FEDERAL SHARIAT COURT
(ORIGINAL JURISDICTION)

PRESENT:

Mr. Salahuddin Ahmed, Chairman
Mr. Justice Agha Ali Hyder Member
Mr. Justice Aftab Hussain Member
Mr. Justice Zakaullah Lodi Member
Mr. Justice Karimullah Durrani Member

SHARIAT PETITION NO.2 OF 1979 (LAHORE)

(Hafiz Muhammad Ameen V/s. Islamic Republic of Pakistan and another)

Petitioner: Memo

SHARIAT PETITION NO.5 OF 1979 & 6 OF 1979 (LAHORE)

(Subedar Lal Khan and Sh.Ghulam Farooq Versus The Central Government and another)

For the Petitioners: Mr.Hassan Ahmed Khan Kanwar, Advocate

Date of hearing. 18/8/1980

SHARIAT PETITION NO. 7 OF 1979 (LAHORE)
(Muhammad Ali etc V/s.Govt. of Punjab and another)

Petitioner: Nemo

SHARIAT PETITION NO. 8 OF 1979 (LAHORE)
Muhammad Hussain V/s.Islamic Republic of Pakistan and another.

Petitioner: Nemo

SHARIAT PEITITION NO. 9 OF 1979 (LAHORE)
Mohammad Bashir Versus Islamic Re public of Pakistan and another.

Petitioner: Memo

SHARIAT PETITION NO. 10 OF 1979 (LAHORE)
Khizar Hayat V/s.Federal Government and another

Petitioner: Nemo

SHARIAT PETITION NO.12 OF 1979 (LAHORE)
Haji Rehim Bakhsh Versus The Government of Pakistan and another.

For the Petitioner: Haji Rahim Bakhsh (Petitioner)
Date of hearing: 25/8/1980

SHARIAT PETITION NO.14 OF 79 (LAHORE)
Mohammad Bakhsh etc Versus Government of Pakistan and another.

AND

SHARIAT PETITION NO.150F 79 (LAHORE)
Muhammad Akram V/s.Govt. of Pak.and another

For the Petitioner: Mr. Riaz Anwar, Advocate

Date of hearing : 18 & 19 - 8-1980

SHARIAT PETITION NO. 16 OF 1979 (LAHORE)
Haji Sadiq Baig and another Versus Province of Punjab and another

For the Petitioner: Sh. Ahmed Saeed, Advocate

Date of hearing : 19-8-1980

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SHARIAT PETITION NO. 21 OF 1979 (LAHORE)
Asghar Ali Moona V/s. Government of Pakistan and another

Petitioner: Nemo

SHARIAT PETITION NO.23 OF 1979 (LAHORE)
Ali Ahmad and another Versus Government of Pakistan and another

For the Petitioner: Raja Azizuddin, Advocate
Date of hearing : 27-9-1980

SHARIAT PETITION NO.24 OF 1979 (LAHORE)
Jahan Khan and others Federation of Pakistan and another

For the Petitioner: Mr. Mushtaq Raj, Advocate
Date of hearing : 19-8-1980

SHARIAT PETITION NO. 25/79 (LAHORE)
Qizilbash Waqf Lahore through Nawab Muzaffar Ali Khan Qizilbash Versus The Chief Land Commissioner Punjab and another.

For the Petitioner: Ch. Fazle Hussain
Date of Hearing : 2nd, 3rd, 7th & 8th Sept.1980

SHARIAT PETITION NO.27 OF 1979 (LAHORE)
Muhammad Ibrahim Versus Barkurdar & another

For the Petitioner: Mr.Muhammad Ibrahim, Advocate
Date of hearing : 20-8-1980

SHARIAT PETITION NO.30 OF 1979 (LAHORE)
Dilawar Khan and others Versus Federation of Pakistan and others.

AND

SHARIAT PETITION NO.31 OF 1979 (LAHORE)
Mohammad Arshad and another Versus Federation of Pakistan and others

AND

SHARIAT PETITION NO.36 OF 1979 (LAHORE)
Khurshid Muhammad Versus Federation of Pakistan etc.

For the Petitioners: Khawaja Mushtaq Ahmed, Advocate
Date of hearing : 20-8-1980

SHARIAT PETITION NO.33 OF 1979 (LAHORE)
Atta Mohiuddin Versus Province of Punjab and another.

For the Petitioner: Syed Fazle Azim Advocate.
Date of hearing : 19-8-1980

SHARIAT PETITION NO.38 OF 1979 (LAHORE)
Kalu and another Versus Govt. of Pakistan and others.

AND

SHARIAT PETITION NO.43 OF 1979 (LAHORE)
Muhammad Latif Tanbridi V/s. Islamic Republic of Pakistan and others.

For the Petitioners: Mr. Mahfoozul Haq Khan, Advocate
Date of hearing : 19-8-1980

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SHARIAT PETITION NO.39 OF 1979 (LAHORE)
Muhammad Zakaullah Khan through Muhammad Zafarullah Khan Vs. Govt. of Punjab and others

Petitioner: Nemo

SHARIAT PETITION NO.40 OF 1979 (LAHORE)
Syed Ghulam Mustafa Shah Versus Islamic Republic of Pakistan and another.

