before the British conquered India, and they were continued to be followed thereafter because the Muslim jurists did not want the British or other non-Muslims to interpret the Holy Qur’an and enunciate law to suit their own purpose... The conditions have, however, completely changed now.” *Ibid.*, para. 4. On the status of sunna, Justice Shafi stated that “Besides the Holy Qur’an, Hadith or Sunna has come to be regarded by a considerable number of Muslims as an equally important source of Muslim law... [Islam] derives its authority from God and God alone. If that be the true concept of Islam, then it necessarily follows that Prophet Muhammad’s sayings, practice and conduct cannot be confused with revelation from God. They can at the most be attracted to interpret the Qur’an in the light of the given circumstances or to apply its general provisions to the facts of the particular case.” *Ibid.*, para. 21.

among Mawdudi's intellectual successors. When the *Hazoor Bakhsh* judgment came out in 1981, Ali wrote a booklet against the judgment for distribution to lawyers.<sup>37</sup>

Muhammad Karam Shah (d. 1998) was a noted Barelawi scholar.<sup>38</sup> Coming from a long line of sufi saints and scholars, he got his hadith diploma under Sayyid Muhammad Na'imuddin Muradabadi (d. 1948), a disciple of Ahmad Raza Khan Barelawi (d. 1921), the eponym of the Barelawi movement. He then earned a B.A. in English from Punjab University (1945) and an M.A. in judiciary (*takhaṣṣūṣ al-qadā*) from the Azhar University in Cairo, Egypt (1954), reportedly graduating second in his class.<sup>39</sup> Shah also started working on an M.Phil. on hudud at the Azhar University, but he could not complete it due to his father's illness. During the 1950s in Cairo, Shah came under the mentorship of Abu Zahra, who reportedly thought very highly of the young Shah.<sup>40</sup> Shah's hagiographers underscore this relationship to affirm Shah's status, which at least affirms Abu Zahra's position as a yardstick in Hanafi-Barelawi circles.<sup>41</sup> I should note, however, that while Abu Zahra formed his opinion against stoning around 1952 when Shah was in Cairo, he would not express the opinion in public until 1972 in the Libyan shari'a conference.<sup>42</sup> During his years in Cairo, Shah authored a famous book, "The Sunna of the Best Creation" (*Sunnat-i Khayr al-Anām*) on the status of hadith as a source of law in response to the growing Ahl-i Qur'an influence in particular, and other hadith

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<sup>36</sup> Abū al-A'īn Mawdūdī, *Sunnat kī Ā'īnī Haythiyyat* (Lahore, Pakistan: Islamic Publications, 2003). This book includes Ali's translation of the Lahore High Court judgment from English to Urdu, with Mawdudi's response to the judgment.

<sup>37</sup> This booklet is referenced in Jān, *Malik Ghulam Ali: Hayāt wa Khidmāt*, 91.

<sup>38</sup> Shahbāz Aḥmad Chishtī, ed. *Dānā'-i Rāz Diyā' al-Ummat: Mufakkir-i Islām, Mufasssir-i Qur'ān, 'Aẓīm Sīrat Nigār, Diyā' al-Ummat Ḥaḍrat Pīr Karam Shāh al-Azhari kī Hayāt-i Tayyiba kī 'Aks Rayziyān* (Lahore, Pakistan: Diyā' al-Qur'ān Publications, 2003).

<sup>39</sup> Muḥammad Ṣiddīq Hazārī, *Ta'aruf-i 'Ulamā-i Ahl-i Sunnat: Pakistan kay Mawjūda 'Ulamā kī Tadhkira* (Lahore, Pakistan: Maktaba Qādirīyya, 1979), 273.

<sup>40</sup> Abu Zahra was a professor at Cairo University at the moment, where Shah would audit classes.

<sup>41</sup> Shah's hagiographers often mention a letter Abu Zahra gave or sent to Shah upon his return to Pakistan, stating, "The moment I met you, I felt that you possessed great self-esteem, a valued character, and an inclination towards exalted objectives and a feeling of distance from futile pursuits. O my son! You have made me aware that, as the East is the place of the sun's rising, similarly it is the horizon of the rising of the spirit. As the East is the source of warmth, similarly it is the origin of the dawn of life. Each time I met you, I saw within you Islam luminous and resplendent as the sun and I saw such an Islam within you that is able to stitch together dispersed and broken hearts. I see within you the hope of a bright future. Today as I am saying farewell to you, it seems as though a section of my soul is separating away from me, a part of my spirit is breaking away from me." Bakhtyar Haider Pirzada, "The Ummah's Luminary: Diya' al-Ummat Justice Shaykh Muhammad Karam Shah al-Azhari," <http://www.mihpirzada.com/pdfs/Introduction%20to%20Diya'%20al-Ummat.pdf> (last accessed May 4, 2014).

<sup>42</sup> Abu Zahra stated in the Libyan conference in 1972 that he has held the opinion against rajm for 20 years. Therefore, we can conclude that Abu Zahra formed the opinion in 1952. See chapter 3 for a complete discussion of this episode.

skeptics and deniers in general.<sup>43</sup> Shah was also a senior vice president of the JUP. He was arrested and imprisoned under the Bhutto government for his non-violent protest in the 1977 post-election demonstrations, and was released once Zia came to power.<sup>44</sup> Under the Zia regime, Shah served on the committee that drafted the Hudud Ordinances in the Council of Islamic Ideology. Shah was also one of the five ‘ulama invited to submit their opinions on stoning by the Federal Shariat Court in the *Hazoor Bakhsh* case, which he did. In the aftermath of *Hazoor Bakhsh*, Shah was at the forefront of the ‘ulama’s protests and defended stoning in his magazine, *Diya-i Haram*.<sup>45</sup>

Muhammad Taqi Usmani (b. 1943) was a rising star among the Deobandis at the time of his appointment. His father, Muhammad Shafi (d. 1976), was the chief mufti at Deoband, India, before he migrated to Pakistan and established the largest and one of the most respected Deobandi madrasas in Pakistan, Dar al-‘Ulum, Karachi (est. 1951).<sup>46</sup> Shafi was also among the founding members of the JUI in 1945. The Deobandis gave Shafi the honorific (not official) title of the grand mufti of Pakistan – later Usmani would share this title with his brother.<sup>47</sup> While Usmani was not active in electoral politics, he represented the intellectual dimension of Deobandi politics. After graduating from Darul ‘Ulum at the age of 17, Usmani specialized in preaching as well as fiqh under the guidance of his father.<sup>48</sup> Then he studied hadith from leading Deobandi scholars, developing a reputation as an expert in the traditional biographical literature of hadith narrators (*asmā’ al-rijāl*) and the art of cross-examining and balancing historical sources (*al-jarḥ wa al-ta’dīl*).<sup>49</sup> He also earned an LL.B. (1967) from Karachi University, reportedly graduating second in his class, and an M.A. in Arabic (1970) from Punjab University.<sup>50</sup> Owing to his religious pedigree as well as his secular education, he represented the Deobandi ‘ulama in drafting the Constitution of 1973 at the age of 30. As Zia’s appointee to the Council of Islamic Ideology in 1977, he was a member of the

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<sup>43</sup> Shah, *Sunnat-i Khayr al-Anām*, 248-61.

<sup>44</sup> See Gul Muhammad Faydī, ed. *Abr-i Karam: Pīr Karam Shāh al-Azharī kī Ayyām-i Athīrī kī Taqārīr* (Lahore, Pakistan: Diyā’ al-Qur’ān Publications, 2003).

<sup>45</sup> See Khān, "Pīr Karam Shāh al-Azharī kī ‘Ilmī awr Dīnī Khidmāt," 331-369.

<sup>46</sup> See Hāfīz Muḥammad Akbar Shāh Bukhārī, *Akābir-i ‘Ulamā-i Deoband* (Karachi, Pakistan: Idāra-i Islāmiyyāt, 1999), 208-214.

<sup>47</sup> Unlike Muslim countries such as Saudi Arabia or Egypt that have an official religious hierarchy, South Asia’s traditional Islamic institutions are non-state. Therefore, there is no office of the grand mufti in Pakistan. In general, the Deobandis and the Barelawis declare the leading mufti among them the grand mufti of their subject as an honorific.

<sup>48</sup> Bukhārī, *Akābir-i ‘Ulamā-i Deoband*, 551.

<sup>49</sup> Usmani’s two noteworthy hadith teachers were Muhammad Yusuf Banuri and Samiullah Khan. In the traditional system of Islamic learning, a student obtains an *ijāza* (lit. permission) from his teacher after learning the text face-to-face and line-by-line with the teacher.

<sup>50</sup> Bukhārī, *Akābir-i ‘Ulamā-i Deoband*, 551.

committee that drafted the Hudud Ordinances. He was also one of the five 'ulama invited by the Federal Shariat Court to send their opinions during the *Hazoor Bakhsh* proceedings, which he did not send (see chapter 3). However, in response to *Hazoor Bakhsh*, Usmani defended stoning in his madrasa's magazine, *al-Balagh*.

In short, the three scholar judges had substantial edge over the professional judges in terms of religious education, pedigree, and authority. Each of the three 'ulama had defended sunna and hadith throughout his career, and especially expressed his opinion after *Hazoor Bakhsh* against the case in writing. They were appointed to the Federal Shariat Court not despite these facts, but precisely because of them. However, their expertise in drawing upon Islamic historical and doctrinal sources on the bench was not the exclusive reason for their appointment. These three 'ulama also served as intellectual representatives of the three religious political parties – JUI, JUP, Jama'at – that were responsible for political mobilization against Bhutto and Zia's rise to power. Zia needed the support of these parties in 1981 more than ever since the remaining political forces were uniting against him under the MRD.

Justice Hussain had already given his opinion in *Hazoor Bakhsh* against stoning as a hadd. The regime, however, wanted to overturn *Hazoor Bakhsh* upon review in order to retain the political support of the religio-political forces. As a self-respecting judge, Justice Hussain presumably did not want to overturn his own decision. But as the *acting* chief justice of a court reconstituted to overturn *Hazoor Bakhsh*, he presumably did not want to confront the regime by reaffirming his decision in a dissenting note. In what appears to be an effort to have the Supreme Court decide the matter instead, Justice Hussain used his *suo motu* power to question the Federal Shariat Court's ability to review the case while an appeal was pending in the Supreme Court. However, the state's counsel insisted that the Supreme Court's adjournment gave the Federal Shariat Court an implied consent to decide the review petition.

The Hussain Court conducted 17 hearings between February and June of 1982, and heard the expert opinion of jurisconsults,<sup>51</sup> namely Muhammad Tahir al-Qadri (Lecturer, University Law College, Lahore, and a rising Barelawi scholar at the time),<sup>52</sup> Mohammad Ashraf (Department of Arabic, Peshawar University),<sup>53</sup> Muhammad Hanif Nadwi (the Ahl-i Hadith scholar who filed a response in the original case), Subhan

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<sup>51</sup> The Constitution allows parties to be represented by jurisconsults instead of lawyers before the Federal Shariat Court. The jurisconsults must be 'ulama who are well-versed in Islamic law in the opinion of the Court and must only offer their expert opinion. *Constitution of Pakistan, 1973*, Article 203E.

<sup>52</sup> Tahir-ul-Qadri would appear as a regular jurisconsult before the Federal Shariat Court and later emerge as an influential Barelawi scholar and an amateur politician. At the time, he was completing his Ph.D on punishments in Islam. See Muhammad Tahir-ul-Qadri, "Punishments in Islām - Their Classification & Philosophy" (Institute of Islamic Studies, Punjab University, 1984).

<sup>53</sup> *Panel of Jurisconsults maintained by Federal Shariat Court under Art. 203-E, 1981 PLD CS 233.*

Mahmud (one of Justice Usmani's teachers at Dar al-'Ulum, Karachi),<sup>54</sup> Qazi Sa'adullah (Majlis-i Shura, Khazdar), and Mahmood Ahmad Ghazi (who would later serve on the Federal Shariat Court and the Supreme Court).<sup>55</sup>

On June 20, 1982, the Federal Shariat Court unanimously overturned *Hazoor Bakhsh* in the following short order: "For reasons to be recorded, this petition is allowed, the order of this Court passed on 21st of March, 1981 is recalled. The result is that the petition of the respondents shall stand dismissed. No order as to costs."<sup>56</sup> The outcome in the *Hazoor Bakhsh* review was a foregone conclusion. Nevertheless, each of the six judges later recorded reasons in separate opinions consisting of nearly two hundred pages in the law reporter.

### 3.1 Acting Chief Justice Aftab Hussain's Opinion

In his *Hazoor Bakhsh* review opinion, Justice Hussain defended the legitimacy of the review and the neutrality of the judges. As he did not want to withdraw his concurring opinion in *Hazoor Bakhsh* that stoning is a ta'zir, he conveniently found jurisdictional grounds to overturn *Hazoor Bakhsh*. He then affirmed his previous opinion on the merits. His analysis provided more hadiths in which stoning was not awarded as punishment, used the hadith analysis of a leading Deobandi scholar, Anwar Shah Kashmiri, and deconstructed the juristic concept of recurrence through a genealogy of the term.

#### *Defending the Court's Legitimacy*

The respondents in *Hazoor Bakhsh* review (petitioners in the original case) raised four objections to the Federal Shariat Court's review jurisdiction: the constitutional amendment empowering the Court to review its decisions was enacted by Zia acting as the president, whereas only Zia acting as the chief martial law administrator can amend the Constitution under martial law; the amendment did not and could not have retroactive effect; review does not entail re-hearing under the Supreme Court Rules; and the review petition was time-barred as it was filed after the 90-day period provided for such petitions in the Federal Shariat Court Rules. The objections involved issues of first impression for the Federal Shariat Court and Justice Hussain was not bound to express his position on them, as the other judges could respond. Nevertheless, he responded and dismissed each of the four objections giving the following arguments respectively: the amendment was duly enacted as the chief martial law administrator had delegated his powers in the 1981 PCO to the president; there is nothing in the text of the constitutional amendment to prevent retroactive application; the review jurisdiction of the Federal Shariat Court is plenary and independent of the Supreme Court Rules; and the 90-day

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<sup>54</sup> Bukhārī, *Akābir-i 'Ulamā-i Deoband*, 531; see also *Panel of Jurisconsults maintained by Federal Shariat Court under Art. 203-E*, 1981 PLD CS 233.

<sup>55</sup> Ghazi was educated at a Deobandi madrasa but later developed his intellectual reputations primarily outside of the Deobandi circles.

<sup>56</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 276.

period to file a review petition, enacted after the petition was filed, has prospective effect only.

The respondents also raised objections on the constitution and neutrality of the bench. They argued that only the bench that heard the original case should be allowed to hear the review. Irrespectively, the present scholar judges should be disqualified from hearing this petition since they have already expressed their opinion on the matter – not to mention that they politically campaigned against the outcome. Justice Hussain dismissed these objections as well. He emphasized that the Federal Shariat Court Rules empower the chief justice to nominate a bench to hear the review petition.<sup>57</sup> He then defended his nomination of the scholar judges on the bench:

The objection against the Ulema Judges is not valid since they have taken an oath to decide all cases according to law without fear or favour. They are not bound by the opinions given by them before their appointments as Members of this Court. Can a person who has written a book on the subject of law and given some opinion about a particular matter be disqualified from hearing the cases in which that opinion is material? ... The only ground on which a person can be disqualified from hearing a matter in the Court would be the ground of bias when he is likely to be a Judge in his own cause... Moreover all the Ulema Judges have made it very clear that they are hearing this matter with an open mind and if they find their earlier opinion to be incorrect they would not mind correcting it or altering it.<sup>58</sup>

### ***Overturing Hazoor Bakhsh on Jurisdictional Grounds***

Having concurred in *Hazoor Bakhsh*, Justice Hussain now discovered a jurisdictional basis to overturn *Hazoor Bakhsh*. Zia had excluded “Muslim Personal Law” from the Federal Shariat Court’s jurisdiction in the Constitution. The exclusion of Muslim Personal Law was meant to protect the Muslim Family Laws Ordinance, which was enacted as liberalizing reform under Ayub Khan. But shortly before *Hazoor Bakhsh*, the Supreme Court gave a general definition of “Muslim Personal Law” as follows: “Such codified or legislated law which is being applied to Muslim residents of Pakistan as or with the denomination “Muslim” which governs their person as such as distinct from general law of the land which applies to every body.”<sup>59</sup>

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<sup>57</sup> *Federal Shariat Court (Procedure) Rules*, 1981, 31-E-2. Stating “Where the Court takes up a matter for review on its own accord, such matter shall be heard by the same Bench which gave the decision or made the order, or by a Bench to be nominated by the Chief Justice.”

<sup>58</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 281-282.

<sup>59</sup> *Federation of Pakistan v. Farishta*, 1981 PLD SC 120. The case involved a challenge to the MFLO based on an appeal from a Peshawar High Court judgment.

Justice Hussain pointed out that according to section 2(d) of the Zina Ordinance, a muhsan subject to stoning must be a Muslim man or woman who commits zina with a Muslim woman or man. Therefore, he concluded, stoning is part of Muslim Personal Law as defined by the Supreme Court and excluded from the Federal Shariat Court's jurisdiction under the Constitution. According to Justice Hussain, the original petition should have been dismissed on this ground alone without going into the merits, but the only reason the Federal Shariat Court did not factor this jurisdictional argument in the original petition is that the Supreme Court's judgment had neither been reported in law reports nor raised by the state's counsel.<sup>60</sup>

### ***Reaffirming Hazoor Bakhsh on the Merits***

Even though Justice Hussain had declared the Zina Ordinance as beyond Federal Shariat Court's jurisdiction, as a self-respecting judge, he reaffirmed his earlier concurring opinion based on merits. He responded to the arguments of Justice Shah and Justice Usmani; provided reports of more cases where the Prophet or his Companions did not award stoning when they should have; and included a more sustained exploration of the concept of recurrent-in-meaning in hadith analysis.

In describing the cases, Justice Hussain quoted a hadith in Arabic to give an example of a case where the Prophet did not enforce stoning:

A woman went out for prayer, when a man came and raped her (fa qaḍā ḥājatahu minhā) so she shouted and he ran away. Someone else passed by her so they [the people] caught him. She thought he is the one, and said: This is the one who did it with me. They brought him to the Prophet, peace and blessings of Allah upon him. [When] he [the Prophet] ordered his [the innocent man's] stoning, her aggressor (ṣāhibuhā) who had sex with her stood and confessed: I am her aggressor. So the Prophet, peace and blessings of Allah upon him, said (to the woman): Go, for Allah has forgiven you. And he said a nice thing to the man. They [the people] said: Will you not stone her aggressor? He said: No, he has made such repentance that if made by the people of Medina, it would have been accepted from them.

Justice Hussain recognized that according to a variant of this hadith in al-Tirmidhi's collection, the rapist was stoned, but to show the authenticity of the hadith, he noted that the above version is accepted by scholars such as Ibn Hanbal (d. 855), al-Bayhaqi (d. 1066), and Ibn Qayyim (d. 1349).

Justice Hussain's concurring opinion in *Hazoor Bakhsh* was based on the Syrian Salafi scholar Mustafa al-Zarqa's analysis (see chapter 3). During *Hazoor Bakhsh* review, the court sent a letter to al-Zarqa to elaborate his position. But presumably to avoid getting in the middle of the bitter debate in Pakistan, al-Zarqa responded that his theory

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<sup>60</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 282.

that stoning is a ta‘zir is provisional in nature.<sup>61</sup> To anchor his opinion, Justice Hussain now found support in a Deobandi-Hanafi scholar, Anwar Shah Kashmiri (d. 1933), once a professor of hadith at Deoband and a teacher of Justice Usmani’s father.<sup>62</sup> The Deobandis would compare Kashmiri to canonical hadith scholars such as al-‘Asqalani and would say that the truth of Islam is evidenced by the fact that Kashmiri with his encyclopedic knowledge is a Muslim.<sup>63</sup>

In his book, “The Puzzles of the Qur’an” (*Mushkilāt al-Qur’ān*), Kashmiri made a distinction between stripes and stoning, not just on the basis of the muhsan status, but also on the basis of the certainty of proof.<sup>64</sup> Furthermore, in his commentary on al-Bukhari (*Fayḍ al-Bārī ‘alā Ṣaḥīḥ al-Bukhārī*), Kashmiri stated, as quoted by Justice Hussain:

According to me the real (and primary) Hadd is that which is described by the Holy Qur’an. It is one hundred stripes. Rajm is a secondary Hadd. The Holy Qur’an did not mention Rajm with the object that it should remain unknown so that it may be repelled from the people. *The real and actual Hadd which cannot be repelled at all is (the sentence of) stripes.* Rajm is not like that. Though Rajm is Hadd but its real purpose is to repel as much as possible. If it had been mentioned in the Holy Qur’an, it would have been well-known even if its concealment was required. Its mention in the Qur’an would guarantee continuous reading of the revelation for all times and this would have frustrated the above object. *This is why the Holy Prophet sometimes inflicted both the punishments (stripes and Rajm) and sometimes considered only one of them sufficient.* This explains the meaning of what has been narrated from [‘Umar] in [al-‘Asqalani’s commentary on al-Bukhari]. When he asked the Holy Prophet about the writing of the verse of Rajm he replied how could he do it when the people were too much excited (sexually) like donkeys. He meant that the people were committing adultery openly and its punishment is Rajm. It follows that if it had been written in the Holy Quran, it would have been (widely) known. So it was preferable that Rajm should continue to be practiced without being known widely by being written in the Holy Qur’an. It would have been unavoidable if it had been a part of the Qur’an.

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<sup>61</sup> To be precise, Mahmood Ahmad Ghazi wrote the letter to al-Zarqa. Ghazi was assisting the court as a jurisconsult and was al-Zarqa’s translator earlier during his stay in Pakistan.

<sup>62</sup> However, Kashmiri’s position at Deoband was short-lived as he moved to Dhabel. Nevertheless, he is considered perhaps the foremost hadith scholars among the Deobandis. See Ḥāfiẓ Muḥammad Akbar Shāh Bukhārī, *Tadhkira-i Awliyā’ay Deoband* (Lahore, Pakistan: Maktaba-i Raḥmāniyya, 2003), 238-246; Bukhārī, *Akābir-i ‘Ulamā-i Deoband*, 95-103.

<sup>63</sup> Bukhārī, *Akābir-i ‘Ulamā-i Deoband*, 96.

<sup>64</sup> Muḥammad Anwar Shāh al-Kashmīrī, *Mushkilāt al-Qur’ān*, ed. Muḥammad Yūsuf al-Banūrī, 3rd ed. (Karachi, Pakistan: Idāra al-Qur’ān wa al-‘Ulūm al-Islāmiyya, 1998), 341. Stating “fa-ju’ila al-jald lā budda minhu li al-muḥṣan wa `in suqita al-rajm bi-shibha.”

It could not have been repelled despite the fact the real object is that it should be avoided as much as possible.<sup>65</sup>

While Kashmiri's opinion is not very clear, he does not consider stoning as a hadd as defined by the jurists. His opinion suggests that while four confessions or four witnesses necessitate the hadd of stripes, something more either in terms of proof or circumstances should be factored in for stoning. For Justice Hussain, anchoring his opinion in another significant scholar, a Deobandi elder in this case, was all the more important when al-Zarqa had described his position as provisional.

Justice Hussain also questioned categorizing the hadiths on stoning as recurrent-in-meaning. He agreed that the Prophet ordered stoning even after the revelation of 24:2, but he still proceeded to "deal with the subject academically in some detail."<sup>66</sup> However, the subject was more than academic. If Justice Hussain could establish that the hadiths are not recurrent-in-meaning, then he could argue that they do not produce certainty ('ilm yaqīn). In the absence of certainty, the meaning of the hadiths on stoning would open up for interpretation.

Justice Hussain started with a historical analysis of the concepts of solitary, widespread, and recurrent hadiths. He stated that al-Shāfi'ī, considered one of the earliest authors in the principles of jurisprudence genre (uṣūl al-fiqh), did not use these concepts.<sup>67</sup> He also stated that the early authors in the principles of hadith genre (uṣūl al-ḥadīth), such as al-Ramahurmuzi (d. circa 1071) and al-Hakim al-Nishaburi (d. 1012), did not use these concepts either.<sup>68</sup> He noted that al-Nishaburi uses the term widespread (mashhūr) and divides it into authentic (ṣaḥīḥ) and inauthentic (ghayr ṣaḥīḥ) but does not define it.

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<sup>65</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 291-292 (emphasis in Justice Hussain's translation). Kashmiri continues – not quoted by Justice Hussain – that, "then in the ḥadīth of 'Alī is that his stoning her was based on sunna. And the jurists said that it was based on the verse abrogated in recitation but retained in (terms of) the rule. I said: that verse is abrogated in regards to recitation, except that this bending in its entirety is in the matter of rajm." The passage Justice Hussain translates from Arabic can be found at Muḥammad Anwar al-Kashmīrī, *Fayḍ al-Bārī 'alā Ṣaḥīḥ al-Bukhārī*, ed. Muḥammad Badr 'Ālam al-Mīrtahī, 6 vols. (Beirut, Lebanon: Dār al-Kutub al-'Ilmiyya, 2005), 6:353-354. The commentary is based on dictation taken by Kashmīrī's students during his lectures on al-Bukhārī. This edition was published in Lebanon in 2005, pointing to the enduring relevance of Kashmīrī's work among Arab scholars as well.

<sup>66</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 296.

<sup>67</sup> Referencing al-Shāfi'ī's *al-Risāla*. On al-Shāfi'ī's role in the development of the genre, see Wael B. Hallaq, "Was *al-Shāfi'ī* the Master Architect of Islamic Jurisprudence?," *International Journal of Middle Eastern Studies* XXV (1993).

<sup>68</sup> Referencing al-Ramahurmuzī's *al-Muḥaddith al-Fāṣil* and al-Ḥakīm al-Nīshābūrī's *Ma'rifa 'Ulūm al-Ḥadīth*. See E. Dickinson, "Uṣūl al-Ḥadīth," in *Encyclopaedia of Islam* (Brill Online: 2013); G. H. A. Juynboll, "al-Ramahurmuzī," in *Encyclopaedia of Islam* (Brill Online: 2013).

According to Justice Hussain, the concept of recurrent was defined for the first time by al-Khatib al-Baghdadi (d. 1071) as “a tradition narrated by such a large number of persons at different stages that uniting by them on falsehood was [an] impossibility.”<sup>69</sup> He noted that the concept was used by al-Bazdawi (d. 1100) in the sense of recurrent-in-words,<sup>70</sup> by al-Jassas (d. 981) in the sense of widespread or recurrent-in-words, and by al-Sarakhsi (d. 1090) without defining the term.<sup>71</sup> But the distinction between recurrent-in-words and recurrent-in-meaning, Justice Hussain argued, was introduced much later as juristic criteria, not as hadith analysis, and used by Ibn Humam (d. 1457) and al-Suyuti (d. 1505).<sup>72</sup>

Justice Hussain proposed his own definition of recurrent-in-meaning. He stated that the concept should mean:

traditions relating to a particular set of facts, the only difference between [recurrent-in-words] and [recurrent-in-meaning] being that while in the first the language of different reports should be similar, in the latter the language might differ but the sense should be similar.<sup>73</sup>

However, Justice Husain recognized that al-Suyuti defines recurrent-in-meaning to mean reports about different events sharing a common element. In this context, the common element across the events is deemed the recurrent sunna.<sup>74</sup> According to Justice Hussain, this method “absolutely dispenses with the need of judging the authenticity of different traditions or the need of reconcilability of different versions of the same tradition.” Criticizing al-Suyuti’s method, Justice Hussain stated:

But to ignore all irreconcilable differences between different versions of the same Hadith or to lump up together all different versions irrespective of their authenticity or otherwise and merely to strive for discovery of a common factor looks to be much too broad [of] a principle. How is it possible to lose sense of authenticity in one’s search of authenticity[?]<sup>75</sup>

After evaluating the concept of recurrent-in-meaning, Justice Hussain explained how scholars have historically talked about the basis of stoning. According to Justice Hussain,

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<sup>69</sup> Referencing al-Khaṭīb al-Baġhdādī’s *Kitāb al-Kifāya fī ‘Ilm al-Riwāya*.

<sup>70</sup> Referencing *Uṣūl al-Bazdawī*.

<sup>71</sup> Referencing al-Sarakhsī’s *Kitāb al-Mabsūt*.

<sup>72</sup> Referencing al-Shawkānī’s *Fath al-Qadīr* and al-Suyūṭī’s *Tadrīb al-Rāwī*.

<sup>73</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 298.

<sup>74</sup> Justice Hussain gave the classic example that when one report says Hatim gave a horse in charity, and the second report says that Hatim gave a donkey in charity, and the third report says that Hatim gave gold in charity, then the common element in the three events is that Hatim is a charitable person.

<sup>75</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 298.

the Sunni books have either assumed that stoning is historically proved or assumed that there is consensus on the matter.<sup>76</sup> The Shi'a books have used the terms "we say it is proved from Sunnah," or "well known Hadith," without even mentioning recurrence.<sup>77</sup> In short, if the hadiths on stoning are not recurrent, Justice Hussain concluded, they should not be able to qualify a Qur'anic verse, though they may still be used to make a case for stoning as ta'zir punishment.<sup>78</sup>

### 3.2 Justice Zahoore-ul-Haq's Opinion

Like Justice Hussain, Justice Zahoore-ul-Haq defended the legitimacy of the Court and the open-mind of the scholar judges, overturned *Hazoor Bakhsh* on jurisdictional grounds, and wrote an opinion on the merits. However, he argued to uphold stoning as Islamic and constitutional on the merits. In quoting Qur'anic verses, he used Pickthall's translation. Justice Zahoore-ul-Haq's opinion was distinctive in using arguments from the principles of constitutional judicial review and common law rules of statutory construction.

#### *Overturing Hazoor Bakhsh on Jurisdictional Grounds*

Justice Zahoore-ul-Haq agreed with Justice Hussain's jurisdictional basis for overturning *Hazoor Bakhsh* but he gave his own explanation, emphasizing the constitutional position of the Federal Shariat Court. In asserting that the Federal Shariat Court cannot review any provision of Muslim Personal Law based on the text of Article 203B, he stressed that, "[t]his Court is the creature of Constitution and has to act within the bounds prescribed by the Constitution."<sup>79</sup> Similarly, he noted that the Supreme Court has "categorically stated that if a provision of law is applicable to Muslims only then it is a provision of Muslim Personal Law[.]" He emphasized that, "[t]his Court is bound by the pronouncements of the Supreme Court and therefore this Court had exceeded its jurisdiction when it declared provisions of [the Zina Ordinance] against the Injunctions of Islam."<sup>80</sup> He also insisted that the jurisdictional argument is "a pure question of law and Constitution" and therefore silence on this point in *Hazoor Bakhsh* does not foreclose consideration of the point in review.<sup>81</sup>

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<sup>76</sup> Referencing Ibn Rushd's *Bidāya al-Mujtahid*.

<sup>77</sup> Referencing Aḥmad b. Yaḥyā b. al-Murtaḍā's *Kitāb al-Baḥr al-Zakḥkḥār* and 'Alī Husayn b. 'Abdullāh's *Uṣūl al-Ḥadīth*. Of course, the authenticity of hadiths was not as much of an issue for the Shi'as since the infallible imams could authoritatively narrate or corroborate hadiths for twelve generations.

<sup>78</sup> Also, Justice Hussain ended his opinion with expressing gratitude to Mahmood Ahmad Ghazi who described the juristic disagreement on categorizing rajm as a hadd before the Court despite his position in favor of categorizing rajm as a hadd.

<sup>79</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 301.

<sup>80</sup> *Ibid.*, 302.

<sup>81</sup> *Ibid.*

### *Defending the Court and the 'Ulama*

Justice Zahoor-ul-Haq also responded to the objections made against the appointment of 'ulama judges and the validity of review jurisdiction. He argued that the 'ulama judges have no pecuniary or personal interest in the matter and the mere expression of a personal opinion is not enough to disqualify them from hearing the case. Insisting upon the integrity of the 'ulama, he stated that they have taken an oath of office and engaged in the proceedings with an open mind. To support this point, Justice Zahoor-ul-Haq argued:

Moreover in view of their deep insight and vast knowledge of Muslim Fiqh and their total dedication to the principles of justice as enunciated and ordained in Islam, these Ulema Judges could be expected to sit with an open mind in this Court and decide the question before them in light of the arguments advanced before them and the material produced before them without being influenced in any manner by their previous expressions of opinion.<sup>82</sup>

Of course, the “deep insight and vast knowledge of Muslim fiqh” representing one perspective, even if the dominant one, was precisely the reason why the 'ulama's neutrality was questioned. Nevertheless, Justice Zahoor-ul-Haq anchored his defense of the 'ulama in the common law tradition. He used Sir Peter Benson Maxwell's *Interpretation of Statutes* in support of his argument:

[In] *Re Mew* (1862) L. J. B. 87 decided by Lord Westbury where a speech made by the same Lord Westbury in 1860, as Attorney-General when introducing the Bill, was referred by him in his judgment while construing the Bankruptcy Act. But he observed that he had endeavoured, in forming his opinion on the interpretation of the Bill as enacted, to divest his mind so far as possible “for one who wrote the words and knew the meaning he intended to convey” of all the impressions received from the past and to consider the language of the Act as if he were seeing it for the first time. If Lord Westbury could divest his mind of all the past impressions these Ulemas could also do the same and hence they were not disqualified to act as judges in this case.<sup>83</sup>

Justice Zahoor-ul-Haq also gave two examples from Supreme Court cases to conclude that mere expression of opinion does not preclude the 'ulama from reviewing the case as impartial judges.

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid., 302-303; See Sir Peter Benson Maxwell, *Interpretation of Statutes*, ed. Peter St. John Langan, 12th ed. (London, United Kingdom: Sweet & Maxwell, 1969).

In responding to the objection to the review jurisdiction, Justice Zahoor-ul-Haq drew again from the common law tradition. On the enactment of the constitutional amendment by Zia as president instead of Zia as chief martial law administrator, he argued that, “there is plenty of authority on the proposition that mere misdescription of nomenclature is of no consequence if the person who is making the order has the authority to do so in the other capacity which he has.”<sup>84</sup> On the point of the retrospective effect of the amendment, Justice Zahoor-ul-Haq quoted the “settled law” from Maxwell’s *Interpretation of Statutes* that, “no person has a vested right in any course of procedure.”<sup>85</sup> He also quoted Lord Blackburn from the same source stating that, “[a]lterations in the form of procedure are always retrospective, unless there is some good reason or other why they should not be.”<sup>86</sup>

### ***Overturing Hazoor Bakhsh on the Merits***

Justice Zahoor-ul-Haq drew upon *usul al-fiqh* as well as common law methods of statutory interpretation in making his argument on the merits. To dismiss Justice Hussain’s distinction between *hadd* and *ta‘zir*, he emphasized that jurists have developed these terms later on and God has nowhere prevented the use of the term *hadd*. In other words, even if stoning is a *ta‘zir* or discretionary punishment, the state can exercise its discretion to make stoning a mandatory punishment and call it *hadd*.

Next, Justice Zahoor-ul-Haq reviewed the arguments raised during the proceedings and quoted the hadiths on stoning. He recognized the discrepancies in the narrations that the *Hazoor Bakhsh* judges focused on. But to conduct his hadith analysis, he drew from common law rules of evidence. Justice Zahoor-ul-Haq argued that:

... mere discrepancies in the statement of witnesses is not regarded in modern law as sufficient to discredit their testimony but on the other hand minor discrepancies in the statements of witnesses in respect of minute details make their statements more credible.<sup>87</sup>

To elaborate his point, he drew from an 1847 Privy Council case holding that disagreement on details among witnesses makes them “more credible than if they were to agree.”<sup>88</sup> After addressing the question of discrepant reports, Justice Zahoor-ul-Haq concluded that if the central point of stoning is common across the reports, then the element of stoning is recurrent in meaning and not solitary.

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<sup>84</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 304.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*, 310-311.

<sup>88</sup> *Ibid.*, 311.

Beyond hadiths, Justice Zahoor-ul-Haq argued that the opinion of the Muslim community in favor of stoning could be used to ascertain the law. To ground this argument in theory, he employed common law methods of discovering the law, quoting Maxwell's *Interpretation of Statutes* again:

Lord Ellenborough C. J. said in *Isherwood v. Oldknow*, it is truer to say 'communis opinio is evidence of what the law is'. It would be unfortunate if doubt had to be thrown on a statement which has appeared in a well-known text-book for a great number of years without being judicially doubted and after it has been acted on by justices and their clerks for many years...<sup>89</sup>

Framing the sources of shari'a in these terms, Justice Zahoor-ul-Haq evaluated the relationship between Qur'an and sunna articulated in *Hazoor Bakhsh* in terms of the constitutional text. According to Justice Zahoor-ul-Haq, a novel approach was taken in *Hazoor Bakhsh* by "adopting the proposition that once Qur'an had made a specific provision of a general nature in respect of the offense of fornication then the Holy Prophet could not make any order in respect of the same[.]"<sup>90</sup> Justice Zahoor-ul-Haq described the consequence in constitutional terms as follows:

This approach led this Court on the path of establishing the primacy of Qur'an over Sunnah and thus placing Sunnah in a secondary position. We lost sight of the fact that this was not our job because the Constitution makers had already decided that issue and had placed both Qur'an and Sunnah in a primary position by making them both as the touchstones for examining the validity of any law.<sup>91</sup>

He explained that in early Islamic history, Kharijis took the approach of placing sunna in secondary position, but the controversy was laid to rest as the Muslim community accepted Qur'an and sunna as the primary sources of law. In an obvious reference to the Ahl al-Qur'an movement, Justice Zahoor-ul-Haq observed that, "[t]he controversy was however again raised by certain scholars in this century. But our Constitution-makers put a stop to that controversy by making both Qur'an and Sunnah as the primary sources of law[.]"<sup>92</sup>

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<sup>89</sup> Ibid; Quoting Maxwell, *Interpretation of Statutes*, 56.

<sup>90</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 311.

<sup>91</sup> Ibid., 311-312.

<sup>92</sup> Ibid., 313. While the Constitution of 1956 provided that the injunctions of the Qur'an and sunna are the source of law, General Ayub Khan's Constitution of 1962 included that the injunctions of Islam, not the Qur'an and sunna, are the source of law. The 'ulama considered this a denial of formal recognition to sunna at the behest of Ghulam Ahmed Parwez, and forced Ayub Khan to replace Islam with Qur'an and sunna as the source of law.

To articulate the relationship between the Qur'an and sunna from an Islamic perspective, Justice Zahoor-ul-Haq quoted a number of Qur'anic verses and explained:

God Himself has made no distinction between Himself and the Holy Prophet in respect of obedience of orders... Quran and Sunnah have concurrent legislative authority and therefore their legislation has to be interpreted in a manner so that repugnancy is avoided[.]<sup>93</sup>

Justice Zahoor-ul-Haq ended his argument on the primacy of sunna with two couplets from Muhammad Iqbal (1877-1938) who is appropriated as Pakistan's national poet, one in Urdu and one in Persian.<sup>94</sup>

After this extensive description of the status of sunna in the Constitution and Islam in response to the perceived assault on sunna, Justice Zahoor-ul-Haq acknowledged the distinction between sunna and hadith literature. He stated that competent scholars and experts of Muslim community could determine the nature of a principle based on sunna as pre-emptory, mandatory, directory or recommendatory, and its scope as local or universal. But he emphasized that, "as long as a law is found supported by a Hadith or Quran, it cannot be declared as repugnant to the Injunctions of Islam."<sup>95</sup>

To resolve the conflict between the Qur'an's general punishment of one hundred stripes for zina and the sunna's particular punishment of stoning for a muhsan's zina, Justice Zahoor-ul-Haq rejected the framework of Qur'anic abrogation. He argued that this is a case of qualification and gave other examples of qualification in fiqh. But then he turned to common law principles of interpretation to affirm his point. He quoted Maxwell's *Interpretation of Statutes* on avoiding repugnancy between two provisions of the same statute:

One way in which repugnancy can be avoided is by regarding two apparently conflicting provisions as dealing with distinct matters or situations.

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<sup>93</sup> Ibid., 317. Justice Zahoor-ul-Haq quoted Qur'an 68:4, 36:3-4, 93:7, 33:21, 2:2, 1:5, 5:42, 5:49-50, 3:79, 3:161, 3:31, 3:32, 4:150-151; 4:113, 4:105, 4:80, 4:69, 4:64-65, 4:59, 4:13-14, 24:48-52, 24:54, 24:56, 49:14, and 59:7. Ibid., 314-317.

<sup>94</sup> The Urdu couplet was: Kī Muḥammad say wafā tū nay tō hum tēray hayn, Yih jahān chīz hay kiyā lawḥ wa qalam tēray hayn. He translated the couplet as "If you remain faithful to Muhammad, then I (meaning Allah) am all for you, what is this world even the whole Universe would be yours[.]" The Persian couplet was: Be Muṣṭafā birasān khawīsh rā kih dīn hamah ost, Agar be o narasīdī tamām bū-lahabī ast. He translated the couplet as "Try to be the true disciple of Muhammad because he is the total Din, viz. religion personified; If you do not attain such level then it is all transgression and disbelief[.]" The term bū-lahabī is a metaphor for "transgression and disbelief" based on the figure of Abū Lahab in the Prophetic period. See Ibid., 318

<sup>95</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 318.

... Collision may also be avoided by holding that one section, which is *ex facie* in conflict with another, merely provides for an exception from the general rule contained in the other.<sup>96</sup>

He quoted Maxwell's *Interpretation of Statutes* again on resolving the conflict when a general law is introduced after a special law:

Now if anything be certain it is this, said the Earl of Selborne L. C. in *The Vera Cruz* case reported in (1884) 10 A. C. 59 at 68, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so". In a later case, Viscount Haldane said: "We are bound ... to apply a rule of construction which has been repeatedly laid down and is firmly established. It is that wherever Parliament in an earlier statute has directed its attention to an individual case and has made provision for it unambiguously, there arises a presumption that if in a subsequent statute the Legislator lays down a general principle, that general principle is not to be taken as meant to rip up what the Legislature had before provided for individually, unless an intention to do so is specially declared..."<sup>97</sup>

Next, he quoted the Supreme Court of Pakistan on resolving a conflict when a special law is introduced after a general law: "Unless express words are used, the provisions of one enactment cannot be treated as curtailed or repealed by implication by a subsequent enactment and this is all the more so if it is found that the later enactment is auxiliary in character or of limited scope."<sup>98</sup>

Justice Zahoor-ul-Haq placed these common law principles of interpretation in the service of the broader goal of judicial restraint in exercising the power of judicial review, quoting the Supreme Court, "[i]t is [a] well-settled principle of interpretation that before a law is struck down as being unconstitutional every effort must be made in such a manner as to bring it, if possible, into conformity with the Constitution."<sup>99</sup> Using common law principles of statutory construction and constitutional interpretation, Justice Zahoor-ul-Haq argued that we can resolve the apparent conflict between the general command of stripes in the Qur'an and the muhsan-specific command of stoning in sunna, regardless of the order of the commands. He emphasized that Muslim jurists reached the same

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<sup>96</sup> Ibid., 322; Quoting Maxwell, *Interpretation of Statutes*, 187-88.

<sup>97</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 322-323; Quoting Maxwell, *Interpretation of Statutes*, 196.

<sup>98</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 323.

<sup>99</sup> Ibid., 324.

conclusion using the principle of qualification. Nevertheless, before concluding his opinion, he drew from Islamic historical sources to argue that the cases of stoning occurred after the revelation of 24:2 as well. In short, Justice Zahoor-ul-Haq concluded that stoning is a hadd under methods of Islamic as well as common law legal interpretation.

### **3.3 Justice Chaudhry Muhammad Siddique's Opinion**

Justice Siddique also agreed with Justice Hussain's argument for dismissing the original petitions on jurisdictional grounds. Nevertheless, he also recorded his arguments on the merits in favor of stoning as a hadd, but focusing on the constitutional text. For quoting Qur'anic verses, Justice Siddique used Abdullah Yusuf Ali's translation.

#### ***The Status of Sunna in the Constitution***

Justice Siddique drew from four separate sections of the Constitution. First, he noted that Article 203D (in Part VII on Judicature) empowers the Federal Shariat Court to decide whether a "law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet," emphasizing that the text includes the Qur'an *and* the sunna. Second, he described how the preamble of the Constitution declares that, "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 Quran and Sunnah."<sup>100</sup> Third, he noted that Article 31 of the Constitution (in Part II on Fundamental Rights and Principles of Policy) states that:

Steps shall be taken to enable the Muslims of Pakistan, individually and collectively, to order their lives in accordance with the fundamental principles and basic concepts of Islam and to provide facilities whereby they may be enabled to understand the meaning of life according to the Holy Qur'an and Sunnah.

Fourth, he drew from Article 227 (in Part IX on Islamic Provisions), which provides that, "[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah," and Article 230 that empowers the Council of Islamic Ideology to recommend "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."

Viewing sunna as under assault in *Hazoor Bakhsh's* challenges to the hadith literature, these references were meant to underscore the position of sunna in the

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<sup>100</sup> The preamble, based on the 1948 Objectives Resolution, was later made a substantive part of the Constitution. Justice Siddique produced the exact quote but without quotations.

constitutional text.<sup>101</sup> To assert his point, Justice Siddique stated that the Constitution has restricted the meaning of injunctions of Islam to “only two sources for which no Muslim can have any valid objection.”<sup>102</sup> He defined the literal meaning of sunna using E. W. Lane’s *Arabic-English Lexicon* as the “way, course, rule, mode or manner of acting or conduct or the life or the like,” and explained the legal meaning of the term as “the way or mode of life adopted by the Holy Prophet (p.b.u.h.) and his sayings and deeds[.]”<sup>103</sup> Justice Siddique then explained the relationship between the Qur’an and sunna in the Constitution and shari‘a as follows:

According to the well-settled principles of the interpretation of statutes, the word ‘and’ used between these two expressions can be interpreted conjunctively or disjunctively but in Article 203-D it does not make any material difference because the Holy Qur’an and the Sunnah of the Holy Prophet (p.b.u.h.) do not conflict or contradict each other – rather they supplement each other.

After framing the terms of his inquiry, Justice Siddique stated that the issue in the present case is whether the sentence of stoning in the Zina Ordinance is in conformity with or contrary to these two sources of constitutional law. He explained that stoning is neither provided nor prohibited in the Qur’an, and after quoting the hadiths and reports of the Companions on stoning, he concluded that stoning is part of the sunna. Justice Siddique, however, did not explain whether stoning is a hadd or a ta‘zir punishment.

### *The Status of Sunna in Islam*

After focusing on the status of sunna and stoning in the Constitution, Justice Siddique engaged in a lengthy discussion on the status of the Prophet and his sunna in Islam. He quoted a series of verses, a number of hadiths in Arabic and Persian with an Urdu translation, and some reports from the companions. Taking the historical authenticity and the meaning of the hadiths for granted, Justice Siddique concluded that:

[Since] the Holy Prophet (p.b.u.h.) imposed the sentence of Rajm in several cases, the only logical and possible presumption is that the sentence of Rajm imposed by the Holy Prophet (p.b.u.h.) was approved by Allah...

... Who are we to Judge and criticise the conduct and deeds of the Holy Prophet (p.b.u.h.) and his Caliphs? ... This is a pure matter of belief and

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<sup>101</sup> These references also covered elements of the Constitution ranging from the 1948 Objectives Resolution, sections of the original 1973 Constitution, and Zia’s recent amendments to the Constitution, emphasizing that the Qur’an and sunna are part of the broader constitutional tradition of Pakistan.

<sup>102</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 330.

<sup>103</sup> *Ibid.*

faith as [a] follower of the Holy Prophet (p.b.u.h.) and his Caliphs which requires no reasoning or arguments.<sup>104</sup>

### 3.4 Justice Malik Ghulam Ali's Opinion

Justice Ali wrote his opinion in Urdu. Since he was equally comfortable in English, the Urdu opinion should be understood as a conscious decision, perhaps to gain a broader readership. Unlike Justice Usmani and Justice Shah, his opinion was structured as a polemic, which is not surprising given that one of his main jobs as Mawdudi's assistant was to respond to his critics. Contrary to what one would expect, Justice Ali did not use Mawdudi's translation of the Qur'an in quoting verses. The opinion focused on the merits of stoning as a hadd, and did not engage with the jurisdictional question.

