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**Court**
FEDERAL SHARIAT COURT

**Date**
2000-01-05

**Appeal No.**
SHARIAT PETITIONS NOS. 29/1, 32/1, 37/1, 42/1, 13/L OF 1993, 3/1, 28/I, 6/L, 10/L, 11/L OF 1994

**Judge**
MIAN MAHMOOB AHMED, C.J., DR. FIDA MUHAMMAD KHAN AND CH. EJAZ YOUSAF

**Parties**
ALLAH RAKHA AND OTHERS (PETITIONERS) VERSUS FEDERATION OF PAKISTAN AND OTHERS (RESPONDENTS)

**Lawyers**

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**Statutes**

MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - PREAMBLE CONSTITUTION OF PAKISTAN (1973) - ARTICLES 203-B(C) AND 203-D CONSTITUTION OF PAKISTAN (1973) - ARTICLE 203-G CONSTITUTION OF PAKISTAN (1973) - ARTICLE 203-D MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - SS.4, 5, 6 AND 7 ISLAMIC JURISPRUDENCE MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S. 5 MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S. 6 MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - R. 7 CONSTITUTION OF PAKISTAN (1973) - ARTICLE 203-D

**Judgment**

MIAN MEHBOOB AHMED, C.J.-37 petitions detailed hereunder have been filed under Article 203-D of the Constitution of the Islamic Republic of Pakistan questionings the validity of various provisions viz. sections 4, 5, 6 and 7 of the Muslim Family Laws Ordinance, 1961 (hereinafter called the Ordinance) on the touchstone of Injunctions of Islam. Shariat Petitions Nos.29-I, 32-I, 37-I,-42-I all of 1993, 13-L of 1993, 3-I-, 28-I of 1994, 6-L, 10-L and 11-L of 1994, 15-I, 18-I and 19-I of 1995, 5-L, 7-L of 1995, 3-I, 4-I, 6-I, 10-I, 11-I and 13-I of 1996 and 10-1 of 1997 and 4-L of 1997, Shariat Miscellaneous Application No. 14-I of 1997, Shariat Petition No.10-I of 1998, 1-L and 2-L of 1998 and 14-I of 1999 seek declaration to the effect that section 4 of the Ordinance is violative of the Injunctions of Islam.

Through Shariat Petition No. 16-I of 1994 declaration has been sought for that section. 5 of the Ordinance is against the Injunctions of Islam.

Shariat Petitions Nos.26-1 of 1994, 2-P of 1996 and 2-1 of 1996 have questioned the validity of section 6 of the Ordinance on the touchstone of Injunctions of Islam while Shariat Petition No.4-1 of 1994, 11-I of 1998 and 7-L of 1999 seek a declaration to annul section 7 of the Ordinance as a whole being against the Injunctions of Islam whereas in Shariat Petition No.7-1 of 1995 sections 7(1), (3) and (4) of the Ordinance have been sought to be declared as opposed, to Injunctions of Islam, while Shariat Petition No.21-1 of 1995 seeks blanket declaration qua-£ections 4 and 7 of the Ordinance to be violative of the Injunctions of Islam.

2. As already mentioned above in view of the position that various provisions of the same Ordinance/Law have been questioned through the aforementioned petition, we proposed to deal with these petitions through this single judgment.

3. Muslim Family Laws Ordinance is an enactment which according to its preamble was intended to give effect to certain recommendations of the Commission on marriage and family laws. To comprehend fully the importance of the subject of this Ordinance it appears appropriate to give some historical background. In the early fifties a sizeable segment of the society and in particulair the female sector had mental reservations as regards the treatment meted but to woma by the male dominated society. The All Pakistan Women's Association, a body which claimed to represent the women point of view was in the forefront in claiming legislation to protect their rights and had in fact started agitation. To alleviate the situation, the then Govemment constituted a Commission to consider the various aspects of the demands and make recommendations in relation to the family system. Initially it was comprised (1) Khalifa Shauja-ud-Din, (2) Dr. Khalifa Abdul /Hakim, (3) Maulana Ehtishamul Haq, (4) Mr. Enayat-ur-Rehman, (5) Begum Shah Nawaz, (6) Begum Anwar G. Ahmad and (7) Begum Shamsunnihar Mahmood. Maulana Ehtishamul. Haq was the only Alim Member of the Commission. Thereference to Commission inter alia was to make a report on the proper registration of marriageand divorces, the right exercisable by either partner through a Court or by other judicial means, maintenanceand/the establislunent of Special Courts to deal expeditiously with cases affecting women rights.

4. The first meeting of the Commission, wras held on 5th of October, 1955 when matters

of procedure, etc., were considered and its Secretary was assigned the duty of framing a questionnaire but shortly thereafter the President of the Commission, Dr. Khalifa Shuja-ud-Din died of a heart attack and the Commission proceedings remained suspended for some time. However, within a short span a former Chief Justice of Pakistan, Mian Abdul Rashid, was appointed in place of late Dr. Khalifa Shuja-ud-Din as the President. The new President rightly pointed out that the preparation of the questionhaire being a very important step should be undertaken by the. Commission itself rather than entrusting it, to the Secretary. Ultimately a questionnaire both in Urdu and English was prepared and its translation in Bengali was entrusted to Begum Shamsunnihar Mahmood. The Commission thereafter circulated the questionnaire to elicit public opinion. The questions framed which are relevant to the provisions under examination in this judgment were as under:--

RE: SECTION 4

Under the heading Inheritance and Wills Question No.3 was framed as under:--

"Is there any sanction in the Holy Qur'an or any authoritative Hadeth whereby the children of the predeceased son or daughter are excluded from inheriting property?"

RE: SECTION 5

Under the heading 'Nikah' questions inter alia framed were as under:--

Question No.1.-Should Nikah be performed by State-appointed Nikah-Khawans only?

Question No.2.-Should there be compulsory registration of marriages, and if so, what machinery should be provided therefor? What should be the penalty, if any, and who is to be penalized for non-registration?

Question No.9.-Should a standard Nikahriama be prescribed and its execution made compulsory at the time of solemnization of the Nikah?"

RE: SECTION NO.5

Under the heading 'Polygamy' following questions were framed:-

Question No.1.-The Qura'nic Verse dealing with polygamy occurs only in connection with the protection of the rights of orphans (Verse III, Surat Al-Nisa). Is polygamy prohibited except when the protection of the rights of the orphans is the main objective?

Question No.2.-Should it be made obligatory on a person who intends to marry a second wife in the lifetime of the first to obtain an order to that effect from a Court of law?

Question No.3.-Should it be laid down that no Court can grant such an order till it is satisfied that the applicant can support both wives and his children in the standard of living to which he and his family have been accustomed?

Question No.4.-Should it be laid down that the Court shall make provision that at least

one-half of the salary of such an individual is paid directly to the first wife and her children?

Question No.5.-In the case of persons who do not enjoy a direct salary should the Court demand guarantees from the applicant for the payment of at least half his income to the first wife and her children?

RE: SECTION 7

Under the heading 'Divorce' no question directly relevant to this section was framed by the Commission.

5. After due deliberations the Commission issued its report, vide Notification, dated 11th of June, 1956, which was published in the Gazette of Pakistan Extraordinary, dated 20th of June,1956. This report of the Commission was dissented to by the only Alim Member, Maulana Ehtishanuil Haq, who gave his own note of dissent. After the issuing of the report various recommendations of the Conurtission were incorporated in the Muslim Family Laws Ordinance, 1961. Some of the provisions of the Ordinance are in question in the petitions under disposal by this judgment.

6. It may also be observed that the Ordiriance aforementioned came under severe criticism by Ulema of various schools of thought who rose in revolt and issued a general Statement declaring the Ordinance to be contradictory to express commandments of the-Holy Qur'an and the Sunnah of the Holy Prophet (peace be upon him). This statement has been placed on record by the petitioners. However, the law has continued to remain in force till date though it has always remain controversial.

7. The President's Order No.3 of 1979 i.e., the Constitutional (Amendment) Order of 1979 was promulgated on 7th of February, 1979. By virtue of Article 203-B of this Constitutional (Amendment) Order jurisdiction was conferred on the High Courts to examine, and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and the Sunnah of the Holy Prophet (peace be upon him). Invoking the above jurisdiction a petition was filed in the Peshawar High Court for the first time challenging the validity of section 4 of the Muslim Family Laws Ordinance, 1961. The Shariat Bench of Peshawar High Court vide judgment reported as Mst. Farishta v. Federation of Pakistan (PLD 1980 Peshawar 47) held that section 4 of the Ordinance was opposed to the Injunctions of Islam.

8. Appeal against this judgment of the Peshawar High Court was taken to the Shariat Bench of die Supreme Court of Pakistan on which the said judgment was set aside on the ground that section 4 of the Ordinance comes within the purview of the Muslim Personal. Laws hence the examination of the same was beyond the jurisdiction of the Shariat Bench of the Peshawar High Court. This judgment of the Shariat Bench of the Supreme Court of Pakistan is reported as PLD 1981 SC 120. This view held the field for a considerable long time.

9. Constitution was again amended by President's Order No.1, dated 25th of June, 1980 and Chapter 3-A was added to it whereunder the Federal Shariat Court was constituted. A number of Shariat Petitions were filed before the Federal Shariat' Court questioning the

provisions of Zakat and Ushr Ordinance, 1980. These were decided by a single judgment titled Dr. Mahmood-ur-Rehman Faisal v. Secretary, Ministry of Justice, Law and Parliamentary Affairs and others reported as PLD 1991 FSC 35. These petitions were dismissed holding as under:-

"On the expiry of the period of 10 years the fiscal laws have now come within the jurisdiction of this Court but Muslim Personal Law still remains outside the pale of authority of this Court and so the Zakat and Ushr Ordinance of 1980, which falls within the definition of Muslim Personal Law, is outside the jurisdiction of this Court."