For the Petitioner: Mr. Naseem Mahmood, Advocate
Date of hearing : 19-8-1980

SHARIAT PETITION NO. 44 OF 1979 (LAHORE)
Bushra Bib V/s. Dy.Land Commissioner and others

AND

SHARIAT PETITION NO. 54 OF 1979 (LAHORE)
Syed Ali Akbar Mahmood Shah Versus Dy. Land Commissioner Rahimyar Khan and others

AND

SHARIAT PETITION NO. 55 OF 1979 (LAHORE)
Muhammad Uzaiq Shah V/s. Dy.Land Commissioner and others

AND

SHARIAT PETITION NO.56 OF 1979 (LAHORE)
Tabseem Ahmad Shah Versus Dy.Land Commissioner Rahimyar Khan and others

AND

SHARIAT PETITION NO. 57 OF 1979 (LAHORE)
Muhammad Awais Shah Versus Dy.Land Commissioner Rahimyar Khan and others.

AND

SHARIAT PETITION NO. 58 OF 1979 (LAHORE)
Amina Bibi Versus Dy.Land Commissioner and others

For the Petitioners: Iftikhar Ali Shaikh, Advocate
Date of hearings: 30th Aug., 7th and 20th Sept.1980

SHARIAT PETITION NO. 46 OF 1979 (LAHORE)
Muhammad Yousaf Versus Federal Government and another.

Petitioner: Nemo

SHARIAT PETITION NO. 47 OF 1979 (LAHORE)
Mushtaq Ahmad Khan Versus Government of Punjab and another

Petitioner: Mr. Mushtaq Ahmed Khan,Petitioner

SHARIAT PETITION NO. 48 OF 1979 (LAHORE)
Muhammad Iqbal Versus Islamic Republic of Pakistan and another.

Petitioner: Nemo

SHARIAT PETITION NO. 49 OF 1979 (LAHORE)
Ghulam Qadir V/s.Govt. of Pakistan, and others

Petitioner: Nemo

SHARIAT PETITION NO. 50 OF 1979 (LAHORE)
Pehalwan Khan and others V/s. Govt. of Punjab & others

Petitioner: Nemo

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SHARIAT PETITION NO. 61 OF 1979 (LAHORE)
Muhammad Younas etc. Versus Govt. of Pakistan

Petitioner: Nemo

SHARIAT PETITION NO. 63 OF 1979 (LAHORE)
Bashir Ahmad and others Versus Government of Pakistan and another

Petitioner: Nemo

SHARIAT PETITION NO. 64 OF 1979 (LAHORE)
Elahi Bakhsh & another V/s. Govt. of Punjab.

Petitioner: Nemo

SHARIAT PETITION NO. 65 OF 1979 (LAHORE)
Muhammad Ashraf Versus Islamic Republic of Pakistan and others.

Petitioner: Nemo

SHARIAT PETITION NO. 72 OF 1979 (LAHORE)
Salim Akhtar Khan V/s. Govt. of Punjab.

Petitioner: Nemo

SHARIAT PETITION NO.45 OF 1979 (LAHORE)
Malik Ghulam Haider and others Versus Government of Pakistan

For the Petitioner: Mr. Riaz Anwar, Advocate
Date of hearing: 18th and 19th August, 1980.

SHARIAT PETITION NO. 73 OF 1979 (LAHORE)
Salim Akhtar Khan V/s. Govt. of Punjab

For the Petitioner: Mr. Muhammad Arshad, Advocate.
Date of hearing : 19-8-1980

SHARIAT PETITION NO. 74 OF 1979 (LAHORE)
Fazal Muhammad etc. V/s. Islamic Republic of Pakistan etc.

For the Petitioner: Mr. Fazal Muhammad, petitioner
Date of hearing : 30/8/1980

SHARIAT PETITION NO. 75 OF 1979 (LAHORE)
Umar Din Versus Government of Pakistan etc

For the Petitioner: Mr. Muhammad Anwar Buttar, Advocate
Date of hearing : 20th, 23rd, 24th and 25th August, 80

SHARIAT PETITION NO. 27 OF 1979 (PEHSAWAR)
Pir Qutub Shah V/s. The State

Petitioner: Mr. Abdul Bari, Advocate

For the Respondent: Mr. Inayat Elahi, Advocate General of N.W.F.P.

Date of hearing: 31-8-1980.and 29-11-1980

SHARIAT PETITION NO. 1 OF 1979 (PESHAWAR)
Syed Ali Khan V/s. Govt. of Pakistan.

For the Petitioner Ch. Muhammad Sadiq, Advocate
Date of hearing : 31st, Augt, 8th, 9th, 10th, 13th & 14th September, 1980.

SHARIAT PETITION NO. 5 OF 1980 (PESHAWAR)
Syed Khushal Khan etc. V/s. Federal Govt. of Pakistan.

For the Petitioner: Mr. Ghulam Naqshban, Advocate

Date of hearing : 30th Aug. & 17th September, 80

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SHARIAT PETITION NO.36 OF 1979 (KARACHI)
Syed Qamarul Hasnain etc Versus Federation of Pakistan.

For the Petitioner: Mr. Faiq Hussain Rizvi, Advocate
Date of hearing : 27-8-1980

SHARIAT PETITION NO.13 OF 1980 (LAHORE)
Feroz V/s. Federation of Pakistan and others

Petitioner: Nemo

SHARIAT PETITION NO. 14 OF 1980 (LAHORE)
Ahmad Ali and others Versus Federal Govt. & others

For Petitioner: Nemo

SHARIAT PETITION NO. 17 OF 1980 (LAHORE)
Dost Muhammad & others V/s. Federal Government and others.

