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Court
SINDH HIGH COURT

Date
1989-05-18

Appeal No.
CONSTITUTIONAL PETITION NO. S-25 OF 1989

Judge
TANZIL-UR-RAHMAN, J .

Parties
SHAUK.AT HUSSAIN (PETITIONER) VERSUS MST. RUBINA AND OTHERS (RESPONDENTS)

Lawyers
GHULAM GHOUS AND DR.HAMEED AHMED AYAZ FOR PETITIONER.

Statutes
CONSTITUTION OF PAKISTAN 1973 - ARTICLE 199 MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S. 7 CONSTITUTION OF PAKISTAN (1973) - ART.227(1), MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) CONSTITUTION OF PAKISTAN (1973) - ARTICLES 227(1), EXPLANATION AND 2-A CONSTITUTION OF PAKISTAN (1973) - ARTICLE 227(1), EXPLANATION-MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S.7 MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S. 7 ISLAMIC JURISPRUDENCE CONSTITUTION OF PAKISTAN (1973) - ARTICLES 268, 227 AND 2-A VIRES OF LAW CONSTITUTION OF PAKISTAN (1973) - ARTICLE 2-A INTERPRETATION OF CONSTITUTION MAXIM

Judgment

This is a Constitutional Petition under Art. 199 of the Constitution of Islamic Republic of Pakistan, 1973, praying, inter alia, for setting aside the judgment and decree, dated 22-2-1989 and 1-3-1989 passed by the 9th Family Judge, Karachi in Suit No.298 of

1988 and declaring the same as illegal, unlawful and void ab initio and remand the abovesaid Family Suit to the trial Court fo:r affording an opportunity to the petitioner to lead evidence and permit the petitioner to cross-examine the respondent and her witnesses. The said petition was dismissed in limine by my order, dated 23-4-1989 for reasons to be recorded later, which are as under: -

2. The facts giving rise to the above petition, briefly stated, are that respondent No.l was married to the petitioner on 7th May,

1986 in accordance with Sunni Muslim Law. The Nikah was registered under the Muslim Family Laws Ordinance, 1961.

3. Two male children were born out of the said wedlock aged about 2£ years and one year respectively. The petitioner after about one month of the marriage, went back to Oman, where he was serving, leaving respondent No.l with his parents. The said respondent, as alleged, was daily beaten, maltreated and insulted by the petitioner's parents and other family members of the petitioner. She was treated like a maid-servant, and her parents were not allowed to visit the plaintiff. The petitioner returned to Pakistan on 21-7-1988. The petitioner, after coming back to Pakistan, also started abusing, beating and maltreating the respondent No.l without any reasonable cause, at the instigation of his parents and other family members. The petitioner made life of the respondent No.l most miserable by his cruelty of conduct and physical maltreatment. On .or about 18-3-1988 said respondent was abused, insulted and beaten by the petitioner and was turned out of his house, after snatching the minor son forcibly from the respondent and pronouncing oral divorce to her. On 30th March, 1988 respondent No.l submitted an application before the Councillor, Union Committee No.44 about divorce. The Councillor called the petitioner who admitted before the Councillor that he has orally divorced respondent No.l under anger. The Councillor directed the parties by his panchayati faisla/sifarish dated 4-6-1988, directed the respondent to approach the Court'of Law. The respondent then filed suit of dissolution of marriage against the petitioner which was decreed in her favour by the learned Family Judge, as aforesaid.

4. It may also be mentioned that respondent No.l had also filed suits for recovery of her prompt dower in the sum of Rs.20,000 and for maintenance, whereas the petitioner had filed suit for restitution of conjugal rights. The three suits were consolidated and tried together and decided by the learned Family Judge; by his judgment, dated 22-2-1988, whereby the marriage was dissolved; Dower amount of Rs.20,000 was ordered to be paid and maintenance at the rate of Rs. 1,000 per month was allowed for three months for the period of Iddat only and the petitioner's suit for conjugal rights was dismissed.

5. The petitioner has filed appeals against the decree passed against him for payment of dower and maintenance and refusing restitution of conjugal rights to him. Since no

appeal is provided against the decree of dissolution of marriage, the petitioner had no alternative but to file this Constitutional Petition.

6. Learned counsel for the petitioner has raised a number of contentions, namely: -

(i) The decree has been obtained by fraud and is nullity in the eye of law.

(ii) Respondents Nos.2 and 3, the petitioner's Advocates, appearing in the suit did not perform their professional duties properly and failed to cross-examine respondent No.l and her witnesses 'being in league with respondent No.l' causing serious prejudice to the petitioner, which has vitiated the entire proceedings.

(iii) No notice having been sent by the petitioner to the Union Council, the Talaq did not become effective. In any case, absence of notice amounted to revocation of divorce.

The first two grounds being interconnected are taken up together. It is submitted by the counsel that the petitioner had engaged two Advocates but they either failed to appear in the Court on the dates fixed or the time when the case was taken up and failed to crossexamine the respondent No.l and her witnesses. It was further submitted that the petitioner was neither afforded any opportunity to cross-examine respondent No.l and her witnesses nor lead his own evidence. Thus the impugned judgment has been passed in violation of the principle of natural justice.

7. To appreciate the submission of the counsel I called for the R & P of the suit and have gone through the case diary. It appears that when the suit was at the stage of framing issues it was transferred to. the 9th Family Court by the District Judge on transfer application, perhaps, moved by the petitioner.

8. The submission of the learned counsel that the petitioner was misinformed and ill-advised by his counsel M/s. Amir Ahmed Khan and Syed Mahmood Ali Shah about the stage and position of the case stands falsified by the facts on record. It appears that the petitioner has all along been attending the Court and was aware about the stage and dates of hearing. On 4-12-1988 the petitioner was himself present and filed application for adjournment. On 12-12-1988 the case was fixed for pre-trial and the petitioner was himself present. The pre-trial proceedings having failed, the issues were settled on the same date and the case was adjourned to 3-1-1989. On 3-1-1989 the respondent and her two witnesses were examined but they were not cross-examined by the petitioner though he was present. On 12-1-1989 when the 3rd witness of the respondent was examined the petitioner was also present. The evidence of respondent No.l was closed on 16-1-1989 and the case was adjourned to 21-1-1989 for petitioner's evidence. The petitioner and his counsel attended the Court in the morning and requested the case to be taken up at 12.00 noon. At about 12.20 p.m. when the case was called the petitioner and his counsel remained absent deliberately. The petitioner's side was then closed and the case was adjourned to 23-1-1989 for post-trial proceedings and final arguments. On 23-1-1989 the petitioner was present in person and filed an application under section 151, C.P.C. for recalling of the respondent No.l and her witnesses and permit the petitioner to cross-examine them and also reopening his side. Notice on the said application was given to the other side. On 28-1- 1989 the Advocate for respondent No.l filed objections and the case was fixed for 4-2-1989. On that day petitioner was present in person and

filed an application for adjournment as he wanted to bring his Advocate. He was granted upto 10 o'clock, and ultimately the request for adjournment was turned down and his application under section 151, C.P.C. for recalling the respondent and her witnesses and allowing the petitioner to cross-examine them was rejected as no sufficient cause was shown for the same. I think that no exception can be taken to the order passed by the learned Family Judge on these two applications which, in the circumstances, cannot be said to be arbitrary or fanciful.

Almost on all the dates, the petitioner was present in person and has been attending the Court and was pursuing the proceedings. If, for some reason, his Advocates did not attend the Court, it was a matter between him and his counsel and not the Court.

9. It is also noticeable that on 14-2-1989, one day before the date fixed for final arguments, the petitioner's counsel superseding the previous ones, filed an application under section 12(2), C.P.C. read with section 41 of the Legal Practitioners and Bar Councils Act,

1973, which was heard on 15-2-1989 and dismissed. It is also noticeable that the petitioner also filed a revision application before the learned District Judge against the order, dated 15-2-1988 passed on his application under section 12(2), C.P.C. which was also dismissed on 25-2- 1989. Another application moved by the petitioner's counsel for stay of proceedings was also dismissed. Learned counsel for the petitioner, M/s. Ghulam Ghous and Dr. Hameed Ahmed Ayaz, then, stated at the bar that they would remain present in Court but will not submit their arguments. The learned Family Judge seems to have directed the counsel to make the statement in writing which they submitted accordingly.

Hence, the arguments as submitted on behalf of the respondent No.l were heard and the judgment was reserved. The suit was decreed on 22- 2-1989.

10. The submission of the counsel for the petitioner that the two counsel namely, M/s. Amir Ahmed Khan and Syed Mahmood Ali Shah earlier engaged by the petitioner appearing in the suit did not perform their professional duties honestly, cannot be inquired into by this Court under Article 199 of the Constitution. The submission of the counsel that the act or omission of the counsel for the petitioner was fraudulent and the adverse orders were obtained by making misrepresentation or practising fraud is entirely misconceived. If the petitioner has any complaint against his Advocates he may move the Bar Council against the said counsel for refund of the fees paid to them and also for awarding damages to him. By no stretch of imagination it can be said that respondent No.l obtained decree by playing fraud on Court. The first two contentions are, therefore, without any substance.

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11. As regards the third contention, the petitioner in the instant case has orally pronounced divorce to respondent No.l on 18-3-1988 without giving any notice as provided in section 7 of the Muslim Family Laws Ordinance. The respondent No.l, however, herself filed some application before the Councillor, Union Committee No.44, Karachi. The petitioner seems to have not denied the pronouncement of divorce before the

Councillor. He, however, appears to have pleaded before him that the divorce was pronounced by him under rage or anger. The Councillor issued a certificate to that effect. The petitioner in the written statement has, however, denied the pronouncement of divorce to respondent No.l. Respondent No.l examined herself on the point of divorce having been pronounced to her thrice on 18-3-1988. The two witnesses produced by her have supported her on the point of divorce having been pronounced thrice to the respondent. The third witness has supported the fact of admitting the divorce by the petitioner before the Councillor. The learned Family Judge, in view of the evidence led by respondent No.l gave a finding of fact that the divorce was pronounced thrice orally to respondent No.l on

18-3-1988 and thus passed a decree of dissolution of marriage of respondent No.l with the petitioner. The petitioner neither crossexamined the respondent or her witnesses nor produced any evidence in rebuttal. Much less to say that he did not enter the witness-box even to deny the statement made by the respondent and her witnesses or dispute the certified copy of the certificate issued by the Councillor which was produced alongwith the plaint and exhibited while recording evidence of the respondent in the case. In the words of the learned family Judge:--

"In the presence of overwhelming evidence on record, and admission of defendant before the Councillor that he divorced plaintiff in rage, it is held defendant verbally gave divorce thrice to plaintiff on 18-3-1988, as such in spite of divorce not been given in writing plaintiff was divorced on 18-3-88. Issue -No.l answered in affirmative. Since defendant divorced plaintiff verbally on 18-3-88, the marriage between plaintiff and defendant does not exist."

12. The contention that no notice of the pronouncement of Talaq was given by the petitioner to the Chairman, and as such no Talaq became effective has no force. It has already been held in the case of Qamar Raza v. Tahira Begum (PLD 1988 Kar. 169) that Talaq becomes operative soon after it is pronounced and no notice to be served on the Chairman, Union Council is necessary, for the divorce to become effective on the expiry of 90 days from the date of the delivery of such notice which is in conflict with Explanation to Article 227(1) of the Constitution and is, therefore, void.

13. For examining the contention of the counsel, in the alternative, that non-delivery of notice by the petitioner amounts to revocation of divorce by the petitioner, it seems necessary to first reproduce the relevant section 7 of the Muslim Family Laws Ordinance, 1961, which reads as under:-

"Section 7.- (1) 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 a notice in writing of his having done so, and shall supply 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 (5) 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 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 Talaa is Dronounced, Talaq shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by Talaq effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective."

Before adverting to the above provision of law, it seems proper to deal with the Muslim Family Laws Ordinance in its historical perspective. I am conscious that it would not be possible in the judgment to deal exhaustively with the historical background and original purpose, if indeed one may be found, of the promulgation of Muslim Family Laws Ordinance. However, some aspects, in the historical perspective, may be mentioned briefly as Mr. Justice Holmes of the United States Surpeme Court observed "a page of history is worth of a volume of logic" New York Trust Co. v. Eisner 256 U.S. 345, 349 (192).

14. It, therefore, seems necessary to first recall the historical background of the promulgation of the Muslim Family Laws Ordinance, 1961. For this I would like to refer to a passage from the book "Women in Muslim Family Law" by John Esposito, New York, 1982, at page 83. The learned author writes: -

"On August 4, 1955, eight years after Pakistan's founding, the Commission on Marriage and Family Laws was established to review Muslim Family Law to determine whether changes were necessary. The Commission was composed of three men, three women and one religious scholar (to represent theUlama). The report (in June, 1956), represented the recommendations of the six laymen majority. However, shortly thereafter in August 1956, Maulana Ihtishamul Haq (Thanvi) a religious scholar (alim, pi. ulama) and a traditionalist published a vigorous dissenting report taking issue with virtually every major recommendation of his colleagues on the Commission. There then ensued an extended debate between the modernists and traditionalists."

15. It appears that as a result of countrywide protest of the ..Ulama, the said report remained lying dormant with the Government for several years. It, however, received an impetus during the military rule of Field-Marshal Ayub Khan who could impose it on the Muslims of Pakistan, under the cover of Martial Law. The strong support came from All Pakistan Women's Association (APWA), headed by Begum Ra'na Liaquat Ali Khan, wife of the first Prime Minister, Shaheed-e- Millat, Liaquat Ali Khan. So, Field-Mashal Ayub Khan, as Chief Martial Law Administrator and self-appointed President of Pakistan promulgated the Muslim Family Laws Ordinance on 2nd March, 1961 which came into force on 15th July, 1961. Notwithstanding the rigours of the Martial Law, there was a countrywide resentment, particularly by the Ulama community over the promulgation of the said Ordinance, as being against the Injunctions of Islam. Later on, the said Ordinance on the enforcement of one-man made Constitution of 1962, was given

Constitutional protection, keeping it outside the ambit of the authority of the Courts of Pakistan from being challenged as violative of Fundamental Rights and repugnant to Islam (See Gardezi's case, PLD 1963 S C 51 at page 74). Although the protection to this Ordinance was first afforded in the Constitution of 1962 but this protection continued in the subsequent Constitutions of 1972 and 1973 and still continues to be so after the revival of the Pakistan Constitution of 1973 by President's Order No.14 of 1985, perhaps, because of the secular influences working both in and outside the relevant quarters.

16. The protection to Family Laws Ordinance of 1961 under Article 8(3) of the Constitution, 1973 amounts to suspension of the Fundamental Right guaranteed to the people of Pakistan by Article 20 of the Constitution, 1973.

17. In fact, by protecting the Muslim Family Laws Ordinance, Article 20 of the Constitution has become, to that extent, nugatory. This C amounts to tinkering of Article 20. It means that an ordinary statute has been allowed to run counter to Article 20 of the Constitution, for being included in the First Schedule, so as to claim immunity from the attack of contravening the fundamental right to profess and practise one's religion according to his own faith as guaranteed under Article 20. But, to my mind, after insertion of Article 2-A in the Constitution by President's Order No.14 on 2nd March, 1985 and the Objectives Resolution being made substantive part of the Constitution allowed by the Eighth Constitutional Amendment by the Parliament the position has undergone a change. The Article 2-A and the Objectives Resolution as its Annex, are reproduced below: -

"2-A. The Objectives Resolution to form part of substantive Provisions. - The principles and provisions set out in the Objectives Resolution reproduced in the Annex, are hereby made substantive part of the Constitution and shall have effect accordingly." "The Objectives Resolution:

In the name of Allah, the Beneficent, the Merciful.

Whereas sovereignty over the entire Universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him is a sacred trust;

This Constituent Assembly representing the people of Pakistan resolves to frame a Constitution for the sovereign independent State of Pakistan.