10. Against the abovementioned decision of this Court appeal was taken to the Shariat Appellate Bench of the Supreme Court of Pakistan. The Shariat Appellate Bench of the Supreme Court of Pakistan decided the appeal on 13th of June, 1993 in the case titled "Dr. Mahmood-ur- Rehman Faisal v. Government of Pakistan" reported as PLD 1994 SC 607. Hon'ble Shariat Appellate Bench of Supreme Court of Pakistan differed with the earlier view of the Shariat Bench of Supreme Court of Pakistan in Mst. Farishta's case (PLD 1981 SC 120) and held that only by reasons of being a codified or statute law and applicable exclusively to the Muslim population of the country, a law would not fall in the category of 'Muslim Personal Law' unless it is also shown to be the personal law of a particular sect of Muslims based on the interpretation of Holy Qur'an and Sunnah by that sect and therefore, the Zakat and Ushr Ordinance was not outside the scope of scrutiny of the Federal Shariat Court under Article 203-D of the Constitution.

11. In the wake of the aforementioned judgment of the Hon'ble Shariat Appellate Bench of the Supreme Court of Pakistan holding that codified/statute laws applicable to the general population of the Muslims are open to question before the Federal Shariat Court for examination as to whether the said law are violative of the Injunctions of Islam or not the petitions under consideration as detailed in the opening para., of this judgment were filed before this Court questioning sections 4, 5, 6 and 7 of the Ordinance as being violative of the Injunctions of Islam.

12. In view of the importance of the provisions of the Ordinance questioned through the petitions under consideration which are relatable to the social fibre of the Muslim community of the country was decided to hear these petitions at the Principal seat as well as at the seats of all the Provinces of the country. Due publicity was given before hearings at all the above places so that any person who can assist the Court in resolving the controversies can appear and canvass his point of view. The Court also invited Ulema of all schools of thought to appear as jurisconsults. The petitioners who have filed the petitions were also heard either in person or through their counsel. The counsel of the parties, petitioners and jurisconsults were heard, at length and whosoever Wanted' to file their written points of view were also allowed to do so.

13.The Registry of the Court was also directed to establish contact with other Muslim countries through their Embassies/Missions so as to obtain any relevant laws enforced in those countries in respect of provisions in question. In response to the request of this Court, Irian, Syria, Jordan, Libya, Malaysia.Tunisia and Egypt have provided their relevant law and we must extend our thanks to the countries which in response to the request of the Court provided relevant laws in force in their countries which have been found to be of great help and assistance.

14. Before we take up each provisions separately and dilate on it, we consider it necessary to decide the question of jurisdiction of this Court as it has been specifically raised during the arguments by some of the parties who represented their point of view. The objection to the jurisdiction is based on the premises that the examination of the Muslim Family Laws Ordinance is beyond the scope of jurisdiction of this Court in view of the definition of law contained in sub-Article (c) of Article 203-B of the Constitution of Islamic Republic of Pakistan. For facility of reference the said provision is reproduced hereunder:-

'law' includes any custom or usage having the force of law but does not inclnde the Constitution, Muslim Personal Law, any law relating to the procedure of the 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 insurance practice and procedure."

15. We have already referred to the case law on the subject. The first relevant decision is the case of Mst. Farishta v Federation of Pakistan PLD 1980 Peshawar 47 wherein section 4 was questioned as opposed to Injunctions of Islam and the Peshawar High Court declared the same to be opposed to the Injunctions Islam. In appeal the Supreme Court of Pakistan vide Federation of Pakistan v. Mst. Farishta, PLD 1981 SC (Shariat Bench) 120 reversed the judgment of the Peshawar High Court holding that the examination of section 4 of the Ordinance was not justified by the High Court as the examination of this law was ousted from its jurisdiction by virtue of the definition of law.

16. However, in petition before the Federal Shariat Court in which the provisions of Zakat and Ushr Ordinance, 1980 were questioned as opposed to Injunctions of Islam, this Court held that the provisions being relatable to Muslim Personal. Law are not open to question before the Federal Shariat Court in view of the same having been kept outside the jurisdiction of the Court. As already pointed out the Shariat Appellate Bench of the Supreme Court of Pakistan in appeal against the above decision of Federal Shariat Court in the case reported as Dr.Mahmood- ur-Rehman Faisal v. Government of Pakistan (PLD 1994 SC 607) formed a contrary view to the one taken in the judgment of this Court and has remanded the case back for adjudication afresh on merits.

17. Mr. Ismail Qureshi, Advocate and Mrs. Asma Jehangir, Advocate appearing at Lahore before us objected to the jurisdiction of this Court and relied on Mst. Farishta's case decided by the Supreme Court of Pakistan vide PLD 1981 SC (Sharait Bench) page 120, Mst. Kaniz Fatima v. Wali Muhammad and another PLD 1993 SC 901 and Muhammad Hass an Musa and two others v. Sardar Muhammad Javed Musa and 5 others 1997 SCMR 1992.

18. We have examined this contention and have carefully gone through the judgments cited in support thereof. As regards the last cited judgment viz. 1997 SCMR 1992 we suffiee by observing that this is only a leave granting order whereby leave has been granted to examine the effect of various judgments.

19. The two others judgments left to be considered are Mst. Kaniz Fatima's case and Mst. Farishta's case. Mst. Kaniz Fatima's case was decided on 1st of August, 1993 while Mst. Farishta's case was decided on 20th of January, 1981. The latter case was decided by the

Shariat Bench of the Supreme Court while the former was decided by the Supreme Court of Pakistan. The Shariat Appellate Bench of Supreme Court of Pakistan in the case of Dr. Mehmood-ur-Rehman Faisal (PLD 1994 SC 607) reviewed the view taken in Mst. Farishta's case and disagreeing therewith held that the Federal Shariat Court has the jurisdiction to examine the provisions of all codified or statute law in the field of Muslim Personal Law which apply to the general body of Muslims. Mst. Farishta's case (PLD 1981 SC 120), therefore, no longer holds the field.

20. The elaborate discussion in the judgment of the Shariat Appellate Bench of the Supreme Court of Pakistan in Dr. Mahmood-urTRehman Faisal's case (PLD 1994 SC 607) reaching the conclusion that Family Laws of particular nature which relate, to a particular sect only are not open to question and that.the codified or other statute laws which are applicable to general Muslim population of the country are not to be place in the category of 'Muslim Personal Law' envisaged by Article 203-B(c) of the Constitution of Pakistan appearing at pages 619 to 621 may usefully be reproduced hereunder:--

"With highest respect and regard to the learned Judges who decided Mst. Farishta's case, the above-quoted reasons in our humble opinion did not support the interpretation of expression 'Muslim Personal Law' adopted in Mst. Farishta's case. The role of the Council as defined in Article 230 of the Constitution is purely of advisory nature. There is nothingin Article 230 (supra) to indicate that the President, the Governor, a House or a Provincial Assembly is bound to obtain advice of the Council before enacting a law. The Council is to advise only when a matter is referred to it in accordance with the provision of Article 229 of the Constitution. Again, pending advice of the Council on a reference, a law could be promulgated by a house, Provincial Assembly, President or the Governor, if it found to be in public interest and the advice of the Council received subsequently that the law is repugnant to the Injunctions of Islam, is only to be considered by the agency making the reference to Council. Therefore, to say that wrong done by promulgation of such law could be remedied through the, Council would be mere illusion. The interpretation of the expression 'Muslim Personal Law', therefore, in a manner which reduces the effective role of Federal Shariat Court contemplated under the Constitution, in the process of Islamization of laws, in our view, will be contrary to the necessary intendment of the Constitution. We are, therefore, inclined to interpret the expression 'Muslim Personal Law' in a manner which would enlarge the scope of scrutiny of all codified and statute laws not strictly falling within the meaning of 'Muslim Personal Law'. Keeping in view the preceding discussion, what then the express 'Muslim Personal Law' really means in the context of jurisdiction of Federal Shariat Court under Article 203- D of the Constitution. The expression 'Muslim Personal Law' used in Article 203-B(c) of the Constitution while defining Law' is not explained anywhere in the Constitution. Chapter 3-A. which contains Article, 203-B (supra) was introduced in the Constitution on 23-5-1980. Almost immediately after that on 18-9-1980, by P.O. 14 of 1980, the explanation to Article 227(I) of the Constitution was added which we have already reproduced earlier in our judgment. The effect of the explanation added to Article 227(1) (supra) was not considered in Mst. Farishta's case by this Court, perhaps for the reasons that Mst. 'Farishta's case was decided on the basis of language of Article 203-A and B and Article 227 of the Constitution, as they stood before substitution of present Chapter 3-A in the Constitution and addition of explanation to Article 227(1) (supra). The fact that this Court did not consider the effect of explanation added to Article 227(1) (supra) in Mst. Farishta's case is evident from the comparison in juxtapositidn of the then Article 203-A and B with Article

227 of the Constitution in the judgment at pages 123/124 of the report in that case. In our view, the addition of explanation to Article 227(1) of the Constitution immediately after insertion of present Chapter 3-A in the Constitution was very significant. The Federal Shariat Court established for the first time under the Constitutional mandate in pursuance of the provisions contained in Chapter 3-A, which became part of theConstitution on 27-5-1980. The jurisdiction of Federal Shariat Court was specified in Article 203-D (supra) after defining the word 'Law' in Article 203-B(c) (supra) the establishment of Federal Shariat Court in the Constitutional scheme was undoubtedly a part of the process of Islamization of laws. The addition to the explanation to Article 227(1) (supra) immediately after establishment of Federal Shariat Court and defining its jurisdiction indicated the scope of process of Islamization of laws. This explanation in our view also provided an insight to the real meaning of expression 'Muslim Personal Law' used in defining 'Law' under Article 203-B of the Constitution. The explanation to Article 227(1) provides that while applying clause (1) of Article 227, which contains a command to bring all existence laws in conformity with the ‘injunctions of Islam and prohibits the Legislature to enact any law in future repugnant to the Injunctions of Islam, the personal law of any Muslim sect, will be construed on the basis of interpretation of Qur'an and Sunnah by that sect. It needs no elaboration here that Muslim Ummah consists of several sects and each sect interprets Holy Qur'an and Sunnah of Holy Prophet (peace be upon him) in its own way and considers it as the personal law of that sect. This personal law of each sect of Muslims has been given full protection during the process of Islamization by adding the explanation to Article 227(1) of the Constitution. It was necessary to protect the personal law of each sect of Muslims based on the interpretation of Holy Qur'an and Sunnah of the Holy Prophet (peace be upon bim) by that sect as otherwise it would lead to unresolvable controversies and conflict between different sects of Muslim Ummah. To us, it appears that the Constitutional Scheme of Islamization of laws intended to keep the personal law of each sect of Muslims outside the scope of scrutiny of Federal Shariat Court under Article 203-D of the Constitution. The expression 'Muslim Personal Law' used in Article 203-B(c), therefore, in our view means the personal law of each sect of Muslims based on the interpretation of Qur'ah and Sunnah by that sect. The expression 'Muslim Personal Law' used in Article 203-B(c) (supra), therefore, will be limited in its meaning only to that part of personal law of each sect of Muslims which is based on the interpretation of Holy Qur'an and Sunnah of Holy Prophet (peace be upon him) by that sect. Therefore, a law which a particular sect of the Muslim, considers as its personal law based on its own interpretation of Holy Qur'an and Sunnah is excluded from being scrutinized by the Federal Shariat Court under Article 203-D of the Constitution as it would fall within the meaning of ‘Muslim Personal Law'. All other codified or statute laws which apply to the general body of Muslims will not be immune from scrutiny by the Federal Shariat Court in exercise of its power under Article 203-D of the Constitution. Mere fact that a codified law or a statute law applied to only Muslim Population of the country, in our view, would not place it in the category of 'Muslim Personal Law' envisaged by Article 203-B(c) of the Constitution.