#### *Hadd versus Ta'zir in the Hadith Canon*

In introducing the concept of hadd, Justice Ali stated that certain punishments have been provided clearly in the Qur'an or sunna or both, that no judge or political authority can alter the punishment once the burden of proof has been met. Such punishments, according to Justice Ali, are called hadd in the terminology of jurists and hadith scholars. To show that the concept of hadd is rooted in the hadith canon, Justice Ali argued that numerous hadiths use the term hadd to suggest that the stoning punishment cannot be altered, including the hadiths on the Ma'iz case and the Ghamidiyya woman's case in Muslim's collection, but no hadith uses the term ta'zir to describe stoning. Furthermore, he stated that we can find no case where the Prophet did not award stoning to a muhsan. However, Justice Ali did not address the hadith on the rape case quoted by Justice Hussain in which the Prophet reportedly forgave the rapist upon his confession.

To illustrate his point, Justice Ali noted that the Prophet declared that the life of a Muslim is sacred, but allowed capital punishment for Muslims in rare cases, including the commission of zina as a muhsan. According to Justice Ali, had stoning been a ta'zir based on a judge's discretion, the Prophet would have exercised his discretion in favor of Ma'iz and the Ghamidiyya woman whose punishments were based on repeated confessions. Justice Ali's concern was that if such a categorical command in the sunna can be left to the discretion of a judge, then every categorical rule of shari'a can be amended. To emphasize the historical authenticity of the command, Justice Ali noted that more than fifty companions of the Prophet have narrated authentic hadiths on stoning, each of the four rightly guided caliphs imposed stoning, and even the reported Khariji position against stoning is inconsistent with what is known about the sect.

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<sup>104</sup> Ibid., 345. (This argument ironically resembled Justice Lodhi's opinion who argued that the Holy Prophet could not have done anything contrary to the Qur'an, and therefore he could not have ordered rajm.)

### *Refuting Three Arguments*

As a professional polemicist, Justice Ali structured his opinion to refute three arguments in the *Hazoor Bakhsh* opinions. First, he noted that certain judges in *Hazoor Bakhsh* found stoning as un-Islamic based on its apparent inconsistency with the categorical Qur'anic command in 24:2 providing the punishment of stripes. In response, he quoted Qur'an 9:34 warning those who amass gold and silver of a grave punishment in the afterlife. Does this categorical verse mean, Justice Ali rhetorically asked, that the Qur'an forbids the ownership of gold and silver and that the hadiths on charity as a means to cleanse wealth are inconsistent with the categorical Qur'anic warning?

Second, he noted that certain judges have argued that stoning was awarded only before the revelation of 24:2 in order to reconcile the apparent conflict between the Qur'an and the hadith literature on stoning and such judges have concluded that stoning could not be awarded once the punishment of stripes was revealed in 24:2. Justice Ali argued that even if stoning was awarded only before 24:2, we definitively know that the narrator of certain hadiths on stoning Abu Hurayra and the participant in certain punishments of stoning Khalid b. Walid did not embrace Islam until long after the Battle of 'Uhud upon which 4:15-16 were revealed. Therefore, stoning was awarded at least after 4:15-16, which would place stoning in apparent conflict with the punishment in 4:15-16. Thus, according to Justice Ali, simply contending that stoning was awarded only before 24:2 does not resolve the apparent conflicts between the Qur'an and the hadith literature.

Third, Justice Ali noted that the last resort in the *Hazoor Bakhsh* opinions is to deny the authenticity of the hadiths on stoning altogether and cast a shadow on the very foundation of sunna. After a detour on the evolution and nature of punishments in the Qur'an, he returned to the theme of the legal authority of sunna in Islam. In response to the sources marshaled in *Hazoor Bakhsh* about the primacy of the Qur'an over sunna, Justice Ali quoted a hadith from Abu Dawud's collection:

Beware! I have been given the Qur'an and something comparable, yet the time shall come when a man replete on his seat will say: Keep to the Qur'an; what you find in it to be permissible treat as permissible, and what you find in it to be prohibited treat as prohibited. Beware, donkeys, beasts of prey with fangs, and a find belonging to a non-Muslim under treaty protection are not permissible.

Because the prohibition of eating donkeys and beasts of prey, and the protection of the lost personal property of non-Muslims, are found only in hadiths, Justice Ali implied that using the Qur'an exclusively as the source of shari'a would change basic aspects of Islamic guidance. Justice Ali also elaborated the meaning of this hadith using the commentaries of al-Khattabi (d. 996) and al-Bayhaqi (d. 1066) and emphasized that such early commentators use the term "lawgiver" (shāri') both for God and his Prophet.

### *Refuting Three Judges*

After dealing with the three general arguments, Justice Ali targeted the statements of each of the three judges in *Hazoor Bakhsh* who declared stoning as un-Islamic. First, without naming any judge, Justice Ali turned to the story of the appointment of Mu‘adh b. Jabal as the governor of Yemen, quoted by Justice Salahuddin Ahmed in his opinion, whereby the companion tells the Prophet that he would use the Qur’an, then the sunna, and then *ijtihad* to resolve matters. In response, Justice Ali emphasized that notwithstanding the many Qur’anic verses and hadiths that do not support the argument of the primacy of the Qur’an over the sunna, even this hadith does not support such an argument. For Justice Ali, to say that someone would use the Qur’an and then the sunna does not mean that he would ignore the sunna once he has found something in the Qur’an.

Next, Justice Ali objected to Justice Agha Ali Hyder’s position on the Sunni hadith canon. As shown in chapter 3, Justice Hyder drew from Orientalist sources, the Egyptian hadith skeptics, and the Shi‘a criticism of the Sunni hadith canon to cast a shadow of doubt on the hadiths relating to stoning. Justice Ali used this opportunity to defend the Sunni hadith canon, elaborating the categories of hadith classification among the Sunni hadith scholars as well as the jurists, and concluding that even a solitary hadith that is authentic must be followed.

Lastly, Justice Ali protested against not just Justice Zakaullah Lodhi’s arguments, but also his tone. He stated that the learned judge’s statements were neither based on facts, nor were his words within moderation. He took particular offense at Justice Lodhi’s statement that Islam is about the “rule of the Book and not the whims of the Prophet.”<sup>105</sup> Stopping short of accusing Justice Lodhi of blasphemy, Justice Ali stated that, “these words are very inappropriate, very careless, and undoubtedly in need of reconsideration as they raise the prospect of insulting (*ihānat*) and belittling (*itkhifāf*) the Prophetic sunna.”<sup>106</sup> In response to Justice Lodhi’s argument that the vested interests of those who support *taqlid* forced stoning into *shari‘a*, Justice Ali quoted the 13th-century scholar Ibn Taymiyya (1263-1328) who opposed *taqlid* from his book, “The Drawn Sword against the Insulter of the Messenger” (*al-Ṣārim al-Maslūl ‘alā Shātīm al-Rasūl*):

The nature of the sacredness of God and His Messenger is the same. Whosoever harmed the Messenger, harmed God. Whosoever obeyed the Messenger, obeyed God. The relationship between the Muslim community and God is through the Messenger. They have no way to follow other than the Messenger’s way, and no cause except for him. God has given the same status to the Messenger as He has in commanding and forbidding,

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<sup>105</sup> *Ibid.*, 362; *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 210.

<sup>106</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 363.

and informing and explaining. So it is not permissible to make distinctions between God and His Messenger in anything.<sup>107</sup>

Apart from the content of the quote, the source of the quote suggested a veiled charge of insulting the Prophet, a crime punishable by life in prison at the time.<sup>108</sup>

Before concluding his opinion, Justice Ali cast doubt on the quality of Justice Lodhi's opinion. He noted that Justice Lodhi quoted an unreferenced hadith in Urdu as "I am leaving behind one thing such that if you held on to it, you will never be misguided, and that thing is the Book of God."<sup>109</sup> He pointed out that the hadith is recorded by Malik and Ibn Hanbal,<sup>110</sup> and quoted the Arabic text, translating as "I am leaving behind *two* things such that if you held on to them, you will never be misguided, and those things are the Book of God and the sunna of His Messenger."<sup>111</sup>

### 3.5 Justice Muhammad Karam Shah's Opinion

Justice Shah's opinion made a theoretical distinction between qualification and abrogation and interpreted the Qur'an and hadiths on stoning through this distinction. He rejected the notion of any abrogated verse in the Qur'an based on the concept of recurrence in hadiths and questioned the authenticity of the hadith in which the Prophet forgave the rapist. Justice Shah's opinion was a restatement of the Hanafi doctrine, but he did not confront his mentor and Hanafi jurist Abu Zahra's opinion against stoning. He wrote his opinion in Urdu, and used his own translations of Qur'anic verses from his 5-volume commentary on the Qur'an.<sup>112</sup>

#### *Theoretical Points*

Before diving into the issue of stoning, Justice Shah explained his position on three underlying issues. First, he considered the legislative status of sunna. He noted that the *Hazoor Bakhsh* opinions focused on the Qur'anic verses relating to the obedience to God, without according an equal obedience to the Prophet, which is also demanded by Qur'anic verses. But he insisted that the entire Qur'an is God's word, quoting Qur'an 58:2, "Do you believe in part of the Book and deny some part." Then he quoted a series

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<sup>107</sup> Ibid.

<sup>108</sup> Later, the crime would become punishable by death.

<sup>109</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 364; *Hazoor Bakhsh v. Federation of Pakistan*, 1981 PLD FSC 145, 210.

<sup>110</sup> Referencing Ibn Hanbal's *al-I'tisām bi'l-Kitāb wa al-Sunna*.

<sup>111</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 364 (emphasis mine).

<sup>112</sup> I have spot-checked a few verses. See Pir Muhammad Karam Shah, *Tafsīr Diyā' al-Qur'ān*, 5 vols. (Lahore, Pakistan: Diyā' al-Qur'ān Publications, 1978); see also Muhammad Akram Wirk, "Pir Muhammad Karam Shah Al-Azharī awr Fitna-i Inkār-i Sunnat: Tafsīr Diyā' al-Qur'ān kī Rawshanī mayn," *al-Sharī'a* 16, no. 2 (2005).

of Qur'anic verses on the obedience to God as well as the Prophet, and stated that, "the learned judges who have quoted the verses that only God's commands are mandatory have ignored that obedience to the Prophet is based on God's command."<sup>113</sup>

Second, he discussed the relationship between the Qur'an and sunna. In this regard, Justice Shah quoted Qur'an 44:16, "and We revealed to you (the Prophet) the message that you may explain to the people what was sent down to them and that they might ponder."<sup>114</sup> He explained that this verse means that the sunna is an explanation (bayān) of the Qur'an, which may clarify what is ambiguous (mujmal) in the Qur'an, restrict what is absolute (muṭlaq), and qualify what is general (ʿāmm). To explain these categories, Justice Shah gave an example for each.

Third, he distinguished between qualification and abrogation in Islamic texts. Justice Shah argued that often people do not make a distinction between the two concepts. Using a contemporary scholar, al-Zarqani of the Azhar University, Justice Shah defined abrogation as the complete repeal of a rule of shari'a by another rule of shari'a, and qualification as a limitation on a rule's application that always existed and is just being made clear. However, he failed to mention that abrogation has been defined in many other ways. The Hanafis have usually considered qualification a form of abrogation, and even al-Zarqani notes that he is only providing the definition that he finds most precise.<sup>115</sup>

### ***Interpreting the Qur'an and Hadiths***

In contrast with Justice Ali who nearly accused Justice Lodhi of blasphemy, Justice Shah used a patronizing tone, treating the *Hazoor Bakhsh* judges with an apparent kindness that betrayed a sense of epistemic superiority. He stated that, "I do not doubt the intelligence, erudition, or perceptiveness of the judges who have declared that stoning is not a hadd in shari'a. Reading their opinions shows the effort they have exerted in solving this puzzle."<sup>116</sup> Justice Shah noted that the strongest argument made by the *Hazoor Bakhsh* judges is that the terms al-zani and al-zaniya in 24:2 are general, and applying them only to unmarried men and women would mean the abrogation of the verse. Using the distinction he drew earlier between abrogation and qualification, Justice Shah argued that qualifying the general terms in 24:2 through sunna does not mean abrogation.

Next, he addressed the argument that the hadiths that underlie the sunna on stoning are solitary. Justice Shah stated that these hadiths have been narrated by more

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<sup>113</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 368-71. Quoting in Arabic, translating in Urdu, and elaborating 132:3, 93:5, 158:7, 1:8, 46:8, 64:4, 80:4, 52:24, 31:3, 13:4, 14:4, 59:9, and 36:33.

<sup>114</sup> Before quoting this verse, Justice Shah also quoted 145:2.

<sup>115</sup> Muḥammad ʿAbd al-ʿAzīm al-Zarqānī, *Manāhil al-ʿIrfān fī ʿUlūm al-Qurʿān* (Beirut, Lebanon: Dār al-Kutub al-ʿIlmiyya, 1995), 2:138.

<sup>116</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 377.

than forty companions of the Prophet. He named fourteen narrators and concluded on the authority of the canonical Sunni hadith scholar al-‘Asqalani (d. 1449) that the companions and the ‘ulama reached a consensus that the punishment of a muhsan for zina is stoning.<sup>117</sup> He stated that the hadith scholars have called these reports recurrent, and emphasized that there is no distinction between recurrent-in-words and recurrent-in-meaning in terms of the legal effect.

Turning toward the argument about the meaning of muhsan, Justice Shah stated that the “deniers of stoning” (munkirīn-i rajm) have drawn this argument from 4:25. While perhaps a valid literal description, using the term “deniers” was a rhetorical strategy to suggest denial of the truth. He drew from two Arabic lexicons and al-Tabari’s exegesis to argue that muhsan is polysemous (mushtarak) whose meaning is based on the context, which should be the Prophet’s sunna.<sup>118</sup>

Next, Justice Shah addressed the historical argument that the cases of stoning occurred before the revelation of 24:2. He argued that Abu Hurayra, one of the narrators of the Ma‘iz case, did not embrace Islam until after the revelation of 24:2. He also marshaled sacred historical sources and biographical dictionaries to show that Khalid b. Walid, a participant in the Ghamidiyya woman’s case, was definitely not a Muslim until long after the revelation of 24:2. Lastly, he dated the Jewish case as before the revelation of 24:2 but that case did not have any bearing on his argument.

Before turning to the cases of stoning, Justice Shah evaluated the hadith, “My word does not repeal God’s word, and God’s word repeals my word, and parts of God’s word repeal other parts of God’s word,” used in *Hazoor Bakhsh* to argue that hadiths cannot repeal or qualify the Qur’an. Conveniently ignoring the source of the hadith as Ibn Hanbal, Justice Shah argued that the hadith scholars al-Dhahabi (1274-1347), al-‘Asqalani (1372-1448), and al-Albani (1903-1999) consider this hadith fabricated (mawḍū‘). Therefore, according to Justice Shah, this hadith should not be used in any legal argument, notwithstanding the fact that the present matter does not even involve abrogation or repeal.

### *Cases of Stoning*

In the case of Ma‘iz, Justice Shah confronted Islahi’s argument that Ma‘iz was stoned not because he was a muhsan, but because he was in the habit of committing offences against women. Justice Shah analyzed and reconciled the narrations on the Ma‘iz case to argue that there is no evidence to suggest that Ma‘iz had a questionable reputation. In fact, according to Justice Shah, Ma‘iz’s confessions were repeated and his punishment was his atonement for which he was reportedly granted a place in heaven.

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<sup>117</sup> Ibid., 380. Naming Abū Bakr, ‘Umar, ‘Uthmn, ‘Alī, ‘Āisha, ‘Abdallāh b. Mas‘ūd, Zayd b. Thābit, Jābir b. ‘Abdallāh, Abī b. Katab, Nu‘mān b. Bashīr, ‘Abdallāh b. ‘Umar, Anas b. Mālik, Abū Dhar Ghaffārī, Abū Sa‘īd Khudrī, and ‘Ammār b. Yāsir.

<sup>118</sup> Using the Arabic lexicons *Mufradāt fī Gharīb al-Qur‘ān* and *Tāj al-‘Arūs*. Justice Shah also argued that the verse 33:30 on the Prophet’s wives does not apply in this context. See *ibid.*, 382-383.

Justice Shah also defended the reputation of the Ghamidiyya woman. He analyzed the hadiths on the case to argue that there is nothing to show that the woman was a prostitute as Islahi suggests. Reconciling the variant reports, Justice Shah argued that she also atoned for her sins and obtained a place in paradise. Justice Shah did not engage with the Jewish case on the grounds that the case occurred before 24:2 and is therefore unhelpful in his argument. But he argued that the ‘Asif case occurred after 24:2, and serves as another example of stoning.

### *The Stoning Verse*

The alleged verse on stoning attributed to ‘Umar was used in the *Hazoor Bakhsh* opinions to suggest that the argument for stoning is based on a fabricated verse. In response, Justice Shah stated the historical authenticity of the Qur’an is confirmed with recurrence. Since the alleged verse is not recurrent, “we do not consider it a part of the Qur’an, or accept it as a verse from any of its chapters, or use it as an argument in support of the punishment of stoning.”<sup>119</sup> He criticized the *Hazoor Bakhsh* judges for focusing on this report of questionable authenticity but ignoring the more authentic reports attributed to ‘Umar that make the case for stoning. As a counterpoint to the report of ‘Umar’s sermon from Muslim’s collection that uses the term “verse of stoning,” he quoted another report of ‘Umar’s sermon from a 16th-century collection, *Kanz al-‘Ummal*, in which ‘Umar does not use the term.<sup>120</sup>

### *Hadd versus Ta‘zir*

In his opinion, Justice Salahuddin Ahmed had argued that there is no agreement among the jurists over the meaning of the term hadd, by stating that the Hanafi jurist Ibn ‘Abidin did not exclude qisas punishments, based on the victim’s discretion, from hadd punishments. Justice Shah quoted another portion of Ibn ‘Abidin’s *Radd al-Muhtar* to show that the author, in fact, did exclude qisas punishments from hadd punishments. After tackling Justice Ahmed’s oversight, Justice Shah directed his attention to a more formidable target, Justice Hussain. To argue that stoning could be a ta‘zir but not a hadd, Justice Hussain had provided a report where the Prophet reportedly forgave a rapist despite his confession, and had emphasized that the report is accepted by authorities such as Ibn Hanbal, al-Bayhaqi, and Ibn Qayyim. Justice Shah argued that the Prophet did not forgive the rapist. He stated that this report is not used in Ibn Hanbal’s *Musnad*, but is used in one manuscript of Abu Dawud’s collection due to transcription error, and that the accurate report appears in the other manuscripts. Justice Shah acknowledged the authority of Ibn Qayyim and conceded his use of the report, but argued that Ibn Qayyim has made a mistake on the grounds that he could not find any independent basis to support Ibn Qayyim’s argument. He also analyzed the chains of narration of the two versions to argue that the reports whereby the rapist was punished are stronger. In short, not awarding stoning was neither in the Prophet’s discretion, nor is it in the state’s discretion.

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<sup>119</sup> Ibid., 396.

<sup>120</sup> Referencing ‘Alī b. ‘Abd al-Malik al-Hindī’s *Kanz al-‘Ummāl*.

### *Defending the Hadith Canon*

Before ending his opinion, Justice Shah defended the historical authenticity of the hadith canon. In *Hazoor Bakhsh*, judges such as Agha Ali Hyder and Zakauallah Lodhi had cast doubt on the Sunni hadith canon, arguing that hadiths were not recorded for two and half centuries after the Prophetic period. In response, Justice Shah stated:

This is a misunderstanding that emerges from lack of knowledge and reinforced by the Orientalists who are biased against Islam and engage in open propaganda against Islam, not distinguishing between truth and falsehood. And, our modern-educated classes endorse such [Orientalist] research with their eyes closed.<sup>121</sup>

Justice Shah provided a history of early hadith compilation and gave examples of hadith collections that came before Malik's *Muwatta*.<sup>122</sup> Finally, he concluded that stoning is a hadd outside the discretionary authority of the state, overturning the judgment in *Hazoor Bakhsh*, and upholding the stoning provisions of the Zina Ordinance.

### **3.6 Justice Muhammad Taqi Usmani's Opinion**

Justice Usmani's opinion was the longest and the most comprehensive and nuanced defense of stoning, perhaps in the entire fiqh literature. Covering more than 70 pages in Urdu, the Deobandi scholar touched on nearly every objection raised in *Hazoor Bakhsh*, including some of the tougher objections raised by Justice Hussain, though he did not directly engage the hadith analysis of fellow Deobandi scholar Kashmiri. However, in his effort to be comprehensive, some of his arguments were tenuous, but even in such cases he executed them with great subtlety. While Justice Usmani's conclusion was consistent with the Hanafi doctrine, some of his justifications went outside the Hanafi canon. In quoting Qur'anic verses, Justice Usmani used the translation of the Deobandi scholar Ashraf Ali Thanawi.<sup>123</sup> Following is a brief description of his major points.

#### *Qur'an on Stoning*

Unlike the other judges who only focused on the sunna to make a case for stoning, Justice Usmani argued that there is one instance even in the Qur'an that relates to stoning. He argued that while the Qur'an does not talk about stoning directly, it talks about stoning indirectly, quoting 5:41-44:

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<sup>121</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 406.

<sup>122</sup> Justice Shah mentioned Muḥammad b. Muslim Zuhri (670-742) in Medina, 'Abd al-Raḥmān al-Awzā'i (707-774) in Syria, Sufyān Thawri (716-778) in Iraq, and 'Umar b. Rāshid in Yemen. *Ibid.*, 408.

<sup>123</sup> Ashraf 'Alī Thānawī, *Tafsīr Bayān al-Qur'ān*, 12 vols. (Lahore, Pakistan: Maktaba al-Ḥasan, 1978).

[42]... If they come to you, then judge between them or recuse yourself. If you recuse yourself, then they cannot harm you. But if you judge, judge between them with equity. For Allah loves the equitable. [43] How come they come to you for judgment when they have the Torah inside which is Allah's command?

Justice Usmani argued that these verses are in the context of the stoning of the Jewish man and woman. He noted that the *Hazoor Bakhsh* opinions did not consider these verses as a Qur'anic source of stoning since the case was decided based on Jewish law. However, he argued that the use of the terms "equity" (al-qist) and "Allah's command" (ḥukm allāh) in the verses indicates that the Prophet's judgment was based on God's command given to the Jews in the Torah that extends to Muslims as well.

Next, Justice Usmani argued that no verse of the Qur'an comes into conflict with the punishment of stoning for muhsans. To explain this point using his training as a lawyer in addition to a religious scholar, he described how Macaulay's Code provides a general punishment for theft (section 379) and a specific punishment for theft in a residential dwelling (section 380) without negating the general rule.<sup>124</sup> Similarly, he argued, the Qur'an's general punishment of stripes does not negate the sunna's specific punishment of stoning for muhsans. Justice Usmani acknowledged that for this argument to work, we have to assume that the Qur'an and sunna are co-equal sources of law. He noted that Justice Lodhi has challenged this assumption by declaring that hadiths cannot be used in lawmaking. Equating hadiths with sunna, Justice Usmani responded that evaluating the authority of sunna as a source of law is not within the jurisdiction of this Court. He also noted that this assumption has been challenged by the judges who have accepted sunna as a source of law but secondary to the Qur'an and concluded that sunna cannot abrogate the Qur'an. Justice Usmani argued that just as we can reconcile sections 379 and 380 of Macaulay's Code, we can reconcile the Qur'an's general and the sunna's specific rules through either qualification or supplementation (iḍāfa).

To explain qualification, Justice Usmani showed that according to the Yemeni "mujtahid" al-Shawkani (d. 1834) and the Shafi'i jurist al-Amidi (d. 1233), there is a consensus that recurrent reports can qualify the Qur'an.<sup>125</sup> Then he quoted the Hanafi jurist al-Sarakhsi to show that even the Hanafis who consider qualification as a form of abrogation allow abrogation of the Qur'an based on recurrent or widespread reports.<sup>126</sup> He also noted that in certain conditions, Hanafis allow qualifications even with a solitary

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<sup>124</sup> Justice Usmani used the term Pakistan Penal Code, but I use Macaulay's Code to emphasize that Justice Usmani is making his point using colonial law.

<sup>125</sup> *Federation of Pakistan v. Hazoor Bakhsh*, 1983 PLD FSC 255, 418. Quoting al-Āmidī's *al-Aḥkām fī Uṣūl al-Aḥkām* that "yajūz takhṣīṣ 'umūm al-qur'ān bi al-sunna, ammā idhā kānat al-sunna al-mutawātira fa lam a'raf fih khilāf<sup>an</sup>," and al-Shawkānī's *Irshād al-Fuḥūl* that "wa yajūz takhṣīṣ 'umūm al-kitāb bi al-sunna al-mutawātira ijma'<sup>an</sup>."

<sup>126</sup> *Ibid.*, 419. Quoting *Uṣūl al-Sarakhsī* that "thumma innamā yajūz naskh al-kitāb bil-akhbār al-mutawātira wa al-mashhūra."

report.<sup>127</sup> To elaborate his point, Justice Usmani gave a series of examples on qualification. For example, the Qur'an provides a general command of amputation for theft, but hadiths provide exceptions for the theft of fruit or theft during famine or theft of things below a certain value.<sup>128</sup> The implication was that without such qualifications, the command of amputation would become operative for the plucking of a fruit even during a famine.

To describe supplementation, Justice Usmani argued that the Qur'an's general command of stripes applies to everyone, but the sunna's command of stoning is an extra punishment for muhsans. But as stoning is a more severe punishment, Justice Usmani noted, stripes no longer remain necessary. As an elaboration, he argued that a person stealing from a residential dwelling is considered in violation of sections 379 and 380 of Macaulay's Code. But since the punishment for section 380 is higher than section 379, the person is punished only under section 380.

Justice Usmani stated that the argument based on supplementation is more convincing to him than qualification. To find support for this argument, he used 'Ubada's hadith that provided for one hundred stripes and exile for the virgin (bikr), and one hundred stripes and stoning for the non-virgin (thayyib).<sup>129</sup> Hanafi jurists considered this hadith solitary and therefore allowed, but did not mandate, exile for virgins on top of stripes. However, Justice Usmani stated that this hadith came after 24:2, and mandated stoning for muhsans on top of stripes. However, according to Justice Usmani, the Prophet dropped stripes and used stoning in cases of muhsans. He argued that the ruler therefore has the authority of either giving the two punishments or using only the higher punishment. However, this position was at variance with the dominant Hanafi doctrine. Therefore, Justice Usmani stated that this position was supported by Ibn Hanbal, Dawud al-Zahiri (c. 815-83), and Shah Wali Allah (1703-62), representing the Hanbali, the Zahiri, and the Shafi'i schools respectively.<sup>130</sup>

### ***Sunna and Stoning***

Before classifying the hadiths on stoning as recurrent, widespread, or solitary, Justice Usmani defined recurrent using al-Suyuti as follows:

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<sup>127</sup> When the Qur'an's command is “‘āmm makhṣūṣ al-ba‘d,” referencing *Uṣūl al-Shāshī* and *Uṣūl al-Bazdawī*.

<sup>128</sup> Under Hanafi law, the amputation also requires two adult male witnesses of unimpeachable moral and religious character who saw the act of trespassory taking from a confined area.

<sup>129</sup> Justice Usmani translates the Arabic term thayyib as “shādī shuda” into Urdu that connotes someone who has been married, but does not necessarily mean muhsan, for the marriage may not have been consummated, underscoring the difficulty of translating such terms.

<sup>130</sup> Referencing al-‘Asqalānī's *Fath al-Bārī* for Ibn Ḥanbal, Dawūd al-Zāhirī, and also Ishāq b. al-Mundhir. The Zahiri school was an early Sunni school of law that is no longer a living tradition. However, Sunni jurists continue to occasionally reference the Zahiri doctrine.

The jurists have described two types of recurrence. First, recurrent-in-words means a hadith that is recurrently transmitted word-by-word. Second, recurrent-in-meaning means that such a number of people whose agreement upon falsehood would be impossible to narrate different events sharing a common element. In these conditions, the common element is deemed recurrent.

... For example, [hadiths on] the Prophet, peace and blessings be upon him, raising his hands for supplication.<sup>131</sup>

Justice Usmani did not engage in a debate with Justice Hussain, who questioned al-Suyuti's method of historical authentication based on the argument that only hadiths about a single event as opposed to a common element in several events could be considered to be recurrent-in-meaning. Quoting the example about raising hands for supplication was important here. Even though certain Ahl-i Hadith question aspects of the practice, this style of supplication is the Hanafi norm and part of the lived spiritual experience of South Asian Muslims.<sup>132</sup> In this context, Justice Usmani was suggesting that if we reject the notion of recurrent-in-meaning, Islam as we know it would cease to exist.

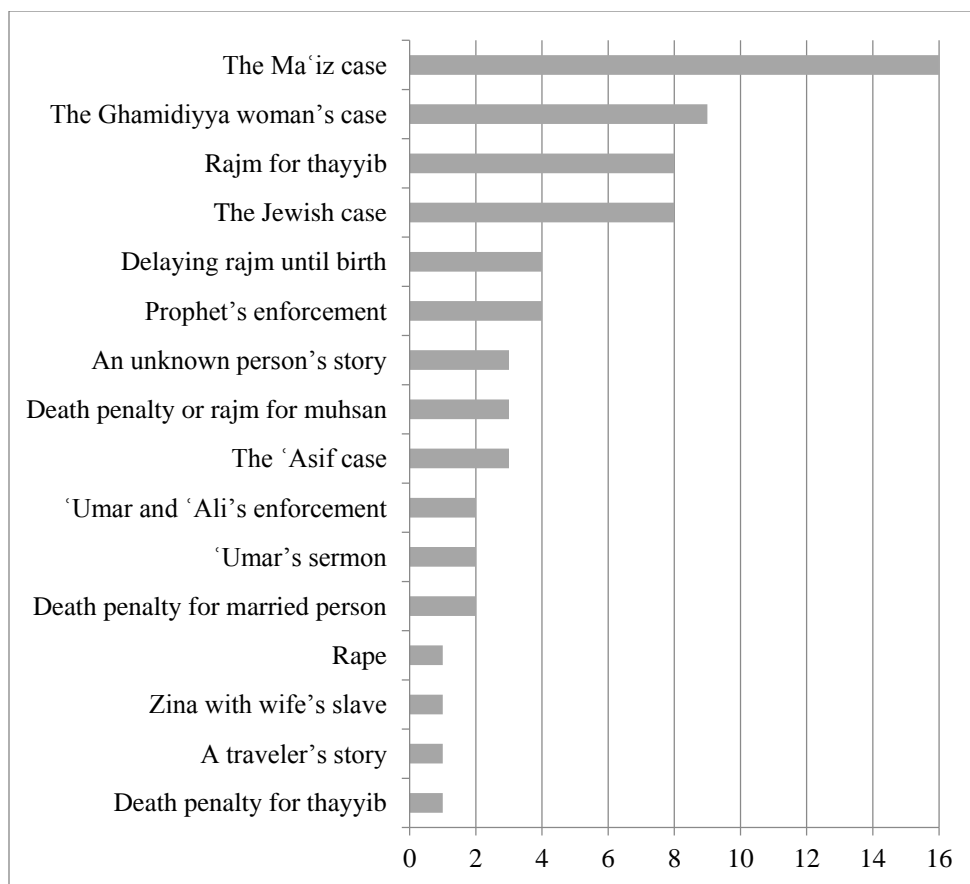
To establish the recurrence of hadiths on stoning, Justice Usmani produced a table of 51 hadiths, providing the narrating companion's name, the underlying event, and the citation in each case. He argued that there is no set number for a hadith to be considered recurrent and that there are hadiths with fewer narrators that are deemed recurrent, providing examples of two Prophetic statements that were considered recurrent based on 30 and 27 reports.<sup>133</sup> However, these reports represented examples of recurrence in terms of variations in words rather than recurrence in terms of drawing a common element from a range of events. Nevertheless, he concluded that the hadiths on stoning are recurrent based on the 51 reports that he listed, even though at most 16 reports corresponded to a single event, the Ma'iz case (see Figure 9).

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<sup>131</sup> Referencing al-Suyūṭī's *Tadrīb al-Rāwī*.

<sup>132</sup> For an anthropology of supplication, see Bilal Ahsan Malik, "Producing Islam: An Ethnography of Muslim Beliefs, Islamist Politics, and Academic Secularity, at a Pakistani Sufi Madrasa" (Harvard University, 2014).

<sup>133</sup> Stating that the hadith on "nuzūl al-qur'ān 'alā sab'a aḥruf" is considered recurrent based on 27 reports and the hadith on "naḍḍar allāh imra' samī'a maqālatī" is considered recurrent based on 30 reports.



**Figure 9. Constructing Recurrence-in-Meaning: Reports on Rajm (compiled by the author from Justice Muhammad Taqi Usmani's opinion).**

Justice Usmani did not stop at arguing that the hadiths on stoning are recurrent-in-meaning. He also found a hadith on stoning that was recurrent-in-words: “The child is for the bed, and the stone for the unlawful partner.”<sup>134</sup> Justice Usmani recognized that this hadith is usually interpreted in a metaphorical sense to mean that paternal rights to the child of a married woman belong to her husband (the owner of the marital bed), and nothing (the stone) belongs to her unlawful sexual partner, even if he is the biological father. But he insisted that the hadith could be interpreted in a literal sense as well to mean that a punishment of stone belongs to the unlawful partner. However, as Justice Hussain responded in his opinion, even if you accept the literal meaning of the hadith, the term unlawful sexual partner (*‘āhir*) does not distinguish between a muhsan and a non-muhsan. To this objection, Justice Usmani responded that this literary statement could not contain the legal minutiae but can still show the established status of stoning.

In the usual pattern, Justice Usmani dated the cases of stoning and provided a contextual analysis far more nuanced than any of the other judges. The analysis was inescapably based on the Sunni exegetical canon whose authenticity was called into

<sup>134</sup> The hadith states, “al-walad li'l-firāsh, wa li'l-‘āhir al-ḥajar.”

question in *Hazoor Bakhsh*. Justice Usmani also responded to the argument from one of the legal advisors to the Federal Shariat Court, S. M. Zafar, that we do not have the complete judicial record in the cases of stoning to extract a legal rule qualifying the Qur'an. Justice Usmani argued that the judicial record in any case is based on the charge, the defense, the proof, and the judgment, all of which are present in the cases of stoning.

### ***The Alleged Verse on Stoning***

Justice Usmani also offered an interesting analysis of the alleged Qur'anic verse on stoning. He realized that the reports about the alleged verse are so many that, even if they do not reach recurrence, they cannot be ignored as Justice Shah had done. But if we accept them as authentic, then the use of the term verse (āyah) would raise the prospect of Qur'an's textual abrogation that Justice Usmani was unwilling to concede, even though many canonical scholars did not have a problem with such a notion. He argued that 'Umar's sermon about the alleged verse did not refer to a verse of the Qur'an, but rather it referred to a verse of the Torah that continued to be God's law for Muslims. But Justice Usmani was aware that the Torah does not include an exact equivalent of the alleged verse. So he argued that in Arabic the term Torah is used in an expansive way to include the Old Testament, the Talmud, the Mishnah, and other Jewish literature. Therefore, according to Justice Usmani, the alleged verse could have been part of any Jewish religious work at the time. By defining Torah so broadly, Justice Usmani was able to explain the reports on the alleged verse without questioning the authenticity of such reports. Justice Usmani also produced reports to show that when people came to the Prophet to learn the alleged verse, the Prophet refused to recite it, using this not as an example of abrogation, but as an example of the lack of inclusion of stoning in the Qur'anic text.

## **4. Courts and Authoritarian Politics**

Before a political analysis of *Hazoor Bakhsh*, some comments on the “impact” question, otherwise beyond the scope of this project, are in order. What is at stake in the Zina Ordinance? *Hazoor Bakhsh* was not an appeal of a person convicted of zina and sentenced to stoning based on repeated confessions or four witnesses. The case was a petition for abstract review under the Federal Shariat Court's shari'a review jurisdiction. While stoning as a hadd remains the law of the land in Pakistan, no hadd punishment for zina has been executed in Pakistan so far.<sup>135</sup> However, trial courts have awarded hadd punishments in several cases, to be overturned in the appeal process. Asma Jahangir and Hina Jilani note that during the Zia regime (up to 1988), five hadd punishments were awarded for zina and two hadd punishments were awarded for rape in trial courts. In two cases involving stoning, a confession to zina was assumed based on the accused's open cohabitation based on marriage that was deemed invalid due to lack of a registered divorce from a prior marriage.<sup>136</sup> In a third case involving stoning, confession was made

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<sup>135</sup> Jahangir and Jilani, *The Hudood Ordinance: A Divine Sanction?*, 47.

<sup>136</sup> For descriptions of these cases, see *ibid.*

by the accused but later retracted.<sup>137</sup> Upon appeal, the Federal Shariat Court overturned the hadd punishment in each case, whether involving stoning or stripes.

But the lack of implementation of stoning does not mean that the 'ulama's goals were frustrated. Just as a criminal law's impact cannot be measured by focusing on conviction rates alone, the success or failure of the 'ulama cannot be determined by the number of times a hadd was executed.<sup>138</sup> As Justice Usmani notes elsewhere, "Sharī'ah does want to ensure that the harsh punishments in hadd cases are imposed as little as possible, and this is why it has laid down strict criteria in these cases."<sup>139</sup> The absence of any executed punishment does not mean that these cases do not have any impact. While the state's regulation of sexual morality has its limits, the specter of hadd placed a legal constraint on the cultural normalization of sexual liberalism and foreclosed paternity suits from unwed mothers and paternity claims from unwed fathers as the underlying claim would be a confession to zina subject to hadd under the Zina Ordinance. In this way, the Zina Ordinance had tangible implications for child support, custody, and inheritance. Furthermore, reinforcing the concept of hadd punishments and placing stoning therein meant that an Islamic state does not have the constitutional authority to change certain fiqh rules.

Soon after the judgment, Zia further amended the Constitution to include 'ulama as ad hoc judges on the shariat appellate bench of the Supreme Court and appointed Justice Usmani and Justice Shah to that bench.<sup>140</sup> Since the Supreme Court could hear *Hazoor Bakhsh* review on appeal, the appointment of 'ulama to the Supreme Court was important to guard their judgments in *Hazoor Bakhsh* and other such cases. Nevertheless, an appeal was filed in the Supreme Court against the *Hazoor Bakhsh* review, which remained pending until February 6, 1991, whereby it was summarily dismissed. To replace the unofficial Deobandi and Barelawi spots vacated on the Federal Shariat Court after the appointments of Justice Usmani and Justice Shah to the Supreme Court, Zia appointed a notable Deobandi scholar, Abdul Quddus Qasmi, and a notable Barelawi scholar, Syed Shujaat Ali Qadri. The Jama'ati scholar Justice Ali remained on the Federal Shariat Court until 1985, when his second term ended. Justice Hussain remained on the

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<sup>137</sup> Ibid.

<sup>138</sup> On the theoretical concerns in studying courts and social change, see Malcolm M. Feeley, "Hollow Hopes, Flypaper, and Metaphors," *Law & Social Inquiry* 17, no. 4 (1992); Michael W. McCann, "Reform Litigation on Trial," *Law & Social Inquiry* 17, no. 4 (1992); Gerald Rosenberg, "Hollow Hopes and Other Aspirations: A Reply to Feeley and McCann," *Law & Social Inquiry* 17, no. 4 (1992); Jonathan Simon, "The Long Walk Home to Politics," *Law and Society Review* 26, no. 4 (1992). While this scholarship is focused on liberal social change, the insights should translate to courts and conservative social change as well.

<sup>139</sup> Muhammad Taqi Usmani, "The Islamization of Laws in Pakistan: The Case of *Hudud* Ordinances," *The Muslim World* 96, no. 2 (2006): 302.

<sup>140</sup> Justice Shah and Justice Usmani officially remained judges of the Federal Shariat Court. See Ministry of Law and Parliamentary Affairs, No. F. 1 (4)/82-AIII(1) (Islamabad, May 15, 1983), *Gazette of Pakistan, Extraordinary*, May 24, 1983, III, 126.

Federal Shariat Court as the acting chief justice until 1984, when he was removed presumably over his nonconformist style of Islamic legal reasoning when the Court reviewed the anti-Ahmadiyya laws. Justice Shah remained on the Supreme Court until his death in 1998. Justice Usmani remained on the Supreme Court until Musharraf removed him in 2002 to set-aside his judgment in the *riba* case (see chapter 6).<sup>141</sup>

**Table 9: Hussain Court**

Name	Preceding Position	Start	End	Succeeding Position
Aftab Hussain	Member, Federal Shariat Ct.	1 June 1981	14 Oct 1984	Transferred
M. Zahoor-ul-Haq	Judge, Sindh	1 June 1981	31 May 1983	Judge, Sindh
Ch. Muhammad Siddiq	Retired Judge, Lahore	1 June 1981	31 May 1985	Retired
Malik Ghulam Ali	Jama'ati scholar	7 June 1981	6 June 1985	Retired
Muhammad Karam Shah	Barelawi scholar	7 June 1981	7 Oct. 1982	Judge, Supreme Ct.
Muhammad Taqi Usmani	Deobandi scholar	7 June 1981	7 Oct. 1982	Judge, Supreme Ct.

The *Hazoor Bakhsh* review provides an opportunity to reflect on many of the elements of the constitutional theocracy thesis.<sup>142</sup> The thesis states that constitutional enshrinement of a religion gives an official status to the religion, but subjects religion to the authority of the state. But unlike many Arab countries, the Muslim religio-political movements in South Asia have jealously guarded their madrasas from state interference, owing to the development of the modern madrasas in resistance to colonial education. However, these movements have used the political process to advance the Sunni orthodoxy in state law without formal recognition of Sunni Islam, much less the Deobandi or the Barelawi brand. As the politics surrounding *Hazoor Bakhsh* shows, the appointment of a Deobandi, a Barelawi, and a Jama'ati judge to the Federal Shariat Court was a co-optation of each movement in prolonging the military rule at a time when the opposition was uniting under the banner of the MRD against the ruling regime. In exchange, the regime ceded authority over the interpretation of the Qur'an and sunna to representatives of these movements. In other words, the relationship between the religio-political movements and the regime was characterized by synergies. Instead of a constitutional delegitimation of religious association, the Federal Shariat Court under Zia gave unofficial recognition to the Deobandi, the Barelawi, and the Jama'ati interpretations.

Furthermore, constitutional law is considered to provide jurisdictional constraints over the expansion of religion by bringing questions of religion under the jurisdiction of state judges and providing jurisdictional protections for secular interests. Such jurisdictional protections or carve-outs have been used in Pakistan for banking and finance laws and Muslim personal law. But the *Hazoor Bakhsh* review shows that jurisdictional carve outs are neither religious nor secular. Instead, they are value neutral

<sup>141</sup> However, Justice Shah and Justice Usmani were reappointed to the Supreme Court in 1996, suggesting that their appointments had lapsed prior to that. I have not seen a notification renewing their appointments beyond 1985 but they continued to serve as judges of the Supreme Court after 1985.

<sup>142</sup> Hirschl, *Constitutional Theocracy*, 51.

tools in the hands of judges that can be used to serve secular as well as religious ends. In the *Hazoor Bakhsh* review, Justice Hussain, Justice Zahoor-ul-Haq, and Justice Siddique used the constitutional carve-out for Muslim Personal Law, designed to exclude the Muslim Family Laws Ordinance from the jurisdiction of the Federal Shariat Court, to protect the stoning provisions of the Zina Ordinance once the provisions were declared un-Islamic.

Moreover, the global norms of constitutional law are assumed to favor secular interests. For example, the language of rights embedded in constitutional frameworks serves to counterbalance religious claims. However, while non-secular constitutions share fundamental features with secular constitutions, they diverge in essential respects from secular constitutions. The Constitution of Pakistan shares certain aspirational and justiciable rights provisions with secular constitutions that judges can use to expand rights. However, the Constitution also includes certain aspirational and justiciable Islamic provisions that judges can use to anchor conservative religious interpretations. As Justice Siddique's opinion shows, traditional interpretations are not just based on the constitutional provisions that enable the Federal Shariat Court to undertake shari'a review, they also draw support from the preamble and the principles of policy outlined in the constitutional framework. Furthermore, as Justice Zahoor-ul-Haq and Justice Usmani's opinions in the *Hazoor Bakhsh* review show, even the presumably secular common law tools of interpretation can be used to defend methods of Islamic legal analysis that support non-secular outcomes.

Lastly, while the state may cede judicial authority to religious forces, the political control of judges is designed to protect the core secular interests of the political regime. As chapter 2 shows, the political control of judges, notably the chief justice, is an essential feature of the Federal Shariat Court. However, as *Hazoor Bakhsh* shows, the political control of judges can be used to enhance the core political interests of the regime, regardless of whether that means advancing secular policies or religious goals. In the case of *Hazoor Bakhsh*, once the regime decided to overturn the decision, the Federal Shariat Court's tenure system was used to reconstitute the bench and make the historic move to appoint three 'ulama to the Court, all of whom were at the forefront of the intellectual and political campaign against the *Hazoor Bakhsh* decision. Furthermore, while the regime retained Justice Hussain and promoted him to acting chairman of the Federal Shariat Court, the provisional status of his position sent a clear signal that he and the other judges served at the pleasure of the regime, which at the time wanted to overturn *Hazoor Bakhsh*. In short, the regime used its political control over the judiciary to empower the religio-political forces.

## **5. Law, Politics, and Authority**

How does the *Hazoor Bakhsh* review illuminate the nature of religious authority in a constitutional court empowered to perform Islamic judicial review in the context of an authoritarian regime? The 'ulama in Pakistan have always understood that judicial outcomes depend on judges. Therefore, since 1953, they have not just demanded shari'a review, but also demanded the appointment of 'ulama on a Supreme Court bench to undertake such shari'a review. But they were initially excluded even from the Federal

Shariat Court, meant to review laws based on the Qur'an and sunna. The 'ulama continued to push the Zia regime to appoint members of their profession to the Federal Shariat Court but Zia never made any promises. However, *Hazoor Bakhsh* presented the perfect opportunity for the 'ulama to mobilize politically. In *Hazoor Bakhsh*, the judges had not just declared stoning as un-Islamic, they had questioned the Sunni hadith canon, shaking the entire discursive foundation of Sunni orthodoxy. Even though the *Hazoor Bakhsh* opinions were mostly drawn from scholars that survived or even thrived under early parts of the Zia regime, the evolving political conditions in 1981 did not provide Zia the luxury to take a stand against the Deobandi, Barelawi, and Jama'ati forces. As the opposition organized against Zia under the MRD banner, the regime accepted the 'ulama's demand in order to keep the JUI, the JUP, and the Jama'at support. In short, the 'ulama proved to be strategic politicians so that they could be "attitudinalist" judges.<sup>143</sup>

The *Hazoor Bakhsh* episode also questions the myth of an impartial judge objectively interpreting the text of the law without any predispositions. But this myth, of course, is neither unique to Pakistan, nor to Islamic judicial review generally. The positions of the scholar judges in *Hazoor Bakhsh* review were based on a lifetime of intellectual consideration and commitment, which was reaffirmed in their writings and protests in 1981 against *Hazoor Bakhsh*. Nevertheless, the professional judges assumed the responsibility of defending the impartiality of the scholar judges. But to suggest that the scholar judges would give fresh consideration to the question of stoning would mean that they have been writing and mobilizing on the issue without completely grasping its dimensions. Therefore, once the bench was reconstituted, the judicial proceedings were an elaborate performance to reach the foregone conclusion.