Wherein the State shall exercise its powers and authority through the chosen representatives of the people;

Wherein the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed;

Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and the Sunnah;

Wherein adequate provision shall be made for the minorities to profess and practise their religions and develop their cultures;

Wherein the territories now included in or in accession with Pakistan and such other territories as may hereafter be included in or accede to Pakistan shall form a Federation wherein the units will be autonomous with such boundaries and limitations on their power and authority as may be prescribed;

Wherein shall be guaranteed fundamental rights, including equality of status, of opportunity and before law, social, economic and political justice, and freedom of thought, expression, belief, faith, worship and association, subject to law and public morality;

Wherein adequate provisions shall be made to safeguard the legitimate interests of minorities and backward and depressed classes;

Wherein the independence of the Judiciary shall be fully secured;

Wherein the intergrity of the territories of the Federation, its independence and all its rights including its sovereign rights on land, sea and air shall be safeguarded;

, So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity."

18. It, therefore, seems necessary to see whether the said Ordinance comes into conflict with the principles and provisions of the said Objectives Resolution. In the face of Article 2-A, subsequently added, it would not, perhaps, be possible to extend recognition to the said protection in so far it derogates or comes into conflict with the principles and provisions underlying the Objectives Resolution, which would ultimately affect the religio-social guarantee given to the people of Pakistan which the Constitution so solemnly proclaims, envisages and secures. The Muslim Family Laws Ordinance, when examined from the point of view of the infringement of fundamanetal rights, in my humble view, comes into conflict with Article 20 of the Constitution inasmuch as it prevents Muslims to practise their religion according to their belief and faith. (See my Article "Constitution and the Freedom of Religion" PLD 1989 Journal 17). It also negatives the express provision as contained in Article 227 which, inter alia, provides that in the application of clause (1) as contained in Article 227, in so far it relates to the personal law of any Muslim sect, the expression "Qur'an and Sunnah" shall mean Qura'an and Sunnah as interpreted by that sect. In other words, the interpretation of the Qur'an and Sunnah will be recognised and applied in accordance with the belief of every Muslim sect. It is true that the right guaranteed under Article 20 is subject to law and morality, but these two expressions, law and morality, will now be subjected to the interpretation in the light of Explanation to Article 227 and Article 2-A; with the result that the said Ordinance, if found against law and morality, judged by Islamic standards it will amount to transgressing the limits and will not be saved merely because it comes within the expressions of law and morality simpliciter used in Article 20 or clause (6) of the Objectives Resolution as referred to in Article 2-A of the Constitution, as the law and morality should' nevertheless be in conformity with the provisions of Article 2-A or, to be more precise, so far as the law and morality relate to Muslims, it would mean conformable to the law and morality as laid down in the Qur'an and Sunnah of the Holy Prophet. (See my Article "Law, Morality and

Society PLD 1989 Journal 94). '

19. It is true, as pointed out earlier, that the Muslim Family Laws Ordinance is a protected piece of legislation, since its inception, by its inclusion in the First Schedule so as to save it from being challenged in a Court of law on the ground that it infringes fundamental right of a Muslim to profess and practise his religion. It cannot, therefore, be attacked on the basis of violation of fundamental right guaranteed under Article 20 of the Constitution. Let it be added that the very fact that the Muslim Family Laws Ordinance has been protected is sufficient to contend that the framer of the law was conscious in his mind that the same, being against the fundamental right as guaranteed in Article 20 of the Constitution, was liable to be challenged in a Court of law and the result being obvious, and, perhaps, for that reason, protection was afforded to that law from being so challenged since its very inception. Thus, the very inclusion of the Muslim Family Laws Ordinance in the First Schedule, which saved it from the operation of Fundamental Rights guaranteed under the Constitution, is enough to show that the Legislature was itself, or I must say, because there was no Legislature in those days, the sole framer of the Constitution and of the said Ordinance, Field- Marshal Muhammad Ayub Khan was himself conscious of the fact that the said law was apparently opposed to, in the conflict and inconsistent with the fundamental right to profess and practise one's own religion. Not only that, no provision of the said Ordinance was challengeable in any Court of law on the ground of its repugnancy to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, under the Constitutions of 1962, 1972 and 1973. The protection seems to be tainted with mala fide intention. This fact is further fortified by further excepting the said Ordinance from the jurisdiction of the Federal Shariat Court as constituted by the Chief Martial Law Administrator and President, General Muhammad Ziaul Haq, in May, 1980, to be tested on the anvil of the Qur'an and Sunnah, in spite of the fact that the exclusion of the Ordinance from the jurisdiction of the Federal Shariat Court seems to be inexplicable, as to why the application of Shariat to a very important branch of law touching the basic foundation of Muslim society was specifically denied to the Shariat Court? The point, perhaps, requires some elaboration.

20. The Federal Shariat Court under Article 203-D of the Constitution, has been empowered 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.

The term 'law' has been defined in Article 203-B of the Constitution 1973, which excludes, inter alia, 'Muslim Personal Law' from the jurisdiction of the Federal Shariat Court.

21. The Muslim Family Laws Ordinance, 1961 was held to be falling within the scope of the "Muslim Personal Law" in the case reported as Federation of Pakistan v. Mst. Farishta PLD 13S1 S C 120. The Supreme Court (Shari'at Appellate Bench), while examining the question of its jurisdiction with reference to section 4 of the Muslim Family Laws Ordinance, 1961 (relating to succession) in the aforesaid case held that section 4 ibid, being part of law applicable to Muslims alone and "Muslim Personal Law", in such context, scrutiny of such section was outside the jurisdiction of Shari'at Courts and the decision of the Shari'at Bench of the Peshawar High Court in Mst. Farishta v. Federation of Pakistan PLD 1980 Pesh. 47, holding provisions of the said section contrary to the Injunctions of Islam was without jurisdiction. The Supreme Court further observed that: -

"The question is not what is the 'Muslim Personal Law' of the Muslims in the divine sense of that law, but as to what is the law for the time being in force which applies and has been applied to Muslims alone as a class and as a special law. If it has been so applied, it will fall within the set of those laws which apply to the class of people known as Muslims and in resultant sense will be Muslim Personal Law for them. This law will not be challengeable before the Shari'at Courts and the wrong, if any, done by the law, will be remedied by the Council of Islamic Ideology."

22. A survey of the criticism on the Muslim Family Laws Ordinance,

1961 will show that some of the provisions of that Ordinance, prima facie, seem to be in conflict with Shari'at, but they have all along been given effect to by the Courts in the absence of the proper forum to examine the provisions of the said Ordinance in the light of the Qur'an and Sunnah.

23. "Muslim Personal Law" is nothing but Shari'at which is also obvious from the short title of the enactments on the subject, namely: The Muslim Personal Law (Shari'at) Application Act, 1937 (since repealed) and the West Pakistan Muslim Personal Law (Shari'at) Application Act, 1961. The history of statutory law on "Muslim Personal Law" has always been equated with the word "Shari'at" but unfortunately, the Federal Shariat Court was precluded from its review.

24. The Council of Islamic Ideology, of which the present author of this judgment happened to be also the Chairman for four years, (1980-84) had suggested to the Government of Pakistan certain amendments in the Muslim Family Laws Ordinance, 1961, to bring it in accord with the Injunctions of Islam as laid down in the Qur'an and Sunnah (See Council's Report on Family Laws).

25. The Government, probably, for fear of opposition of a section of women, felt hesitant to implement the recommendations in respect of the Muslim Family Laws Ordinance, 1961 not only of the Council but the Ministries of Law and Religious Affairs as well.

26. Under the circumstances, the Council and Ansari Commission and the several Ulama Conventions held under the auspices of the Ministry of Religious Affairs, Government of Pakistan, during 1980-84, presided over by the President himself recommended that it would be advisable that the expression "Muslim Personal Law" be omitted from the definition of 'law' occurring in Article 203-B of the Constitution so as to extend the jurisdiction of the Federal Shari'at Court to questions involving 'Muslim Personal Law' including the Muslim Family Laws Ordinance. If the Federal Shari'at Court comes to the conclusion that the provisions of Muslim Family Laws Ordinance or for that matter any other statutory law falling within the domain of 'Muslim Personal Law' is in conflict with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, it will pave the way for the Government to amend the law accordingly, and the Government will also be avoiding the criticism being apprehensive, on this account (See Council's Fifteenth Report on "Islamization of Laws").

27. It was only in early 1986 that the Senate of Pakistan gave effect to that recommendation and passed the 9th Amendment Bill to the Constitution, in fact, to

redeem the pledge given by the Ruling party to the Senators belonging to the Jamaat-e-Islami and some of the members of Independent group, at the time of passing the Eighth Constitutional Amendment Bill in November, 1985. But this Bill remained lying dormant in the National Assembly, till the National Assembly was dissolved by the President by his Proclamation, dated 29th May, 1988, when the said Bill died its own death.

28. However, in the High Court of Sind on a Constitutional Petition, Qamar Raza v. Tahira Begum (PLD 1988 Kar. 169), a view was expressed that the Muslim Family Laws Ordinance, notwithstanding the aforesaid protection under Article 8(3) of the Constitution, is open to be challenged under clauses (2) and (3) and the First paragraph of the Objectives Resolution, made substantive part of the Constitution under Article 2-A, and the Explanation added to clause (1) of Article 227 of the Constitution and that the said Ordinance or any provision thereof may, therefore, be adapted to bring it in conformity with the Constitution by the High Court under Article 268 of the Constitution to the extent of its repugnancy to the Injunctions of Islam as laid down in the Qur'an and Sunnah, I wrote: -

"48. Now, looking to the Muslim Family Laws Ordinance, it is settled proposition of law that Constitution is the fundamental and Supreme Law of the land and all laws are subservient to it. It, therefore, follows that if there be a law which is not in conformity with the Constitution, it must in its application to a particular case, yield to the Supreme Law, that is, the Constitutional provision. Thus, notwithstanding the legal position that the Muslim Family Laws Ordinance, 1961 overrides any other law or custom having the force of law, it remains subservient to the Constitution to the extent that it is inconsistent with or comes into conflict with any provision thereof. No doubt, the Ordinance is protected under Article 8(3)(b) from application of Article 8(1) and Clause (6) of Article 2-A of the Constitution may also be invoked in aid, and, thus, is not challengeable on the ground that it violates any of the fundamental rights enumerated in and guaranteed by the Constitution, but it is still available to be challenged under any of the provisions of the Constitution, particularly the principles and provisions of the Objectives Resolution (except clause (6) thereof) as made substantive part of the Constitution under Article 2-A and, in view of the provisions of Article 2-A, making the Objectives Resolution as substantive part of the Constitution, "any Court, Tribunal or authority required or empowered to enforce an 'existing law' is now obliged under Article 268 of the Constitution 'to construe the same with all such adaptations as are necessary to bring it into accord with the provisions of the Constitution". The provisions of the Muslim Family Laws Ordinance thus, do not stand immune except for the protection provided under Article 8(3)(b) of the Constitution itself. Any provision of the said Ordinance, therefore, can be challenged to the extent that it comes into conflict with the provisions of Article 2-A of the Constitution except clause (6) thereof relating to the fundamental rights.

49. Testing section 7 of the Muslim Family Laws Ordinance, in particular, on the touchstone of Article 2-A (read with the Objectives Resolution) it appears that, for detailed reasons which will follow shortly, it violates the limits prescribed by Allah Almighty as stated in the opening paragraph of the Objectives Resolution and is in conflict with clauses (2) and . (3) of the said 'Resolution' inasmuch as it violates the principles of social justice enunciated by the Qur'an and Sunnah, and disables the Muslims to order their lives, in accordance with the teachings and requirements of Islam,

as set out in the Holy Qur'an and Sunnah. (p.202 of the Law Report)."

29. Thereafter, the President of Pakistan, on 15th of June, 1988 promulgated the "Enforcement of Shari'ah Ordinance". Preamble of the said Ordinance, inter alia provided: -

"Whereas the Principles and Provisions set out in the Objectives Resolution have been incorporated in the Constitution of the Islamic Republic of Pakistan as substantive part thereof;

And whereas the Objectives Resolution provides that the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur'an and Sunnah;

And whereas it is necessary to carry out the purposes of the Objectives Resolution and provide that all existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah;

And whereas the National Assembly is not in Session and the President is satisfied that circumstances exist which render it necessary to take immediate action;

Now, therefore, in exercise of the powers conferred by clause

(1) of Article 89 of the Constitution of the Islamic Republic of Pakistan, the President is pleased to make and promulgate the following Ordinance."

The Ordinance defines Shari'ah as under:-

(e) 'Shari'ah1 means the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah.

Explanation. - As envisaged in Article 227 of the Constitution, in interpreting the Shari'ah with respect to the personal law of any Muslim sect, the expression 'Qur'an and Sunnah' shall mean the Qur'an and Sunnah as interpreted by that sect."

30. Subsections (4) and (5) of section 4, being relevant, are also reproduced below: -

"4(3). The High Court may, either of its own or on the petition of a citizen of Pakistan or the Federal Government or a Provincial Government or on a reference made under the first proviso to subsection (1) examine and decide whether or not any law relating to Muslim Personal Law, any fiscal law or any law relating to the levy and collection of taxes and fees or banking or insurance practice and procedure or any provision of such law, is repugnant to Shari'ah:

Provided that while examining and deciding the question, the High Court shall call for and hear the views of experts having specialized knowledge in the field to which the question relates and of such other persons as the High Court may deem fit.

(4) Where the High Court takes up the examination of a law or provision of law under subsection and such lawor provision of law appears to it to be repugnant to Shari'ah, the

High Court shall cause to be given to the Federal Government in the case of a law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List in the Constitution or to the Provincial Government in the case of a law with respect to a matter not enumerated in either of those Lists, a notice specifying the particular provisions that appear to it to be so repugnant, and afford to such Government adequate opportunity to have its point of view placed before trie High Court.

(5) If the High Court decides that any such law is repugnant to Shari'ah, it shall set out in its decision-

(a) the reason for its holding that opinion;

(b) the extent to which such law or provision is so repugnant; and specify the day on which the decision shall take effect." * * **********

31. Thus, the Ordinance, among some other things, empowered all the High Courts and the Supreme Court of Pakistan in its appellate jurisdiction to examine the question of the vires of Muslim Personal Law which includes the Muslim Family Laws Ordinance of 1961, from Shari'ah point of view, in the light of the Holy Qur'an and Sunnah and declare it or any provision thereof as void if found repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah. The said Ordinance, despite the fact that it had its Constitutional limitation including its short span of life under Article 89(2) of the Constitution, and followed by a Revised Ordinance on 15th October, 1988, died its natural death on 15th February, 1989 as it was not placed before the National Assembly, newly-elected in November, 1988.

32. Reverting to section 7 of the Family Laws Ordinance, quoted above, I may refer to a booklet entitled as ts* ob-vS-"u tuit

i.e. Review by the Ulama on Family Laws Ordinance which has been compiled as long back as 1961 or 1962 by Mian Tufail Muhammad. The said Review or the Fatawa was signed, among others, by a number of notable Ulama namely: (1) (Maulana Mufti) Muhammad Hassan, Mohtamim, Jami'a Ashrafia, Lahore, (2) (Maulana) Sayyid Abul Ala Maududi, Lahore, (3) (Maulana Mufti) Ja'far Hussain, Mujtahid, Ex- Member, Board of Ta'limat-e-Islamia, Constituent Assembly Pakistan, (4) (Maulana) Sayyid Mahmud Ahmed Rizvi, Naib-Nazim, Markazi Anjuman-e-Hizb al-Ahnaf Pakistan (Lahore), (Maulana) Hafiz Abdul Qadir Ropari, Khatib Jamia Quds Ahl-e-Hadith, Lahore, (6) (Maulana) Abu Yahya Imam Khan, Naushehrvi, Lahore, (7) (Maulana) Abul Barkat Sayyid Ahmed Qadri, Nazim, Markazi Anjuman-e-Hizb Al-Ahnaf Pakistan, Lahore, (8) (Maulana) Muhammad Idris Kandhalvi, Shaikh-al-Hadith, Jamia Ashrafia, Lahore, (9) (Maulana) Abul Hasnat Sayid Khalil Ahmed Qadri, Khatib Wazir Khan Mosque, Lahore, (10) (Maulana) Muhammad Ataullah Hanif, Chairman, Jamiat Ahl-e-Hadith, Lahore, (11) (Maulana Hafiz) Mahmud Ahmed Ropari, Nazim Jamia Quds Ahl-e-Hadith, Lahore, (12) (Maulana) Abdul Sattar Khan Niazi, Lahore. Besides, the said review has been countersigned by 137 notable Ulama of East Pakistan including, (13) Maulana Athar Ali, Shaikh Al- Mudarris, Imdad-ul-'Ulum, Kishwar Ganj, and 126 Ulama of Peshawar Region including, (14) Maulana Mohammad Ayoob Binnori Mohtamim Darul Ulum Sarhad, Peshawar City, (15) Maulana Abdul Haq, Mohtamim Darul Ulum Haqqaniya Akorah Khatak District Peshawar and (16) Maulana Sami-ul-Haq, Madrasa Darul Ulum Haqqaniya Akora Khatak. The said review as

per Note printed on its title page was prohibited to be published during Martial Law of late Ayoob Khan and after lifting of Martial Law it was proscribed by the order of the then Governor, West Pakistan which, on being challenged in the High Court of Lahore, the Governor of West Pakistan withdrew the said order as it had no legal basis for proscribing the booklet. The Review pertains to various sections of the Family Laws Ordinance, but I am reproducing only the relevant extract from it relating to section 7 of the Ordinance pertaining to divorce, which reads as under:

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33. Its English Translation by Mian Tufail Muhammad is as under: - "ARTICLE 7

Almost all the provisions regarding 'talaq' in this Article are not only repugnant to the Injunctions of the Holy Qur'an; but also the practical complications caused by them in our social order will be so disasterous that their consequences cannot even be fully conceived at this early stage.