In the case before us, the Federal Shariat Court refused to entertain the petitions of the petitioner on the ground that the Zakat and Ushr Ordinance being a codified law and applicable exclusively to the Muslim population of the country, fell in the category of Muslim Personal Law and, therefore, it was outside the jurisdiction of the 'Federal Shariat Court to examine this statute under Article 203-D of the Constitution. As we have reached the conclusion of that only by reasons of being a codified of statute law and

applicable exclusively to the Muslim population of the country a law would not fall in the category of 'Muslim Personal Law" unless it is also shown to be the personal law of a particular sect of Muslims, based on the interpretation of Holy Qur'an and Sunnah by the sect. The Ordinance was not outside the Scope of scrutiny of Federal Shariat Court under Article 203-D of the Constitution. We accordingly, allow the appeal, set aside the Order of Federal Shariat Court and remand the case with the direction to dispose of these petitions in accordance with the law. There will be no order as to costs."

21. Here it may be pertinent to observe that in Mst. Kaniz Fatima's case (PLD 1993 SC 901) which was decided on a later date than Mahmood-ur-Rehman Faisal's case (supra) which was decided by the Shariat Appellate Bench of the Supreme Court of Pakistan, the latter case was not cited, and thus, the view expressed therein not taken into consideration. In Mst. Kaniz Fatima's case the question of jurisdiction of the Shariat Appellate Bench was not directly in issue. The Hon'ble Supreme Court of Pakistan in this regard at page 915 of the report has just observed as follows:--

"With respect it may be pointed out that the jurisdiction of the Federal Shariat Court and of the Shariat Appellate Bench of the Supreme Court of Pakistan dpes not extend to the Constitution and the Muslim Family Laws....."

22. The headnote in respect of the above averments in the judgment as appearing at page 903 of the report is misleading as it has the addition of the words "Ordinance, 1961" after the words "Family Laws" which words do not appear in the text of the judgment. The legitimate inference from the above position is that the ouster of the jurisdiction of Federal Shariat Court and for that matter of the Shariat Appellate Bench of the Supreme Court of Pakistan in Mst. Kaniz Fatima's case was not as regards the provisions of the Muslim Family Laws Ordinance but was referable to Muslim Personal Laws of particular sects.

23. This point has been succinctly taken care of in the judgment of the Shariat Appellate Bench of the Supreme Court of Pakistan in Dr.

Mahmood-ur-Rehman Faisal's case and the findings therein as reproduced above are binding on all Courts of the country.

24. Before parting with this aspect of the case it may also be observed that by virtue of Article 203-G of the Constitution no Court or Tribunal including the Supreme Court of Pakistan and a High Court, shall entertain any proceedings or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court and the question as to whether the Court has the jurisdiction or not is the one which is within its domain and can be decided by it and final verdict in this regard would be that of the Shariat Appellate Bench of the Supreme Court of Pakistan.

25. We stand, fortified in our above view by the judgment of the Hon'ble Supreme Court of Pakistan in Zaheer-ud-Din and another v. The State decided alongwith other connected appeals and reported as 1993 SCMR 1718 wherein at page 1756 of the report the addition of Chapter. 3-A in the Constitution of Islamic Republic of Pakistan was taken into consideration and on conjunctive reading of Articles 203-A to 203-J and in particular of the above-referred Article 203-G and Article 203-F, it was held as under:-

"These provisions when read together would mean that findings of the Federal Shariat Court, if the same is either not challenged in the Shariat Appellate Bench of the Supreme Court or challenged, but maintained, would be binding even on the Supreme Court."

26. As present, therefore, the position of law that obtains and prevails is that provision of codified laws/statutes covering the general Muslim population of the country would be open to question before the Federal Shariat Court so as to examine their validity on the touchstone of Injunctions of Islam and only Muslim Personal Laws relating to a particular sect cannot be questioned before it.

27. In the light of the above discussion the objection to the jurisdiction of this Court to entertain and decide the petitions under consideration cannot be sustained and in respectful obedience to the dictum of the Shariat Appellate Bench of the Supreme Court of Pakistan we would hold that the Federal Shariat Court has the jurisdiction to examine as to whether sections 4, 5, 6 and 7 of the Muslim Family Laws Ordinance, 1961 are violative of the Injunctions of Islam or not.

28. Before embarking upon the section-wise discussion of the provisions in question in these petitions it would be appropriate to highlight the principles of Ijtehad. It is the consensus of all the Great Imams that there are 4 sources of Muslim Laws viz.:-

(1) Holy Qur'an;

(2) Sunnah of the Nabi-e-Karim;

(3) Ijma (Consensus); and

(4) Qias (Reason by analogy)

It may, however, be kept in mind that Imam Abu Hanifa has also opined that doctrine of Istehsan is mother valid source of Muslim Law, Similarly Malkia have enunciated (public interest) as a source of Muslim Law compatible with the doctrine of Istehsan. According to "Islami Usool Fiqh" to find a solution of a problem or resolve a question the above sources of Islam have to be resorted to in the order of priority. It must, however, be always kept in mind that all other sources of Muslim laws are subordinate to the Injunctions of Qur'an and Sunnah. Reliance on Istehsan" and Qias or for that matter on Ijma cannot be placed so as to transgress the; limitations imposed by the Holy Qur'an and Sunnah.

The following Hadith aptly provides the above principle:-

"The Holy Prophet sent Mu'adh to Yaman. He asked, "How would you judge”?

He said, "I shall judge according to that which is in the Book of God"?

He asked, "If it is not in the Book of God"?

He said, "Then according to the Sunnah of the Holy Prophet"? He asked,"If it is not in the

Sunnah of the Holy Prophet"? He said, "I shall use my own independent judgment". He said, "all praise be to God who has brought into conformity the messenger with the Holy Prophet (peace and blessings of God be upon him)."

(Trimizi, Vol.IV, page 556, Hadith No. 1342)

The lever of Ijtehad in the hands of Ummah, no doubt, has been bestowed upon it to keep the Ummah in pace rather in, advancement; ofthe modem situations prevailing at a particular time, be those in relation to sciences, technology, literature, social conditions or cultural activities but it cannot be lost sight of that "Ijtehad" cannot be so liberalized as to even remotely violate any Qura'nic Injunction or Sunnah of Nabi-e-Karim (s.a.w) which Sunnah is, in fact, the best Tafseer-interpretation of Holy Qur'an itself. Departing from the above principle of "Ijtehad" would obviously lead the

Ummah to degenerative process and must at all costs be deprecated and discouraged. Legal maxim of Shariah in the above connection is:

(where there is a decisive and clear cut text, there no question of Ijtehad arises) (Majallatul Ahkamil Adlia, section 14).

29. Islam as universally acknowledged is a "Deen" and not merely as religion. It being a code of life the Qura'nic Injunctions and the Sunnah of Nabi-e-Karim (s.a.w) which as already observed is the best Tafseer-interpretation of Qur'anic Injunctions covers all aspects of life and whatever has been injunctively and by command given thereby cannot be deviated from at any point of time. It must be always borne in mind that no worldly law can be better than the law of Allah Almighty.

30. With the delineations and limitations as circumscribed above we would now proceed to examine separately each of the provisions in question viz. sections 4, 5, 6 and 7 of the Muslim Family Laws Ordinance, 1961.

Instead of burdening learned 31.

counsel/parties/jurisconsults/organizations we have considered it desirable that the gist of the arguments be capitulated in the judgment especially when all of the arguments proceed practically on the same premises.

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SECTION 4 OF THE MUSLIM FAMILY LAWS

ORDINANCE, 1961

32. The contentions questioning the validity of section 4 of the Ordinance as raised by the learned counsel for the petitioners, petitioners and jurisconsults are as under:-'

(i) Various Ayats of Sura Al-Nisa are relevant Qur'anic Verses governing the law of inheritance of Muslims and clearly give its manner, mode and shares of the heirs and, therefore, anything added thereto will be violative of the Injunctions of Qur'an.

(ii) The principle of inheritance as laid down by the Qur'an is that the nearer in degree of relationship excludes the remote. The inclusion of grandchildren as heirs in the presence of sons/daughters, who are nearer offends the above principle. Under this provision, of law the persons who have a direct link with the propositus and the persons who have indirect link have been brought at par which is against the above basic principle of Islamic Law of inheritance.

(iii) That if the predeceased children could not inherit anything from their parents how can their sons and daughters inherit the quantum of share which never accrued to them, inasmuch as the inheritance devolves on the demise of the propositus and those who have predeceased him obviously could not inherit and what they could not inherit could not he passed on to their successors.

(iv) If the doctrine of representation which has been relied upon in framing section 4 is applied to the children of predeceased son/daughter then why it should not be applied to others, who might have inherited from that predeceased son/daughter. For example, the widow/husband or for that matter the orphan children of predeceased brothers and sisters which brothers and sisters would have been entitled to succeed. The law as framed is therefore, discriminatory and does not even stand the test of equality.