For the Petitioner: Haji Muhammad Anwar Butter, Advocate
Date of hearing : 26-8-1980

SHARIAT PETITION NO. 18 OF 1980 (LAHORE)
Inayat Ali and others Versus Government of Pakistan and others.

For the Petitioner: Mr. Muhammad Ashraf Wahla, Advocate
Date of hearing : 30-8-1980

SHARIAT PETITION NO. 19 OF 1980 (LAHORE)
Jamal Din V/s. Muhammad Sher and others

Petitioner: Nemo

SHARIAT PETITION NO. 20 OF 1980 (LAHORE)
Shaikh Abdul Wadood Versus Government of Pakistan and others.

Petitioner: Nemo

SHARIAT PETITION NO. 22 OF 1980 (LAHORE)
Mst. Khalida Adeeba Khurram Versus Islamic Republic of Pakistan and others.

Petitioner: Nemo

SHARIAT PETITION NO. 4 OF 1980 (R'PINDI)
Azmat Ali and 2 others Versus Federation

For the Petitioners: Mr. S.M. Zafar, Sr.Advocate
Date of hearing : 22nd and 23rd September, 1980

SHARIAT PETITION NO. 5 OF 1980 (R'PINDI)
Sardar Sultan Muhammad Malik V/s.Federation

For the Petitioner: Mr. S.M.Ayub Bokhari, Advocate
Date of hearing : 23-9-1980

SHARIAT PETITION NO. 3 OF 1980 (LAHORE)
Bashir Ahmed V/s. Federation

Petitioner: Nemo

SHARIAT PETITION NO. 4 OF 1980 (LAHORE)
Gulab Din Versus Federation

Petitioner: Nemo

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SHARIAT PETITION NO. 28 OF 1979 (LAHORE)
Malik Haji Muhammad Aslam and others V/s.
Federation of Pakistan and another

For the ~~Appellant~~ Petitioner: Mr. Ghulam Muhammad Qadri, Advocate
Date of hearing : 1-10-1980, 4-10-1980

SHARIAT PETITION NO. 35 OF 1979 (LAHORE)
Syed Bakhtiar Abbas V/s. The Punjab Provincial Government and anohter.

For the Petitioner: Syed Mohammad Ali Zaidi, Advocate
Date of hearing : 4-10-1980

SHARIAT PETITION NO.76 OF 1979(LAHORE)
Baboo Ali Haider and others Versus
Federal Government and others.

For the Petitioner: Mr. Ghulam Muhammad Chahal, Advocate
Date of hearing : 4-10-1980

SHARIAT PETITION NO.23 OF 1980 (LAHORE)
Muhammad Anwer V/s. Federation of Pakistan

For the Petitioner: Ch. Muhammad Nazeer Ahmed, Advocate
Date of hearing : 4-10-1980, 6-10-1980

SHARIAT PETITION NO. 5 OF 1980 (LAHORE)
Rahsid Ahmad Versus Government of Punjab.

For the Petitioner: Mr. Muhammad Ismail Qureshi, Advocate
Date of hearing : 7-10-1980

SHARIAT PETTTION NO. 7 OF 1980 (LAHORE)
Sh. Nasrullah Mushtaq etc. V/s. Islamic Republic of Pakistan etc.

For the Petitioner: Mr. Raza Hussain Shamzi, Advocate
Date of hearing : 7-10-1980

SHARIAT PETITION NO. 8 OF 1980 (LAHORE)
Mistri Mohammad Hussain Versus Mian Ilam Din and others.

Petitioner : Nemo

SHARIAT PETITION NO. 3 OF 1980 (R'PINDI)
Fazal Rehman Foundation and others Versus
Federation of Pakistan and others.

For the Petitioner: Mr. Rashid Murtaza Qureshi, Advocate
Date of hearing : 7-10-1980

Mr. Inayat Elahi, Advocate General of NWFP
Mr. Sahibzada Akhtar Munir, Assistant Advocate General of N.W.F.P. } On behalf of N.W.F.P. Government

Syed Iftikhar Ahmed, Deputy Attorney General for Pakistan } On behalf of Federation of Pakistan