The *Hazoor Bakhsh* review also allows us to evaluate the role of taqlid in Islamic judicial review. In contrast to the decline of taqlid in Arab jurisprudence, the *Hazoor Bakhsh* review demonstrates the enduring relevance of the Hanafī school in Pakistan. While scholar judges do not assert that the Hanafi doctrine is binding, their analysis of the Qur'an and sunna invariably leads to conclusions consistent with the Hanafī doctrine. To repeat Justice Shah from his speech at the 1980 'ulama's convention, "we follow Abu Hanifa because we consider that the elegant manner in which the great imam has interpreted the Qur'an and sunna is not found in other schools."<sup>144</sup> Even Justice Ali, who does not claim an allegiance to the Hanafi doctrine, does not come to a conclusion inconsistent with the Hanafis. However, I should note that Justice Usmani's justifications (though not his conclusions) at times draw from other schools.<sup>145</sup>

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<sup>143</sup> The notion of "attitudinalism" in the empirical literature on public law holds that a judge's general political ideology plays a substantial role in his judicial decisions. See, e.g. Segal and Spaeth, *The Supreme Court and the Attitudinal Model Revisited*.

<sup>144</sup> Pīr Muḥammad Karam Shāh's speech in Ministry of Religious Affairs, *Ulamā Convention: Taqārīr wa Tajāwīz*, 76-77.

<sup>145</sup> So what is the role of the scholar judge in the context of taqlid? The scholar cannot just restate the doctrine in the context of an adversarial proceeding. His job is to engage with the various objections to the doctrine and write a judicial opinion that resolves the apparent inconsistencies.

Interestingly, the scholar judges did not directly engage with some of the conflicting opinions emerging from their own tradition: Justice Ali did not mention the ex-Jama'ati scholar Islahi whose position was the basis of Justice Ahmed's opinion; Justice Shah did not engage with his mentor and fellow Hanafi jurist Abu Zahra whose opinion was used by Justice Lodhi; and Justice Usmani did not talk about the Deobandi hadith master Kashmiri whose opinion was relied upon by Justice Hussain.<sup>146</sup> This does not mean that the opinions of Islahi, Abu Zahra, or Kashmiri would have been dispositive. In the larger canon, such opinions would be considered dissenting or "unique" (shādh) as opposed to the dominant (jumhūr) opinion. Justice Usmani and Justice Shah could say that they prefer the doctrine of Abu Hanifa over the opinions of Abu Zahra or Kashmiri. However, engaging with these opinions would mean at least an acknowledgement of the anxiety over stoning within their traditions that the scholar judges seemingly wanted to avoid.

Moreover, while a Deobandi and a Barelawi scholar is committed to the Hanafi doctrine through his education and socialization, he also owes his scholarly authority and political power to the religio-political movement, which serves as an external constraint on his ijtihad. A scholar can overcome this constraint only at great risk to his own legacy, as Justice Shah and Justice Usmani learned later in their careers. When Justice Shah wrote a book questioning the Barelawi doctrine that the Deobandi elders and anyone who follows them are disbelievers, a collection of Barelawi scholars demanded a recantation.<sup>147</sup> When Justice Shah refused, they issued fatwas declaring him a disbeliever for tolerating the Deobandi doctrine.<sup>148</sup> Similarly, when Justice Usmani developed a juristic framework of Islamic banking exceeding the boundaries of the Hanafi doctrine without the advice and consent of many notable Deobandi scholars, they issued a collective fatwa against the framework and questioned his juristic integrity and financial motives (see chapter 6).<sup>149</sup>

In the modern intellectual context, basic assumptions about fiqh that reached a canonical status have come under deep scrutiny, especially by intellectuals who are literate but not socialized in the canon. In *Hazoor Bakhsh*, the judges made an effort to historicize fiqh, questioning the authenticity of the hadith literature or the canonical methods of its interpretation. By contrast, in the *Hazoor Bakhsh* review, the scholar

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<sup>146</sup> To be sure, however, Justice Hussain wrote his opinion invoking Kashmiri once he had read Usmani's opinion, which may not have given Usmani a chance to respond.

<sup>147</sup> For the Barelawi purists, not recognizing the disbelief of the Deobandis as expressed in the fatwas of Ahmad Raza Khan amounted to Shah's disbelief under the principle, "agreement with disbelief is disbelief" (al-riḍā bi'l-kufr kufr). Muḥammad Hārūn Rashīd, ed. *Justice Muḥammad Karam Shāh Ṣaḥīb kay Ahl-i Sunnat wa Jamā'at say I'tizālī Nazariyyāt kā Taḥqīqī wa Tanqīdī Jā'iza ma' Ahamm Fatāwā* (Lahore, Pakistan: Anjuman-i Fikr-i Raḍa Pakistan, n.d.).

<sup>148</sup> Ibid.

<sup>149</sup> See Shoaib A. Ghias, "Juristic Disagreement: The Collective Fatwā against Islamic Banking in Pakistan," in *Contemporary Islamic Finance: Innovations, Applications, and Best Practices*, ed. Karen Hunt-Ahmed (New York, N.Y.: John Wiley & Sons, 2013).

judges used the hadith canon and the canonical methods of interpretation to make their arguments, spending considerable effort in describing the orthodox sources of shari‘a, their authenticity, and their hierarchy. But without an agreement on these fundamental points, the two sets of opinions were talking past each other. As the Zia regime’s constitutional enshrinement of Islamic injunctions, defined vaguely as the Qur’an and sunna, did not recognize an orthodoxy, the ‘ulama could only manage to assert the orthodoxy through the political process in the authoritarian context.

Since the ‘ulama’s opinions transform into judicial decisions through the political process, the ‘ulama have to remain politically vigilant to guard their judicial decisions. While Islahi had refused an appointment to the Council of Islamic Ideology under the Zia regime in 1977, nearly three decades later his student Javed Ahmad Ghamidi accepted an appointment to the Council in 2006 under the Musharraf regime, which directed the Council to dismantle the Zina Ordinance.<sup>150</sup> Shortly, the Council issued a report questioning once again the orthodox Sunni positions on the nature and meaning of hudud in the Qur’an and hadiths.<sup>151</sup> According to a U.S. diplomatic cable, the government also worked “in concert with private television channels to launch a below-the-radar campaign to build support... for Hudood Ordinance repeal” and “blunt the inevitable criticism that will come from Islamist quarters once the bills are introduced.”<sup>152</sup>

In this period of authoritarian politics, an alliance of the religio-political parties called the MMA was in opposition in the Parliament but the ‘ulama remained influential in the ruling party PML-Q engineered by the army to support the Musharraf regime. After a bitter parliamentary battle, the ‘ulama were able to preserve section 5 of the Zina Ordinance concerning the hadd punishments for zina. But the ensuing Protection of Women (Criminal Laws Amendment) Act of 2006 repealed section 6 of the Zina

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<sup>150</sup> U.S. Embassy, "End of the Hudood Ordinances?," Confidential, No Foreigners, Islamabad, July 3, 2006, <http://wikileaks.org/cable/2006/07/06ISLAMABAD12517.html>.

<sup>151</sup> Council of Islamic Ideology, "Report on Hudood Ordinance."

<sup>152</sup> U.S. Embassy, "New Possibilities for Supporting Women's Rights in Pakistan," Classified, Islamabad, May 26, 2006, <http://wikileaks.org/cable/2006/05/06ISLAMABAD9711.html>. The cable states, "In a May 25 meeting with the Ambassador, Minister of Women's Development and Youth Affairs Sumaira Malik emphasized the high priority she placed on prompt repeal of the remaining discriminatory legislation against women, including the Hudood Ordinances. Malik stated that any legislation that is un-Islamic and/or that violates women's human rights had to go. She shared that the Ministry was working in concert with private television channels to launch a below-the-radar campaign to build support both for Hudood Ordinance repeal and Honor Killing Law reform. At the Ministry's request, private television channels had begun airing debates and news editorials on these issues to generate public awareness on and demand for the reform of this legislation. Private television station Geo has also purchased public service announcements in local English language daily The News, highlighting the need for Hudood Ordinance repeal. Through this public awareness and education strategy, Malik hopes to blunt the inevitable criticism that will come from Islamist quarters once the bills are introduced. The Ministry intends to introduce the bills in the National Assembly following conclusion of the budget session that takes place in June." See also Asifa Quraishi, "What If *Sharia* Weren't the Enemy? Rethinking International Women's Rights Advocacy on Islamic Law," *Columbia Journal of Gender and Law* 22, no. 1 (2011): 205-213.

Ordinance providing the hadd punishments for rape.<sup>153</sup> In other words, the Musharraf regime partly overrode the *Hazoor Bakhsh* review using the legislative process. The 2006 Act was challenged next year in the Federal Shariat Court but the chief justice of the Court appointed by Musharraf did not assign the petitions to a bench for hearings.

However, there is no last word in politics. After the fall of the Musharraf regime in 2008, the Supreme Court in 2009 purged the judges who had supported Musharraf in his 2007 confrontation with the chief justice of the Supreme Court.<sup>154</sup> In 2010, the chief justice of the Federal Shariat Court appointed after Musharraf assigned the petitions challenging the 2006 Act for hearings. While the Federal Shariat Court did not unambiguously reinstate section 6 of the Zina Ordinance,<sup>155</sup> the Court reinstated section 3 of the Zina Ordinance, which stated that, “[t]he provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force.”<sup>156</sup> This meant that the original Zina Ordinance superseded the 2006 Act and thereby section 6 of the Zina Ordinance concerning the hadd punishments for rape remained in force.

But if the Federal Shariat Court’s judgments are contingent on the vagaries of the authoritarian and democratic political process, what is their role in the long-term doctrinal debates in shari‘a? To the extent the ‘ulama are concerned, their Federal Shariat Court judgments transcend temporal politics through becoming canonical opinions or restatements within the Hanafī school. Justice Shah’s nine noteworthy opinions in the Federal Shariat Court and the Supreme Court rendered between 1981 and 1998 are collected in a volume published by his madrasa.<sup>157</sup> Similarly, Justice Usmani’s seventeen important opinions rendered between 1981 and 2002 are collected in three volumes and published by his madrasa. The ‘ulama see the judgments in grand terms:

The important decisions of the Federal Shariat Court and the shariat appellate bench of the Supreme Court on laws conflicting with shari‘a have become a part of Islamic history. The significance of these decisions shall be recognized sooner or later. The magnificent service of these courts

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<sup>153</sup> See *Protection of Women (Criminal Laws Amendment) Act of 2006*, 2007 PLD CS 82. While the Zina Ordinance provided for a separate procedure for ta‘zir punishment based on circumstantial evidence in rape cases, human rights groups contended that the police abuses the hadd provisions of the Zina Ordinance in order to protect influential men who commit rape by demanding the victim to produce four witnesses before filing charges and sometimes even books the victim for confessing to zina.

<sup>154</sup> In this moment, Mahmood Ahmad Ghazi, one of the drafters of the Zina Ordinance and a jurisconsult to the Federal Shariat Court during the *Hazoor Bakhsh* review, was appointed to the Federal Shariat Court as a scholar judge.

<sup>155</sup> Section 13 of the 2006 Act deleted section 6 of the Zina Ordinance.

<sup>156</sup> Section 11 of the 2006 Act deleted section 3 of the Zina Ordinance. The Federal Shariat Court declared sections 11, 25, 28, and 29 unconstitutional. *Mian Abdur Razzaq Aamir v. Federal Government*, 2011 PLD FSC 1.

<sup>157</sup> Muhammad Karam Shah, *Ḍiyā al-Ummat kay ‘Adālatī Fayṣalay* (Lahore, Pakistan: Ḍiyā al-Qur’ān Publications, 2003).

for Islamic lawmaking in modern character shall be acknowledged by tomorrow's historian if not today's.<sup>158</sup>

To be more concrete, the second edition of Justice Usmani's volumes are introduced by one of his colleagues in the following words:

These decisions were not just studied with care and deep respect in the fatwa centers of important religious institutions and madrasas of the country, but important fatwas were also issued based on them. Professors, authors, and speakers used these decisions as a source of guidance for their lessons, books, and academic speeches. The umma's academic circles undoubtedly obtained great religious benefit from them.<sup>159</sup>

In fact, Justice Usmani's volumes are part of the core syllabus for advanced studies for jurists (muftis) at his madrasa, Dar al-'Ulum, Karachi, which is one of the largest and most influential Deobandi seminaries.<sup>160</sup> Most likely, these decisions are taught at other madrasas as well. As generations of jurists study the decisions and issue fatwas based on them, Justice Usmani's opinions rise above the political process and become part of the enduring 'ulama's discourse on shari'a. But this discourse is manifested in state law only through the political process.

Furthermore, the reach of the scholar judges and their judgments is not just limited to Pakistan or South Asia, but also extends to the Arab world through scholarly networks and biographical literature.<sup>161</sup> For example, an Arabic biographical monograph on Justice Usmani published in Syria (whose Sunni Muslims are traditionally Hanafi) titled "Muhammad Taqi Usmani: The Judge, The Jurist and the Traveling Preacher" (*Muḥammad Taqī al-'Uthmānī: al-Qādī al-Faqīh wa al-Dā'īya al-Raḥḥāla*) introduces him to Arab scholars as a leading Hanafi judge and jurist, and presents his opinion on stoning in the Federal Shariat Court as a one of his significant contributions in defense of the traditional doctrine.<sup>162</sup> Similarly, an Arabic biographical monograph on Justice Shah

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<sup>158</sup> Muhammad Taqi Usmani, *Adālatī Fayṣalay*, 2nd ed., 2 vols. (Karachi, Pakistan: Idāra-i Islāmiyāt, 2000), 1:11.

<sup>159</sup> Ibid., 1:7. The third volume consist of his decision on riba that was written in English but translated into Urdu for wider dissemination as Muhammad Taqi Usmani, *Sūd par Tārīkhī Fayṣala*, trans. Muhammad Imran Ashraf Usmani (Karachi, Pakistan: Idāra al-Ma'ārif al-Qur'ān, 2008). The original decision in English was published as Muhammad Taqi Usmani, *The Historic Judgment on Interest Delivered in the Supreme Court of Pakistan* (Karachi, Pakistan: Idāra al-Ma'ārif, 2000). Of course, this decision was also reported in PLD as *Aslam Khaki v. Syed Muhammad Hashim*, 2000 PLD SC 225.

<sup>160</sup> Jāmi'a Dār al-'Ulūm, *Mujawwaza Niṣāb Barā'ay Takhaṣṣuṣ fī al-Ifiā'* (Karachi, Pakistan: Jāmi'a Dār al-'Ulūm, 2009).

<sup>161</sup> In general, the scholar's students who either come from the Arab world to study under him in Pakistan or go from Pakistan to study under Arab scholars produce such biographical works.

<sup>162</sup> See Luqmān Hakīm, *Muḥammad Taqī al-'Uthmānī: al-Qādī al-Faqīh wa al-Dā'īya al-Raḥḥāla*, 'Ulamā wa Mufakkirūn Mu'āṣirūn (Damascus, Syria: Dār al-Qalam, 2002).

published in Egypt (another important center of Hanafi Muslims) titled “The Revival of Religious Thought in the Struggles of the Learned Muhammad Karam Shah of the Azhar” (*Tajdīd al-Fikr al-Dīnī fī Juhūd al-‘Allāma Muḥammad Karam Shāh al-Azharī*) also recounts his contributions as a significant Hanafi judge and jurist.<sup>163</sup> However, while such biographical works construct the authority of the scholar, the use of his judicial office to enhance his authority also assumes and reinforces the authority of the underlying judicial institution, which may or may not remain under the political control of his religio-political movement. Furthermore, as I argue in chapter 6, a judicial position can also be used to question the scholar’s authority.

## 6. Conclusion

The *Hazoor Bakhsh* episode demonstrates that while secular forces use constitutional politics to constrain religion, religio-political forces also use constitutional structures to reassert dogma. In particular, when the political regime depends on religio-political forces for political support, the religio-political forces bargain entry into the state structure. In Pakistan, the Zia regime wanted to retain the support of the Jama‘at, the JUI, and the JUP when the MRD was emerging as a coalition against the military regime. In this context, the ‘ulama were included in the Federal Shariat Court and one representative from each of the three religio-political parties was appointed to the Court. The Zia regime and the ‘ulama thus developed a synergetic relationship. Furthermore, I show how the ‘ulama used their status as Federal Shariat Court judges to predictably draw upon the premodern fiqh tradition and reassert the status of stoning as part of hudud. However, the interpretations of the ‘ulama remained contingent on the political process. The next chapter evaluates the politics of Islamic judicial review using the case of riba.

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<sup>163</sup> See Hāfīz Muḥammad Munīr al-Azharī, *Tajdīd al-Fikr al-Dīnī fī Juhūd al-‘Allāma Muḥammad Karam Shāh al-Azharī* (Cairo, Egypt: Dār al-Salām, 2008).

## Chapter 5.

### Defining Riba: Judicial Review between Pragmatism and Idealism

#### 1. Introduction

In this chapter, I embark on my second historical-interpretive case study of shari‘a review. Since the encounter of Muslims with European capitalism during the colonial period, certain jurists have reinterpreted the Qur‘an’s prohibition of riba (unlawful interest) in order to reconcile Islam and modern banking. But the traditional doctrine continued to enjoy considerable support as the moral ideal. Therefore, when General Muhammad Zia ul-Haq (r. 1977-88) enabled the High Courts and the Supreme Court to engage in shari‘a review in 1978, he excluded any fiscal, banking, insurance, and tax laws from such jurisdiction in order to avoid any judicial disruption to the economy. The exclusion, however, retained a sunset clause that was repeatedly extended but eventually expired in 1990. At this point, President Ghulam Ishaq Khan appointed Tanzil-ur Rahman as the chief justice of the Federal Shariat Court, who had a record of policy positions and judicial activism on riba. The Federal Shariat Court reviewed colonial and post-colonial laws in the 1991 case *Mahmood-ur-Rahman Faisal v. Government of Pakistan* (the *Faisal* case) and predictably declared the interest provisions at issue as un-Islamic.<sup>1</sup>

This chapter answers two questions about Islamic juridical review arising from the *Faisal* case. First, how do juristic debates emerge on modern economic questions and how do courts use such debates in making definitive interpretations of shari‘a? This chapter shows how certain state-sponsored Muslim scholars questioned the traditional doctrine on riba in a period of postcolonial Cold War politics. However, while modern banking and finance penetrated the economy and society, the ‘ulama reasserted the traditional doctrine, which continued to determine the broadly accepted moral status of interest in banking and finance. Owing to the tension between economic pragmatism and religious idealism, authoritarian as well as democratic regimes were unable to resolve the debate and continued to delay the shari‘a review of banking and finance laws.

Second, to what extent and under what circumstances does a political regime allow judicial outcomes inconsistent with the regime’s interests? This chapter argues that the Zia regime favored economic pragmatism in its exclusion of riba from the jurisdiction of the Federal Shariat Court, but did not or could not altogether abandon religious idealism as the exclusion included a sunset clause. Once the exclusion ended during a period of democratic transition, President Ghulam Ishaq Khan supported religious idealism and appointed Chief Justice Rahman as the chief justice of the Federal Shariat Court despite the fact that the elected Sharif government favored economic pragmatism. However, Chief Justice Rahman not only decided the question of riba in domestic law as expected, but also extended his judicial reach to international legal obligations. As the

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<sup>1</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1.

state was dependent on the World Bank and the International Monetary Fund to finance fiscal deficits, President Khan turned toward economic pragmatism and eased out Chief Justice Rahman from the bench while the Sharif government used the appeal process to delay the implementation of the decision on riba.

This chapter is organized as follows. Section 2 describes certain 19th and 20th-century debates in the Muslim world on the meaning of riba that later came up in the Federal Shariat Court and the Supreme Court. The section also lays out the intellectual and political evolution of some of the judges who would undertake shari‘a review on the issue. Section 3 traces the politics of prohibiting riba under the Zia regime while struggling to define its meaning. Owing to pragmatic concerns over financial and economic restructuring and drawing from the dissenting voices in the tradition that legitimized such concerns, the Zia regime remained ambivalent towards eliminating riba, but never publicly abandoned the goal. Section 4 shows how Chief Justice Rahman was appointed to the Federal Shariat Court based on his record of defending the traditional doctrine on riba and how his decision in the *Faisal* case was consistent with his record. However, Chief Justice Rahman went outside the regime’s zone of tolerance when he diverged from his cautious position on international borrowing and reviewed the state’s international obligations as well. Section 5 engages with the scholarship on courts in authoritarian regimes and courts in “constitutional theocracies” to expand our understanding of the role of jurisdictional exclusions, the political control of judges, and the role of courts in economic policy. Lastly, Section 6 evaluates the evolution of religious authority in contemporary Islam and argues that notwithstanding the state-sponsored dissenting voices, the traditional ‘ulama continued to determine what qualifies as a legitimate interpretation of shari‘a.

## 2. 19th/20th-Century Debates on Riba

The Qur’an prohibits riba in categorical terms, stating that, “O you who believe, fear God and give up what remains due from riba, if you are believers. And if you do not, then be informed of a war from God and His messenger...”<sup>2</sup> This raises the question, what is riba? The pre-modern jurists used the hadith literature to define and refine the meaning of riba, which included, but was not limited to, “any loan that accrues a profit.”<sup>3</sup> As an alternative to lending money on interest, the jurists allowed other financial relationships: e.g. partnership (*mushāraka*) and silent partnership (*muḍāraba*) based on sharing the risks and rewards of the enterprise; sale on deferred payment (*bay‘ mu’ajjal*) at a higher price than sale on immediate payment; sale on deferred delivery (*bay‘ al-salam*) at a lower price than sale on immediate delivery. However, in the face of the capitalist economic and banking system, many questions confounded Muslim jurists and produced novel interpretations of the prohibited riba. These interpretations often arose due to the fiscal needs of governments. As taxes were not always enough to finance governments, governments raised capital by borrowing money through issuing bonds,

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<sup>2</sup> Qur’an 2:278.

<sup>3</sup> The definition, sometimes attributed to the Prophet, stated, “kull qarḍ jarr manfa‘a fa-huwa ribā.”

encouraging deposits in government savings accounts, and undertaking foreign debt. But despite the fact that many people used government bonds and savings accounts, the legitimacy of such instruments remained suspect.

In this section, I outline the complicated and often tense relationship between the often state-sponsored scholars who attempted to narrow the scope of the prohibited *riba* and the non-state scholars who resisted such reorientation of the traditional doctrine. I also provide an intellectual biography of certain ‘ulama and judges who would articulate the meaning of *riba* in Pakistani courts and politics. I explore these themes through an exposition of three distinctions in the concept of *riba*: (1) a distinction between original lending and refinancing used to argue that interest in the original lending is permissible; (2) a distinction between production loans and consumption loans used to argue that interest in production loans is allowed; and (3) a distinction between interest and excessive interest used to argue that reasonable interest is acceptable.

## 2.1 Lending and Refinancing: Egyptian and Indian Fatwas on Riba

During the late colonial period, a Hanafi jurist from the princely state of Hyderabad, India, ‘Abd al-Latif (d. 1959), wrote a short treatise on *riba* titled “Request for Fatwa” (*Istiftā*).<sup>4</sup> Latif has not survived in history as an authority but was nevertheless a scholar of some repute who was teaching at Osmania University in Hyderabad and had taught at a madrasa in Mecca and served as a mufti at Nadwa al-‘Ulama, a madrasa established in 1894 in Lucknow, India, by graduates of the Deoband madrasa.<sup>5</sup> The treatise made a distinction between two kinds of transactions in pre-Islamic Arabia. First, when a debtor borrowed money for a fixed duration from a creditor, the debtor would pay a fixed interest to the creditor – *riba* in lending.<sup>6</sup> Second, when the debtor was unable to pay back the loan in the fixed duration, the creditor would extend the duration, often upon doubling the outstanding amount – *riba* in refinancing.<sup>7</sup> The treatise argued that the Qur’an clearly prohibits *riba* in refinancing, but not *riba* in lending.

Latif argued that the Qur’anic commentators consider the term *riba* as used in the Qur’an as ambiguous (*mujmal*). He also argued that the hadith stating that, “any loan that

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<sup>4</sup> I have drawn the historical context of this debate from Muhammad Qasim Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism* (New York, N.Y.: Cambridge University Press, 2012), 119-123.

<sup>5</sup> The Nadwa defined knowledge more broadly than the curriculum at Deoband, incorporating colonial education while making an effort to remain committed to the tradition. The founders of the Nadwa included Muhammad ‘Ali Mongiri, Ashraf ‘Ali Thanawi, Mahmud al-Hasan and Shibli Nu‘mani.

<sup>6</sup> Some scholars use *riba* of delay (*ribā al-nasī’a*) or *riba* of sunna (*ribā al-sunna*) for this transaction.

<sup>7</sup> I am introducing the terms *riba* in lending and *riba* in refinancing for simplicity. The scholars use and debate over terms such as *riba* of Qur’an (*ribā al-qur’ān*), *riba* of sunna (*ribā al-sunna*), *riba* of delay (*ribā al-nasī’a*), *riba* of excess (*riba al-faḍl*), and *riba* of pre-Islamic period (*ribā al-jāhiliyya*). For the use of such terms in premodern and modern fiqh, see Imran Ahsan Khan Nyazee, *The Concept of Ribā and Islamic Banking*, 2nd ed. (Rawalpindi, Pakistan: Federal Law House, 2008).

accrues a profit is riba” is inauthentic since its chain of narrators cannot be definitively traced to the Prophet. Based on these two premises, Latif concluded that neither the Qur’an nor an authentic hadith directly shows that the stipulated profit in a loan is riba. Then why is such “profit” considered riba? Latif stated that such profit is considered riba based on either (1) the inauthentic hadith which, Latif argued, was not a sound basis for legal arguments; or (2) an analogy between riba in lending and riba in refinancing that, Latif contended, did not share the ratio legis of injustice (*qiyās ma‘ al-fāriq*). But even if it were an acceptable analogy at the time the rule was derived, Latif argued, rules derived from analogies may change upon the changing circumstances.

In 1928, Latif sent the treatise to two scholars for comment: the Deobandi-Hanafi scholar Ashraf ‘Ali Thanawi (1863-1943) in Thana Bhawan, India, and the Syro-Egyptian Salafi scholar Rashid Rida (1865-1935) in Cairo, Egypt.<sup>8</sup> The response on Thanawi’s behalf came from his colleague Zafar Ahmad ‘Uthmani and was later published in Thanawi’s collection of fatwas.<sup>9</sup> ‘Uthmani disagreed with both of Latif’s premises and argued that the riba prohibited in the Qur’an unambiguously included lending as well as refinancing. The only reason certain commentators considered riba ambiguous, according to ‘Uthmani, was that certain barter transactions (*ribā al-faḍl*) that the Arabs did not consider as riba were also included in the prohibition. Moreover, ‘Uthmani reminded Latif that the authenticity of a hadith for the purpose of deriving legal rules not only depends upon whether the chain of its narrators is sound or weak but also upon whether the Prophet’s companions and the early jurists used the hadith to derive legal rules – a point of particular significance in and criticism on Hanafi law, which is accused of basing doctrinal positions on unsound hadiths.<sup>10</sup> The fatwa chided Latif for diverging from the consensus of the early jurists, which should have been enough, according to the fatwa, to resolve the matter, and accused him of considering himself a mujtahid in violation of the doctrine of taqlid in vogue in South Asia.

While ‘Uthmani’s response to Latif was within the framework of taqlid, Rida’s response emphasized the need to evaluate the topic outside the confines of the Hanafi school through undertaking ijtihad. This response was published in Rida’s journal that propagated Salafi ideas, *al-Manar*, and later compiled as a book, “Riba and Transactions in Islam” (*al-Ribā wa al-Mu‘āmalāt fī al-Islām*). In a patronizing manner, the Salafi Arab scholar praised the effort of the Indian jurist to engage in original interpretation if only within the bounds of his Hanafi school and doubted the depth of his understanding of the Arabic language as a non-Arab.<sup>11</sup> Nonetheless, Rida came to an effectively similar

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<sup>8</sup> Zaman, *Modern Islamic Thought in a Radical Age: Religious Authority and Internal Criticism*, 122.

<sup>9</sup> Ashraf ‘Alī Thānawī, *Imdād al-Fatāwā*, ed. Muḥammad Shafī‘, 6 vols. (Karachi, Pakistan: Maktaba Dār al-‘Ulūm, 2010), 3:179-302.

<sup>10</sup> However, the authenticity and frequency of a narration is very important when a hadith qualifies the Qur’an or a more authentic hadith as we have seen in the previous two chapters.

<sup>11</sup> Rida questioned Latif’s Arabic credentials as Latif drew a distinction between the terms qarḍ as a repayment obligation arising from a loan and dayn as a payment obligation arising from any context other than a loan, arguing that the rules of riba apply to dayn only. However, dayn was a payment obligation

conclusion as Latif but from a different methodological perspective. According to Rida, riba in lending as well as refinancing were prohibited in Islam. However, only riba in refinancing was the target of the Qur'anic prohibition while riba in lending was the outcome of the sunna's prohibition on the exchange of unequals of the same genus, which Rida considered only a means to the end of avoiding riba in refinancing.<sup>12</sup> Since riba in lending was not categorically prohibited according to Rida, jurists could reconsider its prohibition based on need in the present circumstances, so long as riba in refinancing remained prohibited.<sup>13</sup>

Rida's opinion must be seen in the context of an emerging opinion among the Salafi 'ulama in Egypt in favor of interest in savings accounts. According to Rida, his teacher Muhammad 'Abduh (1849-1905), the grand imam of the Azhar, had said that the payment of interest in the Egyptian Savings Fund could be structured using the rules of silent partnership (*muḍāraba*).<sup>14</sup> In the 1950s, Mahmud Shaltut (1893-1963), the grand imam of the Azhar who belonged to 'Abduh and Rida's Salafi school of thought, also endorsed the interest in the Egyptian Savings Fund. And in 1989, shortly before the Federal Shariat Court in Pakistan would review the question of riba, Muhammad Sayyid al-Tantawi (1928-2010), the grand mufti of Egypt and later the grand imam of the Azhar, endorsed the interest in government bonds and savings accounts based on his teacher Shaltut's view. However, each of these attempts to legitimize interest on savings faced considerable challenges from a wide cross-section of 'ulama in Egypt.<sup>15</sup>

Despite resistance from other 'ulama, the reorientation of the notion of riba was not just a subject of fatwas, which are essentially non-binding, but was also reflected in the legislative and judicial domains as Egyptians sought to Islamicize colonial legal

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arising in any context including a loan. Both Rida and 'Uthmani criticized Latif on this point, but Rida extended the criticism to a general lack of understanding of Arabic among non-Arab Muslims. Muḥammad Rashīd Riḍā, *al-Ribā wa al-Mu'āmalāt fī al-Islām* (Cairo, Egypt: Maktaba al-Qāhira, 1960), 51.

<sup>12</sup> In this sense, lending on riba was an exchange of unequal amounts of money.

<sup>13</sup> In one sense, this position was not completely at odds with the traditional doctrine, which allowed sale on deferred payment. The higher price for the deferred payment could be seen as interest. However, the doctrine emphasized distinctions between sale and lending. According to the traditional doctrine, a sale takes place as part of commerce whereby the seller owns and takes the risk of loss of the object of sale. In a loan, the creditor does not engage in commerce and does not take any such risk. Certain Deobandi-Hanafi scholars such as Muhammad Taqi Usmani would use this structure to develop modern *murabaha* transactions, the backbone of contemporary Islamic finance, in which ownership would first transfer from the seller to the lender, and then from the lender to the buyer, allowing the financing from the lender to comply with the traditional doctrine.

<sup>14</sup> There is considerable debate surrounding whether Rida accurately represented his teacher's position. See Chibli Mallat, "The Debate on Riba and Interest in Twentieth Century Jurisprudence," in *Islamic Law and Finance*, ed. Chibli Mallat (London, U.K.: Graham & Trotman, 1988); Chibli Mallat, "Tantawi on Banking Operations in Egypt," in *Islamic Legal Interpretation: Muftis and Their Fatwas*, ed. Muhammad Khalid Masud, Brinkley Messick, and David S. Powers (Karachi, Pakistan: Oxford University Press, 2005), 286.

<sup>15</sup> See Skovgaard-Peterson, *Defining Islam for the Egyptian State: Muftis & Fatwas of the Dar al-Ifta*, 295-318.

transplants. In drafting the Egyptian Civil Code of 1948, the legal scholar ‘Abd al-Razzaq al-Sanhuri (1895-1971) included ceilings on interest rates, outlawed the accrual of interest on interest (anatocism) as opposed to interest on principal, restricted interest in excess of the principal in non-commercial loans, and enhanced procedural safeguards for the debtor.<sup>16</sup> However, the Egyptian Civil Code, which served as the basis for drafting civil codes across the Arab republics, expressly allowed even *riba* in refinancing:

Article 227: The parties may agree upon another rate of interest either in the event of delay in effecting payment or in any other case in which interest has been stipulated, provided that it does not exceed seven percent.

To be sure, al-Sanhuri considered interest in all of its forms *riba*, but he held that *riba* may be allowed due to necessity in the imperfect capitalist system until Egypt converts to a socialist order: “The prohibiting of *riba* is a principle among the principle[s] of the law, which is veiled by necessity. When this [veil] is lifted it will reappear.”<sup>17</sup> The Supreme Constitutional Court of Egypt was also confronted with the question of defining *riba* in 1985, but the Court bypassed the question, holding that its jurisdiction to review laws based on the principles of *shari‘a* does not extend to laws such as the Egyptian Civil Code of 1948 that were enacted before the Court was granted such jurisdiction in 1980. The Supreme Constitutional Court eventually defined *riba* in a 1996 case as “an agreement between a creditor and a debtor to extend payment deadline in return for additional interest money” – i.e. only as *riba* in refinancing, not as *riba* in lending.<sup>18</sup> Under this definition of *riba*, Article 227 of the Egyptian Civil Code would be unconstitutional. But the Supreme Constitutional Court’s 1985 decision protected the Egyptian Civil Code from review on jurisdictional grounds.

The positions of the Egyptian ‘ulama and legal scholars such as ‘Abduh, Rida, Shaltut, al-Tantawi, and al-Sanhuri, would be raised in the Federal Shariat Court in the 1991 *Faisal* case to argue that bank interest can be allowed, but the Federal Shariat Court would dismiss the argument on the grounds that the original writings of the jurists were not submitted to the Court.<sup>19</sup> The positions would be raised again on appeal in the

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<sup>16</sup> Egyptian Civil Code of 1948, Articles 226-232. See also Emad H. Khalil and Abdulkader Thomas, “The Modern Debate over *Riba* in Egypt,” in *Interest in Islamic Economics: Understanding Riba*, ed. Abdulkader Thomas (New York, N.Y.: Routledge, 2006); Abdulla Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation* (Leiden, The Netherlands: Brill, 1999), 41-50.

<sup>17</sup> al-Sanhuri quoted in Zaki al-Din al-Badawi, *The Theory of Prohibited Riba*, trans. Imran Ahsan Khan Nyazee (Rawalpindi, Pakistan: Federal Law House, 2005).

<sup>18</sup> Constitutional Case No. 93, 6th Judicial Year, decided on March 18, 1996. See Nathan J. Brown and Adel Omar Sherif, “Inscribing the Islamic *Shari‘a* in Arab Constitutional Law,” in *Islamic Law and the Challenges of Modernity*, ed. Yvonne Yazbeck Haddad and Barbara Freyer Stowasser (New York: AltaMira Press, 2004), 79, note 31.

<sup>19</sup> See *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1.

Supreme Court in the 1999 case *Aslam Khaki*, and the Supreme Court would conduct a substantive analysis but still reject them.<sup>20</sup> The positions would be raised yet again upon review before a reconstituted Supreme Court in the 2002 case *United Bank*, and the Court would ultimately set aside its prior judgment partly on the grounds that the arguments of the Egyptian ‘ulama have either been ignored or misunderstood (see chapter 6).

## 2.2 Production and Consumption Loans: Institute of Islamic Culture

In colonial India, Sayyid Ahmad Khan (1817-1898), the founder of what I have described as the Aligarh movement, also questioned the traditional doctrine on riba in his Qur’an commentary published in 1880.<sup>21</sup> An advocate of ijihad, Sayyid made a distinction between consumption loans to the poor on the one hand, and consumption loans to the rich and production loans for development on the other. He argued that only consumption loans to the poor are the subject of the Qur’an’s prohibition on riba.<sup>22</sup> This interpretation was meant to legitimize the promissory notes underlying the bonds and annuities sold by the colonial government.<sup>23</sup> But Sayyid anticipated resistance from the ‘ulama as his interpretation of riba diverged from the juristic tradition. Therefore, he further argued that even the formalist juristic tradition of ‘ulama would produce the same outcome.<sup>24</sup>

Sayyid stated that according to the juristic conception, a loan must have three necessary elements: the borrower must be a person, the lender must be a person, and the lender must have a right to repayment of the principal. The British colonial government’s promissory notes underlying annuities, Sayyid argued, lacked two of these elements. First, drawing upon the lack of corporate or fictional personhood in fiqh, Sayyid contended that the borrower was not a person, rather a concept (mafhum) known as “government.”<sup>25</sup> Second, Sayyid noted that the lender did not have a right to repayment of the principal in annuities.<sup>26</sup> As for the promissory notes underlying bonds where the lender had a right to repayment of the principal, Sayyid argued that the borrower was still

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<sup>20</sup> See *Aslam Khaki v. Syed Muhammad Hashim*, 2000 PLD SC 225.

<sup>21</sup> The first volume of the seven volume work was published in 1880. See Sayyid Ahmad Khān, *Tafsīr al-Qur’ān: wa Huwa al-Hudā wa al-Furqān*, 7 vols. (Lahore, Pakistan: Dost Associates, 1996).

<sup>22</sup> *Ibid.*, 1:308-318.

<sup>23</sup> Sayyid does not use the terms bonds or annuities but the promissory notes that he describes can be understood as such.

<sup>24</sup> Khān, *Tafsīr al-Qur’ān*, 1:318-319.

<sup>25</sup> The closest thing to corporate personhood recognized in fiqh was a pious endowment (waqf) but an endowment’s assets were under the implied ownership of God, theologically a real person rather than a fictional entity.

<sup>26</sup> Without looking at the promissory notes, Sayyid’s description of these negotiable instruments appears to conform to annuities as opposed to bonds.

not a person. Therefore, according to Sayyid, the interest in such promissory notes was not riba.

Sayyid, who would be knighted by Queen Victoria in 1888, knew that the ‘ulama would dismiss his arguments due to his loyalty to the British. So he compared the promissory notes to a scheme under the last Mughal emperor, Bahadur Shah Zafar (r. 1837-1857), whom the British East India Company allowed to maintain a semblance of sovereignty until the formal end of Mughal rule in 1857.<sup>27</sup> What seemed like a Ponzi scheme in a dying monarchy, the Mughal emperor offered a monthly stipend to his subjects based on an upfront contribution (nadhrāna) to the royal treasury. The contributor did not have a right to withdraw his contribution, but the emperor had the privilege to end the stipend upon returning the contribution. Sayyid reminded his readers that the ‘ulama in Delhi not only endorsed the scheme but many also signed up even when it lacked just one element of a loan: the lender’s right of repayment of the principal. The other two elements were present since the emperor and the contributor were real persons.

While the ‘ulama questioned Sayyid’s credentials as a scholar and considered him beholden to colonial interests, certain scholars coming from within the Deobandi circles also raised doubts about the traditional doctrine on riba. After Pakistan’s independence in 1947, a group of intellectuals and ‘ulama established the Institute of Islamic Culture in Lahore, a semi-official think tank for research on Islam and contemporary problems. In 1958, the Institute’s magazine, *Thaqafat*, published a series of essays arguing that interest in production loans is not riba.<sup>28</sup> Muhammad Ja‘far Shah Phulwarwi (d. 1982), a graduate of Nadwa al-‘Ulama and one of the authors, compiled the essays as a volume called “The Juristic Status of Commercial Interest” (*Commercial Interest kī Fiqhī Ḥaythiyyat*).<sup>29</sup>

Phulwarwi’s volume contended that borrowing during pre-Islamic Arabia was for the purpose of consumption, whereas contemporary borrowing in a capitalist economy was for the purpose of financing production to earn a higher return than the interest rate. Therefore, according to the volume, the Qur’an did not address modern commercial lending. Unlike Sayyid, who focused on textual exegesis to make his argument, the essays also made historical claims about the absence of commercial lending in pre-Islamic Arabia. When other ‘ulama pointed out instances of pre-Islamic Arabs borrowing money to finance agriculture, Phulwarwi responded that such farmers borrowed money to take care of their personal needs until the harvest, which is not the reason why

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<sup>27</sup> Khān, *Tafsīr al-Qur’ān*, 1:319-320.

<sup>28</sup> The Institute was established by Khalifa Abdul Hakim (1896-1959).

<sup>29</sup> The essays were authored in 1958 by Syed Yaqub Shah, a retired auditor general of Pakistan, Ataullah Palvi, a prolific author on Islam and Urdu literature, and Phulwarwi himself. Muḥammad Ja‘far Shāh Phulwārwi, *Commercial Interest kī Fiqhī Ḥaythiyyat* (Lahore, Pakistan: Institute of Islamic Culture, 1959); see also Muḥammad Ja‘far Shāh Phulwārwi, *Islamic Law and Commercial Interest*, trans. Hafizur Rahman, 1st ed. (Lahore, Pakistan: Institute of Islamic Culture, 1999).

industrialists borrow money.<sup>30</sup> The underlying argument in the volume was that there is no injustice in commercial interest and therefore commercial interest is not *riba*. The volume had a strong undertone of removing any obstacles to industrialization in the modern Muslim state, which was particularly important in the context of the ideological battles of the Cold War in which Pakistan had pivoted towards the United States and was emerging as a model of capitalist industrial development under Ayub Khan (r. 1958-69).

Based on the points raised in Phulwarwi's book, the Institute of Islamic Culture organized a conference in 1960 and circulated a questionnaire. The Jama'at's founder-president, Sayyid Abu al-A'la Mawdudi, responded to the questionnaire as well as corresponded with one of the contributors to Phulwarwi's volume. Mawdudi contended that since trade and commerce were widely practiced in pre-Islamic Arabia and its neighboring regions, we can reasonably conclude that Arabs were borrowing and lending money based on *riba* not just for consumption, but also for production purposes. Furthermore, Mawdudi argued that just because modern production loans for investment in industrial equipment and infrastructure did not exist in pre-Islamic Arabia does not mean that the prohibition on *riba* does not apply to them. The prohibition, according to Mawdudi, was based on any increase above the principal in lending, regardless of the exact purpose of lending. Mawdudi's response was included in his book "Interest" (*Sūd*) that was focused on the destructive aspects of capitalism as well as socialism and proposed an Islamic economic order as the solution.<sup>31</sup>

Phulwarwi's book was also sent to Muhammad Shafi, considered the grand jurist among the Deobandis at the time, who assigned the book to his then teenaged son, Muhammad Taqi Usmani, for comment.<sup>32</sup> While Mawdudi focused on a broad history of trade and commerce in pre-Islamic Arabia and its neighboring regions, Usmani concentrated on a series of historical reports attributed to the Prophet and his companions to argue that pre-Islamic Arabs borrowed money with *riba* for trading and commercial agriculture.<sup>33</sup> In particular, he compared (1) the *riba* in collective lending between Arab trading tribes to contemporary lending between trading companies, and (2) deposits taken by one of the Prophet's companions and reinvested in commerce to a contemporary bank. While Usmani's response was primarily based on juristic arguments, he concluded with a scathing critique of greed, capitalism, economic cycles, and the banking system.<sup>34</sup> The

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<sup>30</sup> Muhammad Shafi and Muhammad Taqi Usmani, *Mas'ala-i Sūd: Tamyīz al-Hudā min al-Hawā fī al-Farq bayn al-Bay' wa al-Ribā* (New Delhi, India: Islamic Book Service, 1993), 107.

<sup>31</sup> Sayyid Abū al-A'la Mawdūdī, *Sūd: Dawr-i Jadīd kay 'Azīm Challenge kā Jawāb Dalīl wa Burhān kay Sāth*, 23rd ed. (Lahore, Pakistan: Islamic Publications (Private) Limited, 2008), 198-227.

<sup>32</sup> I have introduced Shafi and Usmani in the previous chapter. I would like to note again that there is no official grand mufti in Pakistan.

<sup>33</sup> Shafi and Usmani, *Mas'ala-i Sūd*, 106-115.

<sup>34</sup> *Ibid.*, 136-148.

response was published along with one of his father Shafi's earlier essays on riba as "The Issue of Interest" (*Mas'ala-i Sūd*).<sup>35</sup>

The debate between Phulwarwi and his critics such as Mawdudi, Shafi, and Usmani would resurface three decades later when the government's counsel would take Phulwarwi's position before the Federal Shariat Court in the 1991 *Faisal* case as described later in this chapter. But Chief Justice Tanzil-ur Rahman would reject Phulwarwi's position in his decision. Similarly, as I show in the next chapter, Usmani would become Justice Usmani on the Supreme Court and not surprisingly restate his own argument, developed as a teenager under his father's guidance in response to Phulwarwi's book and refined over the years, to uphold the Federal Shariat Court judgment on appeal in the Supreme Court in the 1999 case *Aslam Khaki*. However, the Musharraf regime (r. 1999-2008) would dismiss Justice Usmani from the Supreme Court and appoint Justice Rashid Ahmad Jalandhari, a director of the Institute of Islamic Culture and a supporter of Phulwarwi's opinion, in order to set-aside the Supreme Court's 1999 judgment upon review in 2002.<sup>36</sup>

### 2.3 Interest and Excessive Interest: Central Institute of Islamic Research

In 1960, General Ayub Khan established the Central Institute of Islamic Research in Karachi in a top-down effort to "organize research on Islam, to give it a rational and scientific interpretation in the context of the modern age[.]"<sup>37</sup> The Central Institute was designed to co-ordinate research with the Institute of Islamic Culture in Lahore and other such modernist projects. In 1961, Ayub Khan appointed Fazlur Rahman (1919-1988), a professor of Islamic studies at McGill University, as the director of the Central Institute.<sup>38</sup> Son of a Deoband graduate, Fazlur Rahman studied the madrasa curriculum at home and earned an M.A. (1942) in Arabic at Punjab University and a D.Phil. (1949) in Islamic philosophy at Oxford University. Before returning to Pakistan, he was working on a theory of re-extracting sunna from hadith literature, focusing on what he considered as the ethical content of the Qur'an. Fazlur Rahman doubted the authority as well as the authenticity of the hadith literature. However, instead of considering hadiths mere forgeries, he considered the origins of the hadith literature as an attempt of the early generations of Muslims to interpret the Prophet's guidance. Fazlur Rahman articulated the methodology in a series of articles published as a book in 1964, *Islamic Methodology*

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<sup>35</sup> Ibid., 100-148.

<sup>36</sup> Talib Hussain, "Islamic Banking in Pakistan - Some Aspects," <http://talib-hussainchahilcom.blogspot.com/2012/02/islamic-banking-in-pakistan-some-aspects.html> (last accessed May 15, 2014).

<sup>37</sup> Ministry of Education, No. F. 15-1059-E. IV (Rawalpindi, March 10, 1960), Gazette of Pakistan, 1960.