For instance some of the provisions made in this Article are:

(1) 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 of the Union Council notice in writing of his having done so. (Subsection

The words 'talaq in any form whatsoever' clearly include all its possible forms (raja'e i.e. revocable; bain i.e. irrevocable or mughallazah i.e. after which the parties cannot remarry without an intervening marriage by the divorced wife with another man.

(2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment which may extend to one year or with fine which may extend to Rs.5,'000 or both. (Subsection

(3) The period if 'iddat' shall begin not from the time of pronouncement of talaq (as prescribed by the Holy Qur'an)

but from the day on which notice under subsection (1) is delivered to the Chairman. (Subsection

(4) The period of 'iddat1, in case the wife is not pregnant, will be ninety days. (Subsection and,

(5) If the wife be pregnant at the time the 'talaq' is pronounced, the period of iddat will be 90 days or the end of pregnancy whichever be later. Subsection

(6) The Chairman of Union Council shall, within 30 days of the receipt of notice under subsection constitute an arbitration Council for the purpose of bringing about a reconciliation between the parties, and the 'talaq' shall become effective only on the failure of this reconciliation effort. (Subsection All these provisions are repugnant to the express injunctions of the Holy Qur'an. The Law Minister has advanced the argument that "one of the principles underlying the Muslim Law of divorce is that whenever differences arise between husband and wife, an attempt should be made by near relatives and others to bring about good relationship between them to prevent hasty separation". We beg to point out that the Law Minister has wrongly confused two altogether independent and separate injunctions of the Holy Qur'an and has made an absolute right of divorce granted to the husband by it consequent to and dependent on a third agency i.e. an Arbitration Council. The Holy Qur'an has described the injunctions about divorce separately and the method of reconciliatory effort to patch up matrimonial disputes between the husband and wife quite separately. The former provisions have been dealt with in II: 227-242; XXXIII: 49 and LXV: 1-7. Nobody with any legal sense, wjiile reading or pondering over these injunctions, can ever think that the right of divorce granted to husband in these verses is in any way tied to or conditional on taking the matter to any council or getting a verdict from any Court of Law. These verses of the Holy Qur'an are absolutely clear that the right of husband to divorce his wife is absolute and unqualified. One of these verses eluding to the husband expresses this fact in so may words and says, "in whose hand is the marriage tie" (II: 237). These words clearly show that the tie of marriage is in the hand of the husband and he can keep or sever it at pleasure, and he is not under any obligation to refer it to anybody else.

On the other hand the verses 34 and 35 of Chapter IV lay down: That men are incharge of women. The good and virtuous women are obedient to their husbands. If a wife shows signs of rebellion, the husband can have recourse to proper measures to mend her ways.

And if it is-feared that there is going to be any breach between the husband and his wife

an arbiter from his folk and an arbiter from her folk should be appointed so that they make a concerted effort to smooth out the differences and reconciliate them. Thus there is no mention of divorce or of anything like that in this context. No-where it is said that the husband cannot exercise his right of divorce without having recourse to this procedure for reconciliation. Therefore to confuse these two independent and separate provisions of the Holy Qur'an and to try to make one inert by the other is evidently wrong.

The fact of the matter is that the very idea of this Article has been derived and borrowed from the most defective laws cf marriage and divorce of the West and to make them palatable for the Muslim society it is being alleged that the so-called reform is based on the Quranic principles of marriage and divorce. The people of the West, until very recent past, have all along been considering divorce as an ignoble and unlawful act and have been attacking Islam on the ground that it makes it lawful. Even when, after experiencing of this wrong notion, they felt the necessity of legalising and adopting the institution of divorce, they did neither adopt it in its perfect form, nor did change their mental outlook respecting it. Thus instead of granting the right of divorce directly to the husband they made it dependent on the verdict of a Court. The naturai uunsequcnce was that dirty linens of private life began to be washed in public Courts and the spouses were, willingly or unwillingly, compelled to cook up false accusations-mostly of immodest and immoral acts-against each other because real cause of desiring separation may not necessarily be such as to convince a Court of law or a third party. As a result of this half-way measure the Western Society has become a cesspool of most scandalous litigation. It appears that, simply in blind immitation of the West, our modernist legislators are desirous of throwing out society into a similar abysmal depth.

Furthermore the following points in this Article are clearly opposed to the injunctions of the Holy Qur'an:

(1) According to this Article the period of 'iddat' shall be counted from the date cf delivering the notice to the Chairman of the Union Council, irrespective of the fact that it may have been delivered after a month or two after the pronouncement of divorce. While according to the Qur'an the period of 'iddat' should be counted from the time of pronouncement of divorce.

(2) This Article fixes the period of 'iddat' of a woman who is not pregnant, as 90 days, while according to the Holy Qur'an it is three monthly courses.

(3) Under this Article the period of 'iddat' for a woman who is pregnant has been fixed as the end of pregnancy or 90 days whichever be later, while according to the Holy Quran it ends with the end of pregnancy. The period of 'iddat' fixed for those women too who have ceased or not begun to have menstruation is three months and not 90 days.

(4) Under this Article the effectuation of 'talaq' has been made dependent on the notice to the Chairman of the Union Council and reconciliatory effort by him. This too as already explained is altogether repugnant to the Holy Qur'an.

(5) Under this Article alongwith an arbiter from the husband's family and an arbiter from the wife's family the Chairman of the Union Council has been added as the third arbiter, while the Holy Qur'an enjoins that the differences of the spouses should be referred to the

arbiters, one from each party's family. It needs no argument to explain that a Chairman of a Union Council cannot necessarily be a trustworthy patron of all the families in a Ward. According to the law, as it stands at present, he need not necessarily be a Muslim even. The parties concerned, or any one of them, may not like to place their family affairs before an outsider. Not only that, you will see that if this Ordinance, God forbid, comes into force and the husband and wife are compelled by law to place all their family affairs before these councils, many of these ladies who are today lauding the promulgation of this Ordinance, will begin to cry hoarse in protest against it. And once the effectuation of divorce becomes dependent on the satisfaction of a council, the parties to such proceedings in our country too will gradually perforce begin to levy against each other false and concocted accusations of immodest and immoral acts so that they may be able to convince the council that their separation has become really inevitable.

Subsection (6) of this Article will create in our society another far-reaching complication. Under this subsection a wife whose marriage has been terminated by 'talaq' effective under this section, can remarry the same husband without an intervening marriage with a third person. This provision, in other words, lays down that the pronouncement of 'talaq' at a single sitting, even though it may have been done thrice, shall be treated as only one and shall not amount to a 'talaq-e-mughallazah'.

No doubt according to some juristic schools of thought among the Muslims, this is the correct legal position. But this is opposed to the Hanafi view of Shariat.

According to the Hanafi view three talaqs even if pronounced in a single sitting amount to a 'talaq-e-Mughallazah' and in such a case the husband can neither revoke it during, the period of iddat nor can remarry her unless she has married another person and the latter dies or divorces her in a natural course of events.

Everyone is aware that an overwhelming majority of the Muslims of this country belong to Hanafi School of thought and they do not and cannot possibly have even a fraction of that confidence on the modern legislators, which they have on Imam Abu Hanifa and the great Hanafi Jurists. Therefore, the necessary consequence of the enforcement of this law will be a conflict between the law and the conscience of the people. This will cause insurmountable difficulties and complications in our society. For instance, if a husband after pronouncing three talaqs at a time to a Hanafi wife decides to retain her, the wife and her Hanafi family will not accept this retention as lawful. In such cases the wife neither will be able to have a second marriage with another person, because according to the law of the land the previous marriage will still subsist and remain binding on the parties, nor will be able to live with that man as according to her belief she would have become unlawful for him and her cohabitation with him would amount to an illicit connection under the Hanafi view. Can any law enacted by our Modernist legislators remove this complication? Is modern legislation potent enough to change the beliefs of the people?

34. I would also like to add here that the position as to the application of statute law relating to Muslim Personal Law in Pakistan has recently undergone a change. As a result of protest launched by the Shi'ah community in Islamabad on 6th July, 1980, an Explanation was added to Article 227 of the Constitution of Pakistan by the P.O.

No. 14 of 1980 in September, 1980, wherein it has been specifically provided that in matter of interpretation of the Holy Qur'an and Sunnah, the interpretation as put by the sect will be adhered to and, therefore, as a consequence of the said Explanation, if the Hanafi sect interprets the Holy Qur'an and Sunnah in a manner that the three talaqs pronounced at one time or in one word, are effective as such, there can be no revocation of the said three talaqs, because the number of three talaqs as provided in the Holy Qur'an is complete. Similarly, according to the Shi'ah Imamiyah sect, interpretation of the Qur'an and Sunnah to that effect that the three talaqs pronounced ai one time are void and of no effect, would be recognized and applied accordingly; with the result that the provisions of section 7 of the Muslim Family Laws Ordinance with which at the moment I am concerned cannot stand counter to the said provision of the Constitution and as such I am bound to ignore section 7 so as to give effect to the Explanation added to the clause (1) of Article 227 of the Constitution, now read with Article 2-A.

35. No one can claim that the Muslim Family Laws Ordinance was ever placed or discussed before any National Assembly or by any Parliament under the Constitution of 1962, 1972 or 1973 or after its Revival under P.O. 14 of 1985. So the basic and fundamental process of legislation in a democracy was always denied to this Ordinance.

36. Now I proceed to examine the alternate contention relating to the revocation of divorce by mere absence of giving notice under section 7.

37. The Honourable Supreme Court of Pakistan in the case of Ali Nawaz Gardezi v. Lt.-Col. Muhammad Yousuf (PLD 1963 S C 51) while considering the provision of section 7 of the Pakistan Muslim Family Laws Ordinance, 1961, inter alia, observed that: -

"The section clearly contemplates a machinery of conciliation whereby a husband wishing to divorce his wife unilaterally, may be enabled to think better of it, if the mediation of others can resolve the differences between the spouses. The talaq pronounced is to be ineffective for a period of 90 days from the date on which notice under subsection (1) of this section is delivered to the Chairman and this period is to be utilised for the attempt at reconciliation." (p.79).

".....here it is obvious that the object of section 7 is to prevent hasty dissolution of marriages by talaq, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status, if the husband himself thinks better of pronouncement of talaq and abstains from giving a notice to the Chairman, he should, perhaps, be deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife." (p.75)

38. In order to examine the question, "Whether the non-delivery of the notice as contemplated by section 7 above, may be deemed as revocation of the pronouncement of talaq by the husband, as held by the Honourale Supreme Court in the Gazdezi's ease, it seems necessary dliat an indepth study be made of the said case on section 7 of the Muslim Family Laws Ordinance, which has been the only source of all the subsequent judgments on the issue, as it has been invariably followed not only by all the High Courts but the Supreme Court also. In that case, the respondent Muhammad Yousuf was tried under sections 497 and 498 of the Pakistan Penal Code by a learned Single Judge of the erstwhile High Court of West Pakistan, Lahore. He was convicted of both the charges and

sentenced to pay fines of Rs.2,500 and Rs.7,500 thereunder, or in default, to suffer R.I. for one year on the first charge and to six months on the second charge. In case the fine was not paid, the terms of imprisonment for default, awarded on the two charges were directed to run consecutively. The case was tried on a complaint lodged by the petitioner, Ali Nawaz Gardezi (hereinafter referred to as the complainant) in the Court of the A.D.M., Lahore but it was transferred, on his application,-for trial in the High Court by the learned Judge, on the ground that the respondent, being a Commissioner of a Division, the subordinate Courts would feel embarrassed in dealing with the case. The convict appealed and the appellate Bench consisting of three learned Judges of the High Court, set aside the convictions and sentences and acquitted him of both the charges. Ali Nawaz Gardezi, thereupon, was granted special leave to appeal as a large number of complicated questions of law and fact arose in the case and nearly on all those questions, the judgment of the appellate Bench had reversed the findings of the learned trial Judge.

39. The prosecution case was that the complainant who is a Shia Muslim and citizen of Pakistan, married a German girl, Christa Renate Sonntag, at Hull (England), before the Registrar of Marriages on

21-7-1951. She was Christian at that time. Three children were born of the marriage-- two sons and a daughter. The couple lived for some time abroad but came to Pakistan in 1953 for the first time. The complainant is Manager of Siemen Engineering Co. Ltd. , The Mall, Lahore, a German firm. The complainant and his wife were visiting Europe off and on and in August 1961, they returned therefrom to Pakistan via Quetta.There they happened to meet the respondent on the 13th of August, 1961. Friendly relations were established between them and the complainant and his wife insisted the respondent to stay with them when he visited Lahore.

Accordingly, on two occasions, the respondent stayed as the house-guest of the complainant, before the end of September, 1961. It appears that Renate and the respondent developed a liking for each other soon after their first meeting and this turned into mutual love later. They corresponded with each other and the respondent made frequent telephone calls to her from Quetta or Loralai, mostly at times when her husband was away from his house. In or about the middle of November, 1961 the complainant is said to have intercepted the letter Ex.P/1, written by the respondent to his wife. This was dated the 9th of November, 1961 and showed that matters had advanced so far between the respondent and the lady that they were thinking of taking active steps to obtain release from their marital ties (both parties being married persons) and to marry each other. Ultimately it appears, that the complainant signed a paper purported to be divorce to his wife Renate, the draft of which was supplied by the respondent to his wife and on 2nd of January, 1962 the respondent and Renate were married according to Muslim rites at Quetta. She was declared to have become a Muslim and was given the name of

Ruqaiya. On the 5th of January, 1962 Mr. Gardezi filed complaint under sections 497 and 498, P.P.C. On 6th of January, 1962 the complainant saw a Press report about the marriage of the respondent with Renate and he then instituted another complaint under section 494, P.P.C. against the respondent and his wife in the High Court. The learned trial Judge directed that it should remain pending while the first complaint was being dealt

with. The respondent did not accept the version put forward by the complainant as correct. According to him the complainant was informed by his wife, on the 19th of September, 1961 on her return from Murree where she had gone to attend the Founder's Day of the Lawrence College, in the interest of her two sons that she loved the respondent who had promised to marry her, if she was released from the marital bond by the complainant. He further stated that he was called from Quetta specially to meet the complainant and his wife at their house on 2 5th of October, 1961 and it was decided on that day that the complainant would fall in with the wishes of his wife and grant a divorce to her provided that, for three months, she and the respondent did not communicate with each other and she did not change her mind in the interval. On 26th October, 1961 Renate accepted Islam at the hands of the respondent in the absence of the complainant who was kept in the dark about her conversion. The respondent appears to have eventually copied out the draft in the presence of the lady and signed it in his own hand, on the 16th of November, 1961 which purported to be a divorce deed. The compact between the parties however, was that in spite of this divorce being granted; Renate would continue living in the complainant's house till their sons went back to the Lawrence College after their long vacation, about end of March, 1962. The idea was to spare the children immediate knowledge of the rift between their parents. Towards the end of December 1961, however, she learnt that the complainant and his brother, who is a Doctor were conspiring to marry off the complainant to a woman in Mardan and then to push Renate out of the country. She, therefore, decided to leave the complainant's house, joined the respondent at General Rana's house on the 30th of December, 1961 after having talked to him earlier in the day and then accompanied him to Quetta on 31st December, 1961. She was married to him on the 2nd of January, 1962. Writing of the divorce deed was, however, denied by the complainant. The Hon'ble Supreme Court disbelieved the evidence of Christa Renate and the accused that she had become Muslim on the 25th of October, 1961. It was thus observed that "if there had been a conversion on that day, it would not have been at all difficult to arrange for some witnesses to be present, when she made a declaration to change her faith. There was then no escape from the conclusion, that, on her own showing, Christa Renate had not been properly divorced by the complainant,, as she was not a Muslim on the relevant date."