AFTAB HUSSAIN MEMBER

This order will dispose of: (1) S.P.No.2/79(Lahore) (2) S.P.No.5/79(Lahore) (3) S.P.No.6/79(Lahore)(4) S.P.No.7/79(Lahore)(5) S.P.No.8/79(Lahore) (6) S.P.No.9/79(Lahore) (7) S.P.No.10/79 (Lahore) (8) S.P.No.12/79(Lahore) (9) S.P. No.14/79(Lahore) (10) S.P.No.15/79(Lahore) (11) S.P.No.16/79-(Lahore) (12) S.P.No.21/79(Lahore)(13) S.P.No.23/79(Lahore) (14) S.P.No.24/79(Lahore) (15) S.P.No.25/79(Lahore) (16) S.P.No.27/79(Lahore)(17) S.P.No.30/79 (Lahore) (18) S.P. No.31/79(Lahore) (19) S.P.No.33/79(Lahore) (20) S.P.No.36/79-(Lahore) (21) S.P. No.38/79(Lahore) (22) S.P.No.39/79 (Lahore) (23) S.P.No.40/79(Lahore) (24) S.P.No.43/79(Lahore) (25) S.P. No.44/79(Lahore) (26) S.P.No.45/79(Lahore)(27) S.P.No.46/79-(Lahore) (28) S.P.No.47/79(Lahore) (29) S.P.No.48/79(Lahore) (30) S.P.No.49/79(Lahore) (31) S.P.No.51/79(Lahore) (32) S.P. No.54/79(Lahore) (33) S.P.No.55/79(Lahore) (34) S.P.No.56/79-(Lahore) (35) S.P.No.57/79(Lahore) (36) S.P.No.58/79(Lahore) (37) S.P.No.61/79(Lahore) (38) S.P.No.63/79(Lahore) (39) S.P. No.64/79(Lahore) (40) S.P.No.65/79(Lahore) (41) S.P. NO.72/79(Lahore)(42) S.P.No.73/79(Lahore) (43) S.P.No.74/79(Lahore) (44) S.P.No.75/79(Lahore) (45) S.P.No.27/79(Peshawar) (46) S.P. No.1/80(Peshawar) (47) S.P.No.5/80(Peshawar) (48) S.P.No.36/79(Karachi) (49) S.P.No.13/80 (Lahore) (50) S.P.No.14/80(Lahore) (51) S.P.No.17/80(Lahore) (52) S.P.No.18/80(Lahore) (53) S.P. No.19/80(Lahore) (54) S.P.No.20/80(Lahore) (55) S.P.No.22/80-(Lahore) (56) S.P.4/1980(R) (57) S.P.5/1980(R) (58) S.P.3/1980(Lahore) (59) S.P.4/1980(Lahore) (60) S.P.28/79(Lahore) (61) S.P.35/79(Lahore) (62) S.P.No.76/79(Lahore)(63) S.P. 23/80(Lahore) (64) S.P.5/80(Lahore) (65)S.P.7/80 (Lahore) (66)S.P.8/80(Lahore)(67) S.P.3/80(R).

These cases are being dealt with together since they seek to challenge one or the other of the provisions of the same statute, i.e. Martial Law Regulation 115 (hereinafter to be called the Regulation) and Act II of 1977 relating respectively to the land reforms of 1972 and 1977 on grounds of their repugnancy to the Holy Quran and Sunnah of the Prophet (PBH). In some petitions provisions of the Punjab Pre-emption Act as well as the N.W.F.P Pre-emption Act are also challenged on the same ground but the points raised in those petitions mainly involve consideration of problems which arise in the treatment of the subject of pre-emption under clause (d) of sub-para (3) of para 25 of the Regulation referred to above. Similarly a number of petitions involve consideration of validity of other enactments concerning acquisition of land e.g. Punjab Acquisition of land (Housing) Act, 1973, Development of Cities Act, 1976, and Capital Development Authority Ordinance 1960. The arguments on the vires of some of these enactments initially centred round the authority of an Islamic State to acquire forcibly property of its citizens for public purposes but the main emphasis came ultimately to be laid on the want or in-adequacy of consideration.

The following points arise in these petitions:

1. The ceiling of ownership of 150 acres of land prescribed in the Regulation and reduced to only a maximum of 100 acres by Act. II of 1977 renders nugatory the rights conferred by the Holy Quran and the Sunnah on an individual (a) to own property without any limitation and (b) to inherit further landed property in excess of the above limit.
2. Property of waqf, vesting as it does in Allah and not a 'person', cannot be made subject to the said ceiling.
3. The provision of acquisition of land made in other enactments, for example the Punjab Acquisition of land (Housing) Act, 1973 is also repugnant to the Holy Quran and the Sunnah.

4) In any case the state had no right to acquire property without payment of proper compensation which should be equivalent to the market value of the land current at the time of acquisition. Act. II of 1977 does provide for payment of compensation but firstly it is too inadequate and has no relation to the prevailing market value, and secondly it is only for the stage when a landowner was required to surrender area in excess of the limit of one hundred acres within four months of the enforcement of the said Act; it does not provide for a subsequent surrender of the area which a land owner may inherit in future thus raising his ownership of land to a limit in excess of the ceiling.

5) The compensation as provided for land acquired under the Punjab Acquisition of land (Housing) Act, 1973, read with the Punjab Development of Cities Act, 1976, at a maximum amount of twenty thousand rupees per acre is extremely inadequate and forms only a small pro-portion of the value of similar land prevailing in the market at the time of acquisition. The state's right to acquire properties cannot at any rate be made subject to payment of compensation fixed so capriciously.

6) The provisions of the CDA Ordinance XXIII of 1960 freezing the value of property within a certain areas at the value prevailing between the Ist day of January, 1954 and the 31st day of December, 1958 though quite a large portion of it has yet to be acquired by the CDA, are bad. The provision of inadequate compensation is also bad for the above reason.

7) The ban imposed on the right to partition certain properties, the restrictions imposed on alienation of land and the statutory rights conferred upon the tenants by paras 22, 24 and 25 respectively impinge upon the sharia rights of the owners to enjoy and dispose of their properties in any manner they like and to let them out to tenants on any conditions mutually acceptable.

8) The sharia recognises only three types of pre-emptors viz., cosharers, participators in appendages and neighbours. To qualify as pre-emptor a person must be owner either in the same property or in the neighbouring property. The conferment of right of pre-emption on a tenant as done by para 25(3)(d) of Martial Law Regulation 115 or on potential heirs or even on persons who are co-owners in the village or Patti as provided in the Punjab Preemption Act is repugnant to the Sunnah of the Holy Prophet.