<sup>38</sup> Alparslan Acikgenc, "The Thinker of Islamic Revival and Reform: Fazlur Rahman's Life and Thought (1919-1988)," *Journal of Islamic Research* 4, no. 4 (1990).

in *History*, and applied this theory in an article, “Research on Riba” (*Tahqīq-i Ribā*) published in the Central Institute’s magazine, *Fikr wa Nazar*.<sup>39</sup>

Unlike Rida who had only allowed fixed interest in lending but not on refinancing or Phulwarwi who had allowed interest in commercial lending but not in personal borrowing, Fazlur Rahman argued that interest is always allowed so long as it is not excessive. Fazlur Rahman’s article engaged with Mawdudi and Shafi’s writings on riba. He saw interest from the perspective of modern economic theory as rent on lending money. Fazlur Rahman anchored the argument that riba means only excessive interest in the verse 3:130, “O you who believe, do not consume *ribā* with continued redoubling.”<sup>40</sup> He argued that the ratio legis (‘illa) of the verse is redoubling and therefore only excessive and unjust interest is prohibited in the so-called riba ordinance of the Qur’an.<sup>41</sup>

After an analysis of the hadith literature on the topic, Fazlur Rahman concluded that the hadiths on the nature of riba are conflicting and contradictory.<sup>42</sup> Based on his general approach to the hadith literature, Fazlur Rahman argued that the hadith that defined riba as “any loan that accrues a profit” was a tenth-century lexicographical construction to understand riba rather than a saying of the Prophet. While Fazlur Rahman conceded that historical evidence suggests that early Muslims abolished all interest, he argued that they saw the entire system as unjust owing to the prevalent practice of redoubling interest. From Fazlur Rahman’s perspective, Islam’s ethical goal was to have a society based on cooperation and mutual consideration. He imagined that this goal could be obtained in a welfare state in some sort of a capitalist utopia whereby the interest rate would reduce to zero through the generation of wealth.<sup>43</sup>

Perhaps recognizing that despite his official patronage under the Ayub Khan regime, any reorientation of Islamic legal doctrine would need the imprimatur of the ‘ulama, Fazlur Rahman sent the article to the Deobandi grand jurist Shafi for comment. However, Shafi did not consider the article worthy of a response. In an interview elsewhere, Shafi compared the Central Institute to a blind woman who breaks the bones of a priceless bird because she is unable to comprehend its contours, suggesting that Fazlur Rahman was disfiguring Islam in the name of research, as he did not have the faculties to understand this priceless religion. In response, Fazlur Rahman reproduced

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<sup>39</sup> For Rahman’s methodology, see Fazlur Rahman, *Islamic Methodology in History*, 3rd ed. (Islamabad, Pakistan: Islamic Research Institute, 1995); For Rahman’s essay on riba, see the English translation in Fazlur Rahman, “*Ribā* and Interest,” *Islamic Studies* 3, no. 1 (1964); and the original Urdu in Fazlur Rahman, “*Tahqīq-i Ribā*,” *Fikr wa Nazar* 1, no. 5 (1963).

<sup>40</sup> Rahman, “*Ribā* and Interest,” 3.

<sup>41</sup> *Ibid.*, 7.

<sup>42</sup> *Ibid.*, 28.

<sup>43</sup> *Ibid.*, 40-41.

Shafi's entire comment in the next issue of *Fikr wa Nazar* to show that the 'ulama were not interested in a serious conversation.<sup>44</sup>

The antagonism between the 'ulama and Fazlur Rahman increased over the years until a cross-section of 'ulama increasingly at odds with Fazlur Rahman over his many controversial opinions and threatened by the implicit official patronage of such opinions gave fatwas branding Fazlur Rahman's ideas as atheistic and used the campaign against Fazlur Rahman to protest against the modernization efforts under Ayub Khan's authoritarian rule.<sup>45</sup> The minister of law and Fazlur Rahman's sympathizer, S. M. Zafar, made an effort to defend Fazlur Rahman and thereby the regime in a joint press conference.<sup>46</sup> But reportedly in response to death threats, Fazlur Rahman resigned from his position at the Central Institute and went into self-imposed exile in the United States where he spent his remaining life, establishing himself as the Harold H. Swift Distinguished Service Professor at the University of Chicago.<sup>47</sup>

While Fazlur Rahman did not survive in the rough religio-political landscape of Pakistan, he supported Tanzil-ur Rahman (b. 1928) at the Central Institute, who would later spearhead the Islamic banking movement as the chairman of the Council of Islamic Ideology under the Zia regime and as the chief justice of the Federal Shariat Court.<sup>48</sup> Rahman cannot be easily placed in a box as he drew from a range of often competing intellectual movements in his prolific career as a lawyer, scholar, judge, and policymaker. He started his education at a Deobandi seminary, Madrasa 'Arabiyya Imdadiyya in Muradabad, India, but moved to a secular school without graduating as a scholar.<sup>49</sup> He migrated to Pakistan after completing his B.A. (1948) at Agra University in India and then earned his M.A. (1952), LL.B. (1954), and later Ph.D. (1971) in Islamic studies at Karachi University. Along with his academic pursuits, Tanzil-ur Rahman also practiced law in Karachi, enrolling as an advocate of the Supreme Court in 1974.<sup>50</sup> Tanzil-ur

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<sup>44</sup> See excerpt of interview with Shafi in Rafi' Allah Khan, "Afkār," *Fikr wa Nazar* 1, no. 7 (1964): 81-82. See also Muhammad Taqi Usmani, *Islām awr Jiddat Pasandī* (Karachi, Pakistan: Maktaba Dār al-'Ulūm, 1990), 39-48.

<sup>45</sup> 'Abd al-Ḥaqq, *Fatāwā Ḥaqqāniyya*, ed. Mukhtārullah Ḥaqqāni, 6th ed., 6 vols. (Akora Khattak, Pakistan: Jāmi'a Dār al-'Ulūm Ḥaqqāniyya, 2009), 1:582.

<sup>46</sup> Christopher Thomas Radbourne Hower, "Fazlur Rahman: A Reinterpretation of Islam in the Twentieth Century" (University of Birmingham, 1998), 122. S. M. Zafar would later argue the *Faisal* case on behalf of the government.

<sup>47</sup> Fazlur Rahman, *Revival and Reform in Islam: A Study of Islamic Fundamentalism* (Oxford, U.K.: Oneworld Publications, 2000), 3.

<sup>48</sup> Another scholar who worked under Rahman at the Central Institute, Muhammad Khalid Masud, would serve as the chairman of the Council of Islamic Ideology under the Musharraf regime and later as a scholar judge on the Supreme Court.

<sup>49</sup> "Mr. Justice Tanzil-ur-Rahman," 1991 PLD Journal 3.

<sup>50</sup> Enrollment as an advocate of the Supreme Court requires several years of enrollment as an advocate of a High Court, which in turn requires a few years of enrollment as an advocate of district and session courts.

Rahman worked at the Central Institute under Fazlur Rahman on a compendium called “Collection of the Laws of Islam” (*Majmū‘a-i Qawānīn-i Islām*), comparing the laws of the four Sunni schools and the modern Arab codes to design an Islamic legal code for Pakistan.<sup>51</sup> The compendium was undertaken when the chief justice of the Supreme Court of Pakistan, A. R. Cornelius, posed the following question to Tanzil-ur Rahman:

When there is a need to go in depth on any jurisprudential issue and find its causes and effects, our Pakistani lawyers provide references from Halsbury’s *Laws of England* and American jurisprudence without hesitation. But rarely do they evaluate the issue from the Islamic jurisprudential perspective as well. Why don’t our lawyers make an effort to research Islamic law, its principles, and its rules?<sup>52</sup>

Chief Justice Cornelius was a devout Catholic, but he encouraged the legal profession to draw upon the Islamic legal tradition.<sup>53</sup> This approach, however, was also a challenge to the monopoly of the ‘ulama over the interpretation of shari‘a.

Tanzil-ur Rahman’s compendium compared the personal status codes of Turkey, Egypt, Syria, Tunisia, Iraq, Morocco, Jordan, precolonial India, colonial India, Pakistan, and Singapore. His efforts may be seen in comparison with the Egyptian legal scholar al-Sanhuri’s efforts in drafting the Arab codes through a comparison of the premodern schools. However, a review of Tanzil-ur Rahman’s compendium indicates that while he drew from a range of premodern and contemporary scholars, most notably the Egyptian Hanafi scholar Muhammad Abu Zahra, he neither drew from the Salafi scholars such as Rida or ‘Abduh nor from al-Sanhuri. Tanzil-ur Rahman’s orientation towards the traditional scholars would be evident when he would decide the case of riba in the Federal Shariat Court, but the Supreme Court in 2002 would see this orientation in the compendium as evidence of Tanzil-ur Rahman’s bias against the Salafi scholars and al-Sanhuri’s interpretations of riba.

When Tanzil-ur Rahman completed the first volume of the compendium on the law of marriage circa 1965 at the Central Institute, Fazlur Rahman endorsed the work as an application of his own method of reevaluating Islamic guidance for the modern

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This means that Tanzil-ur Rahman was in practice for a number of years before his enrollment as an advocate of the Supreme Court. However, enrollment does not always mean continuous and active practice.

<sup>51</sup> On al-Sanhuri, see Enid Hill, *Al-Sanhuri and Islamic Law: 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, Egypt: American University in Cairo Press, 1987); Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari‘a into Egyptian Constitutional Law*.

<sup>52</sup> Tanzil-ur-Rahman, *Kulliyāt-i Sharī‘at* (Lahore, Pakistan: Islamic Publications (Private) Limited, 1999), 9-10. See also Hardinge Stanley Giffard Halsbury et al., *Halsbury's Laws of England*, ed. Gavin Turnbull Simonds, 3rd ed., 43 vols. (London, U.K.: Butterworths, 1964). The compendium is in its 5th edition now.

<sup>53</sup> See Clark B. Lombardi, "Can Islamizing a Legal System Ever Help Promote Liberal Democracy?: A View from Pakistan," *University of St. Thomas Law Journal* 7, no. 3 (2010).

context.<sup>54</sup> (However, as I describe below, Tanzil-ur Rahman's position on riba would be completely at odds with Fazlur Rahman.) But Tanzil-ur Rahman also wanted affirmation from the 'ulama, and took his volume to the Deobandi grand jurist Shafi for review. Shafi predictably refused to review the volume, considering it a waste of time simply due to Tanzil-ur Rahman's association with Fazlur Rahman.<sup>55</sup> However, the influential Deobandi monthly *Bayyinat* reviewed the volume and suggested that it should be presented to an "assembly of 'ulama,"<sup>56</sup> and upon their approval should be enacted as state law.<sup>57</sup> Before the publication of the second volume, Tanzil-ur Rahman studied fiqh texts with a scholar, perhaps to gain more legitimacy among the 'ulama since he was already conversant in Arabic and fiqh as evident from his first volume. While Tanzil-ur Rahman was building bridges with the 'ulama, Fazlur Rahman used the review to patronize them by commenting in his preface to the second volume that the 'ulama are only beginning to understand the complexity of the task of designing an Islamic legal code for a modern state.<sup>58</sup>

When Tanzil-ur Rahman completed the second volume on the law of divorce circa 1967, he went back to Shafi for comment, who was now more receptive, but still did not write a review.<sup>59</sup> When Tanzil-ur Rahman completed the third volume on the law of child custody and support circa 1969, Fazlur Rahman was no longer at the Central Institute, and the Deobandis were becoming more comfortable with associating their names with Central Institute projects. Finally, upon the publication of the fourth volume on the law of bequests, Muhammad Yusuf Banuri, the editor of *Bayyinat* and a leading Deobandi hadith scholar, wrote a foreword, and upon the completion of the fifth volume on the law of inheritance, Shafi wrote a foreword. Shafi's analysis of Tanzil-ur Rahman's work reproduced a debate between what Clark Lombardi calls "comparative neo-taqlid"

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<sup>54</sup> See Fazlur Rahman's preface in Tanzil-ur-Rahman, *Majmū'a-i Qawānīn-i Islām*, 5th ed., 5 vols. (Islamabad, Pakistan: Islamic Research Institute, 2004), 1:3-5.

<sup>55</sup> *Ibid.*, 5:1538.

<sup>56</sup> The proposal to form an assembly of 'ulama (majlis-i 'ulama) was articulated by Muhammad Yusuf Banuri at a conference in Cairo in order to regulate the personal ijtihad of scholars and support collective juristic efforts in searching for solutions to modern problems. See Banūrī, "Qadīm Fiqh-i Islāmī kī Rawshanī mayn Jadīd Masā'il kā Ḥāl; Banūrī, "Jadīd Fiqhī Masā'il awr Chand Rahnumā Uṣūl."

<sup>57</sup> Tanzil-ur Rahman's work was more conservative than the existing Muslim Family Laws Ordinance issued by Ayub Khan. Therefore, an endorsement, even if qualified, by *Bayyinat* is not surprising. Furthermore, the endorsement shows that notwithstanding the difference between the 'ulama and people such as Rahman on some sensational issues, there was also significant common ground between them as both the 'ulama and Rahman largely agreed with Tanzil-ur Rahman's work.

<sup>58</sup> Tanzil-ur-Rahman, *Majmū'a-i Qawānīn-i Islām*, 2:ṭ. In his preface to the second volume, Fazlur Rahman agreed with Tanzil-ur Rahman's conclusions though he expressed disagreement with some of his methods.

<sup>59</sup> *Ibid.*, 5:1538. Upon browsing the second volume, Shafi praised Tanzil-ur Rahman's intelligence and considered him worthy of the title "mawlana," used for graduates of madrasas and signifying entry into the class of 'ulama.

and “neo-traditionalism.”<sup>60</sup> While recognizing the worth of Tanzil-ur Rahman’s contribution, Shafi noted:

In my opinion, one thing in this book has hurt its effectiveness. While it is possible that the respected Mr. Tanzil-ur Rahman considers it the distinguishing quality of this work, from my perspective, it is the legacy of the modern style of research and so called new discoveries [read: Fazlur Rahman’s methodology] that have unconsciously penetrated his approach. The thing is that in many occasions in this book, after producing the positions of the four imams, Dr. Tanzil-ur Rahman has assumed the burden of preferring one over the other after judging them based on legal analysis, and in many issues accepted the doctrine of another imam, departing from the Hanafi doctrine.

In my opinion, this is not correct for many reasons. First, if the person judging between the mujtahid imams such as Abu Hanifa and al-Shafi‘i is not greater than them in knowledge and piety and the capacity of *ijtihad*, he should at least be equal to them, and should at least possess the requirements for *ijtihad*.

And in this matter, I find it necessary to say clearly that I neither find myself capable of this nor find any reason to grant this position to Dr. Tanzil-ur Rahman.

... The second thing deserving attention is that a substantial majority of the Muslims of this country belongs to the Hanafi school. Implementing the Hanafi law upon them means enforcing their own school on them. No one has the right to enforce any law from another school upon them except for the special condition that the jurists have clearly described: that is, if it becomes difficult to follow the Hanafi doctrine in any *ijtihad*-based matter, and the constraining condition is related to the general public rather than an individual’s circumstance, in such a condition Hanafi jurists have the option, under Hanafi doctrine itself, to give fatwas based on another mujtahid imam’s doctrine ...<sup>61</sup>

In other words, Shafi insisted upon an adherence to the Hanafi doctrine in designing legal codes and rejected Tanzil-ur Rahman’s method of comparing the four schools. Notwithstanding this criticism, Shafi concluded, “if this minor modernism is separated from this book, then this book is undoubtedly an unprecedented and comprehensive work.”

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<sup>60</sup> Lombardi, *State Law as Islamic Law in Modern Egypt: The Incorporation of Shari‘a into Egyptian Constitutional Law*, 78-100.

<sup>61</sup> Tanzil-ur-Rahman, *Majmū‘a-i Qawānīn-i Islām*, 5:1540-41. This method was articulated in the 20th-century South Asian context by the Deobandi scholar Ashraf ‘Ali Thanawi in his treatise, *al-Ḥīla al-Nājiza li’l-Ḥalīla al-‘Ājiza*. See Khan, “Traditionalist Approaches to *Shari‘ah* Reform: Mawlana Ashraf ‘Ali Thānawi’s Fatwa on Women’s Rights to Divorce.”

In short, Tanzil-ur Rahman grew out of the shadow of Fazlur Rahman and established himself in the circles of the Deobandi 'ulama, subject of course to the 'ulama's review of his ideas. But Tanzil-ur Rahman cannot be reduced to a Deobandi as there is also some evidence to suggest that he was a member of Mawdudi's Jama'at.<sup>62</sup> Tanzil-ur Rahman's compendium at the Central Institute covered the personal status code but did not reach the law of commercial transactions. However, Tanzil-ur Rahman would have the opportunity to work on this issue during his tenure as the chairman of the Council of Islamic Ideology under the Zia regime, and as the chief justice of the Federal Shariat Court during the Sharif government. Due to the controversial position of Fazlur Rahman, none of the *Faisal* parties would raise his position in the Federal Shariat Court proceedings. However, Chief Justice Tanzil-ur Rahman, whose position would develop in contrast with his mentor's, would still analyze and reject Fazlur Rahman's arguments.

### **3. Political Ambivalence: Riba and the Islamic Economy in the Zia Regime**

In the previous section, I described the 19th and 20th-century debates on the meaning of riba and provided the intellectual biography of certain men who would later undertake shari'a review on the issue as judges of the Federal Shariat Court and the Supreme Court. In this section, I present the legal and political developments in the Zia regime (r. 1977-1988) that enabled the Federal Shariat Court to review the interest provisions of fiscal, banking, insurance, and tax laws in the 1991 *Faisal* case in relation to these doctrinal debates. In contrast to earlier regimes in Pakistan, the Zia regime did not seek to redefine the traditional doctrine on riba. However, the Zia regime was also unable to implement the traditional doctrine in banking and finance due to pragmatic concerns. In the following pages, I explain how the Zia regime navigated through this tension between pragmatism and idealism using the tools of authoritarian politics.

Ayub Khan's era of capitalist development (1958-1969) in Pakistan ended when a national protest movement demanded his resignation primarily on the alleged grounds of concentration of wealth and power in the so-called "twenty-two families" that owned major enterprises. When Ayub Khan resigned, he handed power over to General Yahya Khan who held national elections in 1970 to form a new government and draft a new constitution, but the ensuing constitutional deadlock resulted in a civil war, Indian military intervention, and the secession of East Pakistan as Bangladesh in 1971. In what remained as Pakistan, Zulfikar Ali Bhutto, schooled in socialism during his undergraduate years at the University of California, Berkeley, became the president and civilian martial law administrator (1971-1973) and later the prime minister (1973-1977).

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<sup>62</sup> On the point that Tanzil-ur Rahman was a member of the Jama'at, see Hilda Saeed and Ayesha Khan, "Legalised Cruelty: Anti-Women Laws in Pakistan," in *No Paradise Yet: The World's Women Face the New Century*, ed. Judith Mirsky and Marty Radlett (London, U.K.: Zed Books, 2000), 126.

Bhutto recast his socialism into “Islamic socialism” and nationalized major industries and banks.<sup>63</sup>

As the country moved from capitalism to socialism, the religio-political parties argued that Islam neither supports the concentration of capital endemic to capitalism nor the end of property rights underlying socialism. Rather, Islam offers its own economic model using partnership as its core principle to share the risks and rewards of business in a *riba*-free economy. This notion, most famously articulated by Mawdudi in Pakistan, contributed to the rise of the so-called discipline of Islamic economics.<sup>64</sup> Based on theological and economic writings, Islamic economics articulated a third economic order as the panacea and transformed the debate over *riba* from a question of financial structuring to a solution for an entire country’s economic problems.

After five years of Bhutto’s heavy-handed rule, the opposition expanded to include the religio-political parties, discontented capitalists, and many leftists. When Bhutto conducted early elections in 1977 to renew his mandate for further economic and political restructuring, the opposition gathered together as the Pakistan National Alliance (PNA) under the leadership of the three religio-political parties – Jama‘at, JUI, and JUP. The opposition refused to accept the outcome of the 1977 elections that gave 155 out of 215 seats in the National Assembly to the ruling PPP. The protest movement against the elections transformed into the Nizam-i Mustafa movement. When General Zia deposed Bhutto on the pretext of electoral fraud, the military regime leaned towards the religio-political parties and the economic right to extend its rule. But Zia found himself serving two masters: one demanding denationalization and a return to capitalism and the other insisting on the introduction of Islamic economics. This section explains how General Zia navigated through these pressures using the jurisdictional exclusion of *riba* from shari‘a review while using executive measures to introduce a purportedly *riba*-free economy. But the strategy of using the jurisdictional exclusion, as I argue below, brought even more attention to Zia’s unfulfilled promise of Islamization.

### 3.1 Jurisdictional Exclusion of Riba

While Zia pushed the Islamization program in the social and cultural spheres, as evidenced by the introduction of the Hudud Ordinances and the establishment of shariat benches, his regime was much more cautious and ambivalent in the economic sphere. The original Constitution of 1973 included an aspirational provision in Article 38, stating that, “[t]he State shall: ... (f) eliminate *riba* as early as possible[.]” The constitutional provision recognized that *riba* exists in Pakistan’s economy and society but ultimately remained non-justiciable. When Zia introduced the shariat benches of the High Courts, he

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<sup>63</sup> The list of nationalized banks includes Habib Bank, Muslim Commercial Bank, United Bank, Australasia Bank, Premier Bank, Habib Bank Overseas, Commerce Bank, Memom Cooperative Bank, Lahore Commercial Bank, Punjab Cooperative Bank, Pakistan Bank, Bank of Bahawalpur, and Standards Bank.

<sup>64</sup> Sayyid Abū al-A‘lā Mawdūdī, *Mu‘āshiyāt-i Islām* (Lahore, Pakistan: Islamic Publications (Private) Limited, 1969).

did not allow them to review the Constitution itself, Muslim personal law, court procedures, and fiscal, tax, banking, and insurance laws.<sup>65</sup> The primary but unstated goal behind the exclusion of fiscal, tax, banking, and insurance laws was to prevent the shariat benches from striking down provisions of laws by interpreting them as in conflict with the Qur'anic prohibition of *riba*. However, this exclusion called the regime's stated commitment to Islamize the country into question. While the religio-political forces opposed any jurisdictional exclusion for the shariat benches, they were particularly vocal against the exclusion of fiscal, tax, banking, and insurance laws. Therefore, when Zia made the shariat benches part of the constitutional structure of courts, he included a sunset clause on the exclusion by defining the term "law" subject to shari'a review as follows:

[Law] does not include the Constitution, Muslim personal law, any law relating to the procedure of any Court or tribunal or, until the expiration of three years from the commencement of this Chapter, any fiscal law, or any law relating to the collection of taxes and fees or banking insurance practice and procedure.<sup>66</sup>

The permanent nature of the jurisdictional exclusion of the Constitution, Muslim personal law, and court procedures, and the temporary status of the jurisdictional exclusion of fiscal, tax, banking, and insurance laws, demonstrated the regime's ambivalence in the latter domain. The jurisdictional exclusion was set to expire in 1982, but when Zia established the Federal Shariat Court in 1980, he extended the sunset clause until 1983.<sup>67</sup>

Nevertheless, petitioners challenged the interest provisions of existing laws in the Federal Shariat Court. Under Chairman Salahuddin Ahmed, the Federal Shariat Court dismissed a shariat petition to declare interest as un-Islamic based on lack of jurisdiction over fiscal, tax, banking, and insurance laws.<sup>68</sup> However, provisions for the payment of interest also existed in laws that could not easily be categorized under fiscal, tax, banking, or insurance. Therefore, Chairman Ahmed did not decide a similar petition to declare the interest provisions of the Code of Civil Procedure of 1908 and the Pakistan Refugee Rehabilitation Finance Corporation Ordinance of 1960 as un-Islamic, since these laws were challenged on the grounds that they are not related to fiscal, tax, banking or insurance issues.<sup>69</sup> However, under Chief Justice Aftab Hussain, the Federal Shariat Court decided this petition and unequivocally stated that the Constitution intends to exclude any interest provision from the Court's jurisdiction, not merely fiscal, tax, banking or

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<sup>65</sup> *Shariat Benches of Superior Courts Order*, 1978, 1979 PLD CS 6, §2.

<sup>66</sup> *Constitution (Amendment) Order*, 1979 PLD CS 31.

<sup>67</sup> *Constitution (Amendment) Order*, 1980 PLD CS 89.

<sup>68</sup> *Khurshid Alam Siddiqui v. Muslim Commercial Bank*, 1983 PLD FSC 20. This petition was based on a personal grievance against Muslim Commercial Bank and decided in 1980 but reported in 1983.

<sup>69</sup> The interest in the Code of Civil Procedure was related to delinquent decrees.

insurance laws.<sup>70</sup> The Federal Shariat Court also dismissed a petition that challenged the interest provisions of the Transfer of Property Act of 1882 and the Limitation Act of 1908, holding again that the jurisdictional exclusion covers interest regardless of whether the law is related to fiscal, tax, banking or insurance matters directly.<sup>71</sup>

When Zia considered restoring the Constitution, he formed a commission under Zafar Ahmad Ansari to recommend constitutional amendments.<sup>72</sup> In 1983, the Ansari Commission's report stated, *inter alia*, that the Federal Shariat Court should have no jurisdictional exclusions.<sup>73</sup> But Zia was still not ready to allow the Federal Shariat Court to have such broad jurisdiction, and therefore ordered an amendment to the Constitution extending the exclusion until 1984.<sup>74</sup> The next year, he extended the jurisdictional exclusion again until 1985.<sup>75</sup> But each time Zia extended the exclusion, the religio-political forces that Zia depended upon for legitimizing his rule questioned his commitment to his stated goals. In 1984, Zia conducted a national referendum with one question:

Whether the people of Pakistan endorse the process initiated by General Muhammad Zia-ul-Haq, the President of Pakistan, for bringing the laws of Pakistan in conformity with the injunctions of Islam as laid down in the Holy Quran and Sunnah of the Holy Prophet (PBUH) and for the preservation of the Ideology of Pakistan, for the continuation and consolidation of that process, and for the smooth and orderly transfer of power to the elected representatives of the people.<sup>76</sup>

An affirmative vote meant that Zia would gain a five-year term as the president. Zia, of course, "won" the referendum with 97.7% of the votes cast.<sup>77</sup> While Zia restored the

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<sup>70</sup> *Essa E.H. Jafar v. Federation of Pakistan*, 1982 PLD FSC 212. Justice Zahoor-ul-Haq wrote a concurring opinion in which he argued that while the interest provisions in the two laws are outside its jurisdiction, its jurisdiction does not exclude every law that has interest provisions.

<sup>71</sup> *Muhammad Sadiq Khan v. Government of Pakistan*, 1983 PLD FSC 43. Justice Zahoor-ul-Haq wrote a concurring opinion, while Justice Usmani wrote a dissenting note in this judgment.

<sup>72</sup> Ansari was a former joint secretary of the Muslim League. He was a lawyer by training and conversant in fiqh. Ansari was often called mawlana, despite the fact that he was not a madrasa graduate. He was considered a constitutional expert and was appointed to the Council of Islamic Ideology in 1977. As I describe in the next chapter, his son Zafar Ishaq Ansari would briefly serve as a scholar judge on the Supreme Court between 2000 and 2002.

<sup>73</sup> Ansari Commission, *Report on Form of Government* (Islamabad, Pakistan: National Government Publication, 1983).

<sup>74</sup> *Constitution (Second Amendment) Order*, 1983 PLD CS 86.

<sup>75</sup> *Constitution (Second Amendment) Order*, 1984, 1985 PLD CS 582.

<sup>76</sup> *The Referendum Order of 1984*, 1985 PLD CS 449.

<sup>77</sup> Khan, *Constitutional and Political History of Pakistan*, 364-365; William L. Richter, "Pakistan in 1984: Digging In," *Asian Survey* 25, no. 2 (1985).

Constitution and restrained his unilateral power of enacting constitutional amendments in 1985, he also extended the jurisdictional exclusion again for five years – until 1990 – under the Revival of the Constitution of 1973 Order.<sup>78</sup> Zia was able to make the five-year extension as opposed to yearly extensions in the past since he expected to conduct elections after reviving the Constitution, thereby making him less dependent on the Islamic legitimacy offered by religio-political groups. Nevertheless, the exclusion was not permanent.

When Zia restored the Constitution in 1985, he appointed Ghulam Ishaq Khan (1915-2006), a career civil servant and Zia's trusted advisor, as the chairman of the Senate.<sup>79</sup> Khan introduced the Constitution (Ninth Amendment) Bill in the Parliament calling for an end to all exclusions from the Federal Shariat Court's jurisdiction, except the Constitution itself. While the proposed amendment produced some debate, it never gained enough traction in the Senate to pass. But such attempts did not inspire much faith in Zia's commitment, since Zia himself had extended the exclusion for five years just before reviving the Constitution in 1985.<sup>80</sup> In the Senate, the Deobandi scholar-politician Sami-ul-Haq of JUI-S also proposed a so-called Shariat Bill that, inter alia, included a provision to remove all exclusions to the Federal Shariat Court's jurisdiction. Various versions of the Shariat Bill were debated until 1988, but none were enacted.<sup>81</sup>

In 1988, acting as president, Zia dismissed the government of Prime Minister Muhammad Khan Junejo (1985-88) and dissolved the Parliament under the controversial Article 58(2)(b) that Zia had introduced into the Constitution. As Zia undermined his stated commitment to democracy, he needed to demonstrate his continued commitment to Islam once more. To regain the support of religio-political forces in this moment, he decided to introduce a presidential ordinance that included, among other things, an end to any jurisdictional exclusion to shari'a review. However, his legal adviser, Syed Sharifuddin Pirzada (b. 1923),<sup>82</sup> insisted that since the jurisdictional exclusion is part of the Constitution, Zia could not expand the jurisdiction with an ordinary law or ordinance.<sup>83</sup> Under this interpretation, Zia would need a constitutional amendment to expand the Federal Shariat Court's jurisdiction but since he had dissolved the Parliament, he could not amend the Constitution until a new Parliament was elected that would pass the amendment for Zia to sign into law as the president. Zia's religious affairs adviser,

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<sup>78</sup> *Revival of the Constitution of 1973 Order*, 1985 PLD CS 456, Article 2, Schedule Serial No. 42.

<sup>79</sup> The chairman of the Senate assumes the office of the president in the event of the president's death or incapacitation.

<sup>80</sup> *Constitution (Ninth Amendment) Bill*, 1985.

<sup>81</sup> Shahtaz, *Tārīkh-i Nifādh-i Hudūd*.

<sup>82</sup> Pirzada was a barrister who had served as the attorney general for the military regimes of Ayub Khan (1965-66), Yahya Khan (1968-71), and Zia ul-Haq (1971-85).

<sup>83</sup> Muhammad al-Ghazali, "Bhā'ī Jān," *al-Sharī'a: Khuṣūṣī Ishā'at bi-Yād Dr. Mahmood Ahmad Ghazi* 23, no. 1-2 (2011).

Mahmood Ahmad Ghazi,<sup>84</sup> was not satisfied with the advice of the “constitutional expert,” and upon studying the Constitution noticed that Article 175(2) provided that, “[n]o court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.” Ghazi made the case before Zia that while Article 203B(c) does not confer jurisdiction on the Federal Shariat Court over fiscal, tax, banking, and insurance laws, an ordinary law could confer that jurisdiction under Article 175(2). Following Ghazi’s interpretation in part, Zia issued a presidential ordinance called the Shari‘ah Ordinance in June 1988:

4. Court to decide cases according to Shari‘ah.

(1) If a question arises before a court that a law or provision of law is repugnant to Shari‘ah, the court shall, if it is satisfied that the question needs consideration, make a reference to the Federal Shari‘at Court in respect of matters which fall within the jurisdiction of the Federal Shari‘at Court under the Constitution and that Court may call for and examine the record of the case and decide the question within sixty days.

Provided that, if the question related to Muslim personal law, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure, the court shall refer the question to the High Court which shall decide the question within sixty days.<sup>85</sup>

Granting jurisdiction to the High Courts instead of the Federal Shariat Court may suggest that Zia wanted only professional judges of the High Courts to handle these questions. But as elaborated below, such professional judges included Tanzil-ur Rahman on the Sindh High Court who was taking the unprecedented position of denying awards in civil suits filed for the recovery of interest. Nevertheless, the ordinance was short-lived. Under the Constitution, an act is passed by the Parliament and signed by the president, whereas an ordinance is promulgated by the president alone, with the same force of law as an act, when the Parliament is not in session. However, an ordinance expires after 120 days unless the Parliament passes the ordinance as an act.<sup>86</sup> In practice, the president often reissues the ordinance after 120 days with cosmetic changes and thereby exercises quasi-permanent lawmaking authority, particularly under military regimes. In August 1988, Zia was killed in a mysterious plane crash, and Ghulam Ishaq Khan became the president. As president, Khan reenacted the Shari‘ah Ordinance once upon its expiration in October 1988 but would not renew it again.<sup>87</sup>

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<sup>84</sup> Ghazi was a madrasa graduate with a Ph.D. in Islamic studies from Punjab University who often appeared as an advisor to the Federal Shariat Court (see chapter 4) and would later serve on the Federal Shariat Court and the Supreme Court.

<sup>85</sup> *Enforcement of Shariah Ordinance*, 1988 PLD CS 29.

<sup>86</sup> *Constitution of Pakistan*, 1973, Article 89.

<sup>87</sup> *Enforcement of Shari‘ah (Revised) Ordinance*, 1988, 1989 PLD CS 18.

After Zia's death, President Khan conducted elections and the country transitioned toward democracy. The PPP under Benazir Bhutto, daughter of Zulfikar Ali Bhutto, won the plurality of seats in the Parliament and formed a coalition government in December 1988. Bhutto wanted to scale back Zia's Islamization project. While she was unable to take affirmative steps to dismantle Zia's laws, she was happy to allow the Shari'ah Ordinance to expire in February 1989 – 120 days after its reenactment – without presenting it to the Parliament. But President Khan also did not reissue the Shari'ah Ordinance again, perhaps because the jurisdictional exclusion of fiscal, tax, banking, and insurance laws was coming to an end anyway next year. To extend the exclusion, Bhutto would have needed to pass a constitutional amendment, which would have been politically difficult for her fledgling coalition. Consequently, the jurisdictional exclusion came to an end on June 25, 1990, ten years after the establishment of the Federal Shariat Court.<sup>88</sup> Soon thereafter, President Khan dismissed Bhutto's government on corruption charges using his authority under the infamous Article 58(2)(b). Dealing with the expanded powers of the Federal Shariat Court would become the next prime minister Nawaz Sharif's problem, which was complicated by the fact that Sharif would ride into power in 1990 using the rhetoric of Islam as part of a coalition called the Islami Jumhuri Ittihad (IJI), including the Jama'at among seven other parties.

### **3.2 Tanzil-ur Rahman at the Council of Islamic Ideology: Towards an Islamic Economy**

While Zia did not allow the judiciary to review fiscal, tax, banking or insurance laws from 1978 to 1990, he pursued an executive-centered approach during this period to respond to calls for an Islamic economy. Upon taking power in 1977, Zia asked the Council of Islamic Ideology to prepare a model for an interest-free economic system. On the basis of an interim report of the Council, Zia introduced profit and loss sharing (PLS) in the House Building Finance Corporation, a public sector home-financing institution (now privatized), and the Investment Corporation of Pakistan, a public sector investment bank. In 1980, Zia appointed Tanzil-ur Rahman as the chairman of the Council of Islamic Ideology. Under Tanzil-ur Rahman's leadership, the Council issued a report titled *Elimination of Riba from the Economy and Islamic Modes of Financing*.<sup>89</sup>

The Council consisted of twelve members, mainly 'ulama representing Deobandis, Barelawis, Jama'atis, Ahl-i Hadith, and Shi'as, who were expected to uphold the traditional concept of riba. But the Council also included Khalid M. Ishaque, an attorney with a deep command of the Islamic tradition, who favored Salafi interpretations on riba.<sup>90</sup> Notwithstanding any differences that may have existed among the Council's

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<sup>88</sup> This date is exactly five years after the Revival of the Constitution of 1973 Order.

<sup>89</sup> See Council of Islamic Ideology, "Elimination of *Ribā* from the Economy & Islamic Modes of Financing," (2006).

<sup>90</sup> We know this based on his arguments before the Federal Shariat Court in 1991 and the Supreme Court in 1999. However, I should note that Ishaque appeared as an advocate in these cases, not as a juriconsult offering his expert opinion. Therefore, the extent to which such views can be attributed to him directly is an open question.

members, the Report declared that, “[t]here is complete unanimity among all schools of thought in Islam that the term *riba* stands for interest in all its types and forms.”<sup>91</sup> The Report offered the following explanation:

The rationale for prohibition of charging of interest on loans taken for consumption purposes is obvious. Such loans are usually taken by people of small means to meet urgent personal requirements as they have hardly any cushion of savings with which to meet such requirements. Prohibition of interest in so far as loans of this type are concerned rests mainly on humane consideration. The main rationale for prohibition of interest in the case of loans for production purposes stems from the concept of justice between man and man which is the cornerstone of the Islamic philosophy of social life. Uncertainty is inherent in a business enterprise irrespective of the time and space dimensions. The opening results of the enterprise cannot be foreseen and the occurrence of profit or loss and their magnitudes cannot be fully determined in advance. It is, therefore, a sheer injustice if the party providing money capital is guaranteed a fixed and predetermined return while the party providing enterprise is made to bear the uncertainty all alone. On the other hand, a fixed interest rate can also be unjust to the lender of money in case the entrepreneur using this money earns its profit quite out of proportion to what he pays by way of interest.<sup>92</sup>

In other words, the Report equated what the financial industry considers the “magic” and the “nightmare” of leverage to injustice. The Report offered a blueprint for moving toward an Islamic economy in three phases. The first phase would consist of an end to interest from intra-government transactions, short-term financing to farmers, and long-term home financing. The second phase would focus on the asset side of banks and other financial institutions but only in domestic transactions. The third phase would consist of consumer banking and inter-bank transactions based on profit and loss sharing (PLS). In contrast with the blueprint for the domestic economy, the Report took a more cautious position on *riba* in international borrowing:

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<sup>91</sup> Council of Islamic Ideology, "Elimination of *Ribā* from the Economy & Islamic Modes of Financing," 9.

<sup>92</sup> *Ibid.*, 10-11. The above rationale most notably ignored the credit risk taken by the lender. This oversight was due in part to the fact that *fiqh* did not recognize bankruptcy in the modern sense. Under the traditional doctrine, if a creditor judicially seizes a debtor's assets but the outstanding amount is still not satisfied, the creditor can claim the outstanding amount once the debtor becomes solvent at any later stage. Furthermore, if a debtor is unable to pay the loan in this life, the creditor gets a reward in the hereafter, while if a debtor is unwilling to pay the loan, the creditor can settle the score in the hereafter. In this juridical and theological sense where obligations extend to the hereafter, credit risk does not remain an issue. For a more complete critical assessment of the rationale behind Islamic banking and finance, see Haider Ala Hamoudi, "The Surprising Irrelevance of Islamic Bankruptcy," *American Bankruptcy Institute Law Review* 19 (2011); Haider Ala Hamoudi, "The Impossible, Highly Desired Islamic Bank," *William & Mary Business Law Review* 5 (2014); Samuel L. Hayes and Frank E. Vogel, eds., *Islamic Law and Finance: Religion, Risk, and Return* (Boston, M.A.: Kluwer Law International, 1998); Mahmoud A. El-Gamal, *Islamic Finance: Law, Economics, and Practice* (Cambridge University Press, 2008).

Government borrowing from external sources will have to be continued for the time being on the basis of interest. The Council has recommended that efforts should be made to reduce dependence on foreign aid in general and interest-bearing foreign assistance in particular. In addition, efforts should be made to foster greater economic co-operation among Muslim countries so as to promote movement of capital on the basis of profit/loss sharing or other non-interest basis. With such increased economic co-operation among Muslim countries it is not unlikely that, with the passage of time, non-Muslim aid giving countries and international financial institutions may also begin to deal with Muslim countries on a basis compatible with *Sharī'ah*...

The Council recognizes the difficulties in the elimination of interest from transactions relating to international trade and aid and has, therefore, recommended that initially the objective should be to eliminate interest from domestic transactions.<sup>93</sup>

In 1981, Zia introduced banking reforms. On the deposit side, Zia replaced savings accounts for consumers in public sector banks with PLS accounts. On the lending side, Zia introduced partnership (*mushāraka*) and silent partnership (*muḍāraba*) as Islamic modes of financing without restricting conventional lending.<sup>94</sup> However, the state was falling behind the Council's timeline and many of the changes were more cosmetic than substantive. By 1983, the advocates of an Islamic economy were becoming impatient with the regime's lack of executive progress and extensions of the jurisdictional exclusion. In one instance, Tanzil-ur Rahman confronted Zia directly at a meeting on the pace of Islamization, but Ghulam Ishaq Khan intervened and reminded Tanzil-ur Rahman that he should not exceed his advisory role.<sup>95</sup> Notwithstanding such encounters, later as the president of Pakistan, Khan would appoint Tanzil-ur Rahman as the chief justice of the Federal Shariat Court.

In 1984, Zia introduced the Banking and Financial Services (Amendment of Laws) Ordinance and the Banking Tribunals Ordinance to provide an infrastructure for the recovery of delinquent interest-free loans, but he also extended the jurisdictional exclusion until 1985.<sup>96</sup> In 1985, when Zia extended the exclusion until 1990, the State Bank of Pakistan issued a circular to allow banks to manage risk for the PLS accounts by

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<sup>93</sup> Council of Islamic Ideology, "Elimination of *Ribā* from the Economy & Islamic Modes of Financing," 17-18; see also Tanzil-ur-Rahman, *Implementation of Shari'ah in Pakistan* (Islamabad, Pakistan: Council of Islamic Ideology, 1982).

<sup>94</sup> Modaraba Companies and Modarabas (Floatation And Control) Ordinance, 1980

<sup>95</sup> Irshad Ahmed Haqqani, "Islāmī Nazariyyātī Council kī Sifāriḥāt," *Sū'ay Ḥaram* 1, no. 6 (2009).

<sup>96</sup> See *Banking and Financial Services (Amendment of Laws) Ordinance*, 1984, 1985 PLD CS 498. and *Banking Tribunals Ordinance*, 1984, 1985 PLD CS 507.

investing in treasury bills, i.e. interest-bearing debt sold by the government.<sup>97</sup> The ‘ulama saw through Zia’s laws and regulations and gave fatwas against interest-free banking under Zia. Usmani analyzed the PLS accounts in the following way:

... for now the business of these interest-free [bank] counters is mixed with permissible and impermissible transactions, and some of it is suspicious. Therefore, until these shortcomings are addressed, the profit derived from them cannot be considered completely halal, and it is incorrect for Muslims to participate in such business.<sup>98</sup>

As Zia’s executive measures failed to establish an Islamic economy to the satisfaction of the ‘ulama, his ambivalent regime enabled attempts to use judicial activism for the purpose.

### 3.3 Tanzil-ur Rahman at the Sindh High Court: Judicial Activism

In 1985, Zia appointed Tanzil-ur Rahman as a permanent judge of the Sindh High Court. Tanzil-ur Rahman, who was enrolled as an advocate of the Supreme Court, was among the few people qualified for an appointment to a High Court with an expertise in fiqh.<sup>99</sup> Circumventing the Federal Shariat Court’s jurisdictional exclusion over fiscal, tax, banking, and insurance laws, Justice Rahman asserted the power of the High Courts to review any law on the basis of the Qur’an and sunna in a series of cases in 1987 involving controversies over payment of interest. The jurisprudential grounds for this judicial power was taken from the Objectives Resolutions, a set of principles approved by the Constituent Assembly of Pakistan in 1949, stating:

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 Quran and the Sunnah...

A version of the Objectives Resolution was included as the Preface to the Constitution of 1973. In 1985, when Zia revived a pseudo-constitutional order, he inserted Article 2-A in

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<sup>97</sup> Khurshid Ahmad, *Pākistān mayn Nifādh-i Islām: Senate Taqārīr* (Islamabad, Pakistan: Institute of Policy Studies, 1994).

<sup>98</sup> Muhammad Taqi Usmani, *Fiqhī Maqālāt*, 6 vols. (Karachi, Pakistan: Memon Islamic Publishers, 1994), 2:264.

<sup>99</sup> To be precise, Tanzil-ur Rahman had been working as an additional judge of the Sindh High Court for a few years already.

the Constitution that stated that, “[t]he 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.”<sup>100</sup>

Justice Rahman drew upon Article 2-A in *Bank of Oman Ltd. v. East Trading Co. Ltd.*, where he asserted the power to review the interest payments in a residential mortgage under the Transfer of Property Act of 1882 based on the Qur’an and sunna and found them un-Islamic.<sup>101</sup> But as courts attempting to expand judicial power often develop broad doctrinal authority in decisions that do not directly challenge the regime’s interests,<sup>102</sup> Justice Rahman awarded the interest based on the grounds that the Federal Shariat Court had already upheld the law in another case. Nonetheless, *Bank of Oman* opened the door for shari‘a review at the High Courts using Article 2-A, including the review of laws explicitly excluded from the jurisdiction of the Federal Shariat Court.

Shortly after *Bank of Oman*, Justice Rahman used Article 2-A in *Irshad H. Khan v. Parveen Ajaz* to declare the interest provisions of the Negotiable Instruments Act of 1881 and the Code of Civil Procedure of 1908 un-Islamic. Based on this determination, Justice Rahman declined to award interest on the promissory note at issue before the Sindh High Court.<sup>103</sup> However, in *Habib Bank Ltd. v. Muhammad Hussain*, Justice Rahman used Article 2-A to find the interest provision of the Banking Companies (Recovery of Loans) Ordinance of 1979 un-Islamic but he did not declare the provision void.<sup>104</sup> The ordinance, enacted by Zia, was explicitly declared immune from judicial review under Article 270-A of the Constitution. In this instance, Justice Rahman followed a precedent of the Sindh High Court upholding such immunity even as it related to Article 2-A, and awarded interest “with a heavy heart.”<sup>105</sup>

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<sup>100</sup> However, Zia’s version of the Objectives Resolution made one exception from the original version passed in 1948. Zia omitted the term freely from the provision: “Wherein adequate provision shall be made for the minorities to freely profess and practice their religions and develop their cultures[.]”

<sup>101</sup> *Bank of Oman Ltd. v. East Trading Co. Ltd.*, 1987 PLD Karachi 404.

<sup>102</sup> Gordon Silverstein describes this process as follows: “First, judges will embed claims to judicial authority, making it increasingly difficult for the government to reverse their rulings. Second, judges will identify and employ implied powers (and implied restrictions) inferred from explicit powers and prohibitions. And third, because of the nature of legal reasoning, doctrine developed in one arena will not be easily limited to that arena and thus will overlap with other areas.” Silverstein, “Globalization and the Rule of Law: ‘A Machine That Runs of Itself?’,” 430; see also Shoaib A. Ghias, “International Judicial Lawmaking: A Theoretical and Political Analysis of the WTO Appellate Body,” *Berkeley Journal of International Law* 24, no. 2 (2006).

<sup>103</sup> *Irshad H. Khan v. Parveen Ajaz*, 1987 PLD Karachi 466.

<sup>104</sup> *Habib Bank Ltd. v. Muhammad Hussain*, 1987 PLD Karachi 612.

<sup>105</sup> *Ibid.*, 651. Martin Lau argues that Justice Rahman may have been concerned that, “any admission that [Zia’s] legal measures could be made subject to a judicial review would bring with the possibility of a challenge to the legal framework of Islamisation itself.” Lau, *The Role of Islam in the Legal System of Pakistan*, 196.

These three 1987 decisions of Justice Rahman at the Sindh High Court were reported in the PLD and widely noticed. The Jama'at also translated the decisions into Urdu and published them in a booklet to underscore the incremental progress on Islamizing the economy.<sup>106</sup> However, Justice Rahman was able to advance his agenda only insofar as cases were assigned to him for adjudication by the chief justice of Sindh High Court. Justice Rahman remained on the Sindh High Court for three more years (until 1990) but no other opinion related to interest is reported during this period, which suggests that the serving chief justices, using their power of case assignment, stopped placing such cases before Justice Rahman.<sup>107</sup>

#### **4. Tanzil-ur Rahman at the Federal Shariat Court**

On June 25, 1990, the ten-year constitutional exclusion on the shari'a review of fiscal, banking, insurance, and tax laws by the Federal Shariat Court came to an end. And, in November 1990, President Khan appointed Justice Rahman as the chief justice of the Federal Shariat Court. Given his role in the Council of Islamic Ideology's report on riba and his jurisprudence on the Sindh High Court, there was no doubt about his commitment to taking up the case of riba and also no doubt about the outcome of such a case. Therefore, why would a political regime appoint Justice Rahman as not just a judge, but as the chief justice of the Federal Shariat Court with the power to control case assignment and disposal? In this section, contrary to existing interpretations, I argue that the appointment can only be understood as President Khan's deliberate decision to resolve the issue of riba.