As regards talaq, it was observed as under:

"The alleged talaq could at best be described as talaq bidat, which is not recognised as valid by Shia Law. (See Bailie's Digest of Muhammadan Law, Part II, p. 118, Tyabji's Muhammadan Law, Third Edition, Ss.136-142, Mull'a Muhammadan Law, p.662, 15th Edition, Amir Ali's Muhammadan Law, 4th Edition, Vol.II, p.533). These textbooks writers, moreover, are unanimous in stating that according to Shia doctors, the talaq must be orally pronounced by the husband in the presence of two witnesses and the wife, in a set form of Arabic words. A written divorce is not recognized, except in certain circumstances which do not exist the present case. The learned trial Judge took the view that Exh. D.I, even if it was executed by the complainant, was not effective in law to separate the two spouses because of these provisions of the Shia Fiqh. The Appellate Bench of the High Court regarded the provisions of the Shia Fiqh with regard to the presence of witnesses and the necessity of an oral pronouncement of divorce, as merely rules of evidence which could be disregarded. The law being, however, laid down in categorical terms, it is open to question whether the view taken by the Appellate Bench can be sustained. The

learned Judges do not appear to have adverted to the point that the alleged talaq was in the heretical form (talaqul bidat) which the Shia dispensation of Islamic Law does not sanction."

40. Dealing with the object of section 7 of the Ordinance the Hon'ble Supreme Court observed that its object is "to prevent hasty dissolution of marriages by talaq, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status. If the husband himself thinks better of the pronoucment of talaq and abstains from giving a notice to the Chairman, he should perhaps (underlining by me,) be deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife. Subsection (3) of this section preciude¥~the talaq from being effective as such, for a certain period and within that period, consequently, it could not be said that the marital status of the parties had in any way been changed.

They would still in law continue to be husband and wife. The result in the present case, so far as the question of legality of the subsequent marriage of the respondent to Christa Renate is concerned, would not be in any way different, even if the period envisaged by this section is deemed to start from the time of the pronouncement of talaq or as soon as may be thereafter, instead of postponing the start to the date of receipt of a notice by the Chairman, in order to avoid giving the benefit of his own default to the husband.

Ninety days had not yet elapsed from the date of alleged pronouncement of talaq (underlined by me) when the respondent went through his marriage with the lady." (p.75)

It was further observed:

"We are, therefore, disposed to agree with the learned trial Judge that on the 2nd of January 1962, when Christa Renate went through a form of marriage with the respondent, she was still the wife of the complainant as the divorce, even if granted by the latter, could not have become effective, without recourse to the provisions of section 7 of the Muslim Family Laws Ordinance, 1961. It is also fairly clear that by the 2nd of January 1962, even the iddat period prescibred by Islamic law for a divorced wife, had not yet expired."

41. In the result, the Hon'ble Supreme Court on the principle of volenti non fit injuria, "a person cannot complain of any act, he passively assents to" allowed to stand the acquittal of the respondent on the charge under section 497 but the Hon'ble Judges of the Supreme

Court were cf the view that ends of justice would be met by sentencing the respondent under section 498, P.P.C. to pay a fine of Rs.2,000. In default of payment of fine, he will suffer rigorous imprisonment for three months. He was also ordered to pay fine within 15 days from that date (p.80).

42. The following points in relation to section 7 of the Muslim Family Laws Ordinance, 1961 seem to have been decided by the Hon'ble Supreme Court in the above-quoted Gardezi's case (PLD 1963 SC 51):- (1) Talaq, under Shia Law must be orally pronounced, in

presence oi witnesses and the wife, in a set form of Arabic words (p.72). With due respect, the observation of the Hon'ble Supreme Court regarding the presence of wife at the time of the pronouncement of talaq under the Shi'a Law, to say the least, may perhaps, require reconsideration in view of the discussion in Mirza Qamar Raza v. Tahira Begum and others (PLD 1988 Kar. 169).

(2) Section 6 of the Muslim Family Laws Ordinance, 1961 penalizes the husband for contracting another marriage during the existence of his first marriage but it does not invalidate second marriage (p.73).

(3) The question whether Islamic provisions relating to talaq ahsan and talaq hasan have been incorporated in section 7 cannot be gone into as the jurisdiction of the Court is barred by Articles 5 and 6 of the Constitution of Pakistan, 1962 (p.74). With respect, the question may now be gone into in view of the Explanation to Article 227, and provisions of Article 2-A, added to the Constitution in 1980 and 1985, respectively.

(4) The talaq does not become "effective" in case, the husband fails to give notice to Chairman (p.75).

(5) Husband’s failure to give notice of talaq to Chairman should perhaps be deemed to have revoked the pronouncement of Talaq (p.75). ,

(6) The sphere of section 7 is extended to talaq tafweez and other forms of dissolution of marriage by section 8, mutatis mutandis.

(7) During the period of 90 days (after the notice is delivered to the Chairman) the lady remains wife of the husband pronouncing the divorce. Christa Renate was still the wife of the complainant as the divorce, even if granted by the latter, could not have become effective, without recourse to the provisions of section 7 of the Ordiannce (p.76).

43. With profound respect and in all humility, the following submissions may be made on the above judgment:

(1) The parties to the case were admittedly Shi'a. As such the talaq al-bida't was not recognizable. However, as provided in section 7(1) the talaq pronounced in any form whatsoever (this includes talaq al-bida't also), is to be deemed as 'one' revocable divorce. In the Constitution of 1962 there was no provision as to the acceptability of the interpretation of the Qur'an and

Sunnah as recognized by that sect, as was provided in the previous Constitution of 1956 and is now introduced in 1973 Constitution by virtue of P.O.No.2 of 1980, as also adopted by the Eighth Amendment of the Constitution by the Parliament in December, 1985.

The result will, therefore, be that the provisions of Article 227, Explanation, would now be read with the Personal Law of every- Muslim sect. If so, then the talaq al-bidat cannot be reckoned as "one revocable talaq” by the Shi'a Imamiyah,' even if the other conditions of talaq are present there, but will be ruled as "no talaq at all". It will .be termed as Batil (void), according to the Shi'a Law. The Shia Zaidiyyah, however, regard the 'three talaqs' pronounced at one time as one talaq. Needless to say that among the Hanafis, the three

talaqs pronounced as talaq, talaq, talaq are reckoned as three talaqs and the marital relationship snaps at that very moment, with no right of revocation by the husband.

(2) In the Gardezi's case the talaq held to be written by the complainant in his own handwriting did not appear to have been pronounced orally and in presence of two witnesses, as required by Shia Law. It was not to be taken to have been pronounced and made effective according to Shia law, as no witness was present.

(3) In that view of the matter, the question of its revocation under the Shi'a Law does not arise.

(4) Revocation implies the existence of an act, thing or object before it is to be revoked. The question of its implied revocation by non- delivery of notice to the Chairman does not arise. Even otherwise, the revocation is a positive act which cannot 1 be inferred by mere abstinence from doing an act (non-delivery of notice) which is not even provided by section 7. In such a case, viz. non-delivery of notice, the substantive provision of Islamic Law of revocation of divorce would only be applicable.

(5) As regards effectiveness under section 7 of the talaq legally pronounced by a husband two -things are to be noticed-

(i) that it can be revoked earlier than the expiry of 90 days after delivery of notice to the Chairman. This sort of revocation implies revocation under the substantive Muslim Law. This can be spelt out by the phrase "unless revoked earlier" as used in section 7(4);

(ii) that its revocation is deemed for non-delivery of notice by itself, as observed by the Hon'ble Supreme Court. This, in my humble view, can neither be read ipso facto into the Islamic Law of revocation of talaq nor it can be read plainly from section 7(3), as it will, in effect, render section 7(2) to be redundant. Here I feel inclined to agree with the observation by Mr. Justice Shamim Hussain Qadri, Acting C.J. of the Lahore High Court in Muhammad Rafiq v. Ahmed Yar (PLD 1982 Lah.825). The learned Chief Justice wrote:

"It is thus clear that the absence of notice would obviously be a violation of section 7 of the Ordinance. By no stretch of imagination talaq, if pronounced, can be claimed to be ineffective."

44. There is yet another important thing to be noted. If mere non-delivery of the notice of the pronouncement of talaq as required under section 7(1) is considered to be ipso facto revocation of pronouncement of talaq, it will amount to no talaq at all, for the purpose of section 7(6), for want of notice. The havoc which this interpretation will play is unimaginable. It would lead to the result "that a husband could, with impunity, without recourse to the provisions of section 7(1) of the Ordinance and without incurring any penalty, under section 7(2) of the Ordinance "could go on divorcing" his wife (or wives, as the case may be) without limit if he was so minded". This would, to my mind "amount to returning to the Days of Ignorance "Jahiliyyat" of the Pagan Arabs before the advent of Islam that they used to pronounce talaq in the morning and had recourse to the wife in the night, innumerable times, and the fate of the woman would remain hanging (Refer: Abdul Rahim's Principles of Muhammadan Jurisprudence). "Such absurd results would apparently rot the divorce of almost all its utility" and this wide "interpretation which

leads to such results, would not, in all probability, be in consonance with the intention of the Legislature", and, in fact, it will dismantle the entire framework of Islamic Law of divorce as to its pronouncement and revocation and go against the mandate of the Qur'an and Sunnah, Ijma' and even all canons of Qiyas or analytical reasoning which is recognized as the fourth source, though secondary, of Islamic Law. The policy of the Ordinance seems to be "to provide some curbs on too facile pronouncements of divorce...." The absence of notice may entail punishment as provided in section 7(2) but it should not be interpreted as revocation of talaq by itself, without any other positive and reliable evidence, and without reckoning it as divorce at all. In the instant case, the petitioner filed suit for conjugal rights on 4-7- 1988, about 125 days after the pronouncement of divorce, when iddat period had already expired, even if three divorces are reckoned as one.

45. There is another aspect of the matter also which is equally important. Islamic law is a composite whole. Its law of marriage and divorce and the criminal law vis-a-vis family relations and matrimonial causes are all interconnected and have bearing on each other.

Any side-attempt to legislate on one branch of law, without knowing or even an attempt to know its implications and effects on the other branch of law, is bound to create anomalies and breed social problems in the Muslim society. In 1961, when Muslim Family Laws Ordinance was promulgated and in 1963 when it was interpreted by the Hon'ble Supreme Court in Gardezi's case in the background of its own "peculiar facts" and even in later years when it was followed, its implications on the Society in relation to Offences relating to Zina (Enforcement of Hudood) Ordiannce, 1979 could not possibly be in sight. To quote only one of such latest instances, out of many, is the most recent case of Muhammad Sarwar and Shahida Parveen v. State (PLD 1988 FSC 42) which came up before the Federal Shari'at Court at Karachi. The relevant facts, inter alia, of the said case were that the previous husband was alleged to have divorced his wife Fahmida, who, on the expiry of 'Iddat, contracted another marriage with one Sarwar. By a criminal complaint, lodged by Khushi Muhammad, the previous husband, it was alleged that the woman continues to be the wife of the previous husband and as such Fahmida and Sarwar were living in adultery. The learned Additional Sessions Judge, holding, inter alia, that even if it is admitted that the complainant's previous husband had divorced Fahmida, the non-delivery of notice to Chairman will result in the ineffectiveness of talaq, as per section 7(4) and, therefore, the marital relationship between Fahmida and the complainant husband continues. The learned Additional Sessions Judge on the alleged admission of the accused that they were living as husband and wife convicted them to Zina and awarded punishment of Rajm (stoning to death). On appeal, the Federal Shari'at Court following the judgment in Mirza Qamar Raza v. Tahira Begum (PLD 1988 Kar. 169) that no notice of talaq to the Chairman of Union Council was necessary in the Shari'at as to the effectiveness of divorce otherwise validly pronounced by the husband, set aside the sentence of Rajm, on technical ground and remanded the case to the trial Court for proceeding in accordance with the observations made by the Hon'ble Supreme Court in Muhammad Azam's case (PLD 1984 SC 95). The Additional Sessions Judge, on remand of the case, recorded further evidence on the question of pronouncement of talaq by the previous husband and held that the previous husband had already divorced his wife Fahmida who after completing her period of 'iddat had legally contracted her marriage with Muhammad Sarwar. The couple was then acquitted "from

death row to freedom". Let it be mentioned here that looking at the previous case-law developed in obedience to the' law declared by the Hon'ble Supreme Court in Gardezi's case, the learned Judge was faced with the difficulty as to the effect of non-delivery of notice and the revocation of the pronouncement of talaq as observed by him in his earlier judgment but this difficulty was already removed by the Federal Shari'at Court in following the pronouncement in Qamar Raza's case (PLD 1988 Kar.169) that no notice was incumbent under the Injunctions of Islam as laid down in Qur'an and Sunnah and, moreover, the pronouncement need not be made to be effective after its delivery and expiry of 90 days from the receipt thereof by the Chairman, Union Committee. In the words of the learned Chief Justice, Mr. Justice Gul Muhammad Khan, who delivered opinion of the Court:-

"The position, however, stands radically changed since the decision of the case of Mirza Qamar Raza in which it was held that section 7 making it mandatory to give notice to the Chairman in every form of Talaq is repugnant to Qur'an and Sunnah.....

We have gone through the judgment in Mirza Qamer Raza's case and appreciate that the effectiveness of the Talaq cannot be subjected to the service of notice on .the

Chairman.....Here it may also be mentioned that it is outside the jurisdiction of this Court to declare a statutory law or custom or usage which has the force of law as repugnant to Qur'an and Sunnah if it inter alia relates to Muslim Personal Law. Admittedly the question of Talaq falls in that field. In such a situation this Court is obliged to follow the statutory law as interpreted by the Supreme Court and in its absence that of the High Court in whose jurisdiction the matter would fall otherwise as held in case of Mst.Farishta (PLD 1981 SC

120).....Thus the Sind High Court, in the present circumstances, had the authority to declare any provision of Muslim Personal Law to be repugnant to Qur'an and Sunnah and this Court is obliged to follow that decision.

In the case in hand the Sind High Court has declared section 7 of the Muslim Family Laws Ordinance, 1961 as repugnant to Qur'an and Sunnah and we are bound by the conclusion. So in that situation the pronouncement of written Talaq could not be held invalid just for the reason that no notice of it had been served on Chairman."

46. Now, I mention hereinbelow few "down-to-earth" cases with facts and figures, in some detail, in which the rule laid down by the Honourable Supreme Court in Gardezi's case (PLD 1963 SC 51) that "the absence of notice renders the divorce ineffective" has been followed. A study of these cases will show as to how far "law has become bound in shallows and in miseries", as Sir Alfred Denning (later on, Lord Denning) has nicely observed in one of his early works "The Changing Law" (London Ed.1953).