9) Section 5 of the Punjab Pre-emption Act exempts a shop, Sarai or Katra from the right of pre-emption. This exemption is in violation of the right of preemption conferred by the Sunnah of the Prophet (PBH).

10) Section 7 of the Punjab Preemption Act provides that no right of pre-emption in urban immovable property can accrue unless custom of pre-emption is proved to exist in any locality. This is also in violation of the Sharia right of preemption.

11) Section 8 of the Punjab Preemption Act authorises the Board of Revenue to exempt from the operation of the Act any property or class of property. This also is violative of the above right.

12) Sections 19 and 20 of the Punjab Pre-emption Act provide for service of notice on the pre-emptors prior to the sale, offering to sell the property to them. This also is violative of the right of preemptors since if a person is not willing to purchase the property at that stage he would forfeit his right of pre-emption

13) The right of pre-emption enjoyed by non-muslims is contrary to the Sunnah of the holy Prophet.

14) The period of limitation of one year for a suit for pre-emption provided by s.30 Punjab Pre-emption Act, S.31 NWFP Pre-emption Act, and Art 10, Limitation Act and period of 6 years under Art. 120 Limitation Act. is also repugnant to Sunnah of the Holy Prophet.

In some petitions the provisions of the Constitution were also challenged but it is not necessary to refer to the grounds of challenge, since this Court has no jurisdiction to go into those matters.

There are cases in which reliefs of declaration of personal rights of the petitioners and consequent injunctions have been sought but such reliefs cannot be granted by this Court which has no authority to deal with disputes of personal nature.

Section 14 Punjab Pre-emption Act provides that no person other than a person who was at the date of sale a member of an agricultural tribe in the same group of agricultural tribes as the vendor, shall have a right of pre-emption in respect of agricultural land sold by a member of an agricultural tribe.

This provision was also challenged but it is not necessary to give a finding on it since in view of the notification issued under the Punjab Alienation of Lands Act, giving all the residents of Punjab the status of members of an agricultural tribes, this provision has become a dead letter.

The first point is whether this Court has jurisdiction to determine the vires of Martial Law Regulation 115 and Act. II of 1977 particularly the provisions regarding the limit imposed on the ownership of land and the questions of inadequacy or otherwise of any compensation fixed in either of these laws for excess land directed to be surrendered. The question of jurisdiction also arises in respect of other laws providing for acquisition of land for housing schemes or for providing services such as roads, water supply, sewerage etc.

The jurisdiction of this court extends under Article 203-D of the Constitution to the declaration of any 'law' or provisions of any 'law' as repugnant to the injunctions of Islam as laid down in the Holy Quran and the Sunnah of the Holy Prophet. The term 'law' is defined in that Article and excludes inter alia the constitution from its scope. It is not, therefore, within the jurisdiction of the Court to make such a declaration in respect of the Constitution.

Martial Law Regulation 115 came into force on 11-3-72 while the Constitution was enforced on 14th August, 1973. The Constitution of 1962 stood abrogated since March, 1969. It was for this reason that the Interim Constitution of 1972 had to be enforced with effect from the 21st day of April, 1972. The framers of the Constitution were fully conscious of the frail foundation on which a Martial Law Regulations could stood unless they were validated by the Constitution or by legislation. The interim Constitution restored the fundamental rights which stood suspended since the date of imposition of Martial Law of 1969. The constitution makers were also conscious of the legal position that Martial Law Regulation 115 was repugnant to these fundamental rights at least to the extent that it failed to provide for compensation for the excess land which an owner of land was required to surrender to the government. Several provisions were therefore added to the Interim Constitution to guarantee the validity of interalia the above Regulation.

Article 280(3) declared interalia the said Regulation to be an existing law and further provided that no Bill to amend or repeal it shall be introduced or moved without the previous sanction of the President thus making an unusual encroachment on the authority of the Parliament which is generally exclusive in matters of legislation.

Article 269 made further encroachment which was, to say the least extra ordinary, since it declared that any laws which permit a person to own beneficially or possess

beneficially an area of land greater than that which immediately before the commencing day (21.4. 1972), he could lawfully have owned beneficially or possessed beneficially shall be invalid. This provision permanently deprived the legislative organ of the state of any authority to increase or abolish the ceiling of ownership of land fixed by the Regulation.

Article 7 of the Interim Constitution while declaring as void, laws which were inconsistent with the rights conferred by the chapter ralating to fundamental rights, excepted laws specified in the first schedule to the constitution from its operation and specifically provided that no such law nor any provision thereof shall be void on the grounds that such law or provision is inconsistent with or repugnant to any provision of the chapter relating to fundamental rights. The Regulation was specified as such law in the first schedule at serial No.19 of the laws described under the heading 'Martial Law Regulation and Martial Law Orders!

Article 21 provided that no person shall be deprived of his property save in accordance with law and no property shall be compulsorily acquired or taken possession of save for public purposes or save by the authority of law which provides for compensation thereof, and either fixes the amount of compensation or specifies the principles or the manner in which the compensation is to be determined and given. Clause 3 thereof, however, provided an exception that the article would not affect the validity interalia of any law providing housing facilities and also any'existing law'which obviously included the Regulation. In clause (4) it was provided that the adequacy or otherwise of any compensation provided for by any such law as is referred to in clause 2 or clause 3 of the Article or determined in pursuance thereof shall not be questioned in any court.

These provisions clearly aimed at providing protection to the Regulation which does not provide any compensation for involuntary surrender of excess land to the Government.