There are two interpretations of the appointment of Justice Rahman as the chief justice of the Federal Shariat Court. First, Martin Lau argues that Justice Rahman's "elevation [was] perhaps influenced by the fact that his judgments [in the Sindh High Court] on the effect of Article 2-A had made him a potential liability[.]"<sup>108</sup> Lau's assumption that Justice Rahman was elevated because he was a potential liability appears to rely on the notion that the Federal Shariat Court was used as a dumping ground for unwanted and problematic judges because of the Court's uncertain tenure.<sup>109</sup> But Justice Rahman reached the constitutional retirement age of 62 years for High Court judges in 1990,<sup>110</sup> and retired from the Sindh High Court in June, before he was appointed to the

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<sup>106</sup> *Justice Tanzil-ur-Rahman kay Ahamm 'Adālatī Fayşlay* (Lahore, Pakistan: Idāra-i Tarjumān al-Qur'ān, 1987).

<sup>107</sup> However, as the PLD only reports cases that have precedential value, Justice Rahman may have decided cases concerning riba that did not have precedential value and were therefore unreported in PLD. During this period, Naimuddin Ahmed (1986-88), Ajmal Mian (1988-89), and Sajjad Ali Shah (1989-90), successively served as the chief justices of Sindh High Court.

<sup>108</sup> Lau, *The Role of Islam in the Legal System of Pakistan*, 196.

<sup>109</sup> See chapter 2, where I describe that the Court was used to reward or punish High Court judges.

<sup>110</sup> *Constitution of Pakistan*, 1973, Article 195. The retirement age was increased by Musharraf to sixty-five through the Legal Framework Order of 2002 but later decreased back to sixty-two by the Constitution (Seventeenth Amendment) Act of 2003.

Federal Shariat Court in November. Furthermore, even if the government were removing Justice Rahman for judicial activism, appointing him as the chief justice of the Federal Shariat Court would not have made sense given the extensive power over bench formation and case assignment exercised by a chief justice.

Second, Charles Kennedy states that Justice Rahman's appointment was a "mundane factor" that contributed to the *Faisal* case.<sup>111</sup> However, given Justice Rahman's profile, his appointment could not have been a political oversight. In fact, after retirement from the Sindh High Court, Justice Rahman accepted a tenured teaching position at the International Islamic University in Malaysia.<sup>112</sup> He returned to Pakistan upon the insistence of Justice Afzal Zullah (1928-2011) who had become chief justice of the Supreme Court in early 1990.<sup>113</sup> A long-time advocate of shari'a review, Justice Zullah had served as a member of the shariat appellate bench since his appointment to the Supreme Court in 1979, and as the chairman of the shariat appellate bench from 1982 to 1990.<sup>114</sup> Justice Rahman had a longstanding professional as well as personal relationship with Justice Zullah. In 1980, when Tanzil-ur Rahman was the chairman of the Council of Islamic Ideology, Justice Zullah was his neighbor in Islamabad and contributed to shaping some of Tanzil-ur Rahman's intellectual pursuits.<sup>115</sup>

After becoming the chief justice of the Supreme Court in 1990, Zullah recommended the appointment of Justice Rahman as chief justice of the Federal Shariat Court to President Khan, who made the appointment.<sup>116</sup> As elaborated above, President Khan also had a longstanding professional relationship with Justice Rahman and was intimately familiar with his role in the Council of Islamic Ideology during the Zia regime. Furthermore, President Khan could not have been oblivious to Justice Rahman's judgments on *riba* in the Sindh High Court. We can also assume that the Jama'at, now a coalition partner of the ruling PML-N led by Nawaz Sharif, supported Justice Rahman's appointment as the Jama'at endorsed his jurisprudence on the Sindh High Court, evidenced by the party's translation and distribution of his judgments on *riba*.

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<sup>111</sup> Kennedy, "Pakistan's Superior Courts and the Prohibition of Riba," 106.

<sup>112</sup> Tanzil-ur-Rahman, "Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What More Is Required?."

<sup>113</sup> Muhammad Imdad Hussain Pirzada, "Condolences at the Sad Demise of Former Chief Justice of Pakistan, Muhammad Afzal Zullah," [http://mihpirzada.com/index.php?option=com\\_content&task=view&id=294&Itemid=34](http://mihpirzada.com/index.php?option=com_content&task=view&id=294&Itemid=34) (last accessed September 5, 2014).

<sup>114</sup> Law and Justice Commission of Pakistan, "Muhammad Afzal Zullah," <http://www.ljcp.gov.pk/Menu%20Items/Members/biodata-chariman-03-m%20afzal%20zullah.htm> (last accessed September 5, 2014).

<sup>115</sup> Tanzil-ur-Rahman, *Kulliyāt-i Shari'at*, 11. Tanzil-ur Rahman wrote this book on Islamic legal maxims upon the advice of Justice Zullah.

<sup>116</sup> Sajjad Ali Shah, *Law Courts in a Glass House: An Autobiography* (New York: Oxford University Press, 2001), 156.

Therefore, Justice Rahman's appointment as the chief justice of the Federal Shariat Court is more appropriately seen as a reward for his Islamic judicial activism and an invitation for him to proceed further. Neither President Khan nor Chief Justice Zullah could have been ignorant of the fact that the ten-year exclusion of fiscal, banking, insurance, and tax laws from the jurisdiction of the Federal Shariat Court had come to an end. After all, the exclusion was an important political issue throughout the previous decade requiring several constitutional amendments to maintain and two Shari'ah Ordinances to temporarily end, with the second Shari'ah Ordinance promulgated by President Khan himself. Justice Rahman's appointment as the chief justice more or less guaranteed that the Federal Shariat Court would take up the *Faisal* case.

However, President Khan gave a cautious one-year appointment to Chief Justice Rahman, effective on November 17, 1990, and ending on November 16, 1991.<sup>117</sup> When Chief Justice Rahman assumed his office, several petitions challenging fiscal, tax, banking, and insurance laws were already pending in the Federal Shariat Court, filed as soon as the jurisdictional bar ended, not that he needed the petitions to resolve the *riba* question given the suo motu powers of a chief justice of the Federal Shariat Court. Chief Justice Rahman immediately assigned the petitions to a three-member bench consisting of himself and two other judges: Justice Abaid Ullah Khan as the second professional judge and Justice Fida Muhammad Khan as the only scholar judge. Both of them simply joined Chief Justice Rahman's opinion in the *Faisal* case, as opposed to writing concurring opinions, as was often the case in important matters before the Federal Shariat Court. I provide a short introduction to each of the other two judges in the next paragraph, even though I consider Chief Justice Rahman to be the primary intellectual force on the bench in this case.

Justice Abaid Ullah Khan (b. 1928) was a career judge and a government lawyer.<sup>118</sup> After completing his M.A. and LL.B., he practiced for a short period and then became a civil judge, district and sessions judge, and a High Court judge. He also served as a joint secretary and solicitor to the Government of Pakistan. He was appointed to the Federal Shariat Court in February 1991 when Chief Justice Rahman started the hearings in the *Faisal* case. Justice Fida Muhammad Khan (b. 1938) was an expert in Islamic studies, but apparently not educated at a madrasa.<sup>119</sup> He earned his B.A., B.T., B.Sc. (War Studies), M.A. (English), M.A. (Arabic), M.A. (Islamic studies), and Ph.D. (Islamic studies) from Peshawar University, earning distinctions in most degrees and the gold medal in his B.A. Justice Khan taught Islamic studies at Peshawar University and served as a jurisconsult on the Federal Shariat Court. He was appointed as a scholar judge to the

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<sup>117</sup> Ministry of Law and Parliamentary Affairs, No. F. 10 (7)/90-LR (Islamabad, November 8, 1990), Gazette of Pakistan, Extraordinary, November 8, 1990, III, 9178; see also Tanzil-ur-Rahman, "Islamic Provisions of the Constitution of the Islamic Republic of Pakistan, 1973, What More Is Required?."

<sup>118</sup> Federal Shariat Court, "Mr. Justice Abaid Ullah Khan," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed December 15, 2012).

<sup>119</sup> Law and Justice Commission of Pakistan, "Federal Shariat Court: Annual Report," (Islamabad, Pakistan: Law and Justice Commission of Pakistan, 2011), 6-7.

Federal Shariat Court in 1988 and remains on the Court as of this writing.<sup>120</sup> While earlier scholar judges on the Federal Shariat Court were noteworthy 'ulama in one of South Asia's religio-political movements, situating Justice Khan in any such movement is not easy due to his apparent lack of madrasa credentials. We can assume that he was a non-political judge and his appointment to the Federal Shariat Court and long tenure may indicate a sort of professionalization of the Court.

The three-member bench of the Federal Shariat Court conducted hearings between February and October of 1991. During this period, the Sharif government passed the Enforcement of Shari'ah Act of 1991.<sup>121</sup> The Act was a response to a long-standing demand of the conservative sections of Sharif's party and coalition partners, going back to the proposed Ninth Amendment and the expired Shari'ah Ordinances. But Sharif also used the Act to respond to the proceedings in the Federal Shariat Court and to prepare for Chief Justice Rahman's impending judgment on riba. The Act established a commission for the purpose of eliminating riba. Earlier drafts specified three years for the commission to complete its job but the final Act gave the "shortest possible time" to the commission. The Sharif government used the vagueness to say that the government is committed to the shortest possible time without binding itself to a timeframe. However, the Sharif government was concerned about the effect that the Act or a Federal Shariat Court judgment on riba may have on credible commitments and international borrowing. Therefore, Section 19 of the Act provided that the existing domestic legal obligations would not be affected by the Act and Section 18 provided that present and future international legal obligations would not be affected by either the Act or any decision of any court. According to a U.S. diplomatic cable:

The [Prime Minister's] confidants privately described it as an important victory over the religious right. By introducing his own sharia bill, Nawaz [Sharif] had essentially both acceded to the Islamists' campaign pressing the [Government of Pakistan] to institute Islamic law and derailed it, by watering the legislation down to the point of meaninglessness.<sup>122</sup>

But despite Sharif's crisis management, Chief Justice Rahman continued the *Faisal* proceedings with apparent support from President Khan. Had President Khan wanted to disrupt the Federal Shariat Court proceedings in the *Faisal* case, he could have directly intervened using his powers to "modify the term of the appointment" under Article

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<sup>120</sup> Justice Khan was removed from the bench in 2009 for taking an oath under the Provisional Constitution Order of 2007 issued by Musharraf to dismantle the Supreme Court under Chief Justice Iftikhar Muhammad Chaudhry. Once Chief Justice Chaudhry was restored in 2009, he initiated proceedings against the judges who took that oath. Justice Khan apologized before the Supreme Court and was appointed an ad hoc judge serving on the shariat appellate bench of the Supreme Court from 2010-2011, and then reappointment to the Federal Shariat Court.

<sup>121</sup> The Act was passed on June 5, 1991.

<sup>122</sup> U.S. Embassy, "One Year after the Sharia Act, Creeping Islamization Continues," Confidential, Islamabad, June 8, 1992, <http://wikileaks.org/cable/1992/06/92ISLAMABAD8548.html>.

203C(4B) and remove Chief Justice Rahman from the Federal Shariat Court before he delivered the judgment. Instead, on November 11, 1991, President Khan extended Chief Justice Rahman's term, due to expire on November 16, 1991, for another year.<sup>123</sup> Taking the term extension as the president's vote of confidence in the face of the prime minister's resistance, Chief Justice Rahman delivered the judgment in the *Faisal* case on November 14, 1991, declaring the interest provisions of 23 laws un-Islamic. The following subsection elaborates on Chief Justice Rahman's opinion.

#### **4.1 Mahmood-ur-Rahman Faisal v. Ministry of Law (1991)<sup>124</sup>**

Before giving the Court's opinion on the substantive questions raised in the case, Chief Justice Rahman recounted the entire history of the struggle to outlaw riba in Pakistan. He also described the proceedings – noting the arguments of the bankers, economists, lawyers, and 'ulama who appeared before the court and responded to a questionnaire. The opinion was written in English, used Ahmed Ali's translation of the Qur'an, and quoted extensively from Arabic and Urdu sources. This section analyzes the substantive portion of Chief Justice Rahman's opinion. I demonstrate how the doctrinal debates presented earlier in this chapter manifested in his opinion and show the diverse range and style of his legal argumentation and analysis. The outcome, of course, was predictable.

##### ***Inadmissible Positions***

In the course of the proceedings, counsel for the National Bank of Pakistan and State Life Insurance Corporation, Khalid M. Ishaque, argued that bank interest does not come under the definition of riba. In support, he submitted a brief stating that Egyptian and Syrian scholars such as 'Abduh, Rida, al-Sanhuri, and al-Dawalibi consider bank interest permissible. However, instead of providing the primary sources, Ishaque submitted a secondary source into the record, consisting of portions of a book authored by Nabil Saleh called *Unlawful Gain and Legitimate Profit in Islamic Law*.<sup>125</sup> Chief Justice Rahman dismissed the brief on the grounds that, "unless and until the exact writings of the great Imams or jurists are laid before us by the counsel we are unable to place any reliance on the secondary source of the said Nabil."<sup>126</sup> But Chief Justice Rahman also stated:

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<sup>123</sup> Ministry of Law and Parliamentary Affairs, No. F. 10 (7)/90-LR (Islamabad, November 11, 1991), Gazette of Pakistan, Extraordinary, November 13, 1991, III, 1433.

<sup>124</sup> As the Federal Shariat Court may review laws on the petition of a citizen, Dr. Mahmood-ur-Rahman Faisal is a frequent petitioner before the Federal Shariat Court, and the namesake for a number of leading judgments.

<sup>125</sup> See Nabil A. Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking* (Cambridge, U.K.: Cambridge University Press, 1986).

<sup>126</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 43.

So far as the views of [‘Abduh and Rida], as referred to by the learned counsel in his Note, are concerned they are not supported by their texts. The lecture of [al-Dawalibi] as referred to by him has also not been supplied. In any case we do not subscribe to the view of [al-Dawalibi] said to have been stated by him in a lecture, alleged to have been delivered by him in 1951, as stated by Nabil.<sup>127</sup>

This suggests that Chief Justice Rahman at least knew of Rida’s writings even if Ishaque did not submit them. The divergence between Chief Justice Rahman and Ishaque’s interpretations of Rida can then be explained based on the fact that Rida’s argument was not that riba in lending is permissible in general. Rather, Rida had argued that the ‘ulama can declare that riba in lending is permissible when there is a general need so long as riba in refinancing can be avoided. In contrast, Chief Justice Rahman did not find any need for riba in lending. As evident in the Council of Islamic Ideology’s report, he considered riba in lending an injustice, even when the purpose of the loan was commercial.

Insofar as Nabil Saleh’s description of al-Dawalibi’s lecture was concerned, contrary to what Chief Justice Rahman implied, the argument was not hearsay. The lecture was delivered at a conference on Islamic law in Paris in 1951 and described in al-Sanhuri’s magnum opus *al-Masadir al-Haqq* circa 1954.<sup>128</sup> Moreover, al-Dawalibi was not an unknown figure in Pakistan, having spent six months in Islamabad during 1978, advising the Council of Islamic Ideology during the Zia regime. In 1988, al-Dawalibi revised and published his 1951 lecture in *al-Dirasat al-Islamiyya*,<sup>129</sup> the Arabic journal of the Central Institute of Islamic Research in Pakistan.<sup>130</sup> While it is certainly possible that Chief Justice Rahman was unfamiliar with al-Dawalibi’s position, it is also conceivable that he was using the adversarial process to his advantage. In the adversarial system, the burden of producing evidence and legal authority in support of an argument is on the party raising the argument. Therefore, Chief Justice Rahman could demand that Ishaque produce credible authority in support of his positions. However, the Federal Shariat Court also had considerable inquisitorial powers, such as the Court’s suo motu powers and use of jurisconsults for expert opinions, but Chief Justice Rahman chose not to use the Court’s resources to obtain any primary sources.

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<sup>127</sup> Ibid.

<sup>128</sup> ‘Abd al-Razzāq al-Sanhūrī, *Maṣādir al-Ḥaqq fī al-Fiqh al-Islāmī: Dirāsa Muqārana bi al-Fiqh al-Gharbī* 6vols. (Cairo, Egypt: Jāmi‘at al-Duwal al-‘Arabiyya, 1954), 3:227-49.

<sup>129</sup> Ma‘rūf al-Dawālībī, "Da‘wa li-Takyīf al-Maṣārif al-Tijāriyya al-Hāqira ‘alā Ahkām al-Muḍāraba wa al-Qirād fī al-Sharī‘a al-Islāmiyya," *al-Dirāsāt al-Islāmiyya* 23, no. 4 (1988). See also M. Umer Chapra, "The Nature of Riba in Islam," *Journal of Islamic Economics and Finance* 2, no. 1 (2006).

<sup>130</sup> By then, the Institute was renamed Islamic Research Institute and relocated from Karachi to Islamabad. As I have described earlier, Tanzil-ur Rahman was associated with the Institute since the 1960s.

Less tenably, Ishaque also stated that the Jama'at chief Mawdudi, the Deobandi grand jurist Shafi, the Indian scholar-politician Abul Kalam Azad,<sup>131</sup> and the Syrian scholar Wahba al-Zuhayli also support bank interest and submitted copies of their writings into the record.<sup>132</sup> While Ishaque did not articulate how the writings support bank interest, he was probably drawing upon the commentaries of these scholars on Qur'anic verses that deal with riba in the context of loans to the poor. In response, Chief Justice Rahman simply stated that these writings actually do not support Ishaque's point.<sup>133</sup> Furthermore, the government's counsel, S. M. Zafar, submitted an article authored by a certain Andrew Cunningham, titled "Islamic Banking and Finance: Prospects for the 1990s," that described the Egyptian grand imam of the Azhar al-Tantawi's fatwa allowing interest on Egyptian savings certificates.<sup>134</sup> But Chief Justice Rahman dismissed the fatwa as a solitary opinion, noting that Cunningham's article also states that the Egyptian 'ulama oppose the fatwa. While Ishaque and Zafar were unprepared in terms of providing original sources and articulating their positions, Chief Justice Rahman also did not have patience for their arguments and did not discuss their points in the substantive portion of his judgment. In 2002, the Supreme Court would use this lack of engagement as a pretext for sending the case back to the Federal Shariat Court for review.

### ***Lexical and Juridical Meaning of Riba***

The distinction in modern English between interest as something lawful and usury as unjust or excessive complicates the meaning of the term riba in Qur'anic translations. Against this backdrop, Chief Justice Rahman quoted a series of Qur'anic verses that use the word riba in various forms outside the context of lending and argued that the literal meaning of the word riba is "increase."<sup>135</sup> Then he defined the technical meaning of the Arabic term riba as "an addition, however slight, over and above the principal" attributing it to E.W. Lane's *Arabic-English Lexicon*,<sup>136</sup> and stated that the authoritative Arabic lexicons affirm this meaning.<sup>137</sup> After defining the Arabic term riba as the English term interest, he argued that the English term interest is also understood as the Arabic

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<sup>131</sup> Azad was a notable Indian scholar and Indian National Congress leader. For his discussion on riba, see the relevant verses in Abū al-Kalām Aḥmad, *Tarjumān al-Qur'ān*, 3 vols. (Lahore, India: n.p., 1931).

<sup>132</sup> al-Zuhayli is a notable Syrian scholar and the author of a famous work called *al-Fiqh al-Islāmī wa Adillatuh*. For his discussion on riba, see Wahba al-Zuhayli, "The Juridical Meaning of Riba," in *Interest in Islamic Economics: Understanding Riba*, ed. Abdulkader Thomas (New York, N.Y.: Routledge, 2006).

<sup>133</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 43.

<sup>134</sup> See Andrew Cunningham, "Islamic Banking and Finance: Prospects for the 1990s," *Middle East Economic Digest: Industry Perspective* 4, no. 4 (1990).

<sup>135</sup> Quoting Qur'an 22:5, 2:276, 30:39, 23:50, 2:265, 13:17, 26:18, 69:10, 16:92.

<sup>136</sup> To be precise, though, Lane does not use the explanatory clause "however slight." See Edward William Lane, *Arabic-English Lexicon* (London, U.K.: Willams & Norgate, 1863), 1:1023.

<sup>137</sup> Referencing Isfahānī's *Mufradāt al-Qur'ān* and Zubaydī's *Taj al'Arūs*.

term *riba*, referencing F. Steingass's *English-Arabic Dictionary*.<sup>138</sup> Lastly, Chief Justice Rahman placed the definition of *riba* in the context of Jewish law and argued that the term *riba* has the same meaning as the Hebrew word "neshec," which consists of any gain in lending money, goods, or property, referencing Exodus 22:36 and Leviticus 25:36.<sup>139</sup>

After exploring the lexical meaning of the term *riba*, Chief Justice Rahman turned to the juridical meaning of the term. He argued that *riba* is "that excess amount which a "Creditor" settles to receive/or recover from his "Debtor" in consideration of giving time to the said debtor for re-payment of his loan."<sup>140</sup> Chief Justice Rahman then surveyed Qur'an commentaries of premodern exegetes al-Tabari and al-Razi,<sup>141</sup> and the contemporary scholar Mawdudi, legal exegesis works of Ibn al-'Arabi and al-Jassas,<sup>142</sup> hadith commentary of Ibn Athir,<sup>143</sup> and the Hanafi legal manual of al-Marghinani to argue that his definition is consistent with such works.

Next, Chief Justice Rahman turned to common law, quoting a 1943 Madras High Court judgment that stated, "[t]he excess over the original advance is certainly the compensation which the creditor gets for lending his money for the particular period. The fact that it is not described in so many words as interest will not alter its character."<sup>144</sup> He grounded this interpretation in the common law manual, Halsbury's *Laws of England*, stating that, "[i]nterest when considered in relation to money denotes the return of consideration or compensation for the use of retention by one party of a sum of money or other property belonging to another."<sup>145</sup>

Before defending his position on *riba*, Chief Justice Rahman gave his legal definition of *riba* in the following words:

On a careful study of several forms of commercial activities and credit transactions, prevalent among Arabs during the period of [the] Holy Prophet a transaction which contains [an] excess or addition over and above the principal amount of loan, which is predetermined in relation to time or period to be conditional on the payment of that pre-determined

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<sup>138</sup> See F. Steingass, *Arabic-English Dictionary* (London, U.K.: Crosby Lockwood and Sons, 1884). Justice Tanzil-ur Rahman referenced a version published in Lahore in 1979.

<sup>139</sup> Both of these sources support the definition of the word as any increase, though they are also limited in scope to lending to the poor among the Jews.

<sup>140</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 62.

<sup>141</sup> Quoting from *Tafsīr al-Ṭabarī* and *al-Tafsīr al-Kabīr*.

<sup>142</sup> Quoting from each author's *Aḥkām al-Qur'ān*.

<sup>143</sup> Referencing *Kitāb al-Nihāya fī Gharīb al-Ḥadīth wa al-Āthār*.

<sup>144</sup> See *Edupuganti Pitchayya v. Gonuguntla Venkata Ranga Row*, 1944 AIR Madras 243.

<sup>145</sup> This quote came directly from *ibid*.

excess or addition, payable to the creditor (such a transaction containing the said elements) constitutes Riba and any sale, transaction or credit facility, in money or in kind, has been considered to be a transaction of Riba...<sup>146</sup>

### ***Qur'an on Riba***

To elaborate the technical meaning of riba, Chief Justice Rahman quoted verses from four chapters of the Qur'an. First, he quoted 2:275-276, 278-281, which include the most elaborate Qur'anic treatment of riba and the grounds for Rida's definition of riba:

Those who live on usury will not rise (at Resurrection) but like a man possessed of the devil and demented. This is because they say that trading is like usury. But trade has been sanctioned and usury forbidden by Allah. Those who are warned by their Lord and desist will keep (what they have taken of interest) already and those who revert to it again are the residents of Hell where they will abide for ever.

Allah takes away (gain) from usury, but adds (profits) to charity: and God does not love the ungrateful and unjust...

O believers, fear Allah and forego the interest that is owing if you really believe.

If you do not, beware of war on the part of Allah and His Apostle. But if you repent, you shall keep your principal. Oppress none and no one will oppress you.

If a debtor is in want, give him time until his circumstances improve, but if you forego (the debt) as charity, that will be to your good, if you really understand.

Have fear of the day when you go back to Allah. Then each will be paid back in full his reward and no one will be wronged.

Second, he quoted 3:130, the grounds for Fazlur Rahman's argument:

O you, who believe, do not practice usury, charging doubled and redoubled (interest): but have fear of Allah: you may well attain your goal.

Third, he quoted 30:39, comparing interest and charity:

What you invest at usury in order to increase your capital on other people's wealth, does not find increase with Allah; yet what you give in alms and charity, seeking Allah, will be doubled.

Last, he quoted 4:160-161, about interest and the Jews:

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<sup>146</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 64.

Because of the wickedness of some among the Jews and because they obstructed people from the way of Allah, We forbade them many things which were lawful for them; And because they practiced usury although it had been forbidden to them, and for usurping others' wealth unjustly. For those who are unbelievers among them We have reserved a painful punishment.

To explain how the Qur'an commentators interpret these verses, Chief Justice Rahman drew mainly from contemporary sources. Cognizant of the fact that many Egyptian (not to mention South Asian) scholars had reinterpreted *riba*, he started with a commentary commissioned by the Egyptian Supreme Council of Islamic Affairs, that defined *riba* as "prevalent among Arabs in the pre-Islamic era and that is the increase in loans in lieu of period of time (granted to the debtor for repayment of loan), and that is unlawful ... whether it (*riba*) be less or more."<sup>147</sup> He then quoted the Syrian scholar Muhammad 'Ali al-Sabuni (b. 1930) to confirm this point.<sup>148</sup>

To counter the argument that *riba* is necessary in the contemporary economy, Chief Justice Rahman quoted a lengthy excerpt from the Qur'an commentary of Sayyid Qutb (1906-1966), the political theorist of the Muslim Brotherhood, arguing that *riba* and Islam cannot co-exist since *riba* destroys the moral fabric of the society. In particular, he quoted:

[God] cannot declare anything impermissible that is necessary for the progress and development of human life. Furthermore, it is not possible for a demented and harmful thing to become necessary for human life. The notion that interest is essential for economic development is the outcome of a false and demented propaganda.<sup>149</sup>

Chief Justice Rahman concluded this portion of the opinion by making references to the commentaries of Mawdudi and Shafi as well.

### ***Hadiths on Riba***

After describing the Qur'anic sources on *riba*, Chief Justice Rahman quoted some illustrative hadiths on the topic, emphasizing that these hadiths are only a handful of the reports on the subject and noting that Shafi's book gives 47 such hadiths. He quoted from Malik's *Muwatta*:

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<sup>147</sup> Referencing *al-Muntakhab fī Tafsīr al-Qur'ān al-Karīm*.

<sup>148</sup> Referencing *Tafsīr Āyāt al-Aḥkām*.

<sup>149</sup> Referencing *Tafsīr fī Zilāl al-Qur'ān*. Qutb was convicted in a plot to assassinate the Egyptian president Gamal Nasser, tortured in prison, and hanged to death. Showing that he held the political struggles of Qutb in high regard, Chief Justice Rahman appended martyr (*shahīd*) to Qutb's name as well as the prayer "may Allah have His infinite Mercy on his soul[.]" *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 66.

Zaid b. Aslam reported that interest in pagan times was of this nature: When a person owed money to another man for a certain period and the period expired, the creditor would say: You pay me the amount or pay the interest. If he paid the amount, it was well and good, otherwise the creditor increased the loan amount and extended the period for payment again.

He also quoted the widely used definition of *riba* from al-Bayhaqi's *Sunan* that, "[a] Companion of the Prophet, Fudalah b. Ubayd, said that every loan from which some profit accrues to the creditor is one of the forms of *riba*[" Furthermore, he quoted the Prophet's last sermon that showed that interest was declared impermissible not just prospectively, but also retrospectively, stating that, "Allah has given His Commandment totally prohibiting interest (*Riba*). I start with the amount of interest which people owe to Abbas and declare it all cancelled." Chief Justice Rahman would later use this notion of retrospectively banning *riba* to declare that the protection for pre-existing loan obligations in Section 19 of Sharif's Enforcement of Shari'ah Ordinance was also un-Islamic.

### ***Excessive Interest Argument***

Chief Justice Rahman also considered the argument most notably attributed to his mentor at the Central Institute, Fazlur Rahman. However, Chief Justice Rahman did not mention Fazlur Rahman's name, perhaps to avoid reminding his audience of his association with the "atheistic" professor that could delegitimize him in many circles. He argued that those who take the position that *riba* means doubled and redoubled interest fail to understand the other verses on the subject. Explaining the doubling verse, Chief Justice Rahman argued that the phrase doubling and redoubling (*aḍ'āfa muḍā'fa*) is a metaphor for the aggravated form of *riba* that was prevalent in pre-Islamic Arabia, not the literal definition of the term *riba*. Next, Chief Justice Rahman underscored that the early Muslims understood *riba* as any increase, despite or perhaps because of the fact that Fazlur Rahman conceded this point anyway:

If the meaning, extent and application of [the] *riba ordinance* of the Holy Qur'an is restricted to its being doubled and redoubled..., it goes directly against the historical evidence [that] existed throughout the Muslim civilization that the whole interest system was banned and declared unlawful.<sup>150</sup>

Chief Justice's use of the formulation "*riba ordinance*," which he did not use anywhere else in the entire judgment, is suggestive of the fact that he was in conversation with his former mentor who used this uncommon formulation for the Qur'an's legal commands.<sup>151</sup>

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<sup>150</sup> Ibid., 73 (emphasis mine).

<sup>151</sup> To be sure, the English version of Fazlur Rahman's article on *riba* using the term "*riba ordinance*" was a translation but under the supervision of Fazlur Rahman. Furthermore, Fazlur Rahman often used the term "*ordinance*" to talk about Qur'an's commands in his own English writings.

Next, Chief Justice turned to Fazlur Rahman's central argument. But instead of using Fazlur Rahman's name, Chief Justice Rahman stated that "some modernists" argue that the ratio legis of 3:130 is doubling or redoubling. Drawing from 2:279, he argued that the ratio legis is exploitation. To elaborate this meaning using 2:278, Chief Justice Rahman stated that, "the unequivocal command in the express words ... (remit what remains of riba) leaves no room for doubt that whatever is involved by way of interest, whether big or small, simple or compound, doubled or redoubled, in whatever form or kind, is ordered to be remitted..."<sup>152</sup> Chief Justice Rahman concluded that the term riba is used in the Qur'an in unqualified terms, and a small percentage of interest is prohibited just as much as an exorbitant amount.

### ***Production Loans Argument***

In the course of the *Faisal* proceedings, counsel for the government, S. M. Zafar, had taken Phulwarwi's position that riba only includes consumption loans, not commercial or production loans. In his judgment, Chief Justice Rahman engaged with Phulwarwi directly and explained that according to Phulwarwi the Qur'an's use of the term "al-riba" with the definite article "al-" makes the term particular to the exact form of riba practiced among pre-Islamic Arabs. Since, according to Phulwarwi, production loans were not used among the Arabs, modern bank interest for commercial purposes is not prohibited. In response, Chief Justice Rahman gave two arguments. First, using *reductio ad absurdum*, he argued that if we accept the premise of Phulwarwi's argument, then the Qur'anic prohibitions of "al-khamr" (intoxicant) or "al-fahsha" (obscenity) with the definite article would make the terms particular to the exact form of intoxicants and obscenity prevalent before Islam, thus allowing contemporary forms of intoxicants and obscenity.<sup>153</sup>

Second, using historical examples, Chief Justice Rahman argued that the notion that there were no production loans in pre-Islamic Arabia is factually incorrect. He insisted that agricultural loans that even Phulwarwi concedes existed in pre-Islamic Arabia are just as much production loans as any commercial loan today. Next, he gave a series of conclusory examples of production loans in the Arabian cities of Mecca, Ta'if, and Najran. To support this point, he quoted passages from not just Islamic historical sources, but also contemporary authors namely M. Umar Chapra, a Pakistani-Saudi financial advisor to the Saudi government,<sup>154</sup> Abu Zahra, an "eminent Muslim Scholar" (discussed in the previous two chapters),<sup>155</sup> Abraham Udovitch, a Jewish-American "orientalist" at Princeton University (now Khedouri A. Zilkha Professor of Jewish Civilization in the Near East, Emeritus),<sup>156</sup> a certain other Fazlur Rahman, professor at

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<sup>152</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 73.

<sup>153</sup> This argument, of course, depends on taking the absurdity of the reduction for granted.

<sup>154</sup> Referencing Chapra's *Towards a Just Monetary System*.

<sup>155</sup> Referencing Abu Zahra's *Buḥūth fī al-Ribā*.

<sup>156</sup> Referencing Udovitch's *Partnership and Profit in Medieval Islam*.

Aligarh University whose work was in response to Phulwarwi,<sup>157</sup> and last but not least Mawdudi.<sup>158</sup> Based on these sources, Chief Justice Rahman concluded that, “a bank performs the same function as that of the Jews and Arab tribes in the pre-Islamic period who got capital on interest from ... people and supplied loans on interest to ... individuals as well as merchants.”<sup>159</sup>

After the historical discussion, Chief Justice Rahman drew upon common law principles of statutory construction to interpret the meaning of riba in the Qur’an:

It is an accepted principle of interpretation as also recognized in ... modern jurisprudence that if a provision of statute makes some exception, only that exception is to be taken into consideration while interpreting the main provision of law... It is also a recognized rule of modern jurisprudence that in a provision of law if an exception is made it is to be made by the same authority who is competent to make law who shall so provide in the existing provision of law.<sup>160</sup>

Using these principles, Chief Justice Rahman argued that the Qur’an prohibits riba in absolute terms and several hadiths confirm this prohibition. For someone to claim that commercial interest is excluded from this absolute prohibition, Chief Justice Rahman argued, evidence must be presented from either the Qur’an or hadiths.

After the brief detour into common law, Chief Justice Rahman returned to principles of Islamic legal interpretation. To provide evidence of the meaning of riba from the Qur’an, Chief Justice Rahman argued that the inferred meaning (*ishāra al-naṣṣ*) of 2:279, “but if you repent, you shall keep your principal” is that anything other than the principal is interest. To provide evidence of the meaning from hadiths, Chief Justice Rahman argued that the narration, “any loan that accrues a profit is riba,” is made on the authority of the fourth caliph ‘Ali and is considered by some commentators as a hadith. But instead of establishing whether this narration could definitively be attributed to the Prophet or not, Chief Justice Rahman used the narration as a sufficiently authentic hadith, focusing only on its content. He thus concluded that the definition of riba is inferred from the Qur’an and confirmed in a hadith in absolute terms.<sup>161</sup>

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<sup>157</sup> Referencing Rahman’s *Tijārati Sūd: Tārīkhī awr Fiqhī Nukta-i Nazār Say*.

<sup>158</sup> Referencing Mawdudi’s *Sūd*.

<sup>159</sup> *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 1, 84.

<sup>160</sup> *Ibid.*, 84-85.

<sup>161</sup> To emphasize this point, Chief Justice Rahman referenced a general principle from the Ottoman legal code (*Majalla al-Aḥkām al-‘Adaliyya*) stating that, “the absolute text is construed in its absolute sense, provided that there is no proof of a restricted meaning in text or indication.” *Ibid.*, 85.

### *Institutional Definitions and Consensus*

In an effort to show consensus (ijmā‘) on this definition of riba in the contemporary period, despite the many opposing viewpoints that Chief Justice Rahman discussed or chose not to discuss, he turned to institutional definitions of riba. In this regard, the first definition came from the Report of the Council of Islamic Ideology, which Chief Justice Rahman acknowledged was authored by himself. Of course, this was not a consensus in literal terms since at least one of the Council’s members, Khalid M. Ishaque, made a futile attempt to argue the point that bank interest is not riba before the Federal Shariat Court. Chief Justice Rahman quoted the following text from the Report:

The Holy Qur’an explicitly and emphatically prohibits riba. There is complete unanimity among all schools of thought in Islam that the term riba stands for interest in all its types and forms. The phraseology of the verses in which people are instructed to shun interest and the severity of the admonition administered to those who do not abide by the divine injunction in this regard leave no doubt in one’s mind that the institution of riba is wholly repugnant to the spirit of Islam.<sup>162</sup>

After producing the “consensus” in Pakistan, Chief Justice Rahman turned to showing the consensus of the ‘ulama in the entire Indian subcontinent and produced a 1989 resolution of the Islamic Fiqh Academy of India, an institution dominated by Deobandi scholars. Lastly, to demonstrate the consensus of the entire Muslim community, Chief Justice Rahman produced a 1985 resolution of the Islamic Fiqh Academy of the Organization of Islamic Countries (OIC) representing forty-three countries. Based on this discussion, he concluded: “[t]hus, there is [a] consensus of the Ummah. The question, therefore, stands foreclosed.”<sup>163</sup>

However, the government’s counsel had also produced a paper titled “Silent Consensus on Bank Interest,” based apparently on a decision of Nahda al-‘Ulama, an organization of Indonesian scholars, providing tacit approval for riba based on the juridical concept of maslaha (public interest).<sup>164</sup> The goal of the submission was to

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<sup>162</sup> Ibid., 86.

<sup>163</sup> Ibid., 90.

<sup>164</sup> The published decision uses the term “Nahgatul Ulema,” which I assume refers to Nahḍa al-‘Ulamā, more commonly transliterated as Nahdlatul Ulama or NU. While I have been unable to review the paper referenced in the decision, the following article places the submission of the government’s counsel in context. See Martin van Bruinessen, “The 28th Congress of the Nadatul Ulama: Power Struggle and Social Concerns,” *Archipel* 41 (1991): 196. In describing the 28th Congress of the NU that took place in 1989, a couple of years before *Mahmood-ur-Rahman Faisal*, the article states, “[t]he first step taken by the new board in the socioeconomic field was the establishment, a few months after the congress, of a bank – not one of the interest-free, risk-and profit-sharing “Islamic” variety but an ordinary credit and savings bank. The bank is intended to serve the credit needs of small provincial businessmen, and is expected to draw savings from the numerous NU followers who have so far kept their money under their mattresses instead of in bank deposits. Interest, as is well known, is a sensitive issue on which the ulama’s opinions are divided, but in this case most of the NU ulama silently consented. The board could, in fact, refer to a

counter the argument that there is a consensus on the impermissibility of conventional interest in the contemporary period. In response, Chief Justice Rahman outlined the meaning of *maslaha* in the juristic tradition from the 12th-century Persian scholar Abu Hamid al-Ghazali (c. 1058-1111) to the contemporary Syrian jurist Muhammad Sa'id Ramadan al-Buti (1929-2013), and argued that the concept is “applicable only when there is no direct text of the Holy Qur'an or Sunnah of the Holy Prophet in a matter.”<sup>165</sup> Calling attention to his earlier arguments from the Qur'an and hadiths, Chief Justice Rahman emphasized that the definition of *riba* is sufficiently clear and confirmed by the juristic consensus, and therefore the doctrine of *maslaha* is not applicable. In this way, he dismissed the opinion of a group of Indonesian scholars by drawing, ironically, upon consensus.

## 4.2 Questioning Credible Commitments

After the *Faisal* case, Chief Justice Rahman continued his judicial activism against interest. A three-member bench of the Federal Shariat Court, consisting of Chief Justice Rahman, Justice Abaid Ullah Khan, and Justice Nazir Ahmed Bhatti, used the *Faisal* precedent to successively strike down interest provisions in laws not covered in the case. The bench noticeably did not include any scholar judge, which was inconsistent with the Federal Shariat Court Rules. Perhaps Chief Justice Rahman considered himself a scholar judge, but even though he had the credentials as such, he was not technically appointed as a scholar judge. Nonetheless, the bench invalidated interest in provident funds,<sup>166</sup> the National Industrial Cooperative Finance Corporation,<sup>167</sup> the Cooperative Societies Act,<sup>168</sup> and the Cooperative Societies of Punjab Act.<sup>169</sup>

The emboldened Chief Justice Rahman formed another three-member bench consisting of Chief Justice Rahman, Justice Fida Muhammad Khan, and Justice Mir

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decision by an earlier NU congress allowing the interest of (state-owned) banks as well as to earlier ventures by the NU into banking.”

<sup>165</sup> The government's counsel, S. M. Zafar, had also argued that the term *riba* in the Qur'an is among the allegorical terms (*mutashābihāt*) in the Qur'an as opposed to legal commands (*muḥkamāt*). In response, Chief Justice Rahman gave an education to Zafar on the distinction between allegories and commands in the Qur'an as understood by the juristic and exegetical tradition. In rather sweeping terms, he concluded regarding *riba* that, “[t]here is no Commentator of the Holy Qur'an, no narrator of Ahadith, and no Jurist of Islamic Fiqh worth the name who has even expressed or even mentioned any doubt regarding any obscurity or ambiguity in its meaning.” *Mahmood-ur-Rahman Faisal v. Government of Pakistan*, 1992 PLD FSC 530, 96-98.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Gulzar Ahmad Khan v. Province of Punjab*, 1992 PLD FSC 535.

<sup>168</sup> *Sarwar Hayat v. Province of Punjab*, 1992 PLD FSC 537.

<sup>169</sup> *Gulzar Ahmed Khan v. Province of Punjab*, 1992 PLD FSC 538.

Hazar Khan Khoso, to strike down Section 19 of the Enforcement of Shari‘ah Act of 1991,<sup>170</sup> which provided that:

19. Fulfillment of existing obligations.

Nothing contained in this Act or any decision made thereunder shall affect the validity of any financial obligations incurred, including under any instruments, whether contractual or otherwise, promises to pay or any other financial commitments made by or on behalf of the Federal Government or a Provincial Government or a financial or statutory corporation or other institution to make payments envisaged therein, and all such obligations, promises and commitments shall be valid, binding and operative till an alternative economic system is evolved.

As I have explained above, the Act was partly the Sharif government’s attempt at pre-emptive damage control when the *Faisal* proceedings were taking place in the Federal Shariat Court. Section 19 was meant to maintain investor confidence while the Parliament and the Federal Shariat Court were talking about the elimination of riba. By invalidating Section 19, Chief Justice Rahman showed a disregard for the economic concerns of the Sharif government.

#### 4.3 Questioning International Commitments: The Fall of Tanzil-ur Rahman

Chief Justice Rahman did not stop at domestic transactions. On December 17, 1991, Dr. Mahmood-ur-Rahman Faisal, the namesake for the *Faisal* case, filed a petition in the Federal Shariat Court challenging the constitutionality of Section 18 of the Enforcement of Shari‘ah Act, which provided that:

18. International financial obligations, etc.

Notwithstanding anything contained in this act or any decision of any Court, till an alternative economic system is introduced, financial obligations incurred and contracts made between a National Institution and a Foreign Agency shall continue to remain and be valid, binding and operative.<sup>171</sup>

Chief Justice Rahman accepted the petition on February 12, 1992, along with two more petitions raising the same issue.<sup>172</sup> In his past role as the chairman of the Council of Islamic Ideology, Rahman had shown some flexibility on the question of international financial obligations. As I have noted earlier, the report of the Council encouraged Muslim countries to provide interest-free loans to each other, but stated that interest-bearing international borrowing may be necessary until the government adopts an

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<sup>170</sup> *Muhammad Ismail Qureshy v. Government of Pakistan*, 1992 PLD FSC 445.

<sup>171</sup> *Enforcement of Shari‘ah Act*, 1991 PLD CS 373.

<sup>172</sup> Shariat Petition No. 86/1 of 1991; Shariat Petition No. 5/1 of 1992; and Shariat Petition No. 6/1 of 1992.

alternative. But about a dozen years after the report of the Council, Chief Justice Rahman did not have the patience for interim measures and started hearings in the case.

The government informed the Federal Shariat Court of the magnitude of interest-bearing international financial obligations (97 billion rupees at the time) and asked for more time to provide a complete response. The Court conducted hearings through October and the government filed a response on October 28, 1992. Chief Justice Rahman completed drafting his judgment sometime in November 1992 but the Federal Shariat Court would not pronounce it. The draft judgment addressed the question, “whether or not an Islamic State is permitted in Shari‘ah to enter into interest-based transaction[s] with a non-Muslim State or any non-Muslim Organisation and incur *Riba*-based international obligations?”<sup>173</sup> Once the question was framed as such, the answer could only be no. The draft judgment declared Section 18 of the Enforcement of Shari‘ah Act of 1991, repugnant to the injunctions of Islam and gave the government one year to restructure international financial obligations in conformity with the judgment.

The government could have seen the signs of the forthcoming judgment based simply on the assignment of the petitions to a bench for consideration, not to mention the direction of the proceedings, just as it could have seen the signs of the *Faisal* case. But whereas President Khan had extended Chief Justice Rahman’s term shortly before the *Faisal* case was decided, i.e. when the Federal Shariat Court was reviewing domestic legal obligations, he did not do so this time when the Court was reviewing international legal obligations. Nonetheless, Chief Justice Rahman drafted his opinion in November and could have rendered the judgment before his second one-year term ended.<sup>174</sup> But the government most likely induced him to not pronounce the judgment before leaving the Federal Shariat Court.<sup>175</sup>

A few years later, Chief Justice Rahman published the draft judgment for its “academic value” as a book titled, *The Judgment That Could Not Be Delivered: In re: International Loan Agreements under Shari‘at Act 1991*, stating in the preface that:

[D]ue to the general tendency in Pakistan of the constraint on freedom of expression, this dissertation prepared to be pronounced as Judgment of the Federal Shariat Court is being published in its present form. The reasons

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<sup>173</sup> Tanzil-ur-Rahman, *The Judgment That Could Not Be Delivered: In re: International Loan Agreements under Shari‘at Act 1991* (Karachi, Pakistan: Royal Book Company, 1994), 15.

<sup>174</sup> The date on the later published draft was “November 1992” and his term ended on November 16, 1992, which suggests that Chief Justice Rahman had completed his opinion before his term ended.

<sup>175</sup> Ministry of Law and Parliamentary Affairs, No. F. 10 (7)/90-LR (Islamabad, November 11, 1991), Gazette of Pakistan, Extraordinary, November 13, 1991, III, 1433.

behind such an eventuality are, to my mind, not relevant here for the general reader.<sup>176</sup>

Chief Justice Rahman perhaps meant to criticize the lack of judicial independence, instead of the constraint on the freedom of expression, as he was able to publish the book. While the president eased Chief Justice Rahman out of the Federal Shariat Court, the Sharif government filed an appeal against the *Faisal* case in the Supreme Court, thereby staying the implementation of the judgment. The appeal would be purposely delayed and would not be taken up for review until a constitutional crisis in 1997, as discussed in the next chapter. With the end of Chief Justice Rahman's tenure on the Federal Shariat Court, an era of Islamic judicial review came to an end. The Rahman Court (1990-92) is comparable only to the Ahmed Court (1980-81) and the Hussain Court (1981-84) in terms of the rate of disposing shari'a review cases (see chapter 2).

## 5. Courts, Politics and Economic Policy in Perspective

The *Faisal* case provides an opportunity to reflect on four themes in the scholarship on courts in authoritarian regimes and constitutional theocracies: (1) the role of jurisdictional exclusions; (2) the political control of judges; (3) the role of courts in economic policy; and (4) the epistemology of constitutional law and secular interests. First, when political regimes enshrine religion in constitutions, they often preserve secular interests through jurisdictional exclusions. The previous chapter described how jurisdictional exclusions are not just used to protect secular interests, but may also be used to protect religious laws such as the Zina Ordinance. This chapter shows how jurisdictional exclusions, even when they are meant to protect secular interests, are often unstable. The sunset clause on the exclusion of fiscal, tax, banking, and finance laws from the jurisdiction of the Federal Shariat Court was a reflection of the Zia regime's struggle between economic pragmatism and religious idealism. But while the regime extended the jurisdictional exclusion several times, the very existence of the exclusion and each extension thereof brought attention to the incompleteness of Zia's Islamization project. Furthermore, the duration of each extension of the jurisdictional exclusion depended on the extent of the regime's reliance on religio-political parties for legitimacy. When the regime was particularly dependent on religio-political parties in the period from 1980 to 1985, the exclusion was extended for one-year terms. But when General Zia conducted elections in 1985 and developed his democratic legitimacy, he was not as much dependent on religio-political parties anymore and he extended the exclusion for a five-year term at once. However, when General Zia dissolved the Parliament in 1988, the regime turned towards religio-political parties again and ended the exclusion through the Shari'ah Ordinance – subject to ratification by the Parliament, which never happened.