47. In the case of Mst. Ghulam Fatima v. Abdul Qayyum (PLD 1981 SC 460), Mst. Ghulam Fatima wife of Muhammad Sadiq filed a suit for dissolution of her marriage in or about April, 1970. On the other hand, her husband filed a suit for restitution of conjugal rights. It was alleged by the wife that the husband had, in fact, divorced her by talaq, after she had filed her suit. The husband, in his written statement, to the wife's suit pleaded that he had not pronounced Talaq. It was, however, alternatively pleaded by him that if it was

held that he had pronounced the talaq, then such a talaq was ineffective as he had revoked it. Admittedly, there was no notice of the talaq given to the Chairman, Union Council as required by section 7 of the Muslim Family Laws Ordinance. On such state, it happened that during the pendency of the suit the husband died in East Pakistan. After his death his other heirs viz. brother and father brought a declaration/suit claiming the entire estate of the deceased to themselves alleging that since the wife had already been divorced by him during his lifetime, she was not entitled to any share in the estate left by the deceased. The Lahore High Court upheld the divorce in spite of the fact that no notice as required under section 7 of the Muslim Family Laws Ordinance had been given. In fact, the High Court had held the divorce as Mubarat (a divorce by mutual agreement)-. The High Court was of the view that at the later point of time the parties had agreed to divorce and, therefore, it was a case of Mubarat and in case of mutual agreement of divorce, revocation was not possible and so want of notice or otherwise did not affect finality of divorce. It also expressed its view that it (requirement of notice) applies to unilateral act of divorce by the husband and it is not attracted in the case where both the parties have agreed to the divorce. Islamic law does not contemplate revocation in such cases, nor there is any purpose to efforts at reconciliation and so no need of a notice. The Hon'ble Supreme Court reversing the decision of the High Court came to the conclusion that the evidence did not establish a divorce by mutual consent. It was simply a talaq pronounced by the husband, and the hjusband, it appears, had agreed to divorce her under some pressure and had subsequently revoked the said divorce by resiling subsequently from his act. It also expressed its view that "What was attributed to him was not a voluntary act, »much less by mutual consent, which is the foundation of Mubarat. No notice of the pronouncement of talaq was given to the Chairman as required by section 7 of thi Ordinance and, indeed, five weeks after the pronouncement of the said divorce the husband had instituted a suit for restitution of conjugal rights, thereby evidencing his revocation of pronouncement. The Supreme Court, therefore, concluded that "the talaq had not become effective and stood revoked as no notice under subsection (1) of section 7 was given by the husband." (with respect, it may be submitted that the Honourable Supreme Court did not advert to the question of notice of Talaq by Mubarat, if the same was necessary or not. It may further be submitted that according to Hanafi doctrine Talaq under compulsion (o'-Li>) is valid, as the husband chooses the lesser evil by electing talaq to be pronounced over the act threatened against him.)

48. In the case of Muhammad Rafique v. Ahmed Yar (PLD 1982 Lah.825) one Ahmed Yar married Mst. Taj Bibi in August, 1977. Mst.

Taj Bibi and her second husband, Muhammad Rafique alleged that she had been divorced by Ahmed Yar in August, 1980 and that her marriage with Muhammad Rafique had taken place after the expiry of the period of iddat following that divorce. The first husband, however, alleged that the notice to Union Council to convey the intimation of his pronouncement of talaq in regard to Mst. Taj Bibi was forged. The dispute gave rise to filing a number of suits and the criminal cases: the first husband charged Mst. Taj Bibi and her second husband with adultery; the second husband charged the man whom Mst. Bibi's family had desired to marry her being the rival, the first husband for abduction. Mst. Taj Bibi had filed a suit for jactitation of marriage and for permanent injunction against her father, mother and first husband restraining them from giving out that she was the wife of the first husband and from denying the fact of the divorce from her first

husband. The case, as reported, was that the intra-Court appeal, from the order of a learned Single Judge, accepting the first husband's petition and ordering registration of the case against Mst. Bibi and her second husband for Zina was dismissed. However, Shamim Hussain Kadri, Acting Chief Justice of the Lahore High Court proceeded to remark as follows

"Section 7 of the Muslim Family Laws Ordinance, 1961 provided that a notice in writing by the husband who has divorced his wife, be delivered to the Chairman and its copy to the wife. The violation of this provision is punishable with simple imprisonment for a term of one year and a fine which may extend to five thousand rupees or with both. Subsection (3) of Section 7 speaks of talaq not being effective until period of ninety days expires from the date on which the notice was given to Chairman."

The learned Chief Justice citing the decision of the Supreme Court in Mst. Ghulam Fatima v. Abdul Qayyum (PLD 1981 SC 460) while interpreting the concluding passage from that judgment of the Honourable Supreme Court observed:

"It was held that the Talaq did not become effective but stood revoked for reason of no notice having been given by the husband under section 7(1) of the Ordinance. The learned Judge clearly created a distinction between revocation and the taking effect of the Talaq. It is thus clear that the absence of notice would obviously be a violation of section 7 of the Ordinance only, the crime punishable under the Ordinance.

By no stretch of imagination Talaq, if pronounced, can be claimed to be ineffective."

49. In Aziz Khan v. Muhammad Zareef (PLD 1982 FSC 156) the complainant (Aziz Khan) lodged a report before the Police about the abduction of his wife, Mst. Sahib Khatoon by Muhammad Zareef respondent and others. It transpired that Mst. Sahib Khatoon was married on 25-2-1980 to Zareef Khan, respondent who was said to have divorced her on 14-3-1980. On 17-3-1980, the appellant (Aziz Khan) contracted a marriage with her. The occurrence of abduction was said to have taken place on 25-3-1980 about which the abovementioned FIR was lodged on 17-4-1980.

50. On an application submitted under section 265-K, Cr.P.C. on behalf of the respondent, the learned Sessions Judge took note of the above facts and held that assuming that respondent No.l divorced Mst. Sahib Khatoon on 14-3-1980, the marriage with the appellant was invalid as it Was contracted during the period of iddat. Moreover, -in view of section 7(3) of the Muslim Family Laws Ordinance the divorce could not be said to be effective unless notice of the divorce had been given to the Chairman Union Council and ninety days had expired from the date of delivery of such notice. Since in the case there was no allegation that such a notice had even been given, the learned Sessions Judge held that it was futile to proceed with the trial. He, therefore, acquitted the respondent.

Before the Federal Shari'at Court it was contended on behalf of the appellant that since the marriage of Mst. Sabih Khatoon with Zareef Khan had not been consummated the divorce dated 14-3-1980 operated as a final divorce and since no period of iddat was required in view of Verse 49 of Sura Al-Ahzab the marriage of the appellant with Mst. Sabih Khatoon was valid. Aftab Hussain, J.

who delivered the opinion of the Court observed that:-

"Even otherwise, this is not within our jurisdiction to declare section 7 of the Family Laws Ordinance as repugnant to the Holy Qur'an in view of the embargo placed on our jurisdiction in this respect by Article 203(B) of the Constitution. In view of the terminology of the section we do not find any reason to confine the applicability of section 7 only to the divorce of a person with whom the marriage has been consummated. It is applicable as much to the divorce pronounced before the consummation of marriage.

Subsection (3) of section 7 declares Talaq ineffective until the expiration of ninety days from the day on which notice of divorce is delivered to the Chairman. This was so declared by the Supreme Court of Pakistan in PLD 1963 SC 51 and 1970 SCMR 845. This principle will apply to divorce of a woman who has not been touched."

With respect, it is, however, curious to notice that the learned Judge after quoting Verse 49 from Sura Al-Ahzab observed that "although it follows from this (Verse 49 of Sura Al-Ahzab) that such a divorcee can marry immediately after divorce, we would like to reproduce the line to the same effect from the commentary of Maulana Abdul Majid Daryabadi based on the well-established juristic opinion and commentary of the verse: "so that such divorced women can remarry immediately; there is no waiting period for them", yet the learned Judge feeling bound by the law declared by the Supreme Court of Pakistan, as reported in Gardezi's case (PLD 1963 SC 51) and Abdul Mannan's case (1970 SCMR 845) did not feel inclined to give effect to the express mandate of the Holy Qur'an (Verse 49, Sura Al-Ahzab. With respect, it may be submitted that on the analogy of the observation of the Lahore High Court in Ghulam Fatima's case, that in case of divorce by mutual agreement notice to Chairman was nqt necessary, in the case of divorce to wife before consummation of marriage no notice was necessary as the marriage with no unilateral right of the husband to revoke the divorce stood disolved forthwith. However, if the interpretation of the Federal Shariat Court, following the doctrine laid down by the Hon'ble Supreme Court in Gardezi and Abdul Mannan's case as relied on by the Federal Shari'at Court, is held valid, with respect, it comes in conflict with the express Injunctions of the Holy Qur'an (Verse 49, Surah Al-Ahzab).

51. In Shera and another v. The State (PLD 1982 FSC 229) Shera and Mst. Jowye were convicted by the learned Additional Sessions Judge, Jhang, under section 10(2) and section 16 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and was sentenced to seven years' R.I. with thirty and ten stripes for the each offence, Mst. Allah Jowye, his co-accused was convicted under section 10(2) of the above Ordinance and sentenced to seven years' R.I. and thirty stripes. The admitted facts were that Amir, complainant and Shera were real brothers, while Mst. Allah Jowye appellant had been married to Amir. On the 16th of March, 1980 a first information report was lodged by Amir in police station that Shera, his brother had enticed away his wife Mst. Allah Jowye about 1-3/4 months ago and they were living together in adultery. He also complained that Shera had refused to restore his wife to him. The learned Additional Sessions Judge, after recording the evidence led by prosecution, examined both the appellants under section 340, Cr.P.C. The marriage of Mst. Allah Jowye with the complainant was admitted by them but they asserted that they had married about 2 years ago after Amir, the complainant divorced Mst. Jowye. The Nikah Registrar, Muhammad Ismail was also produced in the case.

He stated that Amir had divorced Mst. Jowye by a written divorce deed which was reduced to writing about a year ago. Aftab Hussain, C.J., however, observed as under:-

"Assuming that some type of divorce had been pronounced by Amir whether oral or in writing, it is not the case of the appellants that the complainant sent any notice of that divorce to the Chairman, Union Council or Union Committee as the case may be as required by section 7 of the Family Laws Ordinance. Non-compliance with section 7 makes a divorce ineffective. It has been held in a number of cases that the relationship of the husband and wife in spite of divorce does not cease to exist in case of non-compliance with the provisions of section 7. In fact in the case of Ali Nawaz Gardezi v. Muhammad Yousuf (PLD 1963 SC 51) (at p.88), it was held by the Supreme Court of Pakistan that if divorce is pronounced, the absence of notice to the Chairman, Union Council or Union Committee would amount to retraction of that divorce. The alleged divorce is ineffective and does not put an end to the

- relationship between Amir and Mst. Jowye. They are even now husband and wife. There can be no doubt that by living apparently as husband and wife and by having sexual intercourse with one another in that capacity the appellants are committing Zina with one another and both of them have been rightly convicted."

The learned Judge, thus held that the conviction of the appellant under section 10(2) was unexceptionable, the sentence was no excessive, the appeal to that extent was dismissed. The conviction and sentence of Shera under section 16 were, however, set aside and the appeal of Shera was allowed to that extent only. Mst. Jowye who was on bail was ordered to be taken in custody. It was further ordered that the sentence of stripes shall be carried out in a public place in the city where the appellants were imprisoned.

52. In the case of Noor Khan v. Haq Nawaz (PLD 1982 t SC 265) the relevant facts were that on 18-11-1979 P.W.4 Noor Khan filed an FIR in Police Station, Saddar, Mianwali alleging that he was resident of Bandeh Alam Khelanwala and employed in the army as Hawaldar and his uncle Fateh Khan "Son of Amir Khan had married Mst. Naziran Bibi, daughter of Sikandar Khan about 30 years ago and the said Mst. Naziran Bibi had given birth to 8 children out of that wedlock and three daughters and two sons out of them were then aliv.e. The complainant alleged further that about 10 years back Mst. Naziran had gone to her fields for cutting of grass when Haq Nawaz son of Alam Khan, resident of Nusratwala forcibly took her away and at that time one boy Shafaullah, her son came running and informed Fateh Khan, whereupon Fateh Khan and Ahmed Khan went to Haq Nawaz and asked him to return Mst.

Naziran Bibi but Haq Nawaz did not return Mst. Naziran Bibi. The complainant further alleged that he had made three such reports of that incident to the Martial Law authorities but Mst. Naziran Bibi had not been restored. It was also stated in the FIR that Mst.

Naziran Bibi had given birth to three children from Haq Nawaz and Haq Nawaz has not so far returned her and has been committting Zina with her. The case was investigated and the police after recording the statement of the prosecution witnesses challaned the two

respondents. Ther prosecution relied upon the statements of Fateh Khan P.W. 2 who was the first husband of Mst. Naziran Bibi, (2) Shafaullah P.W.3 who was the son of Mst. Naziran Bibi out of the wedlock with Fateh Khan, and (3) Noor Khan P.W.4 the complainant in that case who was the nephew of P.W.2 Fateh Khan. The learned Judge after recording the evidence led by the prosecution as well as the defence acquitted the accused/ respondents on the ground that Fateh Khan PW.l divorced his wife Mst.

Naziran Bibi 10/12 years ago and that position has been admitted by Fateh Khan PW before DW Amir Khan. The learned Additional Sessions Judge also held that there was nothing on record to indicate if ,Tateh Khan took any step to recover Mst. Naziran Bibi or got Haq Nawaz prosecuted and that he had not given any explanation for failure to do so, in spite of the fact that it had been alleged that Mst. Naziran Bibi accused was abducted by Haq Nawaz accused about 10/12 years ago. The learned Additional Sessions Judge held that this conduct of Fateh Khan PW lends support to the evidence of Amir Khan and that Muhammad Nawaz Khan DW had also deposed about the divorce. The Court, however, in the peculiar circumstances of the case felt as not necessary to notice the argument for the appellant on the point that since notice under section 7 of Muslim Family Laws Ordinance was not alleged to have been given by Fateh Khan P.W.3, the marriage between Fateh Khan PW and Mst. Naziran Bibi accused should be held to be subsisting. Reliance was placed by the counsel on PLD 1963 SC 51, where it was held that divorce is not effective till ninety days of expiry of notice of divorce by husband to Chairman Onion Council. In appeal before the Federal Shari'at Court, Mr. Justice Zahoorul Haq, writing the main judgment in appeal observed that the case has been fought on the question of divorce which has been denied by one party and asserted by the defence. None of the parties was conscious of the requirement of notice under section 7 and, therefore, no one had considered it, as material for the purpose of a criminal case. Furthermore, the learned Judge noticed the cases cited by the counsel for the appellant and observed that the case reported in PLD 1973 BJ 36 as well as PLD 1963 SC 51 were distinguishable. The first case (PLD 1973 BJ 36) was of a civil nature. The second case (PLD 1963 SC 51) was decided on the special facts of that case where the divorce was alleged to have been given by Mr. Gardezi to his wife, Renate on 5-11-1961 and the marriage between Renate and Col.

Yousuf was solemnized on the 2nd of January, 1962, without even the expiry of two months. Moreover, the Supreme Court had also held at page 72 that there had been no proper divorce proved, and hence PLD 1963 SC 51 was really a ease decided on the basis of its peculiar facts. The following observations of the Supreme Court at page 76, para. 43 were quoted as very significant: -

"It is also fairly clear that by the 2nd of January, 1972 even the iddat period prescribed by Islamic Law for a divorced wife had not yet expired."

53. The learned Judge observed that "these observations of the Supreme Court clearly indicate that if ninety days had expired in that case after divorce then a different view could be possible to take in respect of the offence committed by Col. Yousuf in marrying Renate, whose marriage had not been properly dissolved." The learned Judge thus came to the conclusion that "in the peculiar circumstances of the case before us we are of the view that the version of the defence in respect of the divorce having been pronounced by Fateh Khan, P.W. appears to be plausible in view of the long acquiscence of 10/12

years by the complainanat in allowing the two accused to continue to live as husband and wife without any challenge or prosecution whatsoever. In these circumstances it would be making the technicality of the provision of the notice under section 7 of the Muslim Family Laws Ordinance too cumbersome on the parties who have been living together as husband and wife without any challenge for 10/12 years. They were all the time thinking that they had been validly married after divorce by P.W Fateh Khan and inaction of Fateh Khan had reinforced their belief. Such a state of affairs could not be held to be covered by the provisions of the definition of Zina as provided in section 4 of Ordinance VII of 1979". The learned Judge who had given this judgment could not help observing that the prosecution shows that "it was motivated out of revenge and feeling of loss of face." The appeal was, therefore, dismissed. This was the judgment delivered by Mr. Justice Zahoorul Haq (as Judge, Federal Shariat Court as he then was), Aftab Hussain, C.J. in his separate judgment recorded by him on section 7 of the Family Laws Ordinance observed as follows:-

"28. As regards, section 7 of the Family Laws Ordinance not much discussion is necessary. It clearly lays down that talaq not followed by the procedure provided by the section is not complete which means that the marriage would subsist.