The Interim Constitution was published in the official Gazette, extra ordinary issue on the 15th of April, 1972. However, on the 17th April, 1972 a full Bench of the Lahore High Court delivered Judgement in the case of Zia-ur-Rehman versus the state (PLD 1972 Lahore 382) and held Gen. Mohammad Yayha Khan to be a usurper and the laws promulgated by him throughout the duration of his regime to be void. It also held that all acts done in pursuance or under colour of Martial Law of 1969, unless they be condonable as being in aid of good government and/or in aid of reassertion and recapture of power by the real sovereign i.e. the people would unless shown otherwise, be void. In the case of Miss Asma Jilani versus the Government of the Punjab (PLD 1972 Supreme Court 139) judgment of which was delivered by their lordships of the Supreme Court on the 20th April, 1972 the same view was adopted by that court. The Supreme Court however condoned the following acts:

1) All transactions which are past and closed.
2) All acts and legislative measures which are in accordance with or could have been made mader the abrogated constitution or the previous legal order.
3) All acts which tend to advance or promote the good of the people.
4) All acts required to be done for the ordinary orderly running of the state and all such measures as would establish or lead to the establishment of the objectives mentioned in the objectives Resolution of 1954.

These judgements rendered doubtful the validity of Martial Law Regulations enforced after the ouster of Gen. Mohammad Yayha Khan by the then Chief Administrator of

Martial Law who headed a civilian government since the Martial Law under the Civilian Government was a continuance of the Martial Law of 1969. It was for this reason that a blanket protection was given by Article 269 of the Constitution to all Proclamations, President's Orders, Martial Law Regulations and Orders and all others laws made between the 20th December, 1971 (the date when the Civilian Government came into power) and the 20th April, 1972 by declaring such Regulation and Orders as having been validly made by competent authority, notwithstanding any judgment of any court. It was further provided that those Regulation and orders etc. shall not be called in question in any court on any ground whatsoever. Orders made, proceeding taken and acts done or purported to have been made, taken or done in pursuance of such Regulations, Orders etc. were also declared valid by clause 2 of the same Article. Article 270 authorised the parliament to validate all proclamations, President's Orders, Martial Law Regulations, Martial Law Orders and others laws made between the 25th of March, 1969 and the 19th of December, 1971. It further provided in clause (2) that notwithstanding a judgment of any court the law made by Parliament under clause (1) shall not be questioned in any court on any grounds whatsoever.

In order to afford further protection to the laws specified in the 6th Schedule which includes the Regulations at Serial No.13, it was provided in article 268(2) that the laws specified in the said schedule shall not be altered repealed or amended without the previous sanction of the President. This provision is similar to the proviso to Article 280(3) of the Interim Constitution.

By clause (1) of Article 253 the Parliament was authorised to prescribe the maximum limit as to property or any class thereof which may be owned, held, possessed or controlled by any person. Clause 2 of Article 253 is identical with article 269 of the Interim Constitution in so far as it declares invalid any law which permits a person to own

beneficially an area of land greater than that which, he could have lawfully owned before the commencing day. It clearly means that the Regulation being the enactment fixing a limit on ownership of land cannot be repealed or so amended by the Parliament as to increase or abolish that limit. The purport of Article 253 is that though the Parliament is authorised to further reduce the ceiling on ownership of the property it has no authority to increase or abolish the ceiling already fixed by the Regulation.

Article 8 declares void any law which is inconsistent with fundamental rights conferred by chapter 1, part II. But it also saves laws specified in the first schedule to the Constitution which includes the Regulation at serial No.17 under the heading 'Regulations'. This provision is similar to Article 7(3)(b) of the Interim Constitution.

Again Article 24, which deals with fundamental rights of protection of property makes an exception in favour of certain categories of laws vide its clause (3). The laws so saved include (i) laws providing for the acquisition of any class of property for the purposes of interalia providing housing and public facilities and services such as roads, water supply, sewerage etc, as also (ii) any 'existing law or any law made in pursuance of Article 253'. This provision is identical with the provision of Article 21(3)(4) of the Interim Constitution and protects as well as validates not only the Regulation as an existing law but also Act II of 1974 which has been enacted in exercise of power given to the Parliament by Article 253(I) of the Constitution.

Since Article 24 in its clause (2) provides that any law of compulsory acquisition will have to provide for compensation, clause (4) was added to provide protection to laws covered by clause (3). It reads:

Art.24(4) "The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article or determined in pursuance thereof shall not be called in question in any court".

This takes away the power of the Court to declare invalid existing laws/Act II of 1974, Punjab Acquisition and other laws (e.g. of Land (Housing) Act, 1973, Punjab Development of Cities Act, 1976) even if they fail to provide for any compensation for or provide for compensation which is much less than the market value of the land acquired under their provisions.

Let me now sum up the steps taken by the framers of the Constitution to protect the Regulation and any Law to be framed by the Parliament in exercise of the special and extra ordinary power conferred upon it by Article 253.

1. The Regulation was declared valid by Article 269 and the jurisdiction of all courts to go into its vires was ousted. It cannot be called in question in court on any ground whatsoever.

2. In view of Article 268(2) it cannot be altered, repealed or amended even by the Parliament except with the previous sanction of the President.