Second, the political control of constitutional courts and judges ensures that constitutional doctrine does not challenge the core interests of a political regime. But political regimes are often not as cohesive as we imagine on secular positions. By

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<sup>176</sup> Tanzil-ur-Rahman, *The Judgment That Could Not Be Delivered: In re: International Loan Agreements under Shari'at Act 1991*, 144.

studying how and when political control over judges is exercised, we can understand the tensions in a political regime between secular rationality and religious ideals. In Pakistan, the president enjoyed the power to appoint and remove Federal Shariat Court judges at will. The appointment of Justice Rahman as the chief justice of the Federal Shariat Court soon after the Court was granted the jurisdiction to review fiscal, banking, tax and insurance laws shows that the president was interested in deciding the *riba* issue, though the one-year term given to Chief Justice Rahman suggests that the president was also cautious in making him the chief justice. The one-year term incentivized Chief Justice Rahman to stay within the president's "zone of tolerance" in order to obtain an extension.<sup>177</sup> In this context, the president's extension of Chief Justice Rahman's term when the Federal Shariat Court was just about to pronounce the judgment in the *Faisal* case reaffirms the notion that the president was in support of a judicial restructuring of fiscal, banking, tax and insurance laws, even though the prime minister was resistant towards such change. However, the president's commitment to the *riba* issue did not extend to restructuring international legal obligations. Therefore, when Chief Justice Rahman extended his reach to the state's international borrowing, he went outside the ruling regime's zone of tolerance and the president declined to extend his appointment, ending his term on the Court.

Third, as the economic imperative of any political regime is to foster growth, political regimes in democratic as well as authoritarian contexts establish and use courts to enforce contracts and foster investor confidence. However, one of the political imperatives of any regime in Pakistan has also been to show that its policies are Islamic. Owing to this imperative, General Ayub Khan in the 1960s argued that capitalism is Islamic and Prime Minister Zulfikar Ali Bhutto in the 1970s claimed that socialism is Islamic. In contrast, religio-political movements insisted that an Islamic economy must be based on *riba*-free banking and finance. While the Zia regime took certain executive measures to introduce a *riba*-free system, e.g. the PLS bank accounts, the regime did not allow the Federal Shariat Court to restructure banking and finance based on traditional *fiqh* doctrines. But a decade later, when the Federal Shariat Court was allowed to intervene in banking and finance, the Court not only declared the interest provisions of existing laws unconstitutional, the Court also voided the interest payments in pre-existing domestic loans and was on the verge of constraining interest payments in international loans. In this way, the Federal Shariat Court did not conform to the expected role of courts in periods of economic liberalization. Instead of enforcing contracts and fostering investor confidence, the Federal Shariat Court undermined contracts and investor confidence.<sup>178</sup>

Fourth, the global norms of constitutional law are assumed to favor secular interests. For example, the protection of property rights and economic interests is integral

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<sup>177</sup> See Lee Epstein, Jack Knight, and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government," *Law & Society Review* 35 (2001).

<sup>178</sup> In recent years, the Supreme Court of Pakistan has also played an important role in challenging deregulation, structural adjustment, and privatization. See Ghias, "Miscarriage of *Chief Justice*."

to neoliberal constitutions. However, as I have argued in the last chapter, while non-secular constitutions share fundamental features with secular constitutions, they diverge in essential respects from secular constitutions. The Constitution of Pakistan protects economic interests but also aspires to eliminate *riba* from the economy. Furthermore, the Constitution lays out an elaborate institutional structure but also declares that sovereignty belongs to God. As Justice Rahman's jurisprudence in the Sindh High Court demonstrates, judges can draw upon such constitutional provisions to advance an agenda based on religious interpretations of contract law. Judges, of course, are able to push such religious interpretations only to the extent the political regime allows them. However, political regimes also commit to religious ideals to bolster their legitimacy. Therefore, judges are often able to use the constitutional resources so long as the judgments remain within the regime's zone of tolerance.

## 6. The Custodians of Change

The juridical and judicial opinions on *riba* show how Muslim jurists thought about capitalism and injustice in the context of the doctrine on *riba*. First, Rashid Rida considered that *riba* in lending was prohibited in order to prevent *riba* in refinancing. Thus, he argued that *riba* in lending could be allowed when there is a public need, so long as *riba* in refinancing could be avoided. However, Chief Justice Rahman saw the issue from a policymaking perspective. Whereas need makes sense when a person is reacting to circumstances, Chief Justice Rahman was concerned about remaking economic structures. He saw *riba* from the perspective of Sayyid Qutb, as an inherently unjust system that could produce nothing good.

Second, Phulwarwi focused on the pre-Islamic history of Arabia to argue that production loans in a capitalist economy are inherently different from consumption loans that existed in pre-Islamic Arabia. Therefore, according to Phulwarwi, the term *riba* in the Qur'an did not cover production loans. Furthermore, under this perspective, production loans did not have the element of injustice that would place them under the rule of *riba*. In response, drawing from a range of sources, Chief Justice Rahman argued that *riba* in pre-Islamic Arabia included commercial transactions. Furthermore, Chief Justice Rahman considered the celebrated magic and the dreaded nightmare of leverage in a modern economy as essentially unjust.

Third, Fazlur Rahman used his ethical reading of the Qur'an and historical criticism of hadiths to show that *riba* only means excessive interest. In his study of the *riba* case, Muhammad Qasim Zaman argues that Chief Justice Rahman deliberately ignored Fazlur Rahman's substantive arguments and calls this phenomenon "studied silence" that demonstrates the incommensurability between the 'ulama and Fazlur Rahman.<sup>179</sup> This chapter partly affirms Zaman based on the interactions between the 'ulama, Fazlur Rahman, and Tanzil-ur Rahman in the 1960s, when certain 'ulama refused to even comment on Fazlur Rahman's works and deemed Tanzil-ur Rahman guilty by

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<sup>179</sup> Muhammad Qasim Zaman, "Religious Discourse and the Public Sphere in Contemporary Pakistan," *Revue des mondes musulmans et de la Méditerranée* 123, no. Juillet (2008).

association with Fazlur Rahman. But this chapter also shows that both Fazlur Rahman and the 'ulama largely endorsed the substance of Tanzil-ur Rahman's compendium, which demonstrates the commensurability between the two camps. Furthermore, this chapter demonstrates that Chief Justice Rahman did not ignore Fazlur Rahman's substantive arguments in the *Faisal* case. I argue that Chief Justice Rahman's analysis of the doubling argument was an unmistakable engagement with Fazlur Rahman. But Chief Justice Rahman admittedly did not engage with Fazlur Rahman's hadith analysis and Zaman's notion of incommensurability makes sense herein. Such incommensurability should also be seen in the context of the 1981-1982 *Hazoor Bakhsh* episode, whereby the legal authority of sunna and the historical authenticity of the hadith literature that Fazlur Rahman challenged were resolved in the Federal Shariat Court through the political process.

This chapter also underscores the centrality of certain non-state 'ulama such as Thanawi, Shafi, and Mawdudi as the custodians of change. Latif sent his treatise to Thanawi for an answer, Fazlur Rahman sent his article to Shafi for comment, Tanzil-ur Rahman took his works to Shafi for review, and Phulwarwi sent his work to Shafi and Mawdudi for a response. The political support of the ruling regime was not enough for such scholars. The imprimatur of the 'ulama was also a necessary component for their works to be deemed legitimate. In this way, such scholars conceded the mantle of intellectual leadership to the 'ulama. As the custodians of change, the 'ulama's responses ranged from conditional recognition in the case of Tanzil-ur Rahman, refutation in the case of Latif and Phulwarwi, and silent contempt in the case of Fazlur Rahman. In doing so, the 'ulama showed how they in fact legitimize or delegitimize discourse.

Political regimes consider the 'ulama's positions on riba as impractical. But politicians and military leaders alike have remained unable to legitimize other approaches to riba as consistent with Islam. Therefore, the only way in which political regimes have responded to the issue of riba is to delay the resolution of the matter. The Zia regime used the jurisdictional exclusion to delay the matter and the Sharif government (and later the Bhutto government) used the Supreme Court to delay the matter.<sup>180</sup> The next chapter shows that the case could not be overturned in the Supreme Court as the shariat appellate bench included the Deobandi scholar Justice Usmani and the Barelawi scholar Justice Shah. Furthermore, since Sharif came to power in 1990 playing the Islam card, the Sharif government could not easily dismiss these scholars, even if their judicial appointments were ad hoc. However, the government could apparently work with the serving chief justice to delay the appeal in the Supreme Court – until 1996.

## 7. Conclusion

In this chapter, I evaluate why the Federal Shariat Court declared interest in banking and finance as un-Islamic. I trace the history of debates on interest as Muslim jurists in the colonial and postcolonial periods confronted capitalism. While the Zia

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<sup>180</sup> Even earlier, while the elimination of riba was part of the aspirational provisions of the Constitution of 1973, the Zulfikar Ali Bhutto government never made any progress towards the goal.

regime excluded banking and finance laws from shari‘a review in the Federal Shariat Court for over ten years, the Court ordered the replacement of conventional banking with Islamic banking as soon as the exclusion ended. Instead of focusing on Chief Justice Rahman’s judicial activism per se, I argue that the decision was an outcome of a political struggle between the prime minister and the president who appointed and backed Chief Justice Rahman. The government used an appeal to delay the implementation only when the Federal Shariat Court extended its reach to the country’s international borrowing agreements.

**Table 10. Laws and Regulations Reviewed in the *Faisal* Case**

1. The Interest Act, 1839
2. The Government Savings Banks Act, 1873
3. The Negotiable Instruments Act, 1881
4. The Land Acquisition Act, 1894
5. The Code of Civil Procedure, 1908
6. The Co-operative Societies Act, 1925
7. The Co-operative Societies Rules, 1927
8. The Insurance Act, 1938
9. The State Bank of Pakistan Act, 1956
10. The West Pakistan Money Lenders Ordinance, 1960
11. The West Pakistan Money Lenders Rules, 1965
12. The Punjab Money Lenders Ordinance, 1960
13. The Sind Money Lenders Ordinance, 1960
14. The N.W.F.P. Money Lenders Ordinance, 1960
15. The Baluchistan Money Lenders Ordinance, 1960
16. The Agricultural Development Bank of Pakistan, Rules, 1961
17. The Banking Companies Ordinance, 1962
18. The Banking Companies Rules, 1963
19. The Banks (Nationalization) (Payment of Compensation) Rules, 1974
20. The Banking Companies (Recovery of Loans) Ordinance, 1979
21. The House Building Finance Corporation Act, 1952
22. The Insurance Corporation Employees Provident Fund Regulation, 1954
23. The General Financial Rules of the Central Government and Drawing and Disbursing Officers Book

## Chapter 6.

### Things Fall Apart: Rethinking Riba in the Supreme Court

#### 1. Introduction

In 1991, the Federal Shariat Court defined *riba* as any interest on debt in the *Faisal* case and declared any interest provisions of 23 laws unconstitutional, but the Sharif government joined the appeals against the *Faisal* judgment in order to prevent the judgment from going into effect. The appeals, collectively called the *Aslam Khaki* case, remained pending in the Supreme Court for eight years. But shortly after Musharraf's coup in 1999, the Supreme Court upheld the Federal Shariat Court judgment. However, the Musharraf regime joined the review petitions against the *Aslam Khaki* case in the Supreme Court. The review petitions, collectively called the *United Bank* case, were decided after the shariat appellate bench was reconstituted in 2002, and the judgment remanded the issue of *riba* back to the Federal Shariat Court for reconsideration or indefinite delay.

In this chapter, I explore the Supreme Court's delay, affirmation, reversal and remand of the Federal Shariat Court judgment on *riba* from 1991 to 2002, focusing on two questions. First, while chapter 5 showed that certain elite 'ulama serve as the custodians of change, this chapter raises the timeless question, *quis custodiet ipsos custodiet* (or who guards the custodians)? I explore this question through a comparison between two approaches to shari'a in the modern context. The first approach is based on the enduring relevance of the interpretive community of 'ulama to guard the boundaries of the school of law (*madhhab*) from not just external actors, but also the community's own members. This approach is expressed in the 'ulama's defense of the traditional meaning of *riba* as well as the 'ulama's resistance to the development of modern Islamic finance. The second approach is based on transcending the boundaries of the school to search for authority in the four Sunni schools or beyond. This approach is expressed in the development of modern Islamic finance based on eclectic opinions across the history of the four Sunni schools as well as in the Supreme Court's defense of conventional finance based on opinions from an even broader sphere. The interplay between these two approaches can produce a variety of unexpected outcomes and support secular interests.

Second, how do political regimes balance religion, economic policy, and constitutional politics under democratic and authoritarian contexts? To answer this question, this chapter evaluates the role of shari'a review in economic policy, the political control of judges, the co-optation of religious scholars, and the jurisdictional exclusion of important issues from constitutional courts. I show how shari'a review is often an element of the broader political interplay among the chief justice, the president, the prime minister, and the army chief. Furthermore, while authoritarian regimes have greater concentration of power, I argue that even authoritarian regimes have to contend with shari'a review. In particular, shari'a review asserts itself when authoritarian regimes depend on scholar judges for legitimacy but authoritarian regimes also assert control over shari'a review when religious scholars are conflicted.

This chapter is organized as follows. Section 2 traces the development of Islamic finance during the 1990s and the ‘ulama’s resistance thereto, focusing on the Deobandi scholar and Supreme Court judge Muhammad Taqi Usmani who reconciled the substance of conventional finance with the forms of Islamic contracts and developed the modern Islamic finance industry with his fatwas. Section 3 describes the political struggles among chief justices, presidents, prime ministers, and military generals that delayed the *Aslam Khaki* case in the Supreme Court from 1991 to 1999, but ultimately produced a judgment affirming the *Faisal* judgment in the Federal Shariat Court at a time when the Musharraf regime was consolidating power and depended on religious scholars for legitimacy. Section 4 demonstrates how the regime, unable or unwilling to implement the *Aslam Khaki* judgment, reconstituted the Supreme Court in 2002 and appointed scholar judges that either considered conventional banking Islamic or considered even Islamic banking un-Islamic, thus using the juristic disagreement among the ‘ulama to overturn the *Aslam Khaki* judgment in the *United Bank* case. Section 5 compares the ‘ulama’s discourse on shari‘a with the Supreme Court’s reasoning in *United Bank* to underscore the enduring relevance of the ‘ulama as an interpretive community. Section 6 provides theoretical reflections on the interplay between religion, economic policy, and constitutional politics under democratic and authoritarian regimes.

## **2. The ‘Ulama and Internal Criticism: Debates on Islamic Banking**

This section describes the emergence of the juristic framework of Islamic finance, the global rise of the Islamic finance industry, and the ‘ulama’s internal resistance to the phenomenon. The goal of providing this context is to (1) explain the conditions under which the Supreme Court considered the question of defining *riba* and replacing conventional finance with Islamic finance in 1999 and in 2002, (2) describe the internal politics of the Deobandi ‘ulama that enabled the Musharraf regime to reconstitute the shariat appellate bench of the Supreme Court without the otherwise expected resistance from Deobandis, and (3) present the jurisprudential concerns of the ‘ulama that I later compare with the Supreme Court.

### **2.1 The Emergence of Modern Islamic Finance**

In chapter 5, I showed that the ‘ulama not just considered conventional banking and finance unlawful, they also considered the Zia regime’s Islamic alternatives inadequate. However, the ‘ulama could not put forth any viable alternative to conventional banking and finance. In this context, Usmani established the Institute of Islamic Economics at his madrasa. During 1992 and 1993, Usmani conducted a series of courses at the Institute with the help of a former chief economist of the Ministry of Finance, Arshad Zaman, and the chairman of the Institute of Chartered Accountants, Sayyid Muhammad Husayn.<sup>1</sup> In the courses, Usmani presented lectures on modern economics, finance, banking, securities, and corporations to the madrasa’s students and affiliated scholars. Usmani also offered his tentative ideas for reconciling modern

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<sup>1</sup> Muḥammad Taqī ‘Uthmānī, *Islām awr Jadīd Ma‘īshat wa Tijārat* (Karachi: Quranic Studies Publishers, 2009), 5.

economics with premodern fiqh, making clear that these ideas are not his conclusive fatwas.

While Usmani did not propose to redefine riba, he offered a framework based on legal stratagems that could replicate conventional finance. The core of Usmani's framework was exploiting a distinction between bilateral contracts ('aqd) and unilateral promises (wa'd).<sup>2</sup> For instance, the concept of sale on deferred payment at a higher price in Hanafi law could be used to finance the purchase of assets, e.g. instead of paying 1 million rupees to a seller/bank to purchase a car, a buyer could agree to pay 1.5 million rupees over five years, calculating the interest rate at 8.45%. But if the buyer did not make his payments on time, the bank could not charge a late payment fee, for that would be an increase on debt and thereby riba. The bank's only remedy was judicial recourse for repossession of the secured asset and a deficiency judgment. Since judicial recourse was expensive and not the bank's first choice, the buyer faced a moral hazard as he did not have any worldly incentive (though a moral and religious obligation) to make timely payments until the bank was prepared to use its judicial remedy. In order to incentivize the buyer to make his payments on time, Usmani suggested that while the bank could not demand late payment fees in a bilateral contract of sale, the bank could require the buyer to make a unilateral promise to make a charity contribution (al-iltizām bi al-taṣadduq) upon a late payment in the amount of the otherwise late payment fee.<sup>3</sup> The charity fund could be operated by the bank and used to fund the payments of indigent buyers among other things, even though Usmani emphasized that the bank should not co-mingle the charity fund with its income.

The ingenious structure could put the charity contribution under the bank's control to fund the bank's losses without calling it a late payment fee, thereby addressing the problem of moral hazards as well as underwriting the bank's credit risk through the charity fund. However, the only issue with Usmani's solution was that the bank could not enforce the buyer's unilateral promise to make the charity contribution, as a promissor was only answerable to God after death for his promises. Usmani could not use the doctrine of reliance to allow the bank to enforce such a promise since the bank was neither the beneficiary of the promise nor suffered any harm that could be recognized without being deemed riba. But Usmani noted a solitary opinion of an early Maliki scholar Ibn Dinar that a qadi could enforce such a promise.<sup>4</sup> While even the Maliki doctrine did not accept this opinion, the Hanafi jurist Usmani used the opinion to make such a promise enforceable. From a common law perspective, a contract was defined as a promise that is legally enforceable. Therefore, lawyers did not care about how Usmani theorized contracts and promises in fiqh so long as the obligations were legally enforceable.

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<sup>2</sup> For a discussion of contracts and promises in common law, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1982).

<sup>3</sup> 'Uthmānī, *Islām awr Jadīd Ma'īshat wa Tijārat*, 176-178.

<sup>4</sup> *Ibid.*, 177-178. Referencing the Maliki jurist Imām al-Ḥaṭṭāb's (d. 1547) *Tahrīr al-Kalām fī Masā'il al-Iltizām*.

Moreover, Usmani used the distinction between contracts and promises to develop other legal stratagems to reconcile premodern fiqh and modern finance through legal arbitrage. For example, the higher price in a sale on deferred payment was criticized as equivalent to interest in a loan, but jurists defended the legitimacy of a sale on deferred payment by distinguishing between a sale and a loan. A sale was part of commerce as a seller held legal title to his inventory and assumed the risk of loss, whereas a loan was not deemed part of commerce as a lender did not assume any such risk. In the modern context, however, a seller does not want to enter the financing business. Therefore, Usmani condoned using a bank as an intermediary whereby the seller sold an object to the bank and the bank sold the object to the buyer. But a bank does not want to hold inventory. To address this problem, Usmani approved a master agreement consisting of the following transaction structure: (1) the buyer would make a promise to purchase an object from the bank that the bank did not own; (2) the bank would appoint the buyer as its agent to purchase the object from the seller in the bank's name; (3) the buyer would purchase the object in the bank's name and take physical possession; and (4) the buyer would lastly purchase the object from the bank under a contract of sale on deferred payment based on his promise to enter such a contract.<sup>5</sup> The legal title and constructive possession thus passed from the seller to the bank to the buyer but the bank did not take any risk of loss in effect as the buyer was under a promise to purchase the object from the bank.

But again, while such a promise was morally binding, could the promise be legally enforceable? According to Usmani, the buyer's promise to the bank could be made enforceable under the doctrine of reliance in fiqh, comparable to the doctrine of reliance in common law. But to enforce a promise under the doctrine of reliance, the promisee required a judicial decree upon demonstrating the harm suffered in reliance of the promise. Usmani, however, argued that judicial recourse was so expensive and time-consuming in the modern period (unlike the ideal of qadi justice) that public interest demanded that such a promise should be made enforceable per se.<sup>6</sup> Again, from a common law perspective, an enforceable promise was a contract by definition. Based on such distinctions between contracts and promises, however, Usmani also enabled a range of more complex transactions and provided the juristic framework for what is now the global Islamic finance industry.

Usmani also offered a theory of corporation based on fiqh concepts.<sup>7</sup> A modern corporation is defined by fictional personhood of the corporation as well as the limited

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<sup>5</sup> Muhammad Imran Ashraf Usmani, *Meezanbank's Guide to Islamic Banking* (Karachi: Darul Ishaat, 2002), 127-128.

<sup>6</sup> Muḥammad Taqī 'Uthmānī, *Ghayr Sūdī Baynkārī: Muta'allāqa Fiqhī Masa'il kī Tahqīq awr Ishkalāt kī Jā'iza* (Karachi: Quranic Studies Publishers, 2009), 157-160.

<sup>7</sup> Timur Kuran has recently made the provocative argument that the absence of corporations in Islamic law was partly responsible for the Middle East's stunted growth vis-à-vis Europe. Timur Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton, NJ: Princeton University Press, 2010).

liability of its owners or shareholders, among other features.<sup>8</sup> Usmani found juristic precedent for fictional personhood in concepts such as an endowment (waqf), an Islamic state's treasury (bayt al-māl), and a decedent's insolvent estate (tarka mustaghraqa bi al-dayn), arguing that each of these entities can have rights and obligations.<sup>9</sup> If we accept the fictional personhood of a corporation, Usmani argued, the limited liability of the corporation could be defended if we imagine the business as a silent partnership (muḍāraba) between the corporation and the shareholders. Under this framework, the corporation itself could be seen as the active partner (muḍārib) with management rights and unlimited liability (comparable to a general partner) and each shareholder could be seen as a silent partner or investor (rabb al-māl) with no management rights but limited liability (comparable to a limited partner). Usmani presented an example of limited liability in fiqh in the form of a slave permitted to trade ('abd ma'dhūn fī al-tijāra). In this premodern structure, comparable to the *peculium* in Roman law, the slave's profit belonged to the master but if the slave's debts exceeded the slave's value, the master was not responsible for any debt beyond the slave's value.<sup>10</sup> Usmani explained that despite being property, the slave could serve as a legal person but the owner's liability did not exceed the slave's value – thus the owner had limited liability. As he developed a tentative theory of a corporation under fiqh, Usmani also explored more complex issues in corporate law such as public companies, initial public offerings, underwriting, and securities trading.<sup>11</sup>

As Usmani's ideas matured, he conducted a conference in 1994 and invited a larger group of Deobandi scholars from across the country to present his ideas and develop consensus around them. However, certain 'ulama at the conference, notably 'Abd al-Sattar, chief jurist of the seminary Khayr al-Madaris, Multan, objected to what they considered Usmani's invalid interpretations of fiqh literature to legitimize the capitalist system and the conference ended on a sour note.<sup>12</sup> Usmani ignored this

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<sup>8</sup> The core features of a modern corporation are legal personality, limited liability, transferable shares, centralized management under a board structure, and ownership by the investors. John Armour, Henry Hansmann, and Reinier Kraakman, "What Is Corporate Law?," in *The Anatomy of Corporate Law: A Comparative and Functional Approach* (New York, NY: Oxford University Press, 2009), 5.

<sup>9</sup> 'Uthmānī, *Islām awr Jadīd Ma'īshat wa Tijārat*, 95-100. As I have noted in chapter 5, Sayyid Ahmad Khan had used the lack of fictional personhood in fiqh to argue that the interest paid under the British colonial government's promissory notes was not riba as the government was not a person.

<sup>10</sup> Under Roman law, the *peculium* consisted of assets entrusted by a master to his slave or by a father to his son. The purpose of the *peculium* was to enable the slave or the son to trade for the benefit of the master or the father respectively. However, debts and liabilities incurred by the slave or the son in such trading were payable by the master or the father respectively but only to the extent of the *peculium*. Thus a Roman businessman would invest in trade through his slave or son in order to limit his liability. See Robert W. Hillman, "Limited Liability in Historical Perspective," *Washington & Lee Law Review* 54 (1997).

<sup>11</sup> An English translation of Usmani's essay was included in Usmani, *Meezanbank's Guide to Islamic Banking*. For a more elaborate attempt to theorize corporations in Islamic law, see Imran Ahsan Khan Nyazee, *Islamic Law of Business Organization: Corporations* (New Delhi, India: Adam Publishers, 2005).

<sup>12</sup> On 'Abd al-Sattar, see Bukhārī, *Akābir-i 'Ulamā-i Deoband*, 548-549.

resistance and published his lectures as a book called “Islam and the Modern Economy and Commerce” (*Islām awr Jadīd Ma‘īshat wa Tijārat*).<sup>13</sup> In response, a certain Habibullah Shaykh, professor of hadith studies at Jami‘a Islamiyya, Clifton, Karachi, wrote a scathing critique.<sup>14</sup> While Shaykh’s critique was meant to be a scholarly essay, its title “The Juridical Rebuttal to Justice Muhammad Taqī” (*al-Radd al-Fiqhī ‘alā Justice Muḥammad Taqī*) was a subtle yet provocative challenge to Usmani’s authority as well. Inside Deobandi circles, Usmani’s name was usually taken with a combination of informal honorifics such as “the great presence” (ḥaḍrat) or “the grand jurist” (muftī-i a‘zam) based on his status by the mid 1990s as one of the most respected Deobandi scholars, his formal titles such as “our lord” (mawlānā) or “the jurisconsult” (muftī) based on his graduation from a madrasa and his traditional license to issue fatwas, and his patronym Usmani (niṣba) attributing his lineage to the clan of the Prophet’s companion and the third Muslim caliph ‘Uthman (577-656).<sup>15</sup> Shaykh dropped the informal honorifics, the formal titles, and the patronym that were meant to construct and recognize Usmani’s religious authority, pedigree, and lineage. Instead, he only used Usmani’s office as a Supreme Court judge with his given name to define Usmani as a secular judge rather than a religious scholar, calling him “Justice Muhammad Taqī.” In other words, in contrast to how Usmani’s students and biographers used his office as a judge to reinforce his authority, Shaykh used Usmani’s office as a judge to question his authority.

However, Shaykh’s critique took a while to gain traction despite ultimately being shared by a broad group of Deobandi scholars. This delay was partly due to Shaykh’s irreverent attitude towards the “grand jurist,” which was counterproductive insofar as the critique appeared personal. Since Usmani was on a pedestal, his positions were presumed reasonable, especially when many of the ‘ulama did not initially grasp either Usmani’s enterprise or Shaykh’s critique owing to the technical subject matter of business law. Moreover, the ‘ulama were resistant to exposing any internal disagreements as that would have given their critics an opportunity to say that even the ‘ulama cannot agree on what is riba. Therefore, Shaykh’s essay was written in Arabic in order to signify it as high discourse as well as to restrict its consumption to ‘ulama as opposed to the general public in South Asia. Furthermore, instead of publishing the essay, the critique was only privately circulated among Deobandi ‘ulama. Nevertheless, some ‘ulama gave fatwas against Islamic banking and finance openly. And reportedly, even the retired Chief Justice Tanzil-ur Rahman, who decided the *Faisal* case in the Federal Shariat Court, expressed his disenchantment with modern Islamic banking and finance.<sup>16</sup>

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<sup>13</sup> ‘Uthmānī, *Islām awr Jadīd Ma‘īshat wa Tijārat*.

<sup>14</sup> I have been unable to find the original Arabic book, but an English translation is available as Ḥabībullah Shaykh, “A Juridical Rebuttal against Justice Mufti Muhammad Taqī Uthmaani,” <http://books.themajlis.net/book/print/603>. Furthermore, the Arabic book is referenced at Thāqīb al-Dīn, *Islāmī Baynkarī awr Muttafiqa Fatway kā Tajziya* (Karachi: Memom Islamic Publishers, 2009), 32.

<sup>15</sup> On Usmani’s patronym, see his father’s biography in Bukhārī, *Akābir-i ‘Ulamā-i Deoband*, 208.

<sup>16</sup> Jāmi‘a ‘Ulūm Islāmiyya Banūrī Town, *Murawwaja Islāmī Baynkarī: Tajziyātī Muṭāla‘a, Shar‘ī Jā‘iza, Fiqhī Naqd wa Tabshara* (Karachi: Maktaba-i Bayyināt, 2008), 17.

Notwithstanding the resistance of some notable ‘ulama, Usmani had enough support and deference among Deobandi circles to convert his tentative ideas into fatwas.<sup>17</sup> Usmani’s grasp of the fundamentals of finance, while not enviable was still unparalleled among the ‘ulama across the Muslim world. Therefore, he established a global reputation as an expert in Islamic finance during the 1990s and was appointed a permanent member and vice chairman of the Islamic Fiqh Academy in Jeddah, Saudi Arabia, a member of the shari‘a board of the Dow Jones Islamic Market Index in the United States, and the chairman of the shari‘a boards of the Accounting and Auditing Organization of Islamic Financial Institutions (AAOIFI) in Saudi Arabia, Citi Islamic Investment Bank in Bahrain, Amana Investments in Sri Lanka, Meezan Commercial Bank in Pakistan, Saudi American Bank in Saudi Arabia, and HSBC Global Islamic Finance in the United Kingdom, among others.<sup>18</sup> Usmani thus became the chief architect of modern Islamic finance across the globe and his fatwas started serving as the gold standard to market Islamic finance products in the Sunni world.

## 2.2 The Collective Fatwa against Islamic Finance

Despite the global explosion of Islamic finance during the 1990s, resistance to Islamic banking and finance did not disappear.<sup>19</sup> And in 2008, the camp against Islamic banking decided to take the internal debate public. A group of Deobandi scholars issued a collective fatwa against Usmani’s model of Islamic banking and finance. The intellectual work behind the fatwa came from the jurists at Jami‘a ‘Ulum-i Islamiyya, Banuri Town (est. 1954), a highly regarded madrasa among the Deobandis owing to the scholarly reputation of its founder, the hadith expert Muhammad Yusuf Banuri (d. 1977).<sup>20</sup> But as the existing jurists at Banuri Town were younger than Usmani, Salimullah Khan (b. 1926) from Jami‘a Faruqiyya, Karachi (est. 1967), who was one of Usmani’s few living teachers, took charge of reining in Usmani (b. 1943).<sup>21</sup> In the traditional system of religious knowledge and authority, where a teacher commands great respect and deference, Khan’s role was symbolically important in the fatwa against his former student’s Islamic banking and finance model. Moreover, Khan was the president of the Deobandi board of education (wifāq al-madāris al-‘arabiyya).<sup>22</sup> In the absence of a formal

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<sup>17</sup> While the so-called discipline of Islamic economics had emerged in the 1960s in a bipolar world’s battle between communism and capitalism, Usmani recast Islamic economics as Islamic finance in the unipolar world’s dominant system of capitalism in the 1990s.

<sup>18</sup> His son and nephew joined a range of other Islamic financial institutions across the globe drawing from his guidance and reputation.

<sup>19</sup> This section is partly drawn from Ghias, "Juristic Disagreement."

<sup>20</sup> On Banuri, see Bukhārī, *Akābir-i ‘Ulamā-i Deoband*, 319-322.

<sup>21</sup> On Khan, see *ibid.*, 528. See also Usmani’s letter to Salimullah Khan in Thāqib al-Dīn, *Islāmī Baynkārī awr Muttafiqa Fatway kā Tajziya*, 52-63.

<sup>22</sup> Khalid Rahman and Syed Rashad Bukhari, "Pakistan: Religious Education and Institutions," *The Muslim World* 96, no. 2 (2006): 326.

hierarchy among the Deobandi ‘ulama, his position in the board of education was symbolically crucial for the fatwa’s authority.

Khan issued a circular to a group of Deobandi scholars to evaluate modern Islamic banking and finance.<sup>23</sup> Once the group made a preliminary determination that Islamic banking and finance were un-Islamic indeed, Khan summoned his student Usmani and read a prepared statement of charges against him and his framework of Islamic banking and finance but did not give Usmani an opportunity to respond.<sup>24</sup> To plead his case, Usmani sent a seemingly humble letter (that he later made public) to his teacher insisting that modern Islamic banking and finance was not his single-handed invention, rather a product of two decades of deliberation among ‘ulama across the world, most notably the Islamic Fiqh Academy in Jeddah, Saudi Arabia. However, the Deobandi-Hanafi scholars especially did not consider Arab scholars an authority, owing to the decline of the madhhab in the Arab world. As the collective fatwa’s authors later stated, “the position of the Islamic Fiqh Academy in Jeddah is in no way comparable to the standing of the great imam Abu Hanifa’s fiqh assembly. The insistence upon convincing the country’s Hanafi scholars and public upon the Academy’s authority is completely futile.”<sup>25</sup>

Finally, on August 28, 2008, a conference was convened that issued the collective fatwa against Islamic banking and finance:

In the past few years, the framework of banking practiced in some Islamic legal technical terms was evaluated in the framework of Qur’an and sunna; and along with the focus on the documents, forms, and principles of these banks, the works of great jurists were consulted. Finally, for a conclusive decision on this matter, a conference of respected scholars from the four provinces was conducted in Karachi on 28 August 2008, corresponding to 25 Sha‘ban al-Mu‘azzam 1429 on Thursday, under the chairmanship of professor of hadith Hadrat Mawlana Salimullah Khan, may his blessings endure. The leading jurists present in the conference collectively issued the fatwa that the banking associated with Islam is categorically not shari‘a-based and un-Islamic. Therefore, the contracts with these banks considered Islamic or shari‘a-based are impermissible and unlawful; and the rule about them is the same as the riba-based banks.<sup>26</sup>

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<sup>23</sup> ‘Abd al-Wāhid, *Ghayr Sūdī Baynkārī: Mawlānā Taqī ‘Uthmānī Madda Zillahu kī Khidmat mayn Hadya-i Jawāb* (Karachi: Majlis-i Nasharyāt-i Islām, 2009).

<sup>24</sup> Thāqib al-Dīn, *Islāmī Baynkārī awr Muttafiqa Fatway kā Tajziya*, 52-63.

<sup>25</sup> Banūrī Town, *Murawwaja Islāmī Baynkārī*, 354, 359.

<sup>26</sup> Jāmi‘a ‘Ulūm Islāmiyya Banūrī Town, "Murawwaja Islāmī Baynkārī awr Jamhūr ‘Ulamā kay Mawqaf kā Khulāṣa," *Bayyināt* 71, no. 9 (2008).

The collective fatwa was published in national newspapers and was included in the Deobandi board of education's periodical for distribution across the nearly 18,000 Deobandi madrasas in Pakistan.<sup>27</sup> In response to the collective fatwa, Usmani gave a fatwa that his opinions on Islamic banking and finance stand in the absence of concrete arguments from the opposing side.<sup>28</sup> Shortly afterward, Banuri Town published the book "Existing Islamic Banking" (*Murawwaja Islāmī Baynkārī*) to make the juristic case for the collective fatwa.<sup>29</sup> The critics of Islamic banking have often argued that Islamic banking holds on to Islamic contractual forms at the expense of ignoring the economic substance.<sup>30</sup> But the collective fatwa against Islamic banking was premised on the inherent interdependence between form and substance in fiqh. The fatwa's basic argument was that existing Islamic banking and finance did not have Islamic substance because it had deviated from Islamic legal forms.

In "Existing Islamic Banking," the Banuri Town scholars traced the attempts of the Egyptians (read: Salafis), Fazlur Rahman, Phulwarwi, and others to redefine the concept of riba in the 20th century and applauded the efforts of the Deobandi elders such as Banuri, Shafi, and even Usmani in defense of the traditional doctrine.<sup>31</sup> However, according to the Banuri Town scholars, Usmani's juristic framework of Islamic banking and finance had deviated from the juristic guidance of the Deobandi elders. The Banuri Town scholars argued that in order to legitimize capitalism, Usmani had disfigured several technical concepts, depended on weak (*ḍa'īf*) and abandoned (*marjūh*) opinions, authorized the practice of using rules from different schools in a single transaction without meeting the underlying juristic conditions (*talfīq muḥarram*), normalized the practice of giving fatwas from other schools (*iftā' bi madhhab ghayr*), and misappropriated Thanawi's juristic legacy – on *talfīq* and *takhayyur* – in the entire process.<sup>32</sup> While the debate between Usmani and his critics was extremely complex and layered, I present a few general themes below corresponding to aspects of Islamic banking and finance noted above.

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<sup>27</sup> Wifāq al-Madāris al-'Arabiyya, "Introduction," <http://www.wifaqulmadaris.org/intro.php> (last accessed November 26, 2014).

<sup>28</sup> Muḥammad Taqī 'Uthmānī et al., "Islāmī Baynkārī kay Bāray mayn Ayk Sawāl kā Jawāb," *al-Balāgh* 43, no. 10 (2008): 56.

<sup>29</sup> Banūrī Town, *Murawwaja Islāmī Baynkārī*. See also Banūrī Town, "Murawwaja Islāmī Baynkārī awr Jamhūr 'Ulamā kay Mawqaf kā Khulāṣa."

<sup>30</sup> See, e.g. El-Gamal, *Islamic Finance: Law, Economics, and Practice*; Haider Ala Hamoudi, "Jurisprudential Schizophrenia: On Form and Function in Islamic Finance," *Chicago Journal of International Law* 7, no. 2 (2007).

<sup>31</sup> Banūrī Town, *Murawwaja Islāmī Baynkārī*, 66-67.

<sup>32</sup> As I have noted in chapter 5, a Hanafi jurist was allowed to give fatwas based on the doctrine of the other three Sunni schools under exceptional circumstances based on a general public need. Usmani, however, was accused of normalizing such a practice rather than using it in exceptional cases.

The Banuri Town scholars argued that the enforceable promise to make a charity contribution upon a late payment is un-Islamic. They stated that the Maliki jurist Ibn Dinar's opinion, which Usmani used to make the promise of a charity contribution enforceable, is abandoned even in Maliki law and rejected as if non-existent (*matrūk kal ma'dūm*). According to the Banuri Town scholars, forcible charity in case of late payment is not charity, but purely interest in terms of shari'a, custom, logic, and law. They underscored that this charity is paid for the bank's purpose, with the bank's conditions and preferences, and under the bank's compulsions. For the Banuri Town scholars, when there was compulsion, there could be no charity, and when there was charity, there could be no compulsion. Furthermore, the Banuri Town scholars questioned the master agreement between the buyer and the bank for a sale on deferred payment (described above). They argued that the master agreement is the essence of the contract under which the bank is just an intermediary between the buyer and the seller and just providing financing on interest, not selling anything itself on deferred payment. Therefore, such a master agreement is purely based on interest and therefore un-Islamic.<sup>33</sup>

Moreover, the Banuri Town scholars rejected Usmani's theory of a corporation, considering the concept of a fictional person and its limited liability as completely un-Islamic. They questioned Usmani's use of the legal personhood of an endowment, an Islamic state's treasury, and a decedent's insolvent estate as a model for a theory of fictional personhood. According to the Banuri Town scholars, the property of an endowment and an Islamic state is God's property and the obligations of a decedent's estate are the decedent's obligations in the afterlife.<sup>34</sup> Since the concept of God and the notion of an afterlife are not fictional under Islamic doctrine, an endowment, an Islamic state's treasury, or a decedent's estate could not be used as precedents for fictional personhood of a corporation. Furthermore, the Banuri Town scholars questioned Usmani's use of the limited liability of the master of a slave permitted to trade as an example of limited liability in general. They drew upon canonical works in Hanafi law to argue that the slave acts as an agent of the master and goes beyond the scope of his agency if he incurs an unreasonable debt. Therefore, the master is not liable for any debt beyond the slave's value, but the creditors retain their claim against the slave if and when he ever becomes free (i.e. regains his complete legal capacity) and solvent.<sup>35</sup> The unstated implication was that the creditors also retain their claim against the slave in the afterlife.<sup>36</sup> Therefore, there was no fictional personhood or limited liability in the example of the slave permitted to trade. The Banuri Town scholars also derided the general notion of

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<sup>33</sup> Banūrī Town, *Murawwaja Islāmī Baynkārī*, 246.

<sup>34</sup> *Ibid.*, 122.

<sup>35</sup> *Ibid.*, 145. Referencing Ibn 'Ābidīn's *Radd al-Muḥtar* and al-Marghinānī's *al-Hidāya*. Under Hanafi law, a legal person such as a child or a slave could have the capacity to incur obligations (*ahliyya al-wujūb*) but not the capacity to satisfy claims (*ahliyya al-adā'*).

<sup>36</sup> From a theological perspective, if a debtor does not repay a debt, he remains responsible for the debt in the afterlife unless he was unable to repay due to poverty. If the debtor was unable to pay due to poverty, then the creditor is rewarded by God in the afterlife for the unpaid debt is deemed charity.

limited liability, stating that when the profits are high, the fictional person is more powerful than a real person, but when loss occurs, the fictional person dawns the shroud (kafan) of limited liability and descends into death's well, i.e. the corporation liquidates without passing the loss to the stockholders who enjoyed the profit.

The Banuri Town scholars termed the fatwa against Islamic banking and finance as a collective opinion (muttafiqa) and a majority opinion (jumhūrī), whereas Usmani's supporters called the fatwa a dissenting opinion (ikhtilāfī) to what they considered Usmani's mainstream position.<sup>37</sup> But such claims are difficult to evaluate in the absence of an objective method to measure the prestige and number of scholars on each side. The parent Deoband madrasa in India also intervened in the debate in Pakistan when it issued the following fatwa placing faith in Usmani's ability to address matters of fiqh and finance but not responding to the collective fatwa's substance:

The principles and policies and practical framework, et cetera, of the Islamic banking model established and issued by Hadrat Mawlana Mufti Muhammad Taqī Usmani, may his great shadow extend, are not before us. Therefore, it is difficult to write a conclusive opinion. Nevertheless, Hadrat Mufti Sahib [Usmani], may his shadow extend, has a deep knowledge of fiqh and fatwas, the ability to run banking in the Islamic way, and the capacity to protect the system from interest and other illegal matters. So under such circumstances the questioned model is presumed to supersede (rājih). If the local (Pakistani) scholars and jurists have disagreement over any details, then there is nothing problematic with the scholars taking reformative steps in private without publicity in the general public.

Despite the Deoband madrasa's counsel to keep the affair private, the customers of Islamic banks were already raising questions about the implications of the collective fatwa and the managers of Islamic banks considered the controversy bad for business. In response to Banuri Town's objections, Usmani published the book "Interest-free Banking" (*Ghayr Sūdī Baynkārī*) in 2009.<sup>38</sup> His supporters also produced meticulous books to defend Usmani's positions,<sup>39</sup> and scholarly rank.<sup>40</sup> Whether Usmani's defense could satisfy the Deobandi critics of Islamic banking and finance remains to be seen.<sup>41</sup>

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<sup>37</sup> *Islāmī Baynkārī awr 'Ulamā: Ikhtilāfī Fatway par Ahl-i 'ilm wa Fikr kay Tabṣaron kā Majmū'a*, (Karachi: al-Afnān Publisher, 2009).

<sup>38</sup> 'Uthmānī, *Ghayr Sūdī Baynkārī*.

<sup>39</sup> Thāqib al-Dīn, *Islāmī Baynkārī awr Muttafiqa Fatway kā Tajziya*.

<sup>40</sup> 'Abd al-Ra'ūf, *Islāmī Baynkārī par Akābir 'Ulamā mayn Ikhtilāf: Chand Uṣūlī Bātayn awr Uṣūlī Ḥal* (Multān: Idāra-i Tālīfāt-i Ashrafiyya, 2009).

<sup>41</sup> For a recent response to 'Uthmānī, see Muḥammad Sharīf, *Muftī Taqī 'Uthmānī kī Taṣnīf Ghayr Sūdī Baynkārī kā Jā'iza* (Karachi, Pakistan: Iqbal Book Center, 2010).

Unlike Shaykh's early criticism of Usmani whereby he directly questioned Usmani's authority, the Banuri Town scholars were more strategic as they addressed Usmani with honorific terms such as the great presence, our lord, and the grand jurist, while arguing in the same sentence that his jurisprudence is flawed at the most elementary level. Noticing the sarcasm embedded in the respectful terms, Usmani responded with equally effective style:

When, for some reason, the minds of these young *scholars* [of Banuri Town] are convinced about an elderly *student* [Usmani] that after studying fiqh for half a century he is unaware of even the basic principles, and he will have to be taught those things about fiqh and the principles of interpretation that even a fourth or fifth level student knows, then it is not surprising [for them] to get angry. And it is their grace if, as a concession for the addressed's age, they cover the anger with the curtain of honorifics and respect, and only rely on using metaphors, saying things between the lines, and employing satire.<sup>42</sup>

While much of the public developments took place after *United Bank* (2002) and are still unfolding as of this writing, I argue in Section 4 that the underlying currents manifested in the collective fatwa explain why Musharraf would appoint a Deobandi scholar Khalid Mahmud as one of the scholar judges on the Supreme Court in 2002 to review and overturn his fellow Deobandi scholar Justice Usmani's decision.

### **3. *Aslam Khaki*: Judicial Politics under Democratic Governments (1991-1999)**

This section explores the post-*Faisal* judicial politics over *Aslam Khaki* during the so-called democratic decade in Pakistan. As the shariat appellate bench is a bench of the Supreme Court, the politics over shari'a review is part of the Supreme Court's judicial politics vis-à-vis the ruling regime. When a timely appeal is filed in the Supreme Court against a Federal Shariat Court judgment, the judgment does not go into effect until the appeal is decided.<sup>43</sup> This constitutional design enables the Supreme Court and the political regime to control the direction of shari'a review. The chief justice can use his bench formation and case assignment powers to either not form the shariat appellate bench or not assign a particular appeal to the bench. By the same token, the chief justice can use his bench formation powers to form the shariat appellate bench in a manner that determines the outcome of the case and assign a particular appeal in a manner that expedites the matter. Thus, the chief justice plays a central role in shari'a review, whether or not he is a member of the shariat appellate bench. However, the politics of a chief justice under democratic regimes is often based on the complex interplay between the president, the prime minister, and the chief justice, with the military occasionally playing

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<sup>42</sup> 'Uthmānī, *Ghayr Sūdī Baynkārī*, 12-13 (emphasis mine).

<sup>43</sup> Under Article 203F(1), a party to a proceeding can file an appeal against a Federal Shariat Court judgment within 60 days of the judgment, but the federal government or a provincial government can file an appeal within six months.

a decisive role in the background. I explore the fate of the *Aslam Khaki* case, the collective appeals from the *Faisal* decision, in this political context under five chief justices of Pakistan.