(v) That sons etc. who are heirs, according to Sura Al-Nisa are Aulad-e-Sulbi whereas grandsons etc: are Aulad-e-Majazi and the two of them cannot be equated so as to become heirs to inherit from a propositus.

(vi) That there, is Ijma which has never been disputed right from the time of Kulafa-Rashdeen till date by any Fiqah of Muslim Ummah that the children of the predeceased children of a propositus cannot inherit from him in the presence of other sons/daughters.

(vii) Emphatic contention of all those opposing this law was that it radically upsets the whole structure of the Isramic Law of Inheritance.

33. The learned Advocates-General of Balochistan and N.-W.F.P. categorically supported the above view and stated that section 4 of the Ordinance is violative of Injunctions of Islam. The learned Advocate-General of Sindh also contributed to the view that section 4 of the Ordinance, is violative of the Injunctions of Islam.

34 The learned counsel appearing for the Advocate-General, Punjab has also unequivocally supported the view that this section of the Ordinance is violative of the injunctions of Islam.

35. Initially, Dr. Abdul Malik Irfani (now late) appeared on behalf of the Federal Government and on his demise he was succeeded by Dr.

Riaz-ul-Hassan Gillani, Advocate. The learned Advocates appearing on behalf of the,

Federal Govemment canvassed for retention of section 4 of the Ordinance on the statute as according to them it did not violate any Injunction of Islam.

36. Dr. Muhammad Aslam Khaki, Najmul Sahar, Advocates, Saadia Bukhari and Asma Jahangir as also Mrs. Rashida Petel, Advocates submitted that there is no express command in the Holy Qur'an to exclude grandson from inheritance in the presence of the real son. It was urged that the word 'Wald' and its derivative 'Aulad' as used in the Holy Qur'an clearly shows that these can be alternatively pressed into service for son and grandson and it would not be against the Qur'anic Injunctions to mean son as a grandson at the same point of time; that grandfather is “Qaim Maqam" of father. A grandmother is 'Qaim Muqam' of mother and likewise grandson is Qaim Maqam' of son which principle has been adopted in section 4 of the Ordinance; that deprivation of an orphan grandchild in the presence of the children of a propositus rests on juridical opinion and can be done away with that Ijma of one period. can be changed by the Ijma of another era keeping in view the prevailing situations; that there is a Qur'anic Injunction that when near of kin or orphan and needy person are present at the time of distribution of inheritance give them something for their sustenance and behave with them in kind way so allowing something to the orphan grandchildren is in consonance with the above commandment of Qur'an; that children's children are more beloved of the grandparents than their own children and their deprivation from inheritance would go against the sentiments of the propositus; that it is in the interest of good social order and to keep cohesion of the families the orphan grandchildren should be allowed to inherit.

37. Dr. Riaz-ul-Hassan Gillani representing the Federal Government made the following submissions:-

(a) That legislation which is a State measure for effective implementation of Shariah is below only to Qur'an and Sunnah and is higher than even Ijma provided it is not in conflict with the clear Injunctions of Qur'an, "Nase Sarih Qur'an";

(b) that rationale of Islamic Law of Inheritance is to maintain the integration of the family bonds of family relations;

(c) that the principle of "Al-Aqrab-u-Fal Aqrab" was present in pre-Islamic Arab and is being maintained just to keep the distribution of estate manageable; and

(d) that when rationale of the law is being defeated State measures to include "Mahjoob-ul-Irth" members of the family as legal heirs does not violate the classic law of inheritance, and thus, not repugnant to the Injunctions of Islam on the following basis:-

(i) It is not in conflict with the Holy Qur'an and Ahadith;

(ii) Predeceased son/daughter's children have neither been conferred the status of an heirs nor made representatives of heirs but they have been given a determined share out of estate before distribution of estate of Propositus;

(iii) Section 4 of the Ordinance is a better solution than "Wasiat-e-Wajba”

38. Before we analyse the submissions made by the opponents and supporters of

section 4 of the Ordinance as recapitulated above, it would be desirable to reproduce section 4 of the Ordinance hereinbelow for facility of reference.

“Section 4 Succession- In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be' would have received, if alive.”

We would also like to reproducethe Verses of Holy Qur'an governing the subject alongwith the English translation for the immediate facility of reference. The relevant Ayat-e-Qur’ani are:-- (4:7) From what is left by parents

And those nearest related

There is a share for men

And a share for women

Whether the property be small or large--a determinate share)

(4:11) Allah (thus) directs you As regards your children's (Inheritance): to the male A portion equal to that Of two females; if only Daughters, two or more, Their share is two-thirds Of the inheritance; If only one, her share Is a half. For parents, a sixth share Of the inheritance to each, If the deceased left children; If no children, and the parents Are the (only) heirs, the mother Has a third; if the deceased Left brothers (or sisters), The mother has a sixth. (The distribution in all cases Is) after the payment Of legacies and debts. Ye know not whether Your parents or your children Are nearest to you In benefit. These are Settled portions ordained. By Allah and Allah is All knowing, All wise.

(4:12) In what your wives leave,

Your share is a half,

If they leave no child,

But if they leave a child,

Ye get a fourth; after payment

Of legacies and debts.

In what ye leave,

Their share is a fourth, If ye leave ino child; But if ye leave a child,

They get an eighth; after payment Of legacies and debts. If the man or woman

Whose inheritance is in question

Has left neither ascendants nor descendants,

But has left a brother

Or a sister; each one of the two Gets a Sixth; but if more Than two, they share in a third:

After payment of legacies And debts; so that no loss Is caused (to anyone).

Thus, is it ordained by Allah,

And Allah is All-knowing. Most Forbearing.

(4:13) Those are limits

Set by Allah those who

Obey Allah and His Apostle Will be admitted to hardens With rivets flowing beneath,

To abide therein (for ever) And that will be

The Supreme achievement.

(4:14) But those who disobey Allah and His Apostle And transgress His limits Will be admitted. To a Fire, to abide therein: and they shall have A humiliating punishment.

(4:33) To (benefit) everyone, We have appointed

Shares and heirs

To property left By parents and relatives. To those also, to whom Your right hand was pledged. Give their due portion: For truly Allah is witness To all things.

(4:177) They ask thee For a legal decision

Say: Allah directs (thus) About those who leave

No descendants or ascendants

As heirs, If it is a man

That dies, leaving a sister

But no child, she shall

Have half the inheritance;

If (such a deceased was)

A woman, who left no child

Her brother takes her inheritance:

If there are two sisters,

They shall have two-thirds

Of the inheritance

(Between them): If there are Brothers and sisters, (they share),

The male having twice The share of the female.

Thus, doth Allah make clear

To you (His law), lest Ye err. And Allah

Hath knowledge of all things.

39. The important Ahadith of the Holy Prophet (peace be upon him) as culled out from the various books of traditions regarding the issue under discussion may also be reproduced hereinbelow:-

Narrated Ibn-e-Abbas the Holy Prophet said: give the shares of the inheritance as prescribed in the Holy Qur'an to those who are entitled to receive it, than whatever remains, should be given to the closest male relative of the deceased. (Sahih Bukhari, Hadith No.724, Vol. 8, p. 477).

The grandchildren are to be considered as one's children (in the distribution of inheritance) in case none of one's own children are still alive a grandson is as son, a granddaughter it as a daughter, inherit (their grandparents) property as their own parents would (where they are alive) and they prevent the sharing of the inheritance with all those relatives who would have been prevented from the same, where their parents are alive.

So, one's grandson does not share the inheritance, with one's own son (if the son is ' alive)". (Sahih Bukhari, English, Vol.8, p.479).

"Distribute the appointed portion tolthose entitled to them according to book of Allah. Then whatever remains is for the nearest male. While explaining this tradition Allama Nuvvi writes: the word as appearing in the above-quoted tradition, means 'nearest male' and their is consensus of opinion among the jurists on it." (Sharh Sahih Muslim, Vol. 11, p. 53).

The Shia'a Ithna Asharia also support this contention on the authority of a tradition reported by Abi Jafar al-Sadiq which is follows:-

(While distributing the property of the deceased person) "Your real son shall be preferred over your grandson and your grandson shall be preferred over your brother". '(Wasail-ul-

Shai'a, Vol.17, p.452, Print Beruit).

40. Ayaat 7, 11 and 12 of Surah Nisa directly govern the law of inheritance of Muslims. From these Ayaat the salient features that can be culled out may be enumerated as under:-

(1) From the parents there is a share for men and a share for women. No matter the property may be small or large, determinate share.

(2) By Ayat 11 the shares of all those who are to inherit a given situation are succinctly prescribed.

(3) Similarly in Ayat 12 the inheritance from spouses and the shares devolving on the heirs have been prescribed. (4) In the same Ayah 12 the inheritance of the man or woman who has left neither ascendants nor descendants but has left other relations has been described and me shares of the persons who are to inherit have also been given.

(5) In all cases the inheritance is to devolve on the death of the propositus and the distribution is to take place after payment of legacies and debts. This has been ordained to avoid any loss to any one.

(6) In Ayat 11 it is also very clearly ordained that the portions to be given to the heirs are settled by Allah Almighty and He is all knowing-all wise.

(7) Similarly in Ayat 12 the mandate is that the prescribed shares and the manner of devolution is ordained by Allah Almighty who is all knowing and most forbearing.

41. In order to emphasize that the devolution of inheritance has to be carried out in the manner prescribed in the aforementioned Ayat of Surah Nisa, in Ayat 13 it has been very categorically stated that the limits prescribed for the purpose of inheritance are set by Allah Almighty and those who obey Allah and his Apostle will be rewarded by admittance to gardens with rivers flbwing beneath to live therein for ever and that will be the supreme achievement.

42. Again in Ayat 14 a warning to those who disobey Allah and his Apostle and transgress the limits prescribed by Him has been administered with the punishment to follow for the disobedience which is admittance to a fire and to abide therein and they shall have a humiliating punishment.

43. Ayat 33 of Surah Nisa is also relevant to the subject to inheritance. It reiterates that Allah has appointed shares and heirs to property left by parents and relatives and also it is stated therein that Allah is witness to all things.