3. By Article 253(2) it was declared that any law allowing a person to own or possess beneficially an area of land greater than the area which before the date of enforcement of the Constitution he could have lawfully owned or possessed beneficially will be invalid. The Constitution thus provides that the Regulation shall hold the field notwithstanding the enforcement of any law passed by the Parliament to increase or abolish the ceiling fixed by it. The effect of this provision is that though the President may permit the Parliament to alter or amend or repeal other provision of the Regulation the grant of permission by him for passing of an Act by the Parliament to do away with or increase the ceiling of ownership of land fixed by the Regulation will be an exercise in futility, and this ceiling shall remain effective till it is reduced by an Act to

be passed under Article 253(I). A permanent embargo is thus placed on increase or abolition of ceiling though there can be no constituional objection to its reduction.

4. Art. 8(3) protects this Regulation from being challenged on ground of its inconsistency with or repugnancy to any Fundamental Right.

5. Article 24 protects it against attack on ground of its violation of any of the right, guaranteed by that Article including right to compensation. Thus the vires of the Regulation cannot be challenged even on ground of its being silent about payment of compensation.

6. Act. II of 1977 is firstly a law enacted and enforced by the Parliament by virtue of the powers given to the Parliament by Art. 253 and secondly its validity is protected from any attack by Art. 24(3). The adequacy or otherwise of the compensation fixed by it cannot be questioned in any court vide Article 24(4).

This is a unique example of cases in which the framers of the Constitution have taken unusual, rather extraordinary, pains to plug all the loopholes of attack on the vires of the Regulation. They have gone to the extent of declaring even future laws invalid if they abolish or increase the ceiling on ownership of land fixed by the Regulation.

The question arises: can the Court declare any thing invalid or bad which is declared valid by the Constituion? The answer to this question must be in the negative. But here the court is confronted with another difficulty which to say the least, is insurmountable. It cannot declare any provision of the Constitution as repugnant to Islamic Injunction. Any declaration of repugnancy with Shariah of the provisions of law placing ceiling on ownership or reducing it, would amount to declaration of those constitutional provisions as bad which declare those laws either valid or untouchable.

The question of the validity of the Regulation came up for consideration before the Supreme Court in Mehreen Zaibunnissa v. the Land Commissioner Multan and others, PLD 1975 S.C. 397. It was held to be constitutionally immune from attack. It was further held that:

> "all amendments made to Martial Law Regulation 115 were given protection from the Fundamental Rights, and saved from repeal being included in the first and the seventh schedule to the Interim Constitution, and such inclusion was given retrospective effect from the commencing day of the Constitution". (P.422).

The object of the legislation relating to land reforms was held to be ' a more equitable distribution of land and avoiding its concentration in a few hands' (P.437)

The question of absence or adequacy of compensation is also outside the pale of jurisdiction of this Court in view of the declaration of validity of such laws in article 24(3) of the Constitution.

Mian Fazal Hussain the learned counsel for the petitioner in S.P.No.25/1979(4) however raised three points to meet the objection about "jurisdiction. He referred to Article 227 which provides that existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah and submitted that notwithstanding the above provision in the Constitution the Council of Islamic Ideology can make recommendations as to the measures for bringing the Regulation into conformity with the Injunctions of Islam. Secondly he placed reliance on Article 203-A which provides that:

> "The provisions of this Chapter shall have effect notwithstanding any thing contained in the Constitution".

He submitted that this non-obstante clause confers an overriding jurisdiction on the Court. Thirdly he urged that assuming that the provision of the Regulation in

regard to curtailment of the right of a person to own more than the area provided therein be immune from challenge this principle will not apply to the case of a waqf which is in the ownership of Allah and to which Article 253 cannot apply.

Mr. S. M. Zafar also relied upon article 203-A and further submitted that the exclusion of interalia the Constitution from the definition of law in Article 203-D is in the nature of an exception and it should be construed accordingly. In this respect he made a reference to crawford's statutory construction (see page 128-129 of the 1940 edition). The principle laid down there is as follow:

> "While there is considerable similarity between an exception and a proviso each restrains the enacting clause and operates to except something which would otherwise fall within the general term of the statute. There is a technical distinction between them, although even that is frequently ignored and the terms used synonymous. The exception, however, operates to affirm the operation of the statute to all cases not excepted and excludes all other exceptions that is, it exempts something which would otherwise fall within the general words of the statute. A proviso, on the other hand, is a clause added to an enactment for the purpose of acting as a restraint upon, or as a qualification of the generality of the language which it follows. Sometimes, however, as a precautionary measure it is used to explain the general words of the Act and to exclude some ground of misinterpretation which would extend to cases not intended to be brought within its operation or purview".

On this basis he submitted that the word constitution shall be given a very restricted meaning and shall be treated to include only what is provided in the constitution. When confronted with Article 253 he suggested that the Court

can declare the Regulation void and it should be left to the President to amend the Constitution. Now this suggestion itself negatives the contention of Mr. S.M. Zafar.

The principle of interpretation referred to by Mr. S.M. Zafar is also not acceptable. This court is not called upon in the present case to interpret a proviso or an exception. The relevant clause which has to be interpreted is a definition clause which, as observed by the Supreme Court in Punjab Cooperative Bank versus Republic of Pakistan (PLD 1964 Supreme Court 434), declares what certain words or expressions used in the statute shall mean. The definition thus is, as a rule of declaratory character and normally applies to all cases which come within its ambit. It cannot therefore apply to cases which do not come within its ambit. If the definition says that the Court's power to determine repugnancy with Shariah does not extend to the constitution it will only mean a declaration that the Constitution is not within the ambit of its jurisdiction.