**Table 11. Chief Justices of the Supreme Court, 1990-2003**

	Chief Justice	Term Start	Term End	Termination
1	Afzal Zullah	January 1, 1990	April 17 1993	Retired
2	Nasim Hassan Shah	April 18, 1993	April 14, 1994	Retired
3	Sajjad Ali Shah	June 5, 1994	December 2, 1997	Dismissed
4	Ajmal Mian	December 23, 1997	June 30, 1999	Retired
5	Saeed-uz-Zaman Siddiqui	July 1, 1999	January 26, 2000	Dismissed
6	Irshad Hasan Khan	January 26, 2000	January 6, 2002	Retired
7	Bashir Jehangir	January 7, 2002	January 31, 2002	Retired
8	Sheikh Riaz Ahmad	February 1, 2002	December 31, 2003	Retired

### 3.1 Chief Justice Afzal Zullah

Justice Afzal Zullah was appointed as the chief justice of the Supreme Court under the principle of seniority in 1990 by President Ghulam Ishaq Khan during Prime Minister Benazir Bhutto's first government. Before his appointment as chief justice, Justice Zullah served as the chairman of the shariat appellate bench of the Supreme Court from 1982 to 1990. Soon after Chief Justice Zullah's appointment, President Khan dismissed the Bhutto government under Article 58(2)(B) in August 1990. The Supreme Court upheld President Khan's decision to dismiss the government but the freshman Justice Sajjad Ali Shah, who would soon become the chief justice despite his lack of seniority, wrote a dissenting opinion.<sup>44</sup>

In the November 1990 elections, Nawaz Sharif came to power. During the Sharif government, Chief Justice Zullah recommended the appointment of the retired Justice Tanzil-ur Rahman as the chief justice of the Federal Shariat Court to President Khan, which predictably led to the *Faisal* judgment (see chapter 5). However, there was considerable domestic and international resistance to the implementation of the judgment, resulting in over 65 appeals including the Sharif government's appeal against the judgment in the Supreme Court. In this climate of resistance, Chief Justice Rahman's tenure ended on the Federal Shariat Court before he declared the state's foreign loans un-Islamic, despite completing hearings and drafting a judgment to that effect. Notwithstanding the fact that Chief Justice Zullah enabled the *Faisal* judgment in the Federal Shariat Court, he did not assign the *Aslam Khaki* case to the shariat appellate bench of the Supreme Court as the bench included scholar judges such as Justice Usmani and Justice Shah who were expected to uphold the *Faisal* judgment. However, the exact

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<sup>44</sup> *Ahmad Tariq Rahim v. Federation of Pakistan*, 1992 PLD SC 646, Shah, J., dissenting.

reason behind Chief Justice Zullah's apparent cooperation with the government remains unclear.

### **3.2 Chief Justice Nasim Hassan Shah**

Chief Justice Zullah retired from the Supreme Court in 1993 and Justice Nasim Hassan Shah became the chief justice of the Supreme Court under the principle of seniority. Like Chief Justice Zullah, Chief Justice Nasim Hassan Shah had served as the chairman of the shariat appellate bench prior to becoming the chief justice. During the short tenure of Chief Justice Nasim Hassan Shah from 1993 to 1994, which overlapped with both the Sharif government and the Bhutto government, he also used his power of case assignment to not assign the *Aslam Khaki* petitions to the shariat appellate bench for review.

However, Chief Justice Nasim Hassan Shah's short tenure also faced an extended constitutional crisis, which may have diverted his focus from matters such as the *Aslam Khaki* case. Soon after Chief Justice Nasim Hassan Shah's appointment, President Khan dismissed the Sharif government under Article 58(2)(b). But the Supreme Court reversed President Khan's decision and reinstated the government. Justice Sajjad Ali Shah, who wrote a dissenting opinion against Bhutto's dismissal, wrote a dissenting opinion in favor of Sharif's dismissal.<sup>45</sup> After the Sharif government's judicial restoration, tensions between Prime Minister Sharif and President Khan only exacerbated. In this context, the army chief General Kakar intervened and forced both of them to resign. In the following election, Prime Minister Bhutto came into office for the second time and managed to elect her party loyalist Forooq Leghari as the president.

### **3.3 Chief Justice Sajjad Ali Shah – Law Courts in a Glass House**

When Chief Justice Nasim Hassan Shah retired from the Supreme Court in 1994, President Leghari appointed Justice Sajjad Ali Shah as the chief justice of the Supreme Court upon the recommendation of Prime Minister Bhutto in disregard of the principle of seniority. As a chief justice essentially manages the entire Supreme Court, Bhutto wanted to appoint someone she could trust. However, the Supreme Court in the 1990s consisted of judges who entered the High Courts in the 1980s during the decade-long Zia regime responsible for hanging her father and were therefore expected to be biased against her as well. In appointing Justice Shah as the chief justice, she assumed that his dissent against Bhutto's dismissal in 1990 and his dissent in favor of Sharif's dismissal in 1993 demonstrated his political alignment towards her. Ironically, Bhutto's hand-picked President Leghari would dismiss her government in November 1996 under Article

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<sup>45</sup> *Mian Muhammad Nawaz Sharif v. President of Pakistan*, 1993 PLD SC 473, Justice Shah dissenting.

58(2)(b) and her hand-picked Chief Justice Shah would uphold President Leghari's decision in the Supreme Court.<sup>46</sup>

Furthermore, unlike Sharif's PML-N that came into power in 1990 with a coalition of religio-political forces, Bhutto's PPP came into power with the support of more secular forces. Therefore, Bhutto had greater political space to respond to the *Aslam Khaki* case while also scaling back on the judicial vestiges of the Zia regime. Unlike the professional judges on the Supreme Court, the scholar judges were ad hoc members of the shariat appellate bench who did not enjoy any security of tenure and a simple presidential notification was enough to appoint or remove them. Circa 1994, on advice of his party's leader Bhutto, President Leghari dismissed Justice Usmani and Justice Shah from the shariat appellate bench without replacing them with anyone else.<sup>47</sup> While the shariat appellate bench could still work with three professional judges appointed by the chief justice under the Constitution, though with questionable authority, Chief Justice Shah kept the bench dormant. However, the two scholar judges represented the Deobandi and the Barelawi religio-political movements, which could not be sidelined that easily. Soon after dismissing the Bhutto government, in a moment of democratic deficit, President Leghari reappointed the two religious scholars to the Supreme Court in December 1996.<sup>48</sup>

In the February 1997 elections, Prime Minister Sharif came into office for the second time with a super majority in the Parliament. Owing to Chief Justice Shah's dissent in the 1993 case that restored the Sharif government (albeit to be forced to resign not too long afterward), there was pre-existing tension between Prime Minister Sharif and Chief Justice Shah. In this context, when Chief Justice Shah working with President Leghari sought to fill five vacancies on the Supreme Court, Sharif attempted to reduce the size of the Supreme Court determined by ordinary law, adapting from the U.S. President Roosevelt's 1937 plan to increase the size of the U.S. Supreme Court determined by ordinary law.<sup>49</sup> In this conflict, Chief Justice Shah used the *Aslam Khaki*

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<sup>46</sup> See Osama Siddique, "The Jurisprudence of Dissolutions: Presidential Power to Dissolve Assemblies under the Pakistani Constitution and Its Discontents," *Arizona Journal of International & Comparative Law* 23, no. 3 (2006).

<sup>47</sup> I have not seen the notification that dismissed the two scholar judges therefore I am unable to pinpoint the exact date. But the notification is mentioned without its date in Khalil-ur-Rehman Khan et al., "Order on the Application for Withdrawal of the Appeal of the Government," in *The Supreme Court's Judgment on Riba*, ed. Khalil-ur-Rehman Khan (Islamabad, Pakistan: Shari'ah Academy, International Islamic University, 2008). The last shari'a review decision given by the two judges was in September 1993. Therefore, I conclude that the judges were dismissed circa 1994, when Leghari was the president and therefore by him. Furthermore, the two scholar judges were reappointed at the end of December 1996, which confirms that they were dismissed earlier.

<sup>48</sup> Ministry of Law, No. F. 10 (12)/96-L.R. (Islamabad, December 26, 1996), *Gazette of Pakistan, Extraordinary*, December 24, 1996, III, 2292-2293.

<sup>49</sup> President Roosevelt introduced the Judicial Procedures Reform Bill of 1937 since the conservative bloc of the Supreme Court was striking down his New Deal policies as unconstitutional.

case to his advantage. He put the case at the top of the Supreme Court's agenda to expose the inconsistency between Sharif's rhetoric of Islam and his commitment to capitalism, as the case would force the Sharif government to once again take a position against the Federal Shariat Court's judgment on riba.

The Sharif government responded to the revival of the *Aslam Khaki* case by seeking to withdraw the government's appeal, filed by the first Sharif government, and declaring its plans to implement the *Faisal* judgment.<sup>50</sup> As the Sharif government's goal was only to take the issue off the Supreme Court's agenda for the moment, the government said that it would go back to the Federal Shariat Court and seek guidance on foreign obligations, inflation, and the banking system in order to implement Islamic banking and finance.<sup>51</sup> But as the chief justice's purpose was to embarrass the government, the chief justice did not even register the petition to withdraw in the Supreme Court.<sup>52</sup> Therefore, the Sharif government filed a review petition directly in the Federal Shariat Court (just as the Zia regime had filed a review petition in the Federal Shariat Court against *Hazoor Bakhsh* while an appeal was pending in the Supreme Court). However, the Federal Shariat Court refused to hear the review petition on the grounds of the appeal pending in the Supreme Court.

In essence, the reincarnation of the shariat appellate bench and the assignment of the *Aslam Khaki* case to the bench was a demonstration of the power of the chief justice and president in relation to the prime minister. The Sharif government had contained the president's powers to some extent in April 1997 through passing the Thirteenth Amendment to the Constitution that ended the presidential power to dismiss an elected government under Article 58(2)(b).<sup>53</sup> But Chief Justice Shah formed a bench for the judicial review of the Thirteenth Amendment on the grounds that the amendment violates the basic structure of the Constitution. The judicial review of constitutional amendments on the touchstone of the basic structure doctrine was a theory in vogue in India but not recognized in Pakistan at the time.<sup>54</sup>

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<sup>50</sup> *Shariat Miscellaneous Appeal No. 8*, 1998, filed on June 30, 1997.

<sup>51</sup> Kennedy, "Pakistan's Superior Courts and the Prohibition of Riba." See also K. Ahmad, "Consensus on Riba: Real Hindrance Is the Lack of Will," *Dawn*, August 11, 1997; M. Mansoor Khan and M. Ishaq Bhatti, *Developments in Islamic Banking: The Case of Pakistan* (New York, NY: Palgrave Macmillan, 2008), 135.

<sup>52</sup> *Federation of Pakistan v. Mahmood-ur-Rehman Faisal*, 2000 PLD SC 770; Khan et al., "Order on the Application for Withdrawal of the Appeal of the Government."

<sup>53</sup> *Constitution (Thirteenth Amendment) Act*, 1997.

<sup>54</sup> In general, judicial review empowers a constitutional court to declare a duly enacted law unconstitutional if the court finds that the law conflicts with the court's interpretation of the constitution. To override the court's interpretation of the constitution, the legislator must reenact the law as a constitutional amendment. However, the basic structure doctrine developed in India in 1973, allows a constitutional court to declare even a duly enacted constitutional amendment unconstitutional if the court finds that the amendment conflicts with the basic features of the constitution as articulated by the court. See Manoj Mate, "Two Paths

The Sharif government recognized that the real power of the chief justice was in the authority of his office over bench formation and case assignment that allowed him to manipulate the Supreme Court's agenda and decisions. Otherwise, there were several judges on the Supreme Court that the Sharif government could co-opt. Therefore, the Sharif government developed a strategy to restrain the office of the chief justice. Sharif proposed a change to the Supreme Court Rules to regulate the chief justice's arbitrary power of bench formation and case assignment.<sup>55</sup> While Sharif was unable to pass any legislation to regulate the chief justice's powers, he managed to foment an insurrection inside the Supreme Court against Chief Justice Shah. A group of judges formed a rebel bench, disregarding the exclusive power of the chief justice over bench formation and case assignment, which issued a stay order against Chief Justice Shah's review of the Thirteenth Amendment.

In the midst of such constitutional confusion, Chief Justice Shah charged Prime Minister Sharif with contempt of court for his criticism of the Supreme Court inside the Parliament. When Chief Justice Shah conducted hearings against Prime Minister Sharif, a mob organized by Sharif's party PML-N stormed the Supreme Court's complex. Chief Justice Shah ordered the military to protect the Supreme Court but the army chief General Jehangir Karamat effectively supported the Sharif government and declined under procedural pretext as the order was not delivered to the military through the chain of command going through the Ministry of Defense, which of course was under Prime Minister Sharif's control.

In the context of the crisis of authority in the Supreme Court, another rebel bench was formed and declared Chief Justice Shah's appointment as chief justice void due to its violation of the principle of seniority. Ironically, while seniority was not a constitutional principle, Chief Justice Shah was responsible for making seniority the constitutional standard for elevations in High Courts in the so-called Judges Case in 1996.<sup>56</sup> The rebel bench extended the logic of the Judges Case to elevations in the Supreme Court as well. Based on the rebel bench's judgment, Sharif pressured President Leghari to issue a notification to cancel the 1994 notification appointing Shah as the chief justice. As President Leghari did not have much leverage after the Thirteenth Amendment, the Supreme Court's internal rebellion, and the military's support for the Sharif government, he resigned from office instead. Upon the departure of President Leghari, Chief Justice Shah was also forced to resign effective December 2, 1997.

### **3.4 Chief Justice Ajmal Mian – Restoring the Shariat Appellate Bench**

After Chief Justice Shah's unceremonious removal from the bench, Justice Ajmal Mian became the chief justice under the now constitutional principle of seniority. Despite

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to Judicial Power: The Basic Structure and Public Interest Litigation in Comparative Perspective," *San Diego Journal of International Law* 12 (2010).

<sup>55</sup> Shah, *Law Courts in a Glass House: An Autobiography*, Appendix 10.3.

<sup>56</sup> *Al-Jehad Trust v. Federation of Pakistan*, 1996 PLD SC 324.

the political use of the *Aslam Khaki* case in the Supreme Court to threaten the Sharif government, no actual hearings were conducted during Chief Justice Shah's tenure. However, Chief Justice Mian, a former member of the shariat appellate bench, asserted his autonomy from the Sharif government and appointed Justice Khalil-ur-Rehman Khan, Justice Wajihuddin Ahmed, and Justice Munir A. Sheikh as professional judges to work with Justice Muhammad Taqi Usmani and Justice Muhammad Karam Shah as scholar judges to decide the case. When the Barelawi scholar Justice Shah died in April 1998, Justice Mahmood Ahmad Ghazi was appointed to replace him. I present a biographical profile of each judge below to show that the case's outcome was predictable.

Justice Khalil-ur-Rehman Khan (b. 1936) obtained his B.A. (1954) and LL.B. (1956) from Punjab University and practiced law for 24 years.<sup>57</sup> In 1981, General Zia appointed Justice Khan as a judge of the Lahore High Court. In 1987, Zia also appointed him as the chairman of a board with Usmani and Ghazi as fellow members that certified the formation of business entities as silent partnerships, the so-called modaraba companies, under the Zia regime's model of Islamic finance.<sup>58</sup> Thus Justice Khan, Justice Usmani, and Justice Ghazi had a long record of collaboration on Islamic finance before they gathered on the shariat appellate bench again in 1998 to decide the *Aslam Khaki* case. In 1994, Justice Khan was expected to become the chief justice of the Lahore High Court based on the principle of seniority. However, in order to appoint a more favorable chief justice in the Lahore High Court, Bhutto (acting through President Leghari) sent Justice Khan to the Federal Shariat Court instead. He returned to the Lahore High Court as the chief justice for a brief period in 1996 but then retired and was appointed to the Supreme Court. When Chief Justice Mian appointed Justice Khan to the shariat appellate bench in 1998, Justice Khan requested the chief justice to join the bench as the chairman so that the chief justice would take complete ownership of the *riba* case.<sup>59</sup> However, the chief justice preferred to retain Justice Khan as the chairman of the bench.

Justice Wajihuddin Ahmed (b. 1938) completed his LL.B. from Sindh Muslim Law College in 1966 and a doctoral degree in law from Karachi University in 1971.<sup>60</sup> A former president of the Karachi Bar Association and the Sindh High Court Bar Association, Justice Ahmed was appointed as a judge of the Sindh High Court in 1988. In this period, Justice Tanzil-ur Rahman was also a judge of the Sindh High Court, where he was asserting the authority of High Courts to undertake shari'a review of legislation based on the Objectives Resolution and declare interest un-Islamic. Justice Ahmed

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<sup>57</sup> Lahore High Court, "Mr. Justice Khalil-ur-Rahman Khan," [http://lhc.gov.pk/new/?page\\_id=58](http://lhc.gov.pk/new/?page_id=58) (last accessed November 14, 2014).

<sup>58</sup> The board was formed under *Modaraba Companies and Modaraba (Flotation and Control) Ordinance*, 1980 PLD CS 140.

<sup>59</sup> Khalil-ur-Rehman Khan, *The Supreme Court's Judgment on Riba* (Islamabad, Pakistan: Shari'ah Academy, International Islamic University, 2008), xiv.

<sup>60</sup> Pakistan Herald, "Justice (R) Wajihuddin Ahmed," <http://www.pakistanherald.com/profile/justice-r-wajihuddin-ahmed-119> (last accessed November 23, 2014).

followed Justice Rahman's lead in declaring interest un-Islamic in cases such as *Aijaz Haroon v. Inam Durrani* and *Tyeb v. Alpha Insurance Co. Ltd.*<sup>61</sup> However, whereas Justice Rahman was indecisive about indexation, Justice Ahmed condoned the practice of compensating the creditor for loss of his money's value due to inflation. Son of a Sindh High Court chief justice, Justice Ahmed also became the chief justice of the Sindh High Court for a brief period between 1997 and 1998, and was elevated to the Supreme Court in 1998, where he was immediately placed on the shariat appellate bench.

Justice Munir A. Sheikh completed his LL.B. from Punjab University in 1962. He served as deputy attorney general during the Zia regime from 1981 to 1987, and was appointed to the Lahore High Court thereafter. After ten years on the Lahore High Court, he was appointed to the Supreme Court in 1997. Justice Sheikh's positions on *riba* are difficult to assess as he does not have much of a jurisprudential record. He joined the unanimous opinion in *Aslam Khaki* in 1999 and later joined the unanimous opinion overturning *Aslam Khaki* in 2002 but did not write an opinion in either case. Therefore, I conclude that Justice Sheikh was a passive observer on the bench and did not play any role in shaping *Aslam Khaki*.

Justice Mahmood Ahmad Ghazi (1950-2010) was a scholar judge on the bench.<sup>62</sup> Ghazi started his education at the Banuri Town madrasa but then transferred to a madrasa in Rawalpindi, where he graduated at the age of 16.<sup>63</sup> Ghazi then completed degrees in Arabic and Persian at Punjab University, learned French, and completed a Ph.D. in Oriental Learning at Punjab University in 1988. While respected among the 'ulama, Ghazi did not confine himself to Deobandi circles, and drew inspiration from the Jama'at's chief Mawdudi and the poet-philosopher Muhammad Iqbal (1877-1938). Ghazi's dissertation was on the Sanusi revivalist movement in Libya and he was a keen observer of the modern social, legal and political history of the Arab world.<sup>64</sup> This work has introduced Justice Ghazi as a young man on the legal committee of the Council of Islamic Ideology drafting the Hudud Ordinances in the late 1970s (chapter 3), as a jurisconsult before the Federal Shariat Court defending the stoning provisions in the *Hazoor Bakhsh* review in the early 1980s (chapter 4), and as Zia's advisor on religious affairs making the case to extend the jurisdiction of the Federal Shariat Court to banking and finance laws in the late 1980s (chapter 5). Ghazi was extremely prolific and among his many works was a book called "The Prohibition of Interest and the Interest-Free

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<sup>61</sup> See *Aijaz Haroon v. Inam Durrani*, 1989 PLD Karachi 304; *Tyeb v. Alpha Insurance Co. Ltd.*, 1990 CLC 428.

<sup>62</sup> *al-Sharī'a: Khuṣūṣī Ishā'at bi-Yād Dr. Mahmood Ahmad Ghazi*, 2 vols. (Multan, Pakistan: al-Sharī'a Academy, 2011).

<sup>63</sup> Federal Shariat Court, "Mr. Justice Dr. Mahmood Ahmad Ghazi," <http://federalshariatcourt.gov.pk/FJ.html> (last accessed December 7, 2012).

<sup>64</sup> See Muhammad Junaid Nadvi, "Dr. Mahmood Ahmad Ghazi (1950-2010): Life & Contributions," *Pakistaniaat* 4, no. 2 (2012).

Monetary System” (*Hurmat-i Sūd awr Ghayr Sūdī Māliyātī Niẓām*).<sup>65</sup> Such writings indicated that Ghazi would uphold the *Faisal* judgment.

Justice Usmani was the unofficial Deobandi scholar on the shariat appellate bench. He needs no introduction at this point, as this dissertation has presented Justice Usmani as a teenage madrasa graduate and an interlocutor with Phulwarwi on commercial interest in the early 1960s (chapter 5), as a Deobandi representative in the Constituent Assembly in the early 1970s (chapter 2), as a member of the Council of Islamic Ideology drafting the Hudud Ordinances in the late 1970s (chapter 3), as a judge of the Federal Shariat Court reinstating the stoning provisions of the Hudud Ordinances in the early 1980s (chapter 4), and as a high-ranking Deobandi scholar and the architect of modern Islamic finance in the 1990s (chapter 6). Justice Usmani was, of course, expected to uphold the *Faisal* judgment’s conception of *riba* and propose his model of Islamic finance as the solution.

Based on the composition of the bench, the broad contours of *Aslam Khaki* were a foregone conclusion, notwithstanding a few open questions such as indexation. Nonetheless, the shariat appellate bench sent a questionnaire to a range of financial institutions in Pakistan and across the Muslim world. In regards to the Islamic financial institutions, the questionnaire involved them in the judicial decision-making process and thereby gave them ownership in the outcome. In regards to conventional financial institutions, the questionnaire gave them a notice and an opportunity for hearing in order to prevent them from raising new issues after the decision.<sup>66</sup>

The bench conducted hearings between February 22 and July 6, 1999, during which time Chief Justice Mian retired. The *Aslam Khaki* proceedings exposed the fractures in the Sharif government. On the one hand, Sharif’s PML-N included people who did not want to disrupt conventional finance, represented by the Minister of Finance Sartaj Aziz.<sup>67</sup> On the other hand, the PML-N also included people who supported Islamic finance, represented by the succeeding Minister of Finance Ishaq Dar.<sup>68</sup> In his response to the Supreme Court’s questionnaire, Aziz defended conventional finance as not un-Islamic but noted that he is doing so in his personal capacity and not in his official capacity. The Sharif government made its case through proxies as well. As Sharif’s brother was the chief minister of the Punjab province, the Department of Information and Culture of the Government of Punjab in collaboration with the Institute of Islamic Culture, Lahore,

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<sup>65</sup> See Mahmood A. Ghazi, *Hurmat-i Sūd awr Ghayr Sūdī Māliyātī Niẓām*, 2nd ed. (Islamabad, Pakistan: Institute of Policy Studies, 1996).

<sup>66</sup> During this period, Sharif also proposed a Fifteenth Amendment to the Constitution designed to increase the prime minister’s powers to introduce legislation in the name of Islam, which passed in the National Assembly but not the Senate.

<sup>67</sup> Sartaj Aziz remained the minister of finance from February 25, 1997 to August 6, 1998, at which point he became a national security and foreign affairs adviser.

<sup>68</sup> Ishaq Dar was the minister of finance from November 7, 1998 to October 12, 1999. Dar later served as a director of Islamic Development Bank in Jeddah, Saudi Arabia.

published the translation of Phulwarwi's edited volume, *Juridical Status of Commercial Interest*.<sup>69</sup> The republication of the Phulwarwi volume in 1999, 40 years after the volume's original publication in 1959, was clearly meant to reintroduce Phulwarwi in the Supreme Court proceedings just as the Sharif government had relied on Phulwarwi in the Federal Shariat Court proceedings. As I have elaborated in chapter 5, the volume made the case that commercial interest did not exist in pre-Islamic Arabia and was therefore not covered in the meaning of *riba* as used in the Qur'an and the hadith literature. Furthermore, the book was the subject of a response from the teenage Usmani, arguing that commercial interest does not escape the prohibition on *riba* and criticizing the capitalist economic order. With the benefit of four decades of experience, Justice Usmani was much more sympathetic to commercial concerns, but only within his juristic framework of Islamic finance.

During the *Aslam Khaki* proceedings, the Sharif government was also distracted on another front. In 1999, the military under army chief General Pervez Musharraf started a campaign to occupy Kargil, a strategically significant and disputed high-mountain region under Indian control, without bringing Sharif completely on board.<sup>70</sup> In order to avert a war between the two nuclear-armed countries and address the diplomatic embarrassment created by General Musharraf, Sharif went to Washington for President Bill Clinton's mediation between India and Pakistan. The Pakistani military ultimately withdrew but the Kargil episode produced significant tensions between Prime Minister Sharif and General Musharraf, leading to the October 1999 coup.

### 3.5 Chief Justice Saeed-uz-Zaman Siddiqui – The Coup and the Judgment

After the retirement of Chief Justice Mian on June 30, 1999, Justice Saeed-uz-Zaman Siddiqui became the chief justice of the Supreme Court. Despite the fact that the hearings in *Aslam Khaki* were almost complete, Justice Khan requested Chief Justice Siddiqui, who had served as a member of the shariat appellate bench in the past, to join the bench as the chairman.<sup>71</sup> Again, Justice Khan wanted the chief justice to take ownership of the *riba* case but the chief justice declined, placing his confidence in the existing bench. The shariat appellate bench then focused on the process of writing an elaborate judgment, but before the judgment could be pronounced, Pakistan went through a regime change.

Owing to the tension between Sharif and Musharraf over the Kargil issue, the prime minister decided to use his prerogative to replace the army chief in October 1999.

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<sup>69</sup> Phulwārwi, *Islamic Law and Commercial Interest*.

<sup>70</sup> General Musharraf only brought the prime minister on board once Pakistani forces moved into the treacherous mountains during winter when the Indian military withdraws its forces as the region becomes uninhabitable. When the Indian military returned to its posts during the spring, it was caught off guard by the Pakistani forces. While the Indian military was unable to regain the region, India threatened to open the war front across the cease fire line in other parts of Kashmir or even the international border.

<sup>71</sup> Khan, *The Supreme Court's Judgment on Riba*, xiv.

However, before the new army chief could take charge, the military orchestrated a bloodless coup and General Musharraf took charge, arresting Sharif and holding the Constitution in abeyance. After the coup, the military started the process of consolidating power. Musharraf established a National Security Council and included Justice Ghazi in the Council on November 16, 1999.<sup>72</sup> Justice Ghazi's gave up his position on the shariat appellate bench to accept the position on the Council. His role was not essential on the shariat appellate bench as the contours of the *Aslam Khaki* judgment were already established, even though the judgment had not been rendered. However, his power as a member of the Council could help determine the regime's response to the forthcoming judgment. While the regime was still consolidating power, the judgment in *Aslam Khaki* was pronounced on December 23, 1999:

For the detailed reasons recorded in the three separate judgments authored by Khalil-ur-Rehman Khan, J., Wajihuddin Ahmed, J., and Muhammad Taqi Usmani, J., it is hereby held that any amount, big or small, over the principal, in a contract of loan or debt is "riba" prohibited by the Holy Quran, regardless of whether the loan is taken for the purpose of consumption or for some production activity.<sup>73</sup>

The entire Order was 46 pages,<sup>74</sup> Justice Khan's concurring opinion was 264 pages,<sup>75</sup> Justice Ahmed's concurring opinion was 53 pages,<sup>76</sup> and Justice Usmani's concurring opinion was 94 pages.<sup>77</sup> Justice Sheikh signed the Order without his own opinion. In the next subsection, I present the scope of the Order and certain features of the concurring opinions.

### **3.6 Court Order in *Aslam Khaki* (1999)**

The Order not only affirmed the Federal Shariat Court's decision, but extended the scope of the decision in four ways. First, Chief Justice Rahman's focus in the Federal Shariat Court was riba in lending. He did not deal with the notion of riba in the unequal exchange of goods (*ribā al-faḍl*) as defining such exchange as riba was not germane to evaluating any existing law. However, in order to provide a comprehensive definition of riba, the Supreme Court defined such an exchange as an aspect of riba, though the Order acknowledged that barter transactions were not relevant in the present context. However, Justice Ahmed's concurring opinion argued that such an unequal exchange goes to the heart of justice and fairness and is therefore relevant to the debate.

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<sup>72</sup> Federal Shariat Court, "Mr. Justice Dr. Mahmood Ahmad Ghazi".

<sup>73</sup> *Aslam Khaki v. Syed Muhammad Hashim*, 2000 PLD SC 225, 302.

<sup>74</sup> *Ibid.*, 302-348.

<sup>75</sup> *Ibid.*, 348-612.

<sup>76</sup> *Ibid.*, 612-665.

<sup>77</sup> *Ibid.*, 665-759.

Second, the Supreme Court expanded the scope of the Federal Shariat Court's judgment through considering government borrowing from foreign sources. As noted in the previous chapter, Chief Justice Rahman had taken up the question of international loans after the *Faisal* case and even drafted a judgment but did not render the judgment before his tenure ended. Instead, he published the judgment later as an academic treatise. But the issue of international loans was reintroduced by the Sharif government when the government sought to withdraw its appeal from the Supreme Court and obtain guidance from the Federal Shariat Court on foreign loans, indexation, and the banking system for the ostensible purpose of delaying the case during Chief Justice Shah's confrontational tenure. As the question of foreign loans was raised, the Order in *Aslam Khaki* declared that, "any interest stipulated in the government borrowings, acquired from domestic or foreign sources, is Riba and clearly prohibited by the Holy Quran."<sup>78</sup>

Third, the Supreme Court also responded to the effects of declaring interest un-Islamic on the country's fragile banking system. The Order stated that:

A variety of Islamic modes of financing has been developed by Islamic scholars, economists and bankers that may serve as a better alternative to interest. These modes are being practiced by about 200 Islamic financial institutions in different parts of the world.

These alternatives being available, the transactions of interest cannot be allowed to continue ever on the basis of necessity.<sup>79</sup>

The Supreme Court thus presented the existing Islamic financial institutions, many of which were established under the direct supervision of Justice Usmani, as a viable alternative to the country's banking system.

Fourth, the Supreme Court also engaged with the question of indexation of the principal amount to a consumer price index in order to compensate the lender for the loss of his money's value due to inflation. While the Federal Shariat Court had reviewed the debate on indexation, Chief Justice Rahman had not given a definitive judgment on the point as he did not consider the issue necessary to declaring the interest in existing laws un-Islamic. However, the Sharif government had placed the issue of indexation before the Supreme Court during Chief Justice Shah's tenure. The Order did not deal with indexation but each of Justice Khan and Justice Usmani found indexation unacceptable in his concurring opinion, while Justice Ahmed reserved judgment on indexation in his opinion.

Lastly, Justice Khan and Justice Usmani's opinions are worth outlining as certain aspects of their opinions would be raised later. Justice Khan's opinion was an elaborate treatise on riba, economics, and banking. The opinion was divided into five parts: (1) responses to the Supreme Court's questionnaire; (2) jurisdiction of the Federal Shariat

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<sup>78</sup> Ibid., 303.

<sup>79</sup> Ibid.

Court and the Supreme Court; (3) meaning and scope of riba; (4) inflation and indexation of loans; and (5) function of modern banks under shari‘a. In particular, Justice Khan’s examination of the meaning and scope of riba included an extensive engagement with the original writings of Salafi jurists such as Muhammad ‘Abduh, Rashid Rida and Muhammad Sayyid Tantawi, among many others. He also derivatively dealt with the positions of ‘Abd al-Razzak al-Sanhuri and Ma‘ruf al-Dawalibi through his analysis of Nabil Saleh’s book. As I have noted in the previous chapter, Chief Justice Rahman had refused to engage with these opinions in the Federal Shariat Court as the original writings of Rida, Tantawi, al-Sanhuri, and al-Dawalibi were not submitted to the Court. Justice Khan also directly engaged with the opinions of Phulwarwi and Fazlur Rahman. Ultimately, Justice Khan rejected the 19th/20th-century redefinitions of riba, but endorsed the contemporary development of Islamic finance.

Justice Usmani’s opinion was not as comprehensive as Justice Khan’s opinion, but was more cogently argued – the product of nearly four decades of deliberations since his first book in response to Phulwarwi. Unlike his usual pattern of writing opinions in Urdu on the shariat appellate bench of the Supreme Court, Justice Usmani wrote the opinion in English, suggesting that he understood his audience to be more cosmopolitan. Justice Usmani made an effort to refute five basic arguments in his opinion: (1) that the concept of riba in the Qur’an is ambiguous (attributable to ‘Abd al-Latif and others); (2) that riba consists of only excessive interest, not reasonable interest (attributable to Fazlur Rahman and others); (3) that riba exists in consumption loans, not in production loans (attributable to Phulwarwi and others); (4) that riba means interest in refinancing, not interest in the original lending (attributable to Rida and others); and (5) that conventional banking and finance are necessary and therefore allowed (attributable to al-Sanhuri and others). Justice Usmani engaged with each argument on its merits without always naming the argument’s source, perhaps to avoid any implicit recognition of the authority of such scholars, especially as Justice Usmani saw his opinion not just in terms of its precedential value in Pakistani courts, but also in the fiqh tradition. As expected, Justice Usmani extensively engaged with premodern juristic sources but he also used modern and even Western historical scholarship and economics works. In refuting the argument that conventional banking and finance are necessary, Justice Usmani presented the system of Islamic banking and finance that he had developed and shaped over the years as the alternative.

Thus, the Supreme Court upheld the Federal Shariat Court judgment after 8 years. Justice Khan’s elaborate opinion was later published as a book by the International Islamic University in Islamabad.<sup>80</sup> Justice Usmani’s opinion was also published as a book called *The Historic Judgment on Interest* by his madrasa and later translated into Urdu as well.<sup>81</sup> In many ways, *Aslam Khaki* was indeed a historic moment for the effort to declare interest un-Islamic, underway since Pakistan’s earliest constitutional moments but particularly since the Zia regime. Despite its significance, however, *Aslam Khaki* was

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<sup>80</sup> Khan, *The Supreme Court's Judgment on Riba*.

<sup>81</sup> Usmani, *The Historic Judgment on Interest Delivered in the Supreme Court of Pakistan*.

based on the foundation of modern Islamic banking and finance that itself was becoming controversial. The next section explains how the Musharraf regime welcomed *Aslam Khaki* at first but ultimately politically maneuvered to overturn the judgment.

#### **4. *United Bank: Judicial Politics and Authoritarian Regimes (1999-2002)***

While courts can give judgments on complex questions of law and policy, the endurance of judicial doctrine depends on the retention of judges that support the doctrine and the implementation of judicial decisions depends upon the support of the ruling regime. In this section, I describe how the scholar judges cooperated with the Musharraf regime in order to sustain their doctrinal gains in shari‘a review. While the Musharraf regime expressed its commitment to implement *Aslam Khaki*, I also show how the Musharraf regime soon abandoned the restructuring of the conventional system of banking and finance but decided to introduce a parallel system of Islamic and conventional banking and finance. However, as the scholar judges were an impediment to this strategy, the Musharraf regime was forced to reconstitute the shariat appellate bench. For replacement scholar judges, the regime carefully selected religious scholars who either considered conventional finance not un-Islamic or considered even Islamic finance un-Islamic, therefore ensuring that *Aslam Khaki* would be overturned while also minimizing the political backlash.

##### **4.1 The Oath of Allegiance: Cooperation between the ‘Ulama and the Military**

In an effort to consolidate its power, the Musharraf regime cooperated with a broad range of political forces. After appointing Justice Ghazi to the National Security Council, the regime appointed Zafar Ishaq Ansari (b. 1932) to the shariat appellate bench on January 18, 2000.<sup>82</sup> Justice Ansari held a Ph.D. (1966) in Islamic studies from McGill University and was the son of the noted constitutional expert Zafar Ahmed Ansari, respected in Jama‘ati as well as Deobandi circles. The appointment was most likely made on the recommendation of Justice Ghazi and signaled a cooperation between the military regime and the religio-political forces.

After the coup on October 12, 1999, the military regime was running the country under the Provisional Constitution Order of 1999. The Order stated that:

- (1) Notwithstanding the abeyance of the provisions of the Constitution of the Islamic Republic of Pakistan, hereinafter referred to as the Constitution, Pakistan shall, subject to this Order and any other Orders made by the Chief Executive, be governed, as nearly as may be, in accordance with the Constitution.
- (2) Subject as aforesaid, all courts in existence immediately before the commencement of this Order, shall continue to function and to exercise their respective powers and jurisdiction provided that the Supreme Court

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<sup>82</sup> Ministry of Law, No. F. 10 (3)/2000-LR (Islamabad, January 18, 2000), Gazette of Pakistan, Extraordinary, 2000, III.

or High Courts and any other court shall not have the powers to make any order against the Chief Executive or any person exercising powers or jurisdiction under his authority...<sup>83</sup>

The Musharraf regime's goal was to obtain judicial approval of the coup from the Supreme Court. Chief Justice Siddiqui was prepared to give legal cover to the coup but only so long as the military agreed to conduct elections as soon as possible and restore the democratic order.<sup>84</sup> However, the military wanted to stay in power for a longer period and restructure the Constitution before introducing "guided democracy." In the face of resistance from the judiciary, Musharraf turned to Zia's playbook and reconstituted the High Courts and the Supreme Court.<sup>85</sup>

On January 25, 2000, Musharraf issued the Oath of Office (Judges) Order of 2000.<sup>86</sup> The Order stated that, "a judge of Superior Court shall not continue to hold that office if he is not given, or does not make, Oath in the form set out in the Schedule," and such a judge shall be "bound by the provisions of this Order, the Proclamation of Emergency of the fourteenth day of October, 1999 and the Provisional Constitution Order No. 1 of 1999 as amended and, notwithstanding any judgment of any court, shall not call in question or permit to be called in question the validity of any of the provisions thereof." Using this extra-constitutional order, Musharraf removed the judges that did not want to go along with the military regime, including the chief justice and five judges of the Supreme Court.<sup>87</sup>

Of the five members of the shariat appellate bench, Justice Khan was not given the oath as he was considered sympathetic to the PML-N.<sup>88</sup> Justice Ahmed was offered the oath as he was considered apolitical but he refused take the oath under the PCO on principle.<sup>89</sup> Justice Sheikh, however, took the oath and continued on the bench. But most importantly, the two scholar judges, Justice Usmani and Justice Ansari, also took the oath and continued on the bench. The newly reconstituted Supreme Court under Chief Justice

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<sup>83</sup> *Provisional Constitution Order*, 1999 PLD CS 448.

<sup>84</sup> Khan, *Constitutional and Political History of Pakistan*, 489.

<sup>85</sup> Charles H. Kennedy, "A User's Guide to Guided Democracy: Musharraf and the Pakistani Military Governance Paradigm," in *Pakistan 2005*, ed. Charles H. Kennedy and Cynthia A. Botteron (Karachi: Oxford University Press, 2006).

<sup>86</sup> *Oath of Office (Judges) Order*, 2000 PLD CS 86.

<sup>87</sup> Saeed-uz-Zaman Siddiqui, Mamoon Kazi, Nasir Aslam Zahid, Wajihuddin Ahmed, Rashid Aziz Khan, Kamal Mansur Alam and Khalil-ur-Rehman Khan.

<sup>88</sup> After his tenure on the Supreme Court, Justice Khan would leverage his judgment in the *Aslam Khaki* case to serve as the chairman of the shari'a board of an Islamic bank. Al Baraka Bank, "Shariah Board," <http://www.albaraka.com.pk/al-baraka/shariah-board/> (last accessed November 23, 2014).

<sup>89</sup> In 2008, Justice Ahmed would leverage his 2000 refusal to take the oath under the PCO to emerge as the presidential candidate of the lawyers movement to restore the chief justice.

Irshad Hasan Khan approved the coup on May 12, 2000.<sup>90</sup> The judgment gave three years to Musharraf to restore democracy and allowed him to amend the Constitution in the meantime as needed.

This reconstitution of the Supreme Court in the early moments of the Musharraf regime offers an interesting but not surprising insight into the strategic calculus of the professional judges, the scholar judges, and the regime. Justice Khan's political commitment to the PML-N and Justice Ahmed's principled commitment to democracy came in the way of their judicial careers under the Musharraf regime.<sup>91</sup> However, Justice Usmani's professional commitment to Hanafi law did not inherently conflict with the military regime. Having just made the most historic judgment of his judicial career, he understood more than anyone else that doctrine must be guarded on the bench. The implementation of *Aslam Khaki* was expected to encounter resistance from the financial sector. Therefore, just as he had cooperated with the Zia regime, his cooperation with the Musharraf regime was not surprising.

Similarly, Justice Ghazi's commitment to shari'a did not conflict with his decision to join the National Security Council under the Musharraf regime. Whereas he was redundant on the shariat appellate bench of the Supreme Court in the presence of Justice Usmani, he could play a more important role as a member of the Council to guard the 'ulama's gains and ensure the implementation of *Aslam Khaki*. Furthermore, Justice Ghazi's replacement, Justice Ansari, whose initial appointment was made under military rule was ready to accept the regime for the chance to shape the meaning of shari'a in Pakistan. In this way, cooperation with the new military regime ensured the protection of the interests of the religio-political forces.

From the regime's perspective, the military wanted to retain any judge that did not stand in the way of the military's hold on power. But in the case of scholar judges, the oath of 'ulama such as Justice Usmani, one of the most significant Deobandi scholars, also served to establish the regime's religious legitimacy especially when Musharraf had deposed Sharif who used religion as a cornerstone of his political image. While the significance of such an oath to the regime should not be exaggerated, the oath's function may be seen in comparison with the premodern "oath of allegiance" (bay'a) of religious scholars to the caliph or the ruler after an often bloody regime change.<sup>92</sup> The premodern oath of allegiance cemented the social compact between the 'ulama and the secular power, whereby the religious scholars endorsed the legitimacy of the ruler – regardless of how the ruler came to power – in exchange for his promise to enforce shari'a according to the interpretations of the scholars. In consonance with his premodern counterparts, the "grand jurist's" oath endorsed the legitimacy of the military regime – regardless of how

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<sup>90</sup> *Zafar Ali Shah v. General Pervez Musharraf*, 2000 PLD SC 869.

<sup>91</sup> I do not wish to romanticize such judges since the judicial careers of most of the judges in the Supreme Court at the beginning of the Musharraf regime had started in the High Courts in the Zia regime.

<sup>92</sup> Feldman, *The Fall and Rise of the Islamic State*.

General Musharraf came to power – in exchange for the regime’s implicit promise to enforce shari‘a according to Usmani’s interpretations.

#### **4.2 The Sacred and the Profane: The Emergence of Parallel Banking**

As the cooperation between the ‘ulama and the Musharraf regime was meant to implement *Aslam Khaki*, the regime initially signaled a commitment to implementing the judgment. The regime formed a task force in the Ministry of Finance, a task force in the Ministry of Law and Parliamentary Affairs (under Justice Ghazi’s chairmanship), and a twelve-member Commission on Transformation of the Financial System (including Justice Usmani as a member).<sup>93</sup> But the regime was still figuring out its economic course. Soon after taking power, Musharraf had recruited a New York-based executive vice president of Citibank, Shaukat Aziz, as the finance minister of Pakistan. Aziz’s job was to implement an aggressive program of structural adjustment, deregulation, and privatization based on the Washington Consensus. The regime wanted to stabilize the macroeconomic indicators of the country that had faltered since 1998, when international sanctions were placed on Pakistan for testing its nuclear weapons.

The regime was also charting its political course. After the coup, Musharraf wanted to keep Nawaz Sharif and Benazir Bhutto out of politics. But excluding the top two political leaders meant that the regime would depend on other political players, including the religio-political parties. However, Musharraf was not disposed to the agendas of the religio-political forces. As early as April 2000, he made an effort to enhance safeguards for people accused of violating the blasphemy laws.<sup>94</sup> However, pressure from religio-political parties forced the regime to back down. To show his commitment to Islam in this context and reassure the religio-political parties, Musharraf made a symbolic amendment to the PCO, stating that, “for removal of doubts it is necessary to reaffirm the continuity and enforcement of the Islamic provisions in the Constitution of the Islamic Republic of Pakistan[.]” The amendment inserted the following provision in Section 2 of the PCO:

(4) Notwithstanding anything contained in the Proclamation of the Fourteenth Day of October, 1999 or this Order, or any other law for the time being in force, all provisions of the Constitution of the Islamic Republic of Pakistan embodying Islamic injunctions, including Articles 2, 2A, 31, 203A to 203J, 227 to 231 and 260(3) (a) and (b), shall continue to be in force and be deemed to have always so continued to be in force and

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<sup>93</sup> Khan and Bhatti, *Developments in Islamic Banking: The Case of Pakistan*, 166.

<sup>94</sup> Under the proposal, a complaint against a person for violating the blasphemy laws would have to be filed before the district commissioner as opposed to the local police. Christophe Jaffrelot, "Epilogue," in *A History of Pakistan and Its Origins*, ed. Christophe Jaffrelot (New York, N.Y.: Anthem Press, 2004), 262.

no provision as aforesaid shall remain in abeyance or be deemed to have remained in abeyance at any time.<sup>95</sup>

Nevertheless, the implementation of *Aslam Khaki* was not easy. As the Supreme Court's deadline of June 30, 2001, for the complete implementation of the judgment approached, the regime petitioned the Court to extend the deadline until the end of 2005.<sup>96</sup> Instead of admitting that it is unable or unwilling to implement the decision at all, the Musharraf regime wanted to postpone dealing with the issue for the foreseeable future, just as Zia had used the jurisdictional exclusion and Sharif had used the appeal to the Supreme Court to delay the matter. However, the Supreme Court still had Justice Usmani and Justice Ansari on the shariat appellate bench who understood the regime's tactics. The Supreme Court nevertheless gave a one-year extension to the regime.

Once the Supreme Court gave the extension, the regime developed a strategy of chartering Islamic banks alongside conventional banks as opposed to transforming the entire system. The State Bank of Pakistan developed rules and regulations governing Islamic banks but also allowed the conventional banks to operate under the existing regulations. Minister of Finance Shaukat Aziz argued that a pre-mature transformation of the conventional system would damage the economy and assured international lenders that Pakistan would uphold its international legal obligations and any progress on Islamic banking would only diversify the banking sector, not end conventional banking.<sup>97</sup> While the shariat appellate bench of the Supreme Court was standing in the way of implementing this strategy, the regime told the international community that the Supreme Court would accept this alternative. The regime's message to the international community was an ominous sign for the shariat appellate bench, which soon manifested in the replacement of the scholar judges on the bench.

### **4.3 Juristic Authority and Remaking the Shariat Appellate Bench**

In this section, I describe how the Musharraf regime reconstituted the shariat appellate bench to overturn *Aslam Khaki* without a significant political cost. As the Supreme Court's extended deadline of June 30, 2002 to implement *Aslam Khaki* approached, the Musharraf regime decided to reconstitute the shariat appellate bench. As the chief justice of the Supreme Court was on board with the regime's strategy, Musharraf just needed to follow the constitutional process to appoint a new shariat appellate bench. As the scholar judges on the shariat appellate bench were only ad hoc judges of the Supreme Court, they did not enjoy any security of tenure. Just as the president could appoint them through a notification for an indefinite period, he could also

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<sup>95</sup> Provisional Constitution (Amendment) Order, July 15, 2000. Articles 2-2A concerned the Objectives Resolution, Article 31 concerned the promotion of the "Islamic way of life," Articles 203A-J concerned the Federal Shariat Court and the shariat appellate bench, Articles 227-231 concerned the Islamic Council, and Article and 260(3) (a) and (b) defined who is a Muslim in order to exclude Ahmadis.

<sup>96</sup> Khan and Bhatti, *Developments in Islamic Banking: The Case of Pakistan*, 166.

<sup>97</sup> *Ibid.*, 167.

end the appointment through a notification at any time. Acting as the president, Musharraf issued a notification on May 24, 2002, to end the appointments of Justice Usmani and Justice Ansari.