44. In Ayat 177 of Surah Nisa, Prophet, (s.a.w.) has been addressed to, that when the faithful ask you for a legal decision in certain situations regarding inheritance and as guidance for meeting such situations the heirs have been detailed with, the shares to be allowed to them in the given situations. At the end of this Ayat it has been ordained that Allah has made the law clear so that none should err and He has knowledge of all things.

45. Keeping the above principles governing the law of inheritance which give the

manner, mode and persons to inherit and their shares as well in background we have to now see whether any 'Ijtihad' was/is called for in this respect. The principle of 'Ijtehad' as acknowledged by all the schools of thought is that it is permissible only where there is no Qur'anic Injunction ( ) and if there is any ambiguity to be cleared or clarification needed then resort shall have to be made to Sunnah first.

46. From the contents of Ayaat referred to above it is manifest that there is neither any ambiguity nor any clarification needed as regards devolution of inheritance and persons to inherit as also about their shares. In the line of inheritance prescribed by Qur'an in the presence of son, the children of the predeceased children have been excluded as heirs and this position has been aptly taken care of by the Sunnah of our Holy Prophet Muhammad (peace be upon him) in the above-quoted Ahadith in which the precise position of the grandchildren has been elucidated that the grandchildren are to be considered as one's children in the distribution of inheritance in case none of one's own children are still alive and grandson has been excluded from inheritance simultaneously with the son of the propsitus. This Haidth has been followed by all schools including Fiqa-e-Jafria.

47. At this stage it might also be appropriate to observe that bringing of section 4 on the statute book viz. Muslim Family Laws Ordinance, 1961 was the result of the recommendations of the Commission on Marriage and Family Laws appointed by the Government of Pakistan in 1956 which Commission gave its report referred to in the earlier portion of the judgment. The recommendations of the Commission based on the "so-called Ijtehad" was a futile exercise which has caused confusion in the law of inheritance envisaged for the Muslim Society by mandate of the Holy Qur'an.

The Commission in this respect framed a question as under:-

Is there any sanction in the Holy Qur'an or any authoritative

Hadith whereby the children of a predeceased son or daughter are excluded from inheriting property?"

"There is a very short discussion on this issue in the Commission Report. At page 1222 of the Gazette it has been stated:-

"It was admitted by all the members of the Commission that there is no sanction in the Holy Qur'an or any authoritative Hadith whereby the children of a predeceased son or daughter could be excluded from inheriting property from their grandfather. It appears that during this custom prevailed amongst the Arabs, and the same custom has been made the basis of the exclusion of deceased children's children from ihheriting property of their grandfather. It may be mentioned that if a person leaves a great deal of property and his father has predeceased him, ther grandfather gets the share that the father of the deceased would have got.This means that the right of representation is recognized by Muslim law amongst the ascendants. It does not, therefore, seem to be logical or just that the right of representation should not be recognized among the lineal descendants. If a person has five sons and four of his sons predeceased him, leaving several grandchildren alive, is there any reason in logic or equity whereby the entire property of the grandfather should be inherited by one son only and a large number of orphans left

by the other sons should be deprived of inheritance altogether. The Islamic law of inheritance entails a grandfather to inherit the property of his grandsons even though the father of the testator has predeceased him, why can the same principle be not applied to the lineal descendants, permitting the children' of a predeceased son or daughter to inherit property from their grandfather. There are numerous injunctions in the Holy Qur'an expressing great solicitude for the protection and welfare of the orphans and their property. Any law depriving children of a predeceased son from inheriting the property of their grandfather would go entirely against the spirit of the Holy Qur'an.

It was stated by Maulana Ehteshamul Had that, all the four Imams are agreed that the son of a predeceased son or daughter shall be excluded from inheritance. The Maulana Sahib was not prepared to re-open this question in view of the unanimous opinion of all the Imams. The views of the Maulana Sahib would be elaborated by him in his note of dissent. (Underlining is by us).

It has been suggested in some of the replies that the grandfather can, by will, leave one-third of his property to his grandchildren. This provision does not do full justice to the orphans as is evident from the example given above. We, therefore, recommend that legislation should be undertaken to do justice to the orphans in respect of the property of their grandfathers."

On this point the only Alam Member had disagreed as is apparent from the last but one para, of the above quotation. As regards the opening sentence of the above quotation where admitted position of all the members has been given out Maulana Ehtishamul Haq, the Alam Member in his note has recorded that this does not reflect the correct position.

49. Be that as it may, we are of the view that the above formulation of the question in the manner framed misdirected the proceedings of the Commission. In the presence of the Ayaat of Surah Nisa quoted above the question to be framed required a positive frame and not negative as was done by the Commission. We are certain that if the question had been framed so as to solicit views on the subject in the following form, the result may have been different:

"Are the children of a predeceased son or daughter entitled to inherit from the grandfather in the presence of a son of a propositus according to Qur'an and Sunnah?"

Unfortunately this was not done. Obviously in the presence of a positive direction that inheritance under the Islamic Law as derived from Qur'anic Verses being based on the principle of and and son being the if the grandson was to be included in the list of heirs the "father" would be equated with the"nearer" which would amount to interpolation in the Qur'anic Verses. This principle of Qur'anic Verse has been explained by the Hadith also which is in the following words:-

50. In the presence of the above clear position regarding inheritance to devolve upon nearer (son) to the exclusion of farther (grandson) on verse was specifically required in Qur'an to exclude an orphan grandson from inheritance.

51. To re-explain the position the question for determination was and is whether the

grandsons/daughters of a propositus whose parents have died during the lifetime of the proptisitus are included in the list of those entitled to inheritance under the Qur'anic Injunctions. Qur'anic Injunctions are of two types; directory and prohibitory. It is a matter of common sense otherwise also that in the presence of a mandatory injunction in respect of any matter no prohibitory provision would be required. The Ayaat of Quran e-Hakeem referred to above on the subject of inheritance are mandatory, clear, explicit and, therefore, needed no prohibitory provision for any explanation. The emphasis in the above Ayat of Surah Nisa that the directions contained therein as regards inheritance in all respects have to be followed in letter and spirit and any deviation therefrom entails punishment of severe nature establishes the absolute mandatory nature thereof.

52. Another factor which had been weighing with the learned members bf the Commission and obviously with the framers of section 4 (ibi'd) appears tp be humane and compassionate consideration qua the orphans. The inheritance principles of Islam are not based on financial positions but as already stated above are essentially based on nearness and close proximity of relations, with the deceased whose estate is to be distributed. The above considerations of humane aspects and. compassion, though of great importance, cannot be incorporated in it on account of immense complications and the various discriminatory positions that may emerge therefrom. For example if the orphan children of the predeceased children are to be included in the list of persons to inherit why not include the widows of the predeceased children or for that matter the children of the predeceased brothers and sisters etc. and if it be so done there will be no end to the inclusions. Again in the matter of compassion an orphan grandchild without any tangible asset with him should not be equated with another orphan grandchild who in his own right may be much better placed financially than even the direct heir i.e. a son of the propositus. In the context of the above position that can emerge and do exist, in the ground realities, the human wisdom which, without any doubt cannot equate with the wisdom of the Creator, should not be allowed to muddle up the scheme of inheritance laid down by the Holy Qur'an as it is bound to create confusion and choas rather than be of any comfort or solace to the fiber of the Muslim Society. On the plane of pure worldlyconsiderations even, section 4 cannot be sustained. In order to meet situations of financial inequality in the society it is not merely the law of inheritance ordained through Qur'an which should be tampered with but attempt should be made to create a social order which takes care of all the deprived members of the society. Will it not be better to cater for the needs of all the orphans in a respectable manner, rather than care for only such Orphans who are being allowed to inherit from propositus by virtue of section 4 alone?

53. The inclusion of the grandchildren in the inheritance from the grandfather in the presence of the sons or daughters at the time the succession opens and to have per stripes a share equivalent to the share which such predeceased son or daughter would have received if alive is, therefore, nugatory to the scheme of inheritance envisaged by Qur'an. It may be observed in this regard that the children of predeceased son or daughter appear to have been purposely excluded and there appears to be a justification therefor that they are not to share the burdens and responsibilities which a son as an heir would have to undertake on the demise of his father.

54. Examining the above aspect on the principles of other jurisprudences as well it may be observed that it is well-settled even as regards the man-made law that if in any such

law there is manner and mode prescribed for doing anything in a particular manner it has to be done in the same manner only and in ho otheir manner. It is also well-settled that doing of anything in a manner other than specifically provided for will be wholly illegal and will have no effect whatsoever. If this principle is being adhered to as regards the man-made law how can one think of deviating from the law of Allah which law is the base of all laws and there can be no other law better than that. Although there is no need to derive support from principles of any other jurisprudence to interpret law as contained in Qur'an but nevertheless the above view has been expressed just to satisfy those minds which are over influenced by philosophies of law other than that of Islam. It is also intended to bring home to all such thinkers that the philosophy of law contained in Qur'an is the most just and in consonance with all equitable principles that could possibly be conceived.

55. The next question to be examined is as to what would be the solution for the socio-economic problem with which the orphan grandchildren may be confronted with on the demise of a grandparent who may have left estate from which Uncles and Aunts would inherit but they would not, and thus, may have a sense of deprivation or for that matter confronted with economic problems.

56. As already observed above Qur'an-e-Hakeem is the word of Allah Almighty who is the Creator of the Universe and who knoweth everything which none else can know and is the wisest. It will be presently shown that the solution for this problem is also available in the Holy Qur'an.

57. The Islamic Ideological"Council ih bne bf its reports1 on the-subject of inheritance has recbmmehded that the Uncles and Aunts of orphan grandchildren are duty bound to take care of their orphan nephews and neices and provide for them. It has also been recommended that in the case of non-performarice of this duty by Aunts and Uncles a legal obligation be cast upon them to abide by their duty. Probably the above recommendation is derived from Ayat 8 of Sura-e-Nlsa which lays down that at the time of distribution of assets those next of kins and orphans and others, who are present, be also dealt with kindly. This is a direction for general application to all next of kins who are present at the time of distribution to be taken care of and not specifically for orphan grandchildren.