The Constitution confers legislative authority upon the legislative organs of the state. It provides for the ordinary legislative powers of the Parliament in Articles 70 and 71. Article 70 deals with the Federal legislative list which confers exclusive authority of legislation on the Parliament. Article 71 provides for legislation on subjects enumerated in the concurrent legislative list by virtue of which the power of legislation is exercisable by the Parliament, concurrently with the Provincial legislatures. These powers of the parliament are plenary and any law made in exercise of the authority conferred by them provided it is made keeping in view the Constitutional limitations, will be a good law. It is however, open to the Courts unless their jurisdiction is ousted specifically to determine the vires of such a law on the ground whether the Parliament has acted within its jurisdiction, or has enacted the law by exercise

of its power in a manner which violates the Constitutional limitations. The court can thus strike down a law which derogates from this principle or a law which is not in these two lists and is made by the Parliament by transgressing on the residuary powers of the Provincial legislatures. The vires of such a law, if it is covered by the definition of law in Article 203-D can be determined by the Federal Shariat Court in exercise of the power conferred by Article 203-D because in such cases the Court is not concerned with the Constitution but only with the law enacted in exercise of the plenary powers of legislation conferred by the Constitution.

But this principle will not apply if the Court is called upon to declare the vires of a constitutional provision on ground of its repugnancy with Shariah. It is an elementary principles that what cannot be done directly, cannot also be done indirectly. Consequently it would not be open to this Court to make such a declaration even indirectly about any constitutional provision.

It is a well established principle of interpretation of the Constitution that it must be interpreted as befits an organic instrument, in the widest possible sense. Abdul Aziz versus Province of West Pakistan (PLD 1958 SC (PAK) 499), Reference by the President (PLD 1957 SC (PAK) 219), Mohammad Noor Hussain versus the Province of Pakistan (PLD 1959 SC (PAK) 470), Mohammad Ali versus Crown (PLD 1949 Lahore 376), Mohammad Ali verses Crown (PLD 1950 F.C.I). In view of this what is protected by the Constitution and declared valid by it cannot be questioned in any Court including this Court. If a declaration of invalidity is given by this Court in respect of a law declared valid by the Constitution it would amount to converting that validity into invalidity.

In order to meet this point Mian Fazal Hussain relied upon M. Yamin Qureshi V. Islamic Republic of Pakistan

and another (PLD 1980 SC 22), and submitted that this case lays down the principle that the vires of a law can be challenged before the courts even if such a law is declared valid by the Constitution.

I have carefully gone through this authority but I find nothing in it to justify any such inference. The case did not relate to Article 269 of the Constitution. The appellant in that case had called in question the validity of MLR 58 enforced during the regime of General Mohammad Yahya Khan who had been declared a usurper in the case of Miss Asma Jilani. As already stated Article 270(I) of the Constitution authorised the Parliament to validate by law interalia all Martial Law Regulations. It was further provided that the validity interalia of any regulation would not be challenged in any court for a period of two years. The Parliament passed the validation of laws Act, LXIII of 1975 but did not validate MLR 58. Notwithstanding this it was held by the Supreme Court that all proceedings taken, orders made, and acts done or purported to have been taken, made or done under the said Regulation fell within the purview of validity and immunity from judicial review granted by Art.270(4). The Constitutional immunity did not extend to (i) acts etc not duly taken under the said Regulation and which were thus without jurisdiction and (ii) acts which were mala fide. Such acts were obviously not protected by clause (4) of Art. 270. This authority is not therefore relevant.

The reference to Article 203-A is of no consequence. It only provides for the Court to act notwithstanding any thing in the Constitution but it cannot be interpreted as extending its jurisdiction to directly or indirectly determining the repugnancy with Sharia of any Constitutional provision or to virtually negativing it. The two provisions i.e. Article 203-A and definition of the term 'law' are not therefore, in disharmony nor do they require any reconciliation. But even

if there had been any ambiguity it could be resolved only by the above interpretation. If on the other hand there had been any repugnancy or absolute contradiction between the two provisions the maxim LEGES Posteriores Priores contrarias abrogant would come into play and if it be impossible to construe the two provisions together the former provision must give way to the later. Ahmad Saeed Kirmani MLA versus Fazal Elahi, Speaker West Pakistan Assembly (PLD 1956 Lahore 807) and Golam Mustafa versus Jabiruddin Sarkar (PLD 1959 Dacca 169). In such a case it would not have been difficult to apply this maxim and give full effect to the definition clause. In that case also the result would be identical and it would have to be laid down that this court's jurisdiction does not extend to nullifying the provision of the Regulation, Act. II of 1977 and other relevant laws referred to above.

This finding is also an answer to the last argument of Mian Fazal Hussain about the unlawful inclusion of the waqf property within the ambit of the Regulation. The Court's jurisdiction does not extend to that point also. Article 253 of the Constitution empowered the Parliament to prescribe the maximum limit of property which may be owned by any person. Similarly clause (2) of Article 253 prohibited the passing of any law permitting a person to own more than the area already limited by a Law existing on the date of enforcement of the Constitution. The word 'person' is defined in Article 260 as including any body politic or corporate. It is a well known principle that Waqf is a person and can sue and be used. Masjid Shahid Gung versus S.G.P. Committee (AIR 1938 Lahore 369) see also 50 Punjab Record 1914, ILR 32 Calcutta 129