29. There are a number of cases in which this section has been so interpreted. Ali Nawaz Gardezi v. Muhammad Yousuf (PLD 1963 SC 51), Mst. Fehmida Bibi v. Mukhtiar Ahmad and another (PLD 1972 Lah. 694), Mst. Maqbool Jan v. Arshad Hassan and another (PLD 1975 Lah. 147), Muhammad Latif v. Mst. Hanifan Bibi (1980 P Cr. L J 122), Mst. Ghulam Fatima v. Abdul Qayyum and others (PLD 1981 SC 460). For the effectivenesess of this construction it is immaterial whether these cases arise out cf civil or criminal proceedings since section 7 merely determines the status of the parties and ail Courts are duty bound in law to give effect to that status. The only exception can be of a benefit of doubt which may be given to the accused in a criminal case as has been given by us to the respondents in the present case.

30. At least two of the cases referred to above are criminal cases; Ali Nawaz Gardezi v. Muhammad Yousuf was a criminal case decided ultimately by the Supreme Court and Muhammad Yousuf v. Mst. Hanifan Bibi was a case of quashment of criminal proceedings which on this very construction was dismissed.

31. The Supreme Court in para. 13 of the judgment dealt with the different type of Talaq (Ali Nawaz Gardezi v. Muhammad Yousuf) and then categorically gave a finding about the Talaq being ineffective on account of non-compliance with the provisions of section 7.

The relevant portion of the paragraph is reproduced:-

"Mr. Mahmud Ali also put forward the suggestion that the word "effective" occurring in subsection (PLD 1975 Lah. 147) of this section, means "effective against the husband only" and that if the husband failed to give the required notice to the Chairman, the Talaq would be effective at once. This interpretation would make the section itself wholly nugatory. All that the husband has to do then is that he should refrain from giving the requisite notice and the Talaq would automatically take effect. This is exactly the mischief which the section seems designed to remedy."

In the next para, it is sated:-

"But here it is obvious that the object of section 7 is to prevent hasty dissolution of marriages by Talaq, pronounced by the husband, unilaterally, without an attempt being made to prevent disruption of the matrimonial status. If the husband himself thinks better of the pronouncement of Talaq and abstains from giving a notice to the Chairman, he should perhaps be deemed, in view of section 7, to have revoked the pronouncement and that would be to the advantage of the wife. Subsection (3) of this section precludes the Talaq from being effective as such, for a certain period and within that period, consequently, if could not be said that the marital status of the parties had in any way been changed. They would still in law continue to be husband and wife."

32. The subsequent observations about the expirty of 90 days period from the date of alleged pronouncement of talaq was only a reply to the counsel's argument and not the interpretation of section 7. On the other hand it was held that the failure of the husband to give notice to the Chairman about the divorce amounts to revocation about the pronouncement of the divorce.

33. The Supreme Court interpreted the case of Ali Nawaz Gardezi v. Muhammad Yousuf in similar manner in Mst. Fatima v. Abdul Qayyum. This will be apparent from the fact that the trial Judge had relied upon the judgment of Syed Ali Nawaz Gardezi and the categorical law laid down therein. The Supreme Court granted leave to appeal to examine a differnent question whether khula or divorce by mutual consent was irrevocable and section 7 of the Family Laws Ordinance had no application to it. Since it found that on the evidence this question did not arise it held that as such the talaq had not become effective but stpod revoked as no notice under subsection (1) of section 7 was given by the husband. In these circumstances, it is not open to us to take a different view on this point which otherwise also would not be justified in the face of the unequivocable language of section 7. It was in view of this that I had asked the learned counsel for the respondent to advise his client

. correctly about the legal position so that any conscious persistence on their part to flout the law may not land them in the difficulty of another prosecution.

Justice Pir Muhammad Karam Shah in his separate judgment on the question of section 7 of the Muslim Family Laws Ordinance, however, observed:

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55. With respect, learned Chief Justice Aftab Hussain, in his above judgment seems to have taken a very strict view of the law as expounded by Supreme Court in Gardezi's case, whereas Justice Zahoorul Haq's sympathy for the unfortunate couple seems to be apparent from his approach to the problem, which can be described as humane. Justice Pir Muhammad Karam Shah (non ad-hoc Member, Shari'at Appellate Bench, Supreme Court) took a view where sociology and law come closer to each other. It may, however, be submitted that the Islamic law recognizes the rule of limitation which is termed as ((*3L23) for the purpose of initiating the proceedings in a criminal action. If that rule was known to the prosecution Agency the very uocnplaint after 10/12 years was not even fit for registration, what to say of challaning the accused.

56. In the case of Muhammad Salahuddin Khan v. Muhammad Nazir Siddiqui and others (1984 SCMR 583) the petitioner was married to Mst. Tahira Siddiqui and started living with her in Libya where she was working as Assistant Matron in the Central Hospital, Tripoli. On 13th March, 1975 the petitioner sent to her a deed of divorce which read as follows:-

"As my first wife (who is also my first cousin) and you, Tahira Siddiqui, could not pull on together, I am left with no choice but to divorce you and do hereby pronounce upon you Talaq, Talaq, Talaq.

In view of your getting me a good job in Libya and other financial assistance, I should not have done this but as I have to choose one of the two wives, I cannot leave my first cousin i.e. my .first wife).

Anyhow, be sure, that I will fulfil all my financial commitments with you regarding dower etc."

57. Shortly thereafter, Mst. Tahira was taken ill and hospitalized on 2nd April, 1975. Here as a result of an overdoze of some sleeping pills on 5th April, 1975 she fell into a coma and lost consciousness. Since the petitioner had severed' all relations with her, he took absolutely no interest in her ailment or in her health. The family was notified about her condition at Lahore and a brother of the petitioner reached Libya to see her. While she

was still in a coma, he managed to bring her back to Lahore. She did not, however, recover despite being admitted to United Christian Hospital. She ultimately died in Lahore sometime in October, 1975. The father, mother, brother and sisters of the deceased Tahira Siddiqui, respondents herein, applied for issuance of succession certificate in their favour. The petitioner intervened in these proceedings claiming that he was entitled to one-half share of her estate as he was her husband and that she had died childless.

58. Although the petitioner denied that the signatures on the deed of divorce produced before the Court by the respondents, were his signatures but the Courts below found that the said deed was, indeed a genuine document. However, it was an admited position that copy of the divorce deed was never sent to the Chairman of the relevant Union Committee under section 7 of the Muslim Family Laws Ordinance, 1461. The learned Additional District Judge, therefore, held "that runder section 7 of the said Ordinance, the divorce would have been effective only after expiry of 90 days from the date of its notice to the Chairman. Unless and until the Talaq was sent to the Chairman concerned, it is not to take effect and by the mere fact of not sending the Talaq to the Chairman the necessary implication would be that the husband did not want to divorce the wife and did not want the Talaq to become effective.

Therefore, in spite of the fact the Talaq has been proved to be genuine and under the signatures of the appellant, it having not been sent to the Chairman, section 7 of the Muslim Family Laws Ordinance operates with full force and Talaq would not be effective, with the result that the appellant continues to be the husband of the deceased and under these circumstances, he was entitled to get his share in the estate, the learned District Judge held.

59. The High Court, however, in the revision petition filed by the respondents upset the said judgment and held that once execution of the divorce deed had been proved, Talaq became effective after the expiry of ninety days even if the notice under section 7 of the Muslim Family Law Ordinance, 1961 was not served upon the Chairman concerned. Reliance for that view was placed on Muhammad Rafiq v. Ahmed Yar (PLD 1982 Lah.825). This view taken by the Lahore High Court was assailed by him through petition for special leave to appeal before Supreme Court. The learned Judges of the Supreme Court observed that the judgment relied upon by the High Court, namely, Muhammad Rafiq v. Ahmed Yar, the High Court overlooked two pronouncements of this Court dealing with the same question, namely, Ali Nawaz Gardezi v. Lt. Col. Muhammad Yousuf (PLD 1963 SC 51) and Abdul Mannan v.

Safurunissa (1970 SCMR 845).

60. The' learned Judges, therefore, observed:-

"It is manifest, therefore, that the view expressed by the Lahore High Court in Rafique's case which view was relied upon in his judgment by the learned Judge while accepting the revision petition filed by the respondents cannot be supported."

However, the Honourable Judges of the Supreme Court were not inclined to exercise their discretionary jurisdiction of granting leave to appeal to the petitioner in view of the

peculiar facts and cirumstances of the case. It cannot, however, be overlooked that the approach of the Honourable Judges, with utmost respect, was most humane in the circumstances of the case, it was rather guided by moral sense of right and wrong and to my mind, if I may add so, the lady possibly took an overdoze of sleeping pills and tried to end her life as it was really shocking to her to receive divorce deed from a person whom she not only helped in getting a job at Libya but accepted him as her husband, probably for no other consideration except love for him, in spite of the fact that he was already married and had another wife.

61. In another case, Chuhar v. Mst. Ghulam Fatima and another of the Lahore High Court (PLD 1984 Lah. 234), the facts were that on 27-1-1976 Chuhar, the petitioner filed a suit against Mst. Ghulam Fatima, respondent No.l and Fakir Hussain respondent No.2 for declaration to the effect that he was in occupation of the suit land as sole heir of Jagga, deceased. It was averred in the plaint that Jagga had died bachelor and as such the respondents Nos.l and 2

not being wife and son respectively of Jagga, the deceased were not entitled to any share in the property of the deceased. The Mutation No. 256 dated 24-10-1975 which was got sanctioned through the collusion and fraud, was void and ineffective against his rights. The suit was resisted by raising preliminary objections and denying averments made in the plaint. The respondents asserted that they being wife and son of Jagga deceased, the mutation of inheritance was validly sanctioned in their favour. However, the trial Court decreed the suit on 26-10-1981. Feeling aggrieved, the respondents/defendants filed the appeal which was entrusted to the learned Additional District Judge who vide judgment and decree dated 23-11-1982 while accepting the appeal dismissed the suii of the petitioner/plaintiff. Hence a revision petition was filed in the High Court which came up for hearing before a learned Single Judge of that Court, it was contended by the learned counsel for the petitioners that the petitioner No.l was the first cousin of Jagga, the deceased and there being no legal and valid proof of Mst. Ghulam Fatima's marriage with Jagga, the deceased, on the record, there was no legal justification at all to reverse the finding of the trial Court on the relevant issues. Its was also submitted by him that assuming that the marriage of Mst. Ghulam Fatima with Jagga deceased is proved, then her marriage with her first husband, namely, Boota son of Imam Bux PW 1, having not been terminated, due to non-giving of notice by first husband to Mst. Ghulam Fatima, respondent No.l, as required by section 7(1) and (3) of the Muslim Family Laws Ordinance, she could not validly marry with Jagga and consequently Fakir Hussain, respondent is not a legitimate child. The learned Judge after appreciating the evidence on record came to the conclusion that the defendant's evidence as to the wedlock between Mst. Ghulam Fatima respondent No.l with Muhammad Ramzan alias Jagga was confidence-inspiring inasmuch as it was performed in their presence and that respondent No.2 was born of that wedlock. The witnesses had been seeing Mst. Ghulam Fatima living as wife with the deceased till his death.

Therefore, he was fully convinced that Mst. Ghulam Fatima respondent No.l was married with Jagga and Fakir Hussain respondent No.2 was born out of that wedlock, the learned Judge observed. Next, the learned Judge came to the question as to the effect of non-giving of notice of Talaq to the Chairman of Union Council concerned vis-a-vis, the validity of the divorce by first husband to Mst. ' Ghulam Fatima, respondent No.l and the

legitimacy of respondent No.2. The learned Judge observed that:-

"I am of the view that each case has to be decided on its own facts. In the case in hand, the facts that Muhammad Ramzan deceased was also known as Jagga; that Chauhar petitioner; plaintiff is cousin of Jagga deceased; that Mst. Ghulam Fatima was married with Boota s/o Imam Bakhsh C.W.I; that the sister of C.W.I was married to the brother of Mst. Ghulam Fatima respondent No.I in 'Watta'; that Muhammad Boota

- pronounced Talaq to respondent No.I and the brother of respondent No.I gave Talaq to the sister of the first husband namely Boota C.W.I; that C.W.I did not give notice of Talaq to the Chairman, Union Council as required by section 7 of the Ordinance and consequently no arbitration council could be constituted; that Mst. Ghulam Fatima contracted second marriage with Ramzan alias Jagga much after the expiry of 'Iddat' and that Boota C.W.I never revoked Talaq expressly or otherwise, are the admitted, undisputed and proved facts of the case."

62. After recording the admitted position on facts the learned Judge proceeded to examine whether the instant case fell within the purview of section 7(1) and (3) of the Ordinance or not and recorded his conclusion in the following terms:

"It was, therefore, a case of considered and determined Talaq/ separation by mutual consent. It is well-settled that if the husband abstain from giving a notice to Chairman Union Council, he could perhaps be deemed to have revoked the pronouncement. No doubt, the omission to give notices in some cases may give rise to irresistible presumption that Talaq has been revoked impliedly but the presumption is always rebuttable which stands sufficiently rebutted by the subsequent conduct of the first husband and his statement reproduced above. The observations made by his Lordship Mr. Justice Muhammad Haleem, J. in paras Nos.10 and 13 of the case Mst.

Ghulam Fatima v. Abdul Qayyum and others (PLD 1981 SC 460) are instructive and may be usefully reproduced:-

"Para. No. 10-On the facts of the present case, there was no evidence of mutual consent of the parties as would appear from the above discussion. In fact the husband had disputed the right of the wife to obtain divorce on the basis of Talaq pronounced by him and it was nobody's case that she had filed the suit to obtain separation by Khula. As Muhammad Sadiq had died, the question of exercising her right to obtain separation by Khula did not arise. Therefore, the respondents could have succeeded only on the ground of mutual consent of the spouses which they have failed to establish. The High Court, without examining the evidence as a whole, has erroneously held that it was a case of divorce by Mubarat."

"Para No. 13- In the result and for the reasons given above, I hold that the Talaq had not become effective but stood revoked as no notice under subsection (1) of section 7 was given by Muhammad Sadiq. The appeal is allowed with costs, the order of the High Court is set aside and the order of the trial Court, dismissing the suit, is restored."

63. The learned Single Judge of the Lahore High Court observed that, "it may be noted that the Honourable learned Judge has not declared Talaq ineffective for want of notice

but in- his wisdom has stated that Talaq had not become effective but stood revoked".

The words "stood revoked" are of great significance. The case in hand is, however, a case of determined Talaq/separation by mutual consent where the question of revocation does not arise. Although the Talaq was pronounced 15 to 18 years back, yet the first husband never revoked it expressly or otherwise. In these circumstances, I am convinced that the main object of section 7 of the Ordinance to prevent hasty dissolution of marriage by Talaq pronounced by the husband unilaterally, has not been defeated by non- giving of the notice. Section 7 of the Ordinance is obviously for the benefit of female and if section 7(1) of the Ordinance is interpreted in a manner as desired by the learned counsel, it may create many mischiefs and ruin lives of the respondents. To my mind, in the case in hand, the non-giving of notice under section 7(1) of the Ordinance does not render Talaq ineffective. The decisions relied on by the learned counsel are quite distinguishable, inasmuch as, in those cases either Talaq was revoked expressly/impliedly/otherwise or the factum of Talaq was denied/disputed whereas the situation herein is altogether different, inasmuch as, the Talaq was given with full determination and mutual consent and the same was never revoked expressly/impliedly or otherwise by first husband.

64. For all these reasons I hold that Mst. Ghulam Fatima after having been validly divorced, contracted marriage with Jagga deceased and respondent No.2 having been born out of this wedlock is legitimate son of the deceased ana in the presence of tht.je heirs, the petitioner cannot claim any share from the inheritance of the deceased. The mutation was therefore, not void and illegal."