58. The above could be one of the solutions for the problem but we are of the view that this solution is not such which will be considered respectable in the social conditions of our country inasmuch as in doing such type of a thing it is usually given but by the performer of the duty that he is doing it as a charity and those who receive anything under this arrmgement have a feeling of inferiority and may have inhibition in taking something as a matter of charity. If the piety which is a requisite of an Islamic Social Order had been prevalent it could well have been a good solution but in the situations in which we are placed, we are of the view that the better solution would be the making of a law for Mandatory will in favour of the orphan grandchildren. This view of ours finds support from a Qur'anic Verse as well. Qur'an-e-Hakeem through Ayat 180 of Surah Baqara has ordained that it is prescribed that when death approaches near you, if he leaves any goods, that he makes a bequest to parents and next of kins according to reasonable usage; and this is due from the God-fearing. This Ayat starts with a mandate that a person who sees death is approaching, has an obligation to create will. The

importance of the above mandate of Qur'an has also been stressed by the following Hadith.

Narrated 'Abdullah-bin-Umar Allah's Apostle (s.a.w.) said, "It is not permissible for any Muslim who has something to will, to stay for two nights without having his last will and testament written and kept ready with him."

59. It was canvassed, before us by some learned counsel and the Jurisconsults that this Ayat-e-Qur'ani has been abrogated on account of later revelation by which the parents had been included in the persons to inherit. We are unable to contribute to the above point of view. It is the cardinal principle of interpretation that where two provisions in a law are irreconcilable the latter shall prevail but all efforts should be made to keep both the provisions intact if a reconciliation of the two can be reached. We find that the direction of creating a will on account of latter revelation by including the parents as heirs is abridged to the extent of will in favour of the parents alone but the creation of the will as regards others including the next of kins who are not heirs remains intact in the mandatory form in which it was revealed. Obviously the grandchildren are the nearest next of kin and they having not been included as heirs will be entitled to have a will created in their, favour within the limits prescribed for creating the will. The significance and limits of which can be found from the known traditions of Prophet (s.a.w.). We, therefore, are ofthe view that creation of a will in favour of orphan grandchildren out of an estate of grandparents to the extent of l/3rd would be another very plausible solution to meet the socio-economic problem in this regard.

60. It may also be observed that this measure has been resorted to in some Muslim countries and that the laws enforced in this respect in Egypt and Kuwait are being effectively made use of.

61. We would not dilate on this aspect of the matter in further details and leave it to the legislative domain of the country to deliberate on it and bring about the law which would safeguard the interest of the orphan grandchildren and exclude all possible coriiplicatipns of litigation that may crop up as a result of loose or urithought for provision of law. We are preferring the creation of a will in favour of the orphan grandchildren by the grandparent over other solutions which may be available for the socio-economic problem, inter alia, for the following reasons:-

(a) That this derives strength from-Qur'anic Injunctions as the orphan grandchildren being not heirs would be entitled to the will in their favour as regard the estate of the propositus;

(b) that the orphan grandchildren would have fruits from the assets of their grandparent without any inhibition as they would be enjoying the same as of right in the same manner as their Uncles and Aunts as heirs would be enjoying benefits of the estate of their father; and

(c) that a provision can be made that in case a propositus dies without creating a will, the will, to the extent of 1/3rd in favour of the grandchildren out of the estate with a ceiling that it does not go beyond the share of their predecessor, shall be deetned to have been created by the grandparents in their favour.

62. From the above it squarely follows that in the presence of the direct mandatory injunctions of Holy Qur'an itself and also the Ahadith there was no occasion, and could possibly be none ever, to add anything thereto or subtract anything therefrom in the matter of inheritance.

63 In view of the foregoing discussion we hold that the provision contained in section 4 of the Muslim Family Laws Ordinance, 1961 as presently in force, is repugnant to the Injunctions of Islam and direct the President of Pakistan to take steps to amend the law so as to bring the said provision in conformity with the Injunctions of Islam. We further direct that uthe said provision which has been held repugnant to the Injunctions of Islam shall cease to have effect from 31st day of March, 2000. SECTION 5 OF THE MUSLIM FAMILY LAWS ORDINANCE. 1961

64. Shariat Petitions Nos. 16/1 of 1994 and 21/I-of 1995 are the two petitions through which section 5 of the Muslim Family Laws Ordinance, 1961 has been questioned as opposed to the Injunctions of Islam. It has been contended by the petitioner that under "Shariah" Registration of marriage is not a necessary condition to the performance of Nikah. It has been conceded that though Kitabat-e-Nikah is desirable, but prescribing of punishment for non-registration is not in conformity with the Holy Qur'an and Sunnah, It is farther urged that the only requirement of Nikah in Islam, is the presence of two witnesses.

65. In order to appreciate the contentions as raised in the above petition, it would be appropriate to reproduce section 5 (ibid) for facility of reference:-

"Section 5. Registration of marriage.--(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provision of this Ordinance.

(2) For the purpose of registration of marriage under this Ordinance, the Union Council shall grant licence to one or more persons, to be called Nikah Registrars,, but in no case shall more than one Nikah Registrar be licensed for any one ward.

(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance, be reported to him by the person who has solemnized such marriage.

(4) Whoever contravenes the provisions of subsection (3) shall be punishable with simple imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees, or with both.

(5) The form of Nikahnama, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Council, the manner in which marriage shall be registered and copies of Nikahnama shall be supplied to the parties, and the fees to be charged therefor, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under subsection or obtain a copy of any entry therein.

66. Maulana Muhammad Taseen and Mrs. Rashida Patel, Advocate appeared at Karachi, whereas Maulana Niaz Muhammad, Maulana Anwarul Haque Haqqani, Agha Yaqoob Tawasaly, Qari Iftikhar Ahmad, Qari Arshad Yameen1 and Ghulam Mehdi Najafi Jurisconsults appeared at Quetta. Mrs. Asma Jehangir, M. Ismail Qureshi and Mrs. Shaista Qaiser, Advocates appeared at Lahore. Professor Dr.

Saeeduallah Qazi appeared at Peshawar to assist the Court in respect of the validity or otherwise of the provision. Dr. Riazul Hassan Gillani, Advocate appeared on behalf of the Federal Government while Advocate-General, Punjab through Mr. Fazal-ur-Rehman Rana, Advocate appeared at Islamabad.

67. The crux of the arguments of all the learned counsel as also the jurisconsults was that section 5 being regulatory only does not as such violate any Injunction of Islam, Some of the Jurisconsults, however, tried to canvass that making non-compliance of this provision as punishable tend tp place an embargo on the free performance of Nikah.

68. A Jurisconsult of Fiqh Jafaria also submitted that there is no provision in the Holy Qur'an and Sunnah to make the Registration of Nikah compulsory and, therefore, non-registration of Nikah will not be against Shariah.

69. We have given anxious consideration to the submissions made before the Court as detailed above. It is the admitted positiort that there is no Qur'anic Verse and for that matter any Hadith which prohibits the registration of the Nikah or for bringing into writing the performance of a Nikah. A bare perusal of the provision aforementioned would show that it is intended to regulate the procediire of Nikah in a Muslim country and to keep record of marriages which jin tum entails the paternity of children, in inheritance etc. and keeping of such a record would obviate any possibility of complications in respect of the above matters which, before the promulgation of this provision, were usually faced by the society. The bringing of this provision on the statute book, therefore, is not only not violative of any Injunction of Islam but to the contrary, is helpful in establishing an orderly society in the country. Whilst on the subject it would also be of benefit to observe that in Islam marriage has been given the position of a contract and not only a contract of ordinary nature but a contract of a high social status. It is manifest from Ayat 282, Sura Baqara as also from a number of Ahadith that while entering into a contract it shall be desirable to bring the same into writing. If such a mandate is available for contacts of commercial nature, money matters, etc. how can a contract of a higher status, i.e, a social contract, can be excluded from being brought into black and white. It, therefore, emerges from the above discussion that entering into a written contract of marriage and making it certain by registration through a Government' record is essential for an Islamic society as envisaged by the Holy Qur'an and Sunnah of Nabi-e-Karim (p.b.u.h.). As already observed above registration Of marriage as provided for by section 5 (ibid) in a Government record, will be a positive check on the litigation where due to non-registration, the marriage and/or paternity of children is denied in order to just deprive the wife or the children from their inheritance. The measure intended to be preventive for avoiding litigation can, thus, in no manner be termed as un-Islamic of opposed to the Injunctions of Islam.

70. Before parting with the subject we would like to observe that non-registration of Nikah under section 5 of the Muslim Family Laws Ordinance, 1961 as held by this Court in the

foilowing cases:

Abdul Kalam v. The State NLR 1987 SD 545.

Muhammad Ramzan v. Muhammad Saeed and 3 others PLD 1983 FSC 483.

Arif Hussain and Azra Parveen v. State PLD 1982 FSC 42.

does not invalidate marriage/Nikah itself merely on account of nonregistration of Nikah, if otherwise Nikah has been performed in accordance with the requirements of Islamic Shariah. We in view of the above feel inclined to recommend that the Government should clarify this position in the provision itself.

71. We may also observe that for having effectual compliance of the provision it would be desirable that the punishment prescribed by subsection (4) of section 5 be suitably enhanced as that prescribed presently is not adequate to attract strict compliance of the provision.

72. In the light of the above discussion we hold that the provision contained in section 5 of the Muslim Family Laws Ordinance, 1961 is in no manner violative of any Injunctions of Islam.

SECTION 6 OF MUSLIM FAMILY

LAWS ORDINANCE. 1961

72-A. Shariat Petition Nos.26/1 of 1994, 2/P of 1996 and 2/1 of 1996 were filed to challenge the validity of secton 6 of the Muslim Family Laws Ordinance, 1961 as opposed to the Injunctions of Islam. The premises of these petitions is that since the Holy Qur'an has permitted the Muslims to have more than one wife with a ceiling of 4, any embargo placed thereon is against he Qur'anic ( ) and thus, should be struck down as opposed to the Injunctions of Islam.

73. Hearing was afforded to all who wanted to appear at the Principal Seat as also at all the seats of the Provinces. Many Jurisconsults were also invited to address the Court.