In the case of Justice Usmani, who had served on the Supreme Court from 1982 to 1994 and 1996 to 2002, the unceremonious replacement was reminiscent of the circumstances of his original appointment to the Federal Shariat Court in 1981. As I have described in chapter 4, the authoritarian Zia regime appointed Justice Usmani to the Federal Shariat Court in 1981 precisely to replace the existing bench and overturn *Hazoor Bakhsh*. In 2002, the authoritarian Musharraf regime dismissed Justice Usmani to reconstitute the shariat appellate bench and overturn *Aslam Khaki*. However, Justice Usmani's on and off two decades on the Supreme Court were not based on a constitutional tenure, they were based on his status as a Deobandi scholar on what I have described as the unofficial Deobandi seat on the shariat appellate bench. When he was appointed to the Federal Shariat Court in 1981 at the age of 37 and elevated to the Supreme Court the next year, he could be considered a rising Deobandi star. However, by the time he was permanently dismissed from the Supreme Court in 2002, he was considered the grand jurist among the Deobandis in Pakistan. His continued tenure on the Supreme Court provided religious legitimacy to the authoritarian and democratic regimes, but his dismissal could also incur political costs. Therefore, the regime devised an ingenious plan. In order to replace the 58-year-old Deobandi grand mufti on the shariat appellate bench, Musharraf appointed a 77-year-old Deobandi scholar, Khalid Mahmud.

Born in 1925 in Punjab, Mahmud's Deobandi pedigree was also impeccable.<sup>98</sup> He studied at the Deoband madrasa and graduated from Jami'a Islamiyya, Dhabel, India.<sup>99</sup> He was a student of notable Deobandi scholars such as Sayyid Sulayman Nadwi (d. 1953), Muhammad Shafi (Justice Usmani's father), and Idris Kandihalwi (d. 1974).<sup>100</sup> In 1950, Mahmud started teaching Islamic studies at a Scottish Presbyterian institution, Murray College in Sialkot, Pakistan.<sup>101</sup> A prolific author, his writings focused on Islamic historiography and sectarian debates. When one of Mahmud's books was sent to the Deoband madrasa in India for comment circa 1964, the madrasa's rector Muhammad Tayyib Qasimi (d. 1983) underscored that the book should be considered authentic simply by virtue of the fact that Mahmud was its author – an endorsement comparable to the Deoband madrasa's 2008 fatwa in favor of Usmani that modern Islamic finance should be considered legitimate simply by virtue of the fact that Usmani was its

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<sup>98</sup> Law and Justice Commission of Pakistan, "Supreme Court of Pakistan: Annual Report," (Islamabad, Pakistan: Law and Justice Commission of Pakistan, 2002), 29.

<sup>99</sup> Bukhārī, *Akābir-i 'Ulamā-i Deoband*, 535.

<sup>100</sup> Ibid.

<sup>101</sup> Khalid Mahmud, *Āthār al-Tanzīl*, 2 vols. (Lahore, Pakistan: Dār al-Ma'ārif, n.d.), 1:25.

architect.<sup>102</sup> In other words, Mahmud enjoyed an enviable reputation as a Deobandi scholar as early as the 1960s. As Mahmud was a generation older than Usmani, his chain of authority in terms of his teachers was based on an earlier generation of Deobandi scholars and he also deserved greater respect owed to elders in a traditional context.

However, by the turn of the century, Mahmud did not have as much influence in Pakistan as Usmani had developed. This was partly due to the fact that Mahmud moved to the United Kingdom in 1966 where he completed a Ph.D. in theology at the University of Birmingham in 1973 and established the Islamic Academy of Manchester in 1974.<sup>103</sup> While the academy established by Mahmud was a reputable mosque and elementary madrasa, the madrasa established by Usmani's father in Karachi in 1951 and run by Usmani and his brother since his father's death in 1976 had emerged as a graduate school comparable to the reputation of the original Deoband madrasa in India. Furthermore, Usmani was even more prolific than Mahmud and his writings included extensive works on law, not to mention his judicial decisions on the Federal Shariat Court and the Supreme Court that were studied in madrasas and used as bases for fatwas.<sup>104</sup> In combination with his judicial office, the honorific of the grand jurist of Pakistan that Usmani shared with his brother was widely recognized in Deobandi circles.

So why would Musharraf appoint the Deobandi scholar Mahmud to replace the Deobandi scholar Usmani? Since Mahmud's help was sought to overturn *Aslam Khaki*, Mahmud must have been uncomfortable with the decision. This suggests that he either considered conventional banking Islamic or considered Islamic banking un-Islamic. I have not uncovered any of Mahmud's writings that show his positions either on conventional banking or Islamic banking. Based on circumstantial evidence, however, I argue that Mahmud should be considered in the Deobandi camp that eventually issued the collective fatwa against Usmani's model of Islamic banking. While Mahmud was appointed to the shariat appellate bench in 2002, much earlier than the collective fatwa was issued in 2008, the critique of Islamic banking had started upon Usmani's lectures in 1994 and the earliest polemic against Usmani, "The Juridical Rebuttal against Justice Muhammad Taqi," was circulated among the Deobandi 'ulama in the United Kingdom as well.<sup>105</sup> Since Mahmud would help to overturn *Aslam Khaki*, we can reasonably assume that Mahmud shared this critique of Islamic banking.

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<sup>102</sup> Qasimi's endorsement stated that, "the value of a testimony is based on the credibility of the witnesses" (qadr al-shahāda qadr al-shuḥūd). Ibid., 1:3-425. For a biographical note on Qasimi, see Bukhārī, *Akābir-i 'Ulamā-i Deoband*, 276-278.

<sup>103</sup> Khalid Mahmud, "A Comparison of the Attitudes of Al-Bukhari and Al-Kulayni Along with Their Co-Religionists Regarding the Basic Doctrines of Islam" (University of Birmingham, 1973).

<sup>104</sup> How could a person serve as a judge of the Supreme Court and the vice president of a madrasa and also produce such extensive scholarship? As I have described in chapter 2, the chief justice of the Supreme Court controlled the shariat appellate bench's docket and the bench often had nothing to do.

<sup>105</sup> This observation is based on email correspondence with certain 'ulama in the United Kingdom.

The alternative explanation that Mahmud considered conventional banking Islamic is not tenable. While some Deoband-related scholars, notably Phulwarwi, took this position, such scholars were ostracized from Deobandi circles and could only find intellectual space in institutions such as the Institute of Islamic Culture in Lahore. Mahmud, however, was respected across the Deobandi circles. In short, the Musharraf regime seems to have used the cleavage among the Deobandi 'ulama on Islamic banking in replacing Usmani with Mahmud.

The Musharraf regime also appointed Rashid Ahmad Jalandhari as a scholar judge who supported conventional banking as not un-Islamic. Jalandhari earned a bachelor's degree from Bahawalpur University, a master's degree in Arabic at the Azhar University, and a Ph.D. on Sufi exegesis from Cambridge University in 1968.<sup>106</sup> He also served as a Senior Fulbright Scholar at Harvard University and at Princeton University. As an Azhar graduate and Sufism expert, Jalandhari could be presented as a rightful occupant of the unofficial Barelawi seat on the shariat appellate bench that was held by the Azhar graduate and Sufi master Justice Muhammad Karam Shah until his death in 1998. But Jalandhari was not part of the Barelawi 'ulama's circles. He was the director of the Institute of Islamic Culture in Lahore in 1999 when he commissioned the English translation of Phulwarwi's edited book, *Juridical Status of Commercial Interest*, 40 years after the book's original publication in 1959, during the *Aslam Khaki* proceedings. As I have elaborated in chapter 5, the book made the case that commercial interest did not exist in pre-Islamic Arabia and was therefore not covered in the meaning of riba as used in the Qur'an and the hadith literature. As such, the Musharraf regime appointed Jalandhari to represent Phulwarwi's position on the shariat appellate bench.

As ad hoc scholar members of the shariat appellate bench could come from among the scholar judges of the Federal Shariat Court or from the panel of 'ulama appointed by the president, Musharraf first appointed Mahmud and Jalandhari to the panel of 'ulama on May 22, 2002.<sup>107</sup> Two days after this constitutional formality, on May 24, 2002, Musharraf dismissed Justice Usmani and Justice Ansari as ad hoc judges of the shariat appellate bench of the Supreme Court and appointed Mahmud and Jalandhari to assume the vacant positions.<sup>108</sup> And on May 29, 2002, Mahmud and Jalandhari took the oath of office.<sup>109</sup> The chief justice of the Supreme Court, Sheikh Riaz Ahmad, assumed the office of the chairman of the shariat appellate bench and included Justice Mahmud

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<sup>106</sup> Law and Justice Commission of Pakistan, "Supreme Court of Pakistan: Annual Report," 29. See also Zaman, "Religious Discourse and the Public Sphere in Contemporary Pakistan," footnote 11.

<sup>107</sup> Ministry of Law, No. F. 44 (6)/2002-Secy. (Islamabad, May 22, 2002), Gazette of Pakistan, Extraordinary, May 24, 2002, III, 709.

<sup>108</sup> Ministry of Law, No. F. 44 (6)/2002-Secy. (Islamabad, May 24, 2002), Gazette of Pakistan, Extraordinary, May 28, 2002, III, 715-716.

<sup>109</sup> Ministry of Law, No. F. 44 (6)/2002-Secy. (Islamabad, June 13, 2002), Gazette of Pakistan, Extraordinary, June 15, 2002, III, 795.

and Justice Jalandhari as scholar judges and Justice Munir A. Sheikh and Justice Qazi Muhammad Farooq as professional judges.

Chief Justice Ahmad (b. 1938) held a B.A. and LL.B. and served as the advocate general of Punjab before his appointment as a judge of the Lahore High Court in 1984. He was elevated to chief justice of the Lahore High Court in 1997 and appointed to the Supreme Court at the end of the same year. After Musharraf's coup in 1999, then Justice Ahmad was among the judges who took the oath of office under Musharraf's PCO in order to continue on the bench. He became the chief justice of the Supreme Court in 2002 and served until 2004. Chief Justice Ahmad assumed the position of the chairman of the shariat appellate bench in order to ensure control of the *United Bank* proceedings to review the *Aslam Khaki* judgment and obtain a desirable outcome for the Musharraf regime. In comparison, his predecessors Chief Justice Mian (1997-99) and Chief Justice Siddique (1999-2000) had declined Justice Khan's requests to assume such office in *Aslam Khaki*.<sup>110</sup>

Justice Sheikh was the only judge who continued on the shariat appellate bench. As noted earlier, Justice Sheikh was appointed to the Supreme Court in 1997 and was among the judges who took the oath of office under the PCO in order to continue on the bench. He joined the unanimous decision in *Aslam Khaki* in 1999 and, as I will explain shortly, also joined the unanimous decision in *United Bank* in 2002 overturning *Aslam Khaki* after the reconstitution of the shariat appellate bench of the Supreme Court under Musharraf. Justice Sheikh's role may be compared to Justice Aftab Hussain, who joined the majority in *Hazoor Bakhsh* in 1981 and joined the unanimous decision in *Hazoor Bakhsh* review in 1982 overturning *Hazoor Bakhsh* after the reconstitution of the Federal Shariat Court under Zia (see chapters 3-4). However, while Justice Hussain wrote an extensive opinion in each case to defend his substantive position on stoning as a ta'zir and explain the inconsistent outcome on procedural grounds, Justice Sheikh neither wrote an opinion in *Aslam Khaki* to present his position on riba nor in *United Bank* to explain the inconsistent outcome.<sup>111</sup> In other words, Justice Sheikh acted as a passive observer on the shariat appellate bench, signing his name on whatever decision came down.

Lastly, Justice Farooq held an LL.B. from University Law College, Lahore, and served as a civil court judge before his appointment to the Peshawar High Court in 1991.<sup>112</sup> He was appointed as the chief justice of the Peshawar High Court in 1999, and as a judge of the Supreme Court in 2000, when Musharraf needed a batch of new judges in order to replace the judges ousted by the PCO. Justice Farooq had attended courses at the Institute of Shariah and Legal Profession in Islamabad and the Islamic University of

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<sup>110</sup> While holding the office of chief justice and chairman of the shariat appellate bench, such office gave an even greater control to the chief justice over the proceedings.

<sup>111</sup> This inconsistency was later underscored by Justice Khan: "Mr. Justice Sheikh had not a single word to explain as to why he thought it proper to remand the case." Khan, *The Supreme Court's Judgment on Riba*, xv-xvi.

<sup>112</sup> Law and Justice Commission of Pakistan, "Supreme Court of Pakistan: Annual Report," 24.

Medina in Saudi Arabia. However, he did not write an opinion in *United Bank*, and as such should be considered another passive observer on the shariat appellate bench.

The five-member shariat appellate bench of the Supreme Court conducted hearings from June 6-22, 2002, and gave its judgment on June 24, 2002. The judgment, again, was a foregone conclusion. During the course of the proceedings, when the media raised questions about the reconstitution of the shariat appellate bench, the Musharraf regime defended its actions on the grounds that Justice Usmani's monetary interests led to his removal.<sup>113</sup> To substantiate the claim of Usmani's conflict of interest, the regime underscored Justice Usmani's membership in the shari'a boards of various global Islamic financial institutions. According to government officials, Usmani was disqualified from holding conventional banking as un-Islamic since he had a financial interest in the Islamic banking industry.

In response, Justice Usmani stated that he had no grievance on his removal and declined to comment into its reasons. But such resignation was not characteristic of 'ulama in general and Deobandis in particular. As evident from the 'ulama's struggle to establish and guide shari'a review since decolonization, the 'ulama's gains were a product of their persistent political engagement and mobilization. To be sure, the Barelawi political party JUP joined the *United Bank* proceedings through its counsel. However, the Deobandi political party JUI or any other Deobandi group did not join the proceedings. As *Aslam Khaki* was deemed a historic judgment by Justice Usmani and his supporters and was unquestionably a significant moment in the 'ulama's long struggle against the concept of riba, why would the Deobandis not defend this historic gain? I suggest that the 'ulama's ambivalence was the product of their internal disagreements about Islamic finance that was presented as the solution to conventional finance in *Aslam Khaki*. Usmani's refusal to engage on the causes behind his removal avoided exposing the 'ulama's internal disagreements hitherto expressed privately against Justice Usmani. As the religio-political forces did not put up an effective fight, the Musharraf regime was able to overturn *Aslam Khaki* without much political disruption. The next section provides an overview of Chief Justice Ahmad's opinion in *United Bank* that set aside *Aslam Khaki* and sent the issue of riba back to the Federal Shariat Court for reconsideration.

#### **4.4 Chief Justice Ahmad's Opinion in *United Bank***

Chief Justice Ahmad wrote a unanimous decision on behalf of the entire shariat appellate bench. No one else wrote a concurring or a dissenting opinion. The judgment, without resolving any question, sent the case back to the Federal Shariat Court for reconsideration. The opinion consisted of 16 pages and did not engage in a substantive analysis of doctrinal issues. Instead, the opinion raised certain procedural concerns and presented certain substantive objections raised in the review petitions and during oral arguments.

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<sup>113</sup> "Usmani's Monetary Interest Led to His Removal," *Dawn*, June 12, 2002.

### *Defending the Court and the ‘Ulama*

Just as the respondents in the *Hazoor Bakhsh* review had questioned the reconstitution of the Federal Shariat Court, the respondents in *United Bank* questioned the reconstitution of the shariat appellate bench of the Supreme Court, in particular the appointment of Justice Mahmud and Justice Jalandhari to replace Justice Usmani and Justice Ansari as scholar judges. However, Chief Justice Ahmad somewhat disingenuously stated that the appointment of judges could not be raised collaterally in the present case despite the fact that the composition of a bench is often questioned by parties though rarely with any success (as was the case in *Hazoor Bakhsh* review as well).<sup>114</sup> But more pertinently, Chief Justice Ahmad noted that since the two scholar judges are on the president’s panel of ‘ulama, their appointments are valid under the Constitution. In this way, Musharraf’s adherence to the constitutional formalities of appointing the two scholars to the panel of ‘ulama two days before appointing them to the shariat appellate bench of the Supreme Court ensured the procedural legitimacy of the appointments.

### *Constitutional and Jurisdictional Arguments*

Chief Justice Ahmad presented the argument of the state’s counsel, Raza Kazim, on constitutional points. As noted in the previous chapter, Article 38(f) of the Constitution stated that the state shall “eliminate riba as early as possible.” Kazim argued that Article 38(f) gives exclusive authority to the federal government to eliminate riba and thereby any timeframe by the Federal Shariat Court or the Supreme Court is unconstitutional. Based on this premise, Kazim described the state’s efforts to eliminate riba through the task force in the Ministry of Finance, the task force in the Ministry of Law, and the Commission. Kazim also submitted an affidavit of the secretary of the Ministry of Finance stating that implementing the Supreme Court’s judgment was infeasible and an affidavit of the deputy governor of the State Bank describing the parallel system of conventional and Islamic banking as evidence of the federal government’s action under Article 38(f).<sup>115</sup>

Chief Justice Ahmad also presented the arguments of the attorney general, Makhdoom Ali Khan, who underscored the constitutional provisions that provide for the payment of interest in the federal fund, the provincial funds, and the pension system. The attorney general argued that the *Faisal* judgment and the *Aslam Khaki* judgment were in conflict with such explicit provisions of the Constitution. Therefore, according to the attorney general, the Federal Shariat Court and the Supreme Court exceeded their jurisdiction in evaluating the issue in the *Faisal* case and the *Aslam Khaki* case respectively.

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<sup>114</sup> While the appointment of a judge to the Supreme Court and the assignment of an existing judge to a particular bench raise separate issues, the appointment of a scholar to the shariat appellate bench as an ad hoc judge of the Supreme Court combine the two issues.

<sup>115</sup> *United Bank Ltd. v. Farooq Brothers*, 2002 PLD SC 800, 808-809.

Chief Justice Ahmad also noted the argument of the state’s counsel, Syed Riazul Hasan Gilani, about the Supreme Court’s original jurisdiction. In the *Faisal* case, the Federal Shariat Court had concluded that the question of riba in the unequal exchange of goods of the same genus (ribā al-faḍl) did not relate to bank interest and refrained from elaborating the point. However, in the *Aslam Khaki* case, the Supreme Court had concluded that certain aspects of unequal exchange of goods of the same genus are applicable to modern business. Gilani argued that there was “an error apparent on the record” – the legal standard for exercising review jurisdiction – since only the Federal Shariat Court had original jurisdiction to undertake shari’a review and therefore the Supreme Court could not engage the question on appeal.<sup>116</sup> At best, the Supreme Court could send the case back to the Federal Shariat Court for a resolution of the question.

### ***Productive Loans and Reasonable Interest***

Chief Justice Ahmad described the arguments of the United Bank’s counsel, Raja Muhammad Akram, based on Sayyid and Phulwarwi’s productive loans argument and Fazlur Rahman’s excessive interest argument. The bank’s counsel stated that the Qur’an commentaries of Sayyid Ahmad Khan, Abul Kalam Azad and Muhammad Shafi (Usmani’s father) explain verses such as 2:262-282 in the context of charity and the notion of charity makes sense for consumptive loans for the poor, but not for productive loans of corporations. As noted in the last chapter, this argument was an accurate representation of Sayyid’s commentary but took Azad and Shafi’s positions out of context.

Furthermore, the bank’s counsel stated that the Qur’an prohibits riba in categorical terms in 3:130 wherein riba is described as doubling and redoubling. Therefore, according to the bank’s counsel, only excessive and unjust interest rates were covered in the meaning of riba. The bank’s counsel also argued that riba was not defined in the Qur’an and the Federal Shariat Court and the Supreme Court’s judgments erroneously used analogies to equate interest, usury, and riba. In short, the bank’s position was that riba only meant excessive interest and that “banks cannot make [charity] in favour of industrialists.”<sup>117</sup>

### ***Salafi and/or Egyptian Positions***

Chief Justice Ahmad also presented Gilani’s arguments based on the Egyptian and/or Salafi scholars.<sup>118</sup> The state’s counsel contended that Justice Khan’s concurring

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<sup>116</sup> Ibid., 812.

<sup>117</sup> Ibid., 807-808.

<sup>118</sup> Gilani’s law firm biography indicates that he holds a Ph.D. from the Azhar University, though the biography is silent on the exact field. See Gilani Law Firm, <https://www.linkedin.com/pub/gilani-law-firm-llp/60/398/19a> (last accessed November 25, 2014). Gilani is the author of an academic work on comparative Islamic and British law. Syed Riazul Hasan Gilani, *The Reconstruction of Legal Thought in Islam: Comparative Study of the Islamic and the Western Systems of Law in the Latter’s Terminology with*

opinion in the Supreme Court misread the positions of the scholars such as Muhammad ‘Abduh, Rashid Rida, ‘Abd al-Razzak al-Sanhuri, Mahmud Shaltut, Muhammad Sayyid Tantawi, ‘Abd al-Wahhab Khallaf, and Ma‘ruf al-Dawalibi. While Gilani may have elaborated on this point in the oral arguments, Chief Justice Ahmad simply provided the conclusory statement. Gilani also contended that Chief Justice Rahman’s opinion in the Federal Shariat Court “lacked objectivity” as he did not even give consideration to such scholars and confined his judgment to the scholars from whom he “derived inspiration for producing his works in the Council of Islamic Ideology ... and kept out of consideration the opinions of other eminent jurists[.]”<sup>119</sup> Expanding upon Gilani’s point, Chief Justice Ahmad noted that Chief Justice Rahman’s argument for ignoring such views was that the original texts of such scholars were not submitted to the Federal Shariat Court – and the burden to produce legal authority in support of a position was on the party raising the position under the adversarial process. To justify his decision to remand the case back to the Federal Shariat Court, Chief Justice Ahmad imposed an inquisitorial duty on the Federal Shariat Court, stating that, “it was all the more necessary for the Shariat Appellate Bench to have remanded the cases to the Federal Shariat Court for giving a clear verdict after considering all the relevant material.”<sup>120</sup>

### ***Analogical Reasoning: Ratio Legis and Divine Wisdom***

Chief Justice Ahmad also noted Gilani’s argument about the ratio legis (‘illa) and the divine wisdom (ḥikma) of riba. According to Justice Usmani’s opinion in *Aslam Khaki*, the ratio legis of riba was “the excess claimed over and above the principal in a transaction of loan,” whereas the divine wisdom of riba was injustice (ẓulm). From a jurisprudential perspective, the ratio legis was considered an objective idea and therefore useful for applying the rule, whereas the divine wisdom was considered a subjective and enigmatic idea and therefore not very useful from a jurist’s standpoint.<sup>121</sup> Seemingly in response to Justice Usmani’s argument, Gilani underscored that according to the Maliki polymath Averroës (1126-1198) as well as the Deobandi-Hanafī scholar Ashraf ‘Ali Thanawi (1863-1943), the ratio legis of riba was in fact injustice. Gilani’s source was most likely Thanawi’s 1929 response to ‘Abd al-Latif (see chapter 5), which invoked Averroës to state that the ratio legis of riba was injustice (ẓulm) and defraudation (ghabn).<sup>122</sup>

Gilani thus argued that the pre-determination of fixed profit – the assumed ratio legis of riba – was not sufficient for riba, and noted that the pre-determination of fixed

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*Particular Reference to the Islamic Laws Suspended by the British Rule in the Subcontinent* (Lahore, Pakistan: Idāra-i Tarjumān al-Qur’ān, 1977).

<sup>119</sup> *United Bank Ltd. v. Farooq Brothers*, 2002 PLD SC 800, 811.

<sup>120</sup> *Ibid.*, 814-815.

<sup>121</sup> On the distinction between ratio legis and divine wisdom in the context of riba, see Saeed, *Islamic Banking and Interest: A Study of the Prohibition of Riba and Its Contemporary Interpretation*, 36.

<sup>122</sup> 183-184

profit is a characteristic of silent partnership, attributing the position to the Hanafi legal manual *al-Hidaya* and the Deobandi-Hanafi scholar Thanawi. However, this argument obscured the distinction between pre-determination of fixed profit in proportion to the fixed capital that was considered *riba* in lending (e.g. 10% of the lender's capital) and pre-determination of fixed profit and loss ratio to allocate the actual profit or loss in a business that was deemed acceptable in a silent partnership (e.g. 10% of the partnership's profits but no guarantee of the capital contribution).

### ***Existing Islamic Banking***

Chief Justice Ahmad also noted Gilani's argument that modern Islamic banking was a misnomer. Upon arguing that the ratio legis of *riba* was injustice, Gilani claimed that the so-called Islamic banking was nothing but legal stratagems, "devices to avoid what is otherwise *Riba* which are in fact more harsh and oppressive having the element of [injustice] and are worse in consequences as compared to the present day banking system[.]"<sup>123</sup> The claim that Islamic banking was nothing but legal stratagems was also the core of the 'ulama's critique of Islamic banking, though the 'ulama considered Islamic banking just as oppressive as conventional banking, not more so. Chief Justice Ahmad emphasized the importance of evaluating this claim with an unbiased mind.

Furthermore, Chief Justice Ahmad underscored that modern Islamic banking was not based on consensus. He argued that the juristic foundations of the system were opposed by many eminent jurists including the Prophet's companions such as 'Abdullah b. 'Umar and 'Abdullah b. 'Abbas. Chief Justice Ahmad drew this position as well from Gilani, but he did not elaborate on the aspects of modern Islamic banking that were controversial.<sup>124</sup> Nonetheless, the argument had particular resonance in the context of the internal debates among the 'ulama on modern Islamic banking.

### ***Shi'a Positions***

Chief Justice Ahmad also presented Gilani's argument that modern Islamic banking as presented in the Federal Shariat Court and the Supreme Court's judgments did not consider the positions of the notable Iraqi Shi'a grand ayatollah Muhammad Baqir al-Sadr (1935-1980).<sup>125</sup> al-Sadr's books on Islamic economics (*al-Iqtisādunā*) and Islamic banking (*al-Bank al-lā Ribawī fī al-Islām*) were central to the early developments in the field, but Sunni scholars such as Usmani did not credit their Shi'a counterpart even if they benefited from such works. For a Sunni scholar to attribute an argument to a Shi'a authority would have served to undermine the credibility of the argument, particularly

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<sup>123</sup> *United Bank Ltd. v. Farooq Brothers*, 2002 PLD SC 800, 812.

<sup>124</sup> The two companions reportedly expressed doubts about *riba* in unequal exchange. Since scholars such as Rida argued that *riba* in lending is an extension of *riba* in unequal exchange, Gilani may have been using the two companions to argue against the consensus on *riba* in lending.

<sup>125</sup> See Chibli Mallat, *The Renewal of Islamic Law: Muhammad Baqer as-Sadr, Najaf and the Shi'i International* (New York, N.Y.: Cambridge University Press, 1993), 113-187.

when the goal was to develop consensus among traditional Sunni scholars on a novel position. Nevertheless, Gilani placed a duty on the Federal Shariat Court and the Supreme Court to consider not just the opinions of the four Sunni schools across history and the reinterpretations of 20th-century Salafi scholars, but also the interpretations of Shi'a scholars before declaring a law un-Islamic.

Chief Justice Ahmad's opinion did not elaborate on al-Sadr's views that the Federal Shariat Court and the Supreme Court should have considered. However, al-Sadr's model of Islamic banking imagined the relationship between the bank's depositors and the bank's "borrowers" as a silent partnership in the profit and loss of the borrower's business.<sup>126</sup> The bank served as an intermediary that charged a fee and could underwrite any loss to the depositor, thereby guaranteeing the capital. In contrast, Usmani's model of Islamic banking imagined a relationship between the bank's depositors and the bank's owners as a silent partnership in the profit and loss of the bank. The bank in turn made money using any of the modes of Islamic finance, such as silent partnership, sale on deferred payment, or leasing with its borrowers. In short, while neither al-Sadr nor Usmani allowed a pre-determined return on the capital, al-Sadr guaranteed the capital but Usmani did not.

#### ***Application to Non-Muslims***

Chief Justice Ahmad also described Gilani's position on the Supreme Court's application of the prohibition of *riba* to non-Muslims in *Aslam Khaki*. In Gilani's view, this position was a violation of the Qur'an and sunna as well as Ja'fari law.<sup>127</sup> But Chief Justice Ahmad converted this argument into a jurisdictional question.<sup>128</sup> As the Federal Shariat Court did not engage with this question under its original jurisdiction, he argued that the Supreme Court could not resolve the question on appeal. The Supreme Court, according to Chief Justice Ahmad, should have sent the case back to the Federal Shariat Court on this point as well.

#### ***Inflation and Indexation***

Chief Justice Ahmad noted that the issue of inflation and indexation remained unresolved in the *Faisal* case. As interest rate includes inflation risk, according to Chief Justice Ahmad, the Supreme Court should have sent the question back to the Federal Shariat Court for research and consideration. Furthermore, Chief Justice Ahmad described Gilani's argument on indexation that the principal amount in a loan should be based on the intrinsic value of money and the outstanding amount should be indexed to such intrinsic value in order to avoid any exploitation of the parties. In support of this argument, Gilani had cited the Barelawi eponym Ahmad Raza Khan and the Iraqi grand

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<sup>126</sup> *Ibid.*, 169-173.

<sup>127</sup> *United Bank Ltd. v. Farooq Brothers*, 2002 PLD SC 800, 810.

<sup>128</sup> *Ibid.*, 813.

ayatollah al-Sadr. But instead of endorsing any opinion, Chief Justice Ahmad stated that the Federal Shariat Court should evaluate the matter before declaring interest un-Islamic.

In conclusion, Chief Justice Ahmad stated that, “we are of the considered view that the issues involved in these cases require to be re-determined after thorough and elaborate research and comparative study of the financial systems which are prevalent in the contemporary Muslim countries.” In other words, Chief Justice Ahmad disregarded the nearly 264-page opinion that Justice Khan had written in *Aslam Khaki* after evaluating the responses to the questionnaires sent to a variety of Islamic and conventional financial institutions and analyzing the positions of a range of bankers, economists, and ‘ulama, precisely to overcome such an objection. Justice Ahmed concluded his 16-page opinion with the following holding:

Since the Federal Shariat Court did not give a definite finding on all of the issues involved the determination whereof was essential to the resolution of the controversy involved in these cases, it would be in the fitness of things if the matter is remanded to the Federal Shariat Court which under the Constitution is enjoined upon to give a definite finding on all the issues falling within its jurisdiction.<sup>129</sup>

## **5. Shari‘a between the Bench and the ‘Ulama**

*United Bank* presents an interesting example of how shari‘a review, constitutional politics, and juristic traditions interact with each other. While Chief Justice Ahmad’s opinion was meant to delay a resolution of the question of riba for the foreseeable future, the opinion was nevertheless based on the principle of judicial restraint in shari‘a review. Under the opinion’s logic, as long as the Federal Shariat Court could find any opinion of any authority from any period that could uphold a law, the law should not be declared un-Islamic. This approach was not that different from Justice Usmani’s use of juristic discretion in giving fatwas on Islamic finance. But while Justice Usmani confined his approach to the four Sunni schools, the Supreme Court suggested that the authority may come from even Salafi scholars such as Rida or Shi‘a scholars such as al-Sadr. In fact, the Federal Shariat Court was under an obligation to conduct legal research and fact-finding as an inquisitorial court to explore any authority that may uphold the law. But *United Bank* was not an unprecedented use of judicial restraint. As chapter 4 notes, the Federal Shariat Court judges in *Hazoor Bakhsh* review also used judicial restraint as an argument against declaring the stoning provisions of the Zina Ordinance un-Islamic. In fact, as constitutional politics often makes clear, the notion of judicial restraint is strategically used by judges to uphold laws as constitutional but easily abandoned in order to declare laws unconstitutional.

The Supreme Court’s jurisprudence must be contrasted with the ‘ulama’s jurisprudence. While the central concern of judicial restraint is to uphold state law, the basic goal of the ‘ulama’s juristic restraint is to uphold the tradition through the doctrine

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<sup>129</sup> Ibid., 816.

of taqlid. Justice Usmani's fatwas on Islamic finance often drew upon authority outside of his Hanafi school and even reincarnated abandoned opinions from other schools in contrast to the notion of juristic restraint. Furthermore, Justice Usmani's juristic works pushed the boundaries of the Hanafi doctrine in order to keep pace with the modern economic order.<sup>130</sup> In this context, the fatwa against Justice Usmani's model of Islamic banking and finance demonstrates the enduring relevance of the Hanafi school that defines religio-political movements such as the Deobandis and the Barelawis. The school continues to be an interpretive community with doctrinal boundaries that a jurist can exceed only at the risk of having abandoned the interpretive community. As Justice Usmani ventured outside the boundaries, he undertook the risk of having abandoned the Hanafi-Deobandi movement, even though he was qualified more than anyone else to redraw such boundaries.

But as the interpretive community does not have any formal authority over its members, how does the community enforce the boundaries of the school? The collective fatwa against Islamic banking and finance demonstrates two important social mechanisms – apart from the discursive productions – used to discipline the elite members of the profession. First, the role of Usmani's teacher Salimullah Khan in the collective fatwa shows how the respect of and deference to teachers afforded in a traditional system of education and authority is deployed to restrain the students even when such students emerge as jurists and scholars in their own right. As Usmani's authority depends on the authority of his teachers, his few living teachers can question his authority rather effectively. Second, the collective aspect of the fatwa shows that in order to discipline a high-ranking jurist, the interpretive community must form a collective voice, even if the criteria to define the collective is unclear. The role of the Deobandi board of education in making and disseminating the fatwa shows how non-hierarchical bodies that serve to standardize entry into the 'ulama's profession are also used to give a collective voice to the profession in relation to powerful factions in the profession (such as Usmani and his madrasa). But in response, Usmani's supporters invoke the authority of the mother seminary, the madrasa in Deoband, India, that gives the Deobandis a collective identity.

Furthermore, a scholar's authority depends on his position in the interpretive community and his judicial appointment and tenure is a function of such authority. In this way, the religio-political movement serves as an external constraint on the scholar judge's jurisprudence on the bench. From the regime's perspective, the politics of judicial appointments for scholar judges is distinct from professional judges. The appointment of professional judges is often in consideration of the political alignment of such judges with the ruling regime. However, the political alignment of scholar judges transcends

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<sup>130</sup> At the risk of oversimplification, the case of riba offers an interesting comparison with the case of stoning. Usmani's expansive search for authority outside the doctrine of his school and even in the abandoned positions of other schools in order to develop modern Islamic finance was driven by the goal to reconcile Islam and modern economics. By the same token, Abu Zahra or al-Zarqa's positions outside the consensus of the four schools in order to declare stoning unacceptable or unnecessary in Islam was an effort to reconcile hudud codes with modern anxieties about cruel and unusual punishments.

ruling regimes. The appointment of scholar judges is based on the position of such scholars in the religio-political movement with the purpose of drawing support from the movement. Thus, when a judge becomes controversial within his religio-political movement, he also becomes dispensable from the regime's perspective, as was the case with Justice Usmani after nearly two decades on the Supreme Court.

Moreover, political regimes understand the cleavages among the 'ulama and exploit them. As I have argued in this chapter, the Musharraf regime drew upon the internal debates among the 'ulama to reconstitute the shariat appellate bench to its advantage. On the one hand, the Musharraf regime appointed Justice Jalandhari who supported Phulwarwi's position that commercial interest is not *riba*. On the other hand, the regime appointed Justice Mahmud who most likely considered not only conventional banking un-Islamic, but also the existing Islamic banking un-Islamic. From this perspective, as there was no distinction between conventional finance and existing Islamic finance, condoning Justice Usmani's model meant legitimizing conventional banking, which was unacceptable to a substantial portion of the Deobandi scholars.

But while the *riba* issue went back to the Federal Shariat Court for indefinite delay, the Islamic finance and banking movement was not a "hollow hope."<sup>131</sup> To begin, the agenda of the Islamic banking and finance movement was rather ambitious for any court to implement, since courts are rarely successful in structural reform.<sup>132</sup> But the movement to transform the country's entire system based on Usmani's juridical model at least forced the Musharraf regime to establish Islamic banking alongside conventional banking. The State Bank enabled a regulatory framework and allowed jurists such as Usmani to oversee Islamic banks. However, as Islamic banks expanded, they also reaffirmed the concerns of Usmani's critics among the 'ulama and ultimately produced the fatwa against Islamic banking in 2008. In fact, a petition was also filed in the Federal Shariat Court in 2008 to declare Meezan Bank, established under the State Bank's Islamic banking regulations, as a conventional bank instead.<sup>133</sup> Usmani was the chairman of Meezan Bank's shari'a board.<sup>134</sup> The petition remains undecided just as the *riba* issue remains pending in the Federal Shariat Court.

## **6. Religion, Economic Policy, and Constitutional Politics**

*Aslam Khaki* and *United Bank* allow us to understand the complex interplay between religion, economic policy, and constitutional politics under democracy and authoritarianism, returning to the themes of (1) the role of courts in economic policy, (2)

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<sup>131</sup> See Gerald Rosenberg, *The Hollow Hope*, 2nd ed. (Chicago: University of Chicago Press, 2008).

<sup>132</sup> See Lon L. Fuller, "The Forms and Limits of Adjudication," *Harvard Law Review* 92 (1978). But see Malcolm M. Feeley and Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons* (New York, N.Y. : Cambridge University Press, 1999).

<sup>133</sup> *Shariat Petition No. 2/K*, 2008.

<sup>134</sup> Meezan Bank, "Shariah Supervisory Board," (last accessed November 23, 2014).

the political control of judges, (3) the co-optation of religious scholars, and (4) the jurisdictional exclusion of important issues from constitutional courts. First, courts are often expected to support political regimes in attracting foreign investments and fostering economic growth. But as constitutional courts are used for the interpretation of shari‘a and economic critique is fostered in the vocabulary of shari‘a, constitutional courts are inescapably expected to define the meaning of riba. But the traditional meaning of riba closes the door to many aspects of the modern economic order. While the ‘ulama have resisted a reinterpretation of the traditional meaning of riba, modern Islamic finance and banking have sought to replicate conventional finance using legal stratagems. However, just as conventional finance remains morally suspect in Muslim societies despite its prevalence, Islamic finance as a viable alternative remains financially suspect in the global economy despite its expansion.

Nonetheless, the success of Islamic finance in private law across the world has emboldened religious scholars to redouble their efforts to make Islamic finance the public law in Muslim countries. *Aslam Khaki* was an expression of such confidence at the expense of nervousness among international lenders. While institutions such as the World Bank and the IMF welcome Islamic finance, they see Islamic finance on its economic terms as an asset class in a diverse portfolio of debt and equity, not an economic system per se. Furthermore, judicial interpretations of riba generate uncertainty about the enforceability of existing financial obligations. In order to respond to such concerns, political regimes provide assurances to international financial institutions that courts will not be allowed to intervene in the economic order as opposed to the conventional wisdom on courts that suggests that an independent judiciary provides assurances to the investors that the political regime will not violate binding commitments. Thus dependent courts rather than independent courts in this context serve to foster economic growth.

Second, ruling regimes often use the political control of judges to control the shariat appellate bench. But the political control of judges varies under democratic and authoritarian periods. Under democratic periods, professional judges of the Supreme Court enjoy constitutional tenure. Therefore, an effort to control professional judges, particularly the chief justice, creates constitutional crises whose outcomes are often influenced by other judges and the military. As the case of Chief Justice Shah shows, the rebel bench and the military determined the Supreme Court’s fate. However, scholar judges do not enjoy constitutional tenure and the president exercises complete constitutional authority to appoint or dismiss them. But even though scholar judges serve at the pleasure of the president, they remain on the bench based on the religious authority and political influence of the religio-political movement that they represent. When governments draw support from such movements (e.g. the Sharif government), they retain or are unable to dismiss the scholar judges on the bench, but when governments are independent of such movements (e.g. the Bhutto government), they are able to dismiss such judges.

Under authoritarian regimes, professional judges are often made subject to provisions of a Provisional Constitution Order and forced to take an oath of office under military rule. As the professional judges do not have a basis of authority independent of their office and often have political alignments with political parties, the military regime

only retains those professional judges who volunteer to reorient their political alignment to the regime. But as the scholar judges have an independent basis of authority rooted in their religio-political movement, the regime retains the scholar judges in order to establish its legitimacy in the religio-political movement to overcome its democratic deficit in part. As the scholar judges provide legitimacy to the military regime, the political cost of dismissing them when such judges go outside the regime's zone of tolerance is not negligible. The replacement of the Deobandi scholar Justice Usmani only with a comparable Deobandi scholar Justice Mahmud demonstrates that the military regime takes such political costs into consideration and makes an effort to minimize them when it appoints replacement scholar judges.

Third, political regimes use constitutional politics to co-opt the religio-political forces in unexpected ways. As this chapter suggests, while the state was unable to reorient the meaning of *riba*, the Musharraf regime was able to co-opt Deobandi scholars such as Justice Mahmud who presumably considered modern Islamic banking more dangerous than conventional banking under the logic that engaging in an impermissible transaction while considering it impermissible was a lesser sin than doing so considering it permissible. According to such scholars:

A conventional Muslim banker [or bank customer], considering himself a wrongdoer and sinner can reach the doors of repentance for the forgiveness of his impermissible and interest-based transactions as he may be given an opportunity for repentance. However, a modern Islamic banker [or bank customer] would neither be drawn towards repentance nor get an opportunity for repentance because he does not even feel the need for repentance.<sup>135</sup>

Therefore, sending the case back to the Federal Shariat Court served the regime's goal that wanted to delay the matter as well as those 'ulama's goal who wanted to prevent modern Islamic banking from taking root. Furthermore, through its strategy of divide and conquer, the Musharraf regime was able to limit the otherwise expected resistance from the Deobandi religio-political movement against the regime's dismissal of Justice Usmani and the overturning of the *Aslam Khaki* judgment.

Lastly, political regimes often use jurisdictional exclusions to constrain religion but as I have argued in chapter 5, such jurisdictional exclusions have limits. Once the jurisdictional exclusion of banking, insurance, fiscal and tax laws expired in 1990, the democratic governments were unable to pass a constitutional amendment to reintroduce the exclusion. Therefore, they used delay in the Supreme Court to avoid the *riba* issue. Even the authoritarian Musharraf regime was unable to reintroduce the exclusion despite the fact that the regime overhauled the entire Constitution through an elaborate Legal Framework Order (LFO) in 2002 before holding elections and restoring a pseudo-constitutional order.<sup>136</sup> While the LFO reintroduced Article 58(2)(b) so that Musharraf

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<sup>135</sup> Banūrī Town, "Murawwaja Islāmī Baynkārī awr Jamhūr 'Ulamā kay Mawqaf kā Khulāṣa."

<sup>136</sup> *Legal Framework Order*, 2002 PLD CS 1604.

may have expansive powers as the president, the LFO did not and could not include the jurisdictional exclusion as the regime ultimately relied in part upon the support of a coalition of religio-political parties called the MMA to ratify the LFO in the Parliament through the Seventeenth Amendment in 2003.<sup>137</sup>

Just as the democratic governments used the Supreme Court to delay the issue, the Musharraf regime used the Federal Shariat Court to delay the matter. For this purpose, the Supreme Court strictly construed the notions of original jurisdiction and appellate jurisdiction in order to declare that the Federal Shariat Court is the only forum for questions such as indexation, foreign obligations, and riba in unequal exchange. According to the opinion, the Federal Shariat Court could declare any law un-Islamic under its original jurisdiction. But if the Federal Shariat Court did not conclusively determine a tangential doctrinal point, the Supreme Court could not evaluate the question. The Supreme Court would have to send the case back to the Federal Shariat Court for reconsideration. However, the Supreme Court was not just using a general principle of law. As Justice Khan later objected:

The Bench could not explain that why it did not deal with the matters contained in the judgment even if [a] certain matter was not considered by the Federal Shariat Court, the court of original jurisdiction. This is a well-established principle that the jurisdiction of an appellate court is coextensive with the jurisdiction of the court of original jurisdiction and the remand should not be resorted to when the matter can be dealt with by the appellate court itself as remand of cases to the courts of original jurisdiction tends to delay the decisions.<sup>138</sup>

Notwithstanding the regime's strategic use of jurisdictional arguments to delay the matter, the riba issue sat in the Federal Shariat Court only to re-emerge in a different political context. More than 22 years after the Federal Shariat Court's judgment in the *Faisal* case, 12 years after the Supreme Court sent the case back to the Federal Shariat Court in *United Bank*, and 6 years after the fall of the Musharraf regime, the Federal Shariat Court scheduled a hearing on the matter on March 24, 2014, during the third Sharif government.<sup>139</sup> No other hearing seems to have been held since then. But even if the Federal Shariat Court decides the case, the inevitable appeal shall lie before the Supreme Court where the two scholar judges as of this writing are Justice Muhammad al-Ghazali (Justice Ghazi's brother) and Justice Khalid Masud (Fazlur Rahman's follower).

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<sup>137</sup> *Constitution (Seventeenth Amendment) Act*, 2003.

<sup>138</sup> Khan, *The Supreme Court's Judgment on Riba*, xvi.

<sup>139</sup> Hasanaat Malik, "Shariat Court to Take up 22-Year-Old Riba Case on March 24," *The Express Tribune*, March 2, 2014.

## **7. Conclusion**

In this chapter, I explained why the Supreme Court affirmed the Federal Shariat Court's judgment against interest in banking and finance in 1999, but reversed its own ruling in 2002 and sent the case back to the Federal Shariat Court. This chapter shows that shari'a review asserts itself in the context of democratic as well as authoritarian politics. When political regimes depend on religio-political movements for legitimacy, scholar judges exercise greater autonomy to undertake shari'a review. But when religio-political movements are conflicted, political regimes have greater autonomy to determine the direction of shari'a review. This chapter also shows the internal dynamics of 'ulama's discourse and politics to guard the boundaries of the school of law. While certain elite 'ulama may venture outside the boundaries of the school, the interpretive community uses its informal mechanisms of conferring and questioning authority to restrain the jurisprudence of such scholars. Lastly, this chapters shows that the interaction between shari'a politics and regime politics not just advances shari'a, but also protects secular interests in unexpected ways.

## Conclusion

In a recent article, Ebrahim Moosa reminds us how the early formation of Sunni orthodoxy was the product of a political struggle among various intellectual and sectarian forces.<sup>1</sup> The 'ulama emerged as a professional class across Muslim lands and established their epistemic and political dominance as an outcome of this struggle. But the colonial rule disrupted this dominance through disenfranchising the 'ulama and introducing a modern intellectual class and legal profession. The reassertion as well as rethinking of Islamic orthodoxy in the post-colonial context has produced a renewed struggle among and within these intellectual and religio-political forces. The case of shari'a review in Pakistan gives us a sense of the political, intellectual, and legal contours of this struggle.

In this dissertation, my goal has been to produce a richly textured narrative exploring the interaction of shari'a politics, regime politics, and judicial politics. The judicial institutions empowered to undertake shari'a review often have the task of resolving deeply contested questions involving doctrinal orthodoxies, modern sensibilities, and economic interests. In this context, courts are unlikely to produce stable doctrine, at least in the short-term. However, the seemingly inconsistent doctrinal positions undertaken in shari'a review have a more predictable political logic. The positions of intellectual and religio-political movements are reflected in courts through the political appointment and retention of judges as democratic governments and authoritarian regimes draw on such movements for political support and legitimacy.<sup>2</sup>

But to assert that shari'a is articulated in the religio-political space and only manifested in state law through politics is not to dismiss the importance of law and courts. In recent years, some religio-political movements have taken the path of violent struggle to enforce their conception of shari'a and justice. In contrast, shari'a review offers an avenue for religio-political movements to work within the state's institutional context to assert their conception of shari'a. Finally, despite the colonial rupture, the evolving relationship between the 'ulama and the ruling regime in the post-colonial state may reflect a continuity in Islamic legal history over the *longue durée*.

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<sup>1</sup> Ebrahim Moosa, "The Sunni Orthodoxy," *Critical Muslim* 10 (2014).

<sup>2</sup> In this regard, shari'a review may be seen in comparison with judicial politics and party politics in the United States over contested issues such as abortion.

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## **2. Datasets**

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