65. In a latest case of the Supreme Court, Mst. Bashiran and another v. Muhamamd Hussain and another the question of Zina under Hudood Ordinance on an appeal against the order of the Federal Shari'at Court dated 24-6-1984, whereby the conviction and sentence imposed upon the appellants was upheld and their appeal dismissed, came under consideration. The learned trial Court had convicted both the appellants under section 494, P.P.C. and section 10(2) of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced them for the first offence to two years' rigorous imprisonment and Rs.1,000 as fine (in default one month R.I.) and for the second offence to five years' rigorous imprisonment, 10 stripes and Rs.1,000 as fine (in default one month's R.I.). Both the sentences were ordered to run concurrently.

66. Mst. Bashiran (appellant No.l therein) was married to Muhammad Hussain (P.W.l) on 10-6-1961. Muhammad Hussain was already married when he contracted the marriage with Mst. Bashiran and their marital relations remained extremely strained with the result that quite soon after the marriage Mst. Bashiran returned to the house of her parents and lived with them for several years.

Here she also fell seriously ill and her kidneys had to be operated upon but Muhammad Hussain showed no concern for her, during all this period.

67. According to the appellants, Muhammad Hussain visited the house of Mst. Bashiran on 6-2-1979 and was prevailed upon to dissolve the marriage and allegedly pronounced an oral divorce. He then went to the City Courts alongwith Muhammad Yusuf, Abbas Ali (D.W.2) and Muhammad Ishaq (D.W.3) where he executed a written talaqnama (Exh.

D.10) and handed it over to the D.Ws. after the same had been duly attested by a Notary Public and Advocate, Mr. M.I. Merchant, Bar-at-Law. The Talaqnama was then handed over to Mst. Bashiran by these witnesses. It was only thereafter that on 24-3-1980, she contracted a second marriage with Abdur Rehman (appellant No.2).

68. However, Muhammad Hussain complainant on coming to know of this development reported the matter to the police but they refused to take any action in view of the talaqnama (Exh.D.10). He thereupon filed a private complaint on 22-5-1980 which has resulted in the conviction of the appellants. The Court below found that Muhammad Hussain had not divorced Mst. Bashiran and the alleged talaqnama dated 6-2-1979 (Exh. D. 10) did not bear his signature and hence the earlier marriage between him and Mst.

Bashiran subsisted and the marriage contracted by Mst. Bashiran with Abdur Rehman was not valid, accordingly, the appellants were found guilty of the offences noted above.

69. On appeal, the Hon'ble Supreme Court held that "in our view even if the finding of fact that the Talaqnama (Exh.D.10) was a forged document is accepted as correct and that Mst. Bashiran is found to have contracted the second marriage with Abdur Rahman while she was still the wedded wife of Muhammad Hussain; the question would still remain as to whether the appellants can be found guilty of committing "zina", in all the circumstances of the case."

70. Then, coming to the facts of the case, the Hon'ble Supreme Court found that Abbas Ali, D.W. deposed, and this part of his statement remained unchallenged in cross-examination, is as follows: -

"On 6-2-1979 complainant came to the house of parents of accused Mst. Bashiran and divorced her. Muhammad Yousuf, Muhammad Ishaque, Haji Ghulam Muhammad and myself were present at the time. I, Muhammad Ishaque and Muhammad Yousuf accompanied the complainant to City Court for execution of talaqnama. Complainant signed talaqnama. I and Muhammad Yousuf also signed. I see talaqnama Exh.10. It bears my signatures, the signature of complainant and of two witnesses. We returned from City Court to Korangi and talaqnama was handed over to accused Mst. Bashiran. In 1980 accused Mst. Bashiran was married....."

71. The Supreme Court held "thus, Mst. Bashiran had taken no part in fabricating the talaqnama and she believed bona fide that it was a genuine document and that there was no impediment in her contracting a second marriage." It was, then, observed that "indeed, after having carefully considered all aspects of the case we have come to the conclusion that the appellants had entered into a marriage believing that they could validly do so and even if they have been having sexual intercourse (which is only a presumption as there is no offspring of this marriage) they cannot be held guilty of the offence, of 'Zina", as defined in section 4 of the Ordinance.

In result, the appeal is allowed. The conviction and sentence passed on the appellants is set aside and the appellants are ordered to be released forthwith, if not required in any other case.

72. It is not ascertainable from the facts stated in the above judgment whether any plea

of non-service of notice under section 7 of the Muslim Family Ordinance was raised before the trial Court the Federal Shari'at Court or not. However, with due respect, the Hon'ble Supreme Court without adverting to the provision of section 7 for the ineffectiveness of divorce by the first husband to Mst. Bashiran, acquitted both the appellants/convicts that no mens rea was established on facts of the case which is a well-settled principle of imposing criminal liability and well-recognized foundation of Criminal administration of justice.

73. The above case as well as Salahuddin's case, already referred indicate an anxiety of the Hon'ble Judges of the Supreme Court to adhere to the norm of justice and not to sacrifice it at the altar of the precedent established in Gardezi's case.

74. This recent trend in the Supreme Court shows that too much adherence to the force of precedent which has sometime been termed as "Slavery to Precedent", may lead to injustice. For this, support may be had from an observation of the Hon'ble Chief Justice, Mr.

Justice Muhammad Haleem's judgment in Benazir Bhutto v. Federation of Pakistan (PLD 1988 SC 416) which reads as follows:

"And, therefore, like a precedent under Article 189 of the Constitution, the principle of stare decisis is also not rigidly applicable to the practice in constitutional interpretation if it leads to or is likely to lead to injustice. In this connection I would refer to the following observations of Hamoodur Rahman,

C.J.. in Asma Jilani v. Government of the Punjab (PLD 1972 SC 139 at p.149):

"In spite of a Judge's fondness for the written word and his normal inclination to adhere to prior precedents one cannot fail to recognize that it is equally important to remember that there is need for flexibility in the application of this rule, for, law cannot standstill nor can the Judges become mere slaves of precedents. The rule of stare decisis does not apply with the same strictness in criminal, fiscal and constitutional matters where the liberty of the subject is involved or some other grave injustice is likely to occur by strict adherence to the rule"

This principle was invoked to overrule Dosso's case reported as (PLD 1958 SC 533).

In Pir Bakhsh v. Chairman, Allotment Committee (PLD 1987 SC 145), this dictum is followed at page 160 of the report, and it is further observed:

"----too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law____"

Concluding, therefore, for the reasons given above, the salutary practice of long-standing as applied to the particular facts and circumstances of Ch. Manzoor Elahi's case cannot be invoked with any force to stultify the hearing of this petition", (p.496-97).

75. The question of the validity of talaq or its revocation for want of notice to Chairman has arisen in innumerable cases, but only few criminal case and two cases involving the

question of inheritance have been mentioned above. The question has also been subject- matter of cases relating to wife's maintenance under Islamic Laws. Reference may be made to Abdul Mannan v. Safurunissa (1970 SCMR 845) and Tauqir Fatima v. State (PLD 1964 Kar. 306). Besides, there are many cases that the parties have been dragged in Courts of law for sending notices to wrong Union Committees or for non-receipt of notices by them. Such proceedings have been continued for number of years and the matters of talaq have remained undecided, just on technical grounds of service of such notices.

Reference may be made to Zakria Khan v. Aftab Ali Khan (PLD 1985 Lah. 319), Akhtar Hussain v. Collector Lahore etc. (PLD 1977 Lah. 1173), Rashida v. Ghulam Raza (PLD 1977 Lah. 363), Muhammad Taqi v. Councillor, Chairman Union Council and others (1986 CLC 1808), Dr. Razia v. Mushir Ahmed Pesh Imam and others (1988 CLC 467) and Muhammad

Aslam Naseem v. Province of Punjab and others (1981 SCMR 453). These cases go a long way to show the miseries and sufferings of our womenfolk mostly living in rural areas. Here, I would like to quote from Mr. Justice Dr. Javid Iqbal's key-note address at a Women's Seminar. Its English translation, published in PLD 1988 Journal 195, reads

"The second problem is that of conflict between (the interpretation of the various provisions of the Muslim Family Laws Ordinance and the Zina Ordinance. According to the Family Laws, if a man decides to divorce his wife, he has to send verbal or written intimation of divorce to his wife and also to get it registered with the local Union Council. The Chairman of the Council then constitutes a conciliation committee which tries to bring about a reconciliation between the spouses. If these efforts fail, the divorce becomes effective in ninety days after its registration with the Union Council. The woman can then remarry after the expiry of the 'iddat' period. Very often the husband disregards these provisions and divorces his wife without getting the divorce registered with the Union Council. Due to ignorance of the law, women usually accept such a divorce as valid and effective and contract a second marriage after the 'iddat' period. Legally the first marriage is still subsisting, and a second marriage in such circumstances amounts to admission of Zina with another man. The husband who made the invalid divorce then perversely files a complaint of Zina against his ex-wife and her new husband, and gets them both arrested."

It further reads:

"The Family Laws have adopted the procedure of "talaq ahsan" rather than the prevailing "talaq bidat" because under the latter method the man can instantly and arbitrarily divorce his wife, whereas in the former case it becomes effective after a period of ninety days, and thus offers some protection to a woman. Ironically those provisions of the law which were designed to protect women, now provide the means of convicting them for Zina." Although the Article is controversial on certain points, but one may agree with the learned author while he says that, as a result, "eight out of every ten women in the Jails today are those charged with the offence of Zina", perhaps, for the interpretation of section 7 in Gardezi's case. (It may be added that the first sentence of the Urdu version of Dr.

Javid Iqbal's lecture of the paragraph, quoted first, as printed in Daily "Jang" Karachi,

speaks of the conflict between "the interpretation of several clauses of the Family Laws Ordinance and the Law of Zina, adultery. The word (;J) Ta'bir (interpretation), perhaps, went unnoticed by the learned translator as it does not appear in the English translation, which has now been added by me shown into brackets).

76. To sum up, if the Talaq by aHanafi Muslim has been pronounced to his wife thrice, it becomes (0*L->) Ba'in. The husband has no right of its revocation according to the interpretation of the relevant Injunctions laid down in the Holy Qur'an and Sunnah, relating to the divorce and its revocation as put in by the Hanafi's and to that extent the provision of section 7 of the Family Laws Ordinance will give its way to those Injunctions as enshrined in the Constitution of Pakistan, particularly, Article 227(1), Explanation, read with second part of the said sub-Article, which specifically provides that no law shall be enacted in Pakistan which is against the Injunctions of Islam as provided in the Qur'an and Sunnah and now more particualrly in the light of the Objectives Resolution made substantive part of the Constitution by Article 2-A inserted in the Constitution by P.O. No. 14 of 1985, read with Article 268 of the Constitution.

77. Perhaps. Article 268 of the Constitution requires some more discussion. The Honourable Supreme Court in the case of Sardar Ali v. Muhammad Ali PLD 1988 SC 287 having noticed some of my judgments, as relied on at the Bar in the written notes, which have been extensively quoted in the first part of the judgment. In the said judgment, the difficulty of the Hon'ble Supreme Court in reconciling the provisions of Article 268 with those of relating to(Art.227, consequent on the insertion of Art.2-A in the Constitution, is manifest. However, the question was left open to be decided in some other "appropriate case", perhaps, for the lack of assistance available to the Honourable Supreme Court in the case before it. I may, in humble attempt, venture to reconcile the several provisions of the Constitution on the point at issue.

78. The Constitution of 1973 provides for the following modes or agencies in the matter of Islamization of the Laws of Pakistan, (i) Parliament and Provincial Assemblies, (ii) Council of Islamic Ideology,

(iii) Federal Shariat Court, (iv) President of Pakistan and Governors of Provinces, and (v) the Courts, Tribunals and Authorities required to enforce law.

(i) As regards legislative power, the Parliament is the Supreme Body to enact laws of Pakistan. Chapter 1 of Part V (Articles 141 to 144) of the Constitution relates to the distribution of legislative powers of the Parliament and the Provincial Assemblies. Articles 141 and 142 prescribe the extent and nature of the laws' to be enacted by them. Article 143 provides that in case of inconsistency between Federal and Provincial Laws, Federal Law, to the extent of inconsistency, shall prevail. Article 2-A with the Annex. (Objectives Resolution) prescribes the limits for the exercise of the powers in the matter of legislation by the respresentatives of the peoples of Pakistan, i.e. the members of the Parliament and Provincial Assemblies. Article 230(4) also casts a duty on both the Houses and each Provincial Assembly to consider the Reports of the Council of Islamic Ideology and enact laws in respect thereof in the light of the Injunctions of Islam as laid down in the Qur'an and Sunnah.

(ii) The entire Part IX (Articles 227 to 230) of the Constitution is devoted to the process of

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

September 17, 1980, provides that in the application of clause (1) of Article 227 to the personal laws of any Muslim sect the expression "Qur'an and Sunnah" shall mean the Qur'an and Sunnah, as interpreted by the sect. Article 228 provides for the constitution and composition of the members of the Council of Islamic Ideology by the President who shall ensure, as far as practicable, that various schools of thought are represented in the Council. Article 229 provides for making a reference to the Council by President of Pakistan or the Governor of Province or by a House or a Provincial Assembly, if two-fifth of its total membership so requires, for advice as to whether a proposed law is or is not repugnant to the Injunctions of Islam. Article 230 states its functions which are enumerated as under: -

The functions of the Islamic Council shall be-

(a) to make recommendations to Majlis-e-Shoora (Parliament) and the Provincial Assemblies as to the ways and means of enabling and encouraging the Muslims of Pakistan to order their lives individually and collectively in all respects in accordance with the principles and concepts of Islam as enunciated in the Holy Qur'an and Sunnah;

(b) to advise a House, a Provincial Assembly, the President or a Governor on any question referred to the Council as to whether a proposed law is or is not repugnant to the Injunctions of Islam;

(c) to make recommendations as to the measures for bringing, existing laws into conformity with the Injunctions cf Islam and the stages by which such measures should be brought into effect;

(d) to compile in a suitable form, for the guidance of Majlis-e-Shoora (Parliament) and the Provincial Assemblies, such Injunctions of Islam as can be given legislative effect.

Article 230 further provides that: When, under Article 229, a question is referred by a House, a Provincial Assembly, the President or a Governor to the Islamic Council, the Council shall, within fifteen days thereof, inform the House, the Assembly, the President or the Governor, as the case may be, of the period within which the Council expects to be able to furnish that advice.

(3) Where a House, a Provincial Assembly, the President or the Governor, as the case may be, considers that in the public interest, the making of the proposed law in relation to which the question arose should not be postponed until the advice of the Islamic Council is furnished, the law may be made before the advice is furnished:

Provided that, where a law is referred for advice to the Islamic Council, and the Council advises that the law is repugnant to the Injunctions of Islam, the House or, as the case

may be, the Provincial Assembly, the President or the Governor shall reconsider the law so made.

(4) The Islamic Council shall submit its final report within seven years of its appointment, and shall submit an annual interim report.

The report, whether interim or final, shall be laid for discussion before both Houses and each Provincial Assembly within six months of its receipt, and Majlis-i-Shoora (Parliament) and the Assembly, after considering the report, shall enact laws in respect thereof within a period of two years of the final report.

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

"Then came the 1962 Constitution of Field-Marshal Ayub Khan. This too retained the Objectives Resolution as its preamble, repeated the prohibition against the making of Laws inconsistent with the Injunctions of Islam and directed that existing laws should be brought into conformity with such injunctions. These, however, were made principles of State policy. The validity of an action or law not in accordance with these principles could not be called in question in any Court. The Commission under the 1956 Constitution was replaced by a Council of Islamic Ideology whose functions were more or less similar to those of the Commission but the Council was required to submit annual reports to the President with regard to its proceedings and the latter was to cause them

to be presented before the National Assembly.