74. Late Maulana Muhammad Taseen who appeared at Karachi contended that there is no prohibition in Islam if someone wants to marry more than one woman but this is subjected to an important condition. He elaborated his point of view by submitting that if a Muslim is not having a monitary position and also a physical condition which enables him to keep between the wives in all respects then he is enjoined to keep one wife only. He also expressed the view that if a person is not able to justify the marital obligation towards a single wife then he may not marry at all and if he dies in such a condition he would not be a sinner.

75. Maulana Fazal Rahim who appeared at Lahore submitted that there is no prohibition on a Muslim to marry more than one woman but the paramount condition is that he should be in a position to do justice to all of them in all respects.

76. Dr. Saeedullah Qazi who appeared at Peshawar submitted that no clog can be put on more than one marriage by a Muslim male and it is the husband who would bethe sole judge to determine whether he wouldbe able to do justice or not.

77 Maulana Ghulam Muhammad Najafi, Agha Yaqoob Ali-Tawasuly and Qari Arshad Yaseen appearing at Quetta submitted that no restraint is permissible on a male Muslim to marry more than one woman.

78. Qari Iftikhar Ahmed appearing at Quetta contended that Arbitration Council can be formed to see whether a person is competent and justified to contract second, third or fourth marriage and if the Council feels otherwise then it should be competent to interfere. -

78. Dr. Riazul Hassan Gillani, Advocate appearing on behalf of the Federal Government and Rana. Fazal-ur-Rehman, Advocatc appearing on behalf of Advocate-General, Punjab submitted that section 6 is not violative of the Injunctions of Islam.

79. Before exmaining the validity of the provision in question it would be appropriate to reproduce the same hereunder for immediate reference:-

Section 6. Polygamy.-

"(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permissionunder subsection (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee and shall state the reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto.

(3) On receipt of the application under subsection (2) the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied.that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission-applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision (to the Collector) concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall-

(a) pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid shall be recoverable as arrears of land revenue; and

(b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both."

80. We have with grave concern been giving consideration to the respective contentions as raised above in regard to the provision under discussion which deliberations continued for hours on a number of days.

81. Before dilating on the subject in issue we may like to remove some misgivings as regards ploy gamy permitted in Islam. Polygamy is not something which has been introduced by Islam. It has been in existence as an ancient practice prevalent in almost all human societies. Bible did not condemn polygamy. In the Old Testament as also by rabbinic writings legality of polygamy has been introduced. King David and King Solomen statedly had many wives (2 Samuel 5:13) and (1 Kings 11:3). The only restrictionson polygamy appears to be a ban on taking a wife's sister as a rival wife (Leviticus 18:18). The Talmud advises a maximum of four wives. European Jews continued to practise polygamy until the sixteenth century. Oriental Jews regularly practised polygamy until they arrived in Israel where it is forbidden under civil law. Taking up the New Testament it may be pointed out that according to Rather Eugene Hillman as given by him in his book "Polygamy Reconsidered" the following may be of use to reproduce:--

"Nowhere in the New Testament is there any explicit commandment that marriage should be monogamous or any explicit commandment forbidding polygamy."

Jesus Christ has also not spoken against polygamy though it was in practice by the jews of the then society. Father Hillman also stressed the fact that the Church in Rome banned polygamy under the influence of Greco Roman Culture which prescribed only one legal wife while tolerating concubinage and prostitution. He in support of his view cited St. Augustine. African Churches and African Christians often remind their European brothers that the Church's ban on polygamy is a cultural tradition and not a confirmed Christian injunction.

82. Wheh viewed in the above background that in the pre-Islamic-era there was no restriction on the number of wives and in addition the morality of society was so degenerative to have concubines and also resort to prostitution, the Qur'anic Injunctions in this regard appear to be bjessings in the society as a whole and for the women a matter of respectability. The Qur'an has allowed ploygamy but not without restrictions and we quote from Qur'an:--

"If you fear that you shall not be able to deal justly with orphans, marry women of your choice two or three or four but if you fear that you shall not be able to deal justly with them, then only one." (4:3).

83. It may also be observed that it should not be understood that the Qur'an is exhorting the believers to practise polygamy or that polygamy is considered as an ideal. In other words the Qur'an has tolerated or allowed polygamy and no more. Now we will see why polygamy has been made permissible by Qur'an. The answer is not very difficult to reach. There are situatioris which require polygamy. Islam being a religion of universality and without any limitation as to time and space has to provide for situations obtaining at all

places and at all times and, therefore, could not ignore these compelling reasons.

84. In very many human societies females outnumber males. According to a latest statistics in the United States‘there are eight riullion more women than men. In Guinea there are 122 females as against 100 males. In Tanzania the percentage of males is 95.1 to 100 females. What should be a moral solution for societies with iriibalaneed sex ratios. Callously celibacy, infanticide can be suggested as solutions which are present in some societies in the world today even. The obvious to follow if the polygamy is not permitted would be to tolerate all manners of moral, decadence and degeneration such as prostitution, sex out of wedlock, homosexuality etc. The above evils are in fact prevalent wherer polygamy is prohibited and the sex imbalances are prevalent and this has crept irito the higher stratas of the society and in the power echelons as well. Whilst on the subject it may also be of benefit to point out that some woriien organizations coriiplairi against polygamy by dubbing it as cruelty to women. They however, lose sight of the fact that in this world there are societies where women themselves choose to be second or third wife andfeel more comfortable than being driven to immorality or deprivation. Many young African brides without distinction of religion would prefer to marry a married man who has already proved himself to be a responsible husband. Similarly many African wives urge their husbands to get a second wife to avoid loneliness.

85. Theproblem of imbalanced sex ratios becomes highly acute in wars and after wars. After the second world war there were 7,300,000 more women than men in Germany out of which 3.3 million were widows. Against 100 men in the age group of 20 to 30 there were 167 women in that age group. Many of them needed a man not only as companion or for any biological reasons but also as a provider in the times of unprecedented misery and hardship. It is not unknown to the world that the soldiers of the Victorious Allied Armies, exploited these women's vulnerability. Young girls and widows were under a compulsion to create extra marital relations with personnel of the Armies who satisfied their lust by affording cigarettes, chocolate and bread etc. to such girls and widows. To be a second wife or a. third wife or fourth wife in such situations would obviously be more respectable than degradation to which these helpless women would be 41 otherwise goaded to. The permission of polygamy becomes more and more important when we view the world in the presence of the lethal weapons of mass destruction in the hands of the West, which in wars eliminate male more than female. This position by itself proves that the Qur'an which is word of Allah Almighty is meant to be for all times for the whole of the world and contains solutions of all problems that the humanity may be confronted with at any place at any point of time.

86. Reverting to the issue we may refer to the Ayyat of Qur'an-e-Hakeem which may be relevant for the effectual resolution of the point in issue. These are Ayat No.3 of Sura Nisa and Ayat No.35 of the said Surah. These may be reproduced hereunder for facility of ready reference:- "4:3. And if ye fear that ye will not deal fairly by the orphans, marry of the women, who seem good to you, two or three or four, and if ye fear that ye cannot do justice (to so many) then one (only) or (the captives) that your right hands possess. Thus, it is more likely that ye will not do injustice."

"4.35. And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind. Lol Allah is ever Knower, Aware."

We have also kept in view the practice in this regard in the early days of Islam and in particular during the lifetime of the Holy Prophet (s.a.w.).

88. There is no doubt that a Muslim-male is permitted to have more than one Woman as wife with a'ceiling of 4, at a point of time as the ultimate, but the very Ayat which gives this permission also prescribes a condition of and the Holy Qur'an has laid emphasis in the same. Verse on the gravity and hardship oif the condition which Allah Himself says is very difficult to be fulfilled.

89. Now section 6 of the Ordinance as framed, in no manner places any prohibition in having more than one wife. It only requires that the condition of prescribed by Holy Qur'an, itself should be satisfied by the male who wants to have more than one wife. The provision for constituting an Arbitration Council, therefore, cannot in itself be said to be violative of Injunctions of Qur'an, as only a procedure has been prescribed how the Qura'nic Verse will be observed in its totality with reference to the condition of placed in the Verse itself.

90. Here we may also refer to Sura Nisa, Ayat 35 which provides, for the resolution, of dispute between husband and wife and the Qur'anic Injunction as ordained in the said Ayat also is to refer the matter in dispute to representatives of each pf the parties to the dispute. The provisions contained in section 6 are, therefore, derivable on a conjunctive reading of Ayat 3 and 35 of Sura Nisa.

91. It may, however, be observed that it be explicitly made clear in subsection (1) of section 6 of the Ordinance that Arbitration Council may be moved by the wife herself or her parents to determine whether a husband can have a second, third or fourth wife as the case may be. We are fortified in making the above recommendation from an instance regarding the intention of marriage of Hazrat Ali the presence of his wife Hazrat Fatima Bint-e-Rasool when Nabi-e-Karim indicated his anxiety on Ali having Abu Jehl' s daughter as his second wife whereupon Hazrat Aii refrained from having Abu Jehl's daughter as a second wife. The right to object to the second marriage of a Muslim male would, therefore, be available only to the wife herself as well as to her parents.

For reference please see:

92. Before parting with the subject we may also, observe that Nikah as already indicated above is a social contract of very, high status and conjoins a couple and the spouses in a sacred association, with mutual rights and obligations; to be performed in a spirit, of love and affection that should last life long, as envisaged by Ayah No:21 of Sura.No.30, Ayah No.228 of Sura Baqara and Ayah No. 19 of Sura-e-Nisa.

Therefore, anything, big or small, that may provide a cause for a breach in mutual love and trust is viewed seriously by Islamic Injunctions. In such situations the Holy Qur'an enjoins upon all Muslims to take appropriate measures to save this sacred union from disruption. Reference in this connection may be made to Verse No.35 of Sura Al-Nisa, already reproduced hereinabove1. Since one of the reasons for such disputes may be intention of the husband to contract subsequent marriage of his choice, an Arbitration Council may be required to settle the dispute. We may mention that the Arbitration

Council is not empowered to make unlawful anything declared lawful by Islam nor could do vice versa.