Such a Council was set up and it functioned till the second Martial Law in 1969 but none of its reports, I understand, were presented to the National Assembly. The Second Martial Law abrogated the 1962 Constitution. No new Council was set up. No further steps were taken for Islamization until 1974. Similar provisions are to be found in the interim Constitution of 1972 and the Constitution of 1973. A new Council of Islamic Ideology was set up in February, 1974 with a term of three years. It was required to complete its task within seven years. The tasks assigned to it were the same as those assigned to the Commission under the 1956 Constitutions and in addition it was called upon to make recommendations as to the ways and means of enabling Muslims in their individual and collective capacity to order their lives in accordance with the principles and concepts of Islam. It has also an advisory jurisdiction. If a question arose as to whether a law proposed to be enacted was in conflict with the injunctions of the Quran and Sunnah it had to be referred to the Council for its opinion.

The Council submitted its first interim report under clause

(4) of Article 230 of the Constitution direct to the Speakers of the respective Assemblies for being laid before the Assemblies. It was so laid, discussed and adopted by the Assemblies of Baluchistan and N.-W.F.P. No action was taken by the Speakers of the other Assemblies but the Central Government promptly amended the rules of procedures of the Council requiring it to submit its reports to the Central Government. After this no report was laid before any Assembly even though the Constitution required this to be done within six months of its receipt. The term of this Council came to an end on the 18th February, 1977 and was not revived thereafter.

During the period it functioned it examined some 140 existing laws, compiled some 30 recommendations for the establishment of an Islamic Social Order and answered some references made to it by some Provincial governments. No reference to it was made by any Assembly.

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

(iii) By Constitutional Amendment Order, 1980 (P.O. No.I of 1980) from May 26, 1980 (substituting P.O. No.3 of 1979), a new Chapter 3-A was added to the Constitution of 1973, whereby Federal Shari'at Court was constituted for the first time in Pakistan. It has been provided in Article 203-A that the provisions of Chapter 3-A shall have effect notwithstanding anything contained in the Constitution, and that the Federal Shari'at Court, as provided under Article 203-B may, either of its own motion or on the application

of a citizen of Pakistan or the Federal Government or the Provincial Government examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (the term law, however, has a restricted meaning as defined in Article 203(b), and any law or provision of law if so held by that Court, steps shall be taken to amend the law so as to bring such law in conformity with the Injunctions of Islam and such law shall, to the extent of its repugnancy, cease to have effect on the day on which the decision of the Court takes effect. A Shari'at Appellate Bench of the Supreme Court of Pakistan was also provided therein and was invested with the power to entertain appeals against the decisions of the Federal Shari'at Court. Refer: Article 203(f) (2b) and Under Article 203(g) a bar of the jurisdiction was imposed that no Court or tribunal including the Supreme Court and or a High Court shall have jurisdiction in respect of a matter which lies within the jurisdiction of the Federal Shari'at Court, whose decisions were binding on all the High Courts and all Courts subordinate to a High Court.

) Now, coming to Article 268, it seems advantageous to reproduce it as under: -

"268. Continuance in force, and adaptation of certain laws. - (1) Except as provided by this Article, all existing laws shall, subject to the Constitution, continue in force, so far as applicable and with the necessary adaptations, until altered, repealed or amended by the appropriate Legislature.

The laws specified in the Sixth Schedule shall not be altered, repealed or amended without the previous sanction of the President.

For the purpose of bringing the provisions of any existing law into accord with the provisions of the Constitution (other than Part II of the Constitution), the President may by Order, within a period of two years from the commencing day, make such adaptations whether by way of modification, addition or omission, as he may deem to be necessary or expedient, and any such Order may be made so as to have effect from such day, not being a day earlier than the commencing day, as may be specified in the Order.

The President may authorise the Governor of a Province to exercise in relation to the Province, the powers conferred on the President by clause (3) in respect of laws relating to matters with respect to which the Provincial Assembly has power to make laws.

The powers exercisable under clauses (3) and (4) shall be subject to the provisions of an Act of the appropriate Legislature.

Any Court, tribunal or authority required or empowered to enforce an existing law shall, notwithstanding that no adaptations have been made in such law by an order made under clause (3) or clause construe the law with all such adaptations as are necessary to bring it into accord with the provisions of the Constitution.

(7) In this Article, "existing laws" means all laws (including Ordinances, Orders-in-Council, Orders, rules, bye-laws, regulations and Letters Patent constituting a High Court, and any notifications and other legal instruments having the force of law) in force in Pakistan or any part thereof, or having extra-territorial validity, immediately before the commencing day.

Explanation. - In this Article, "in force", in relation to any law, means having effect as law whether or not the law has been brought into operation."

Sub-Article (1) says about the continuity of the existing laws, so far as applicable, with necessary adaptation, until altered, repealed or amended by the appropriate Legislature whereas sub-Article (2) specifies that laws mentioned in the Sixth Schedule are to be altered with the prior sanction of the President.

81. Article 268(3) provides that for the purpose of bringing the provisions of any existing law into accord with the provisions of the Constitution (other than Part II of the Constitution), the President may, by Order, within a period of two years from the commencing day, make such adaptation by way of modification, addition or omission he may deem necessary or expedient. Same powers may be exercised by the Governor of a province under Article 268(4) in relation to the province in respect of laws relating to matters with respect to which { a Provincial Assembly has power to make law, on authority of the President under clause (3) thereof. The powers exercisable under clauses (3) and are, however, "subject to the provision of an Act of the appropriate legislature". This power was exercisable by the President within a period of two years from the commencing day of the Constitution which has automatically come to an end on expiry of the said period and is now no more available to the President and/or the Governor.

(v) Lastly under clause (6) of Article 268 any Court, Tribunal or Authority required to or empowered to enforce the existing law (as defined in the succeeding clause) is empowered to construe the law and to adapt the same as is necessary to bring it into accord with provision of the Constitution. This power is further strengthened by insertion of Article 2-A, making the Objectives Resolution a substantive part of the Constitution with effect from 13th March, 1985. Yet, referring to my earlier decisions in the cases of (i) Bank of Oman v. East Trading Company Limited (PLD 1987 Kar. 425), (2) Irshad

H. Khan v. Parveen Aijaz (PLD 1987 Kar. 466), (3) Habib Bank Ltd. v. Muhammad Hussain (PLD 1987 Kar. 612), and

(4) Qamar Raza v. Tahira Begum (PLD 1988 Kar. 169), I may also refer to the decision in the case of Ayaz Haroon v. Imran Durrani by my learned brother, Wajihuddin Ahmed, J (PLD 1989 Kar. 321). I may also refer to a decision of the Federal Shari'at Court in the case of Mohammad Sarwar v.

The State (PLD 1988 FSC 42) relevant portion thereof is as under:-

"So the High Court in the present situation had the authority to declare any provision of Muslim Personal Law to be repugnant to Qur'an and Sunnah and this Court is obliged to follow that decision."

82. Reverting to the above five modes or agencies to Islamize the law it may be submitted that the Parliament and the- Provincial Assemblies enjoy unfettered power to make laws in their respective fields in accordance with the Constitution. The Council of Islamic Ideology is to perform its function in advisory capacity and make recommendations to bring the existing laws into conformity with the Injunctions of Islam

as laid down in the Holy Qur'an and Sunnah. The concerned legislatures carry alongwith them bounden duty to consider the reports of the Council of Islamic Ideology and enact laws in respect thereof, as effect to those recommendations is to be given only in the manner provided in Part IX of the Constitution by the Parliament and the Provincial Assemblies in their respective fields. This will include the power to amend, modify, or repeal any existing law or provision of law in order to bring it in conformity with the Injunctions of Islam. As regards Federal Shari'at Court it has specific, rather special jurisdiction, to decide about the repugnancy of a law or a provision of law to the Injunctions of Islam, but the said jurisdiction has a limited scope by restricting the definition of law, as provided in Article 203 (b) It is also noticeable that in such matters the Federal Shariat Court can grant no relief, either interim or final, in consequence, as it does not act as a Court in a conventional sense, and it is not concerned with the facts in an actual case or a given situation between the parties, except when it exercises its power under appellate or revisional jurisdiction.

83. The President in case of law with respect to a matter in the Federal Legislative List or the Concurrent Legislative List, or the Governor in the case of law with respect to a matter not enumerated in either of those lists shall, then, take steps to amend the law so as to bring such law or provision thereof into conformity with the Injunctions of Islam and such law or provision thereof shall, to the extent to which it is held to be so repugnant cease to have effect on the day on which the decision of tno Shari'at Court takes effect.

Article 203 (b) (3) (a) and This implies that in case no step to so amend the law, as held by the Federal Shari'at Court, within the time prescribed by it, is taken by the concerned Legislature, the said law or a provision thereof will cease to remain on the statute book of Pakistan.

84. As regards power of the President and the Governor under Articles 268 (3) & (4) it was exerciseable within a period of two years from the commencing day of the Constitution. Since the period prescribed by the Constitution itself has expired, the said power of f the President and Governor to bring law or a provision thereof in accordance with the provisions of the Constitution is no more available to them. However, notwithstanding the fact that no adaptations have been made in the existing laws under clauses (3) and (4) by the President or the Governor of the Province, a Court, Tribunal or Authority, enforcing such law shall construe the existing law with all such adaptations which include modification, addition or omission as it is deemed necessary to bring it in accord with the Constitution. The question whether the provisions of Article 268, as a whole are of transitional nature or otherwise finds expression in the said judgment of the Honourable Supreme Court. In my humble view the powers conferred under clauses (3) and (4) are transitory in nature for a period of two years only from the commencing day whereas the power conferred under sub-Article 6 is not restricted to a time limit. For this, I ‘may refer to the observation of Hon'ble Supreme Court in Muhammad Din v. The State PLD 1977 SC 52 relevant portion whereof reads as under:-

".....Article 268 of the Constitution provides for continuance in force subject to adaptation of all existing laws to bring them into conformity with the provisions of the Constitution. The Constitution is the supreme law of the land and all existing and future laws will have to conform to its provisions to make them enforceable. It is not controverted that at the commencement of the Constitution of 1973, P.O. 14 was "existing law," therefore, vide

clause (3) of Article 268, it has to be read subject to necessary adaptation so as to bring it "into accord with the provisions of the Constitution." Clause (6) imposes a further duty on Courts to read into an existing law, the necessary adaptation, notwithstanding that no adaptation has in fact been made in such law. Because of this provision in the Constitution, the power initially conferred on the President under Article 4 of P.O. 14 of 1972 shall under the Constitution, be read as exercisable in accordance with the advice tendered by the Prime Minister under Article 48 of the Constitution. It is therefore, wrong- to suggest that the transitional scheme underlying P.O. 14 of 1972 has become unworkable since the commencement of the Constitution."

Article 2-A added by P.O. 14 of 1985 has made a significant improvement to it inasmuch as previously the effect to be given to clause (1) of Article 227 was the exclusive jurisdiction of the Legislature in the matter of Islamic provisions in the manner provided in Part IX of the Constitution, whereas any Court, Tribunal or Authority required or empowered to enforce an existing law is now obliged to give effect to the principles and provision of Objectives , Resolution as brought in the forefront of the Constitution, by virtue1' of Article 2-A, while construing a provision of law, and_ if found repugnant to any provision of the Constitution to ignore it or refuse to recognise it in the case before it. Reference may be made to Jubinder Kishore's case PLD 1957 SC 46. It may be clarified that the Islamization of Laws remains the function of the legislature as provided under Article 227 It may also be added that superior Courts are depository of judicial power and generally lean in favour jurisdiction and guard it, unless the jurisdiction of the superior Courts has been specifically taken away or is curtailed. So, the universally recognized principle of the interpretation of the Constitution that there should be harmonious interpretation and that every attempt should be made to bring a harmonious construction and interpretation of the various provisions of the Constitution to bring into conformity is thus available in the analysis of the 5 modes or agencies of' Islamization of laws in the Constitution which could work together and also indpendently. The difficulty pointed out by the Honourable Supreme Court in Sardar Ali's case PLD 1988 SC 287 is thus explained, and has been, if I may say so, removed. I may here refer to the excellent statement of the Court of West Virgina USA in Shefard v. Wheeling 30 W Va 479, in support of the proposition that a declaration by Court of the unconstitutionality of a law or a provision of law does not nullify or abrogate the provision of law so as to wipe it off from the statute book. The Court said that:-

"the Court does not annul or repeal the statute if it finds it in conflict with the Constitution. It simply refuses to recognize it and determines the right of the parties just as if that statute had no application. The Court may give its reasons for ignoring or disregarding the statute, but the decision affects the parties only, and there is no judgment against the statute. The opinion or reasons of the Court may operate as the precedent for the determination of other similar cases,! but it does not strike the statute from the statute book; it does not repeal the statute." Quoted by Willoughby on the Constitution of United States, Vol. I, 2nd Edn., p. 10. " The learned author has referred to an interesting decision State of IOWA v. O'Neil 147 I A 513, 33 LRA n.s 788, in which the following observation also lends support to the above view-

"a statute unconstitutional of the written law, but those who are bound to obey the law may, we think, reasonably take into account the decisions referred by the Courts in the exercise of their peculiar functioning of passing upon the constitutionality of the statutes

in determining what the law of the State really is." page 14, ibid.

I may also refer to a case reported in PLD 1958 Karachi 283, in which it was held: Courts do not legislate and even if a statute is declared void it remains on the statute book.

85. The principle has been of dominant force that the Constitution is to be construed as a whole. So each of its provisions has to b(interpreted in the light of all other parts so as to find out the general purpose for the attainment of which, it was framed. It therefore, seems imperative to review the provisions relating to(enforcement of the Qur'an and Sunnah in the Constitution, which is the purpose of the creation of Pakistan itself.

G6. From the general nature and intent of the Constitution, in the context of Islam, not to mention other aspects, I must confess that the enforcement of the Qur'an and Sunnah, as the Constitution was originally framed in 1973, appears to be through legislature and legislature alone. Article 227 (2) is a direct evidence for that but after the imposition of Martial Law on July 5, 1977, General Mohammad Zia-ul-Haq, the then Chief Martial Law Administrator, established Federal Shari'at Court thereby giving power to that newly-established Court to declare any law or a provision thereof, within the restricted definition of 'law' as repugnant to the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah of the Holy Prophet. It was definitely an inroad into the Constitution of 1973, but a positive step towards the enforcement of the Qur'an and Sunnah, though in a restricted field. In early 1982, he nominated a Majlis-i-Shoora which was to follow the National Assembly Rules as framed and applicable under the Constitution of 1973. He got first-hand experience of it. At the time of revival of the Constitution in March, 1985, he incorporated as many as about 64 amendments in the Constitution, including the insertion of Article 2-A, whereby the Objectives Resolution which hitherto had been only a preamble in every Constitution, was made substantive part of the Constitution. He seems to be aware of the decision of the Honourable Supreme Court in Asma Jillani and Zia-ur-Rahman's cases. It seems that he felt satisfied with the result and achievement of the Federal Shari'at Court, and visualised the process of Islamization to work further through Courts of law, as he had first proclaimed on January 1, 1978 that the Courts in general will be given power to enforce the provisions of the Qur'an and Sunnah. In this background, it can be reasonably assumed that the purpose of insertion of Article 2-A is the enforcement of Qur'an and Sunnah within the framework of the principles and provisions of the Objectives Resolution through Courts of law. This intention is also ascertainable from the speech of 12th August, 1983 and ihe subsequent speeches made by the late President in Majlis-i-Shoora with special reference to the making of the Objectives Resolution as substantive part of the Constitution. I will very humbly submit that the fundamental purpose and spirit of the Constitution must not be lost sight of. It should not be construed so as to avoid the higher norm deducible from the fundamental theme which is the significant feature of every Constitution, whether it be 1956 Conrtitution or of 1973.

87. The phrase employed in Article 2-A "effect shall be given accordingly", to my mind, is explainable in the background of the two cases of the Honourable Supreme Court, namely Asma Jillani and Zia-ur-Rahman, in circumstances, that at the time when these cases were decided the Objectives Resolution was only preamble and so the desired effect could not be imported thereof, which is now very well available. In short, I mean to say that for correct explanation to the word "effect" used in Article 2-A, one has to read

and re- read the abovementioned two cases of the Honourable Supreme Court. It is the only interpretation of Article 2-A, if I may venture to say, which, could, perhaps, be acceptable. Any other interpretation, to my mind, will render the Article as impracticable, if not meaningless.

Case Result :