However, it may be reiterated that the status of polygamy in Islam is no more or no less than that of a permissible act and has never been considered a command, and therefore, like any other matter made lawful in principle may become forbidden or restricted if it involves unlawful things or leads to unlawful consequences such as injustice. Misuse of the permission granted by Almighty Allah could be checked by adopting suitable measures to put an end to or at least minimise the instances of injustice being found abundantly in the prevalent society. The Arbitration Council in such circumstances would be needed to look into the disputes arising between husband and his existing wife/wives with respect to another marriage and after taking into consideration the age, physical health, financial position and other attending factors, come to a conclusion to settle their disputes. However, we are of the view and accordingly recommend that the Arbitration Council should figure in when a complaint is made by the existing wife or her parents/guardians. The intention is to protect the rights of the existing wife/wives and interest of her/their children. Tlie wife is, therefore, the best judge of her cause who or her parents may initiate the proceedings if her husband intends to contract another marriage. Moreover, we feel that since a Nikah validly performed with a wife, whether first or fourth, necessarily entails various consequences including those related to dower, maintenance, inheritance, legitimacy of children etc., non-registration ofthe Nikah, thus, performed could not only be a source of litigation between the parties but would also lead to a, lot of injustice to such wife/wives.

93. Since this section has not expressly, declared the subsequent marriage as illegal and has merely prescribed a procedure to be followed for the subsequent marriages and punishment for its non-observance, we find that the spirit of this section is reformative only as in fact it has prescribed a corrective measure for prevention of injustice to the existing wife/wives.

94. In the light of the above discussion we would, hold that subject to our observations and recommendation in para.92 to amend the provisions of section 6 of the Muslim Family Laws. Ordinance, 1961, the said provision are not violative of the Injunctions of Islam.

SECTION 7 OF THE MUSLIM FAMILY LAWS

ORDINANCE, 1961

95. Through Shariat Petitions Nos. 4/I of 1995 and 11/I of 1998 the validity of section 7 of the Muslim Family Laws Ordinance has been questioned on the touchstone of Injunctions of Islam. The basis of these petitions in essence is that the period of Iddat preseribed by Holy Qur'an is different in different situations while subsection (3) of section 7 of the Ordinance has made it uniform and thus, the said provision is not in consonance with the Qur’anic Injunctions. The other grievance raised is that the mandatory requirement for a man to give notice of Talaq in writing to the Chairman of the Arbitrary Council has been made punishable which should not have been done as no notice of Talaq is required to be given to Chairman or any other person by any command of Holy Qur’an. Yet another objection is that the period of Iddat has been made to run under the aforementioned

provision from the date of notice to the Chairman and not from the date of pronouncement of Talaq which is also against the Injunctions of Islam.

96. Shariat Miscellaneous Application No. 27/I of 1995 claims a relief in personam and is thus, not within the scope of adjudication by this Court.

97. We have heard the petitioners, of these petitions as also some jurisconsults at the principal seat and at the seats of the Provinces. Mrs.

Asma Jehangir, Advocate appeared at Lahore on behalf of some organization. Maulana Fazle Raheem of Jamia. Ashrafia also appeared at Lahore whereas Maulana-Niza Muhammad Durrani, Qari Iftekhar Ahmad and Maulana Arshad Yamin appeared at Quetta. Dr. Raiz-ul- Hassan Gillani appeared on behalf of the Federal Government while Rana Fazlur Rehman, Advocate appeared on behalf of the Advocate- General, Puhjab.

98. Mrs. Asma Jehangir submitted that the provisions of section 7 of the Ordinance are not repugnant to the Injunctions of Islam. All others who appeared to assist the Court only objected to the provision contained in subsection (3) of section 7 of the Ordinance as violative of the Injunctions of Islam. The repugnancy or otherwise of other subsections of section 7 (ibid) were not dilated upon by any one of them.

99. The said section 7 and the relevant Ayat-e-Qur'ani are reproduced hereunder for immediate reference:-

Section 7 of the Muslim Family Laws Ordinance, 1961

"Talaq Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of Talaq in any form whatsoever, give the Chairman" notice in writing of his having done so, and shall a copy thereof to the wife.

(2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

(3) Save as provided in subsection a Talaq unless revoked earlier expressly or otherwise shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under subsection (1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time Talaq is pronounced, Talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

(6) Ndthing shall debar a wife whose marriage has been terminated by Talaq effective under this section from remarrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

"And if ye fear a breach between them twain (the man and wife), appoint an arbiter from his folk and an arbiter from her folk. If they desire amendment Allah will make them of one mind Lo! Allah is ever Knower, Aware." (4:35).

O ye who believe! If ye wed believing women and divorce then before ye have touched them, then there is no period that ye should reckon. But content them and release them handsomely. (33:49). .

O Prophet! When ye (men) put away women, put them away for their (legal) period, and reckon the period, and keep your duty to Allah, your Lord Expel them not from their houses nor let them go forth unless they commit open immorality. Such are the limits (imposed by) Allah, and who so transgresseth Allah's limits, he verily wrongeth his soul. Thou knowest not: it may be that Allah will afterward bring some new thing to pass. (65:I)

“Then, when they have reached their term, take them back in kindness or part from them in kindness and call to witness two just men among you, and keep your testimony upright for Allah. Whoso believeth in Allah and the Last Day is exhorted to act thus. And whosoever keepeth his duty to Allah. Allah will appoint a way out for him.” (65:4)

"And for such of your women as despair of menstruation, if ye doubt, their period (of waiting) shall be three months, alongwith those who have it not. And for those with child, their period shall be till they bring forth their burden. And whosoever keepeth his duty to Allah. He maketh his course easy for him." (65:4)

100. We have very carefully gone through the provisions contained in section 7 of the Ordinance and also minutely perused the Ayat-e-Qur'ani on the subject.

101. In our view the purport of section 7 of the Ordinance is regulatory only to give certainty to an event of great spouses and their families.

However, the over exuberance of legislation in a new field has resulted into the creeping in of certain discrepancies and implied violation of the Injunctions of Qur'an in two of its subsections viz. subsections (3) and

102. Talaq though a legally permissible mode of separation between spouses and bringing to end the relations between husband and wife, is nevertheless-an act which has been looked down upon by Holy Prophet (s.a.w). He has.termed Talaq as i.e. the most abhorred amongst the permissible, acts. This H.adith of Nabi-e-Karim (s.a.w) gains significance when read in conjunction with Ayat No.2 of Sura Talaq which has been, reproduced above. It would be distinctly seen that the emphasis of presence of witnesses in the matter of Talaq by Holy Qur'an is for obvious reason that since it disassociates two persons from each other who were before that act the closest to each other and, therefore, all obligations towards each one of them, should be brought to end with certainty through recorded measure. The principle underlying the provision of section 7 being the intention to achieve the objective of Holy Qur'an viz. to avoid uncertainty and exploitation as regards one of the most important elements of an Islamic society, which, if not recorded, may entail immorality as also litigation, no valid objection can be raised to the spirit of section 7 of the Ordinance.

103. However, we are of the view that subsection (3) as presently framed does not conform to the requirements of Injunctions of Qur'an. The period of Iddat can be clearly derived from the Ayaat hereinabove quoted and these cater for situations of all types that may arise in the event of Talaq. It may be pertinently observed that the matter of Iddat is of great importance as can be seen from Ayat No.l of Sura-e-Talaq. There is emphasis laid that the'period of Iddat should be computed specifically and accurately and for each situation that, may arise specifical period has been prescribed. For example in the case of a marriage which has not been consummated there is no period of Iddat as laid down by Ayat No.49 of Sura Al-Ahzab. Similarly in case of Talaq during the period of pregnancy the Iddat stands terminated immediately on the delivery of child which may well be within one minute of the pronouncement of Talaq as mentioned in Ayat No.4 of Sura Talaq. Now keeping this period of 90 days in such cases as well, is clearly violative not only of the Injunctions of Islam but is also a matter of grave hardship to the divorcee.

Islam is the protector of rights of all human beings and is the first religion which has conferred all possible rights that could be bestowed upon a woman. Fixation of period of 90 days of Iddat in all cases including those referred to above abridges the rights of women as bestowed upon them by Qur'an and, therefore, does not merit to be retained in the present form.

104. It may also be of benefit to express our firm view that the period of Iddat is to commence from the date of pronouncement of Talaq and not from the day of delivery of notice to the Chairman as the Talaq takes effect from the date of pronouncement of Talaq by the husband. Now it may well be that the husband may not give notice of Talaq as required by subsection (1) of section 7 with ill-intention for a long period, and thus, by virtue of subsection (3) keep the woman in suspended animation and cause her torture by keeping her bound, although according to the Qur'anic Injunctions she would stand released of the bond and under no obligation towards him. This will certainly be a cruelty to the woman who, by virtue of this provision can be exjposed to the hazards of litigation by an unscrupulous husband if she marries after the expiry of Iddat as enjoined by Holy Qur'an but before the expiry of period prescribed by subscction (3) (ibid). Such a situation of uncertainty entailing peril to a party should not be allowed to continue.

105. Advertirig now to subsection (5) of section 7 the same when viewed in the light of the above discussion also appears to be an unwanted provision as it prescribes a period which is not in consonance with the period of Iddat prescribed by the Qura'nic Injunctions referred to above.

To our mind there is because a comprehensive subsection (3) providing all periods of Iddat as may be enjoined upon a Muslim woman when Talaq is pronounce by her husband, should be succinctly provided in one and the same subsection.

106. In view of the foregoing discussion we would hold that section 7 of the Muslim Family Laws Ordinance, 1961 as a whole cannot be, declared as violative of Injunctions of Islam. However, the provisions contained in subsection (3) and subsection (5) of the said section 7 cannot be maintained.

107. Resultantly we declare that subsection (3) and subsection (5) of 1 section 7 of Muslim

Family Laws Ordinance, 1961 are repugnant to the Injurictions of Islam and it is directed that the President of the Islamic Republic of Pakistan shall take steps to amend the law so as to bring the above provisions into conformity with the Injunctions of Islam. The above provisions of subsection (3) and subsection (5) which have been held to be repugnant to the injunctions of Islam shall cease to have effect on 31 st day of March, 2000.

108. All the 37 petitions detailed in the opening para, hereof are disposed of in terms of the above judgment.

109. In the end we also feel that thanks to and appreciation of assistance of all those who appeared to assist the Court be placed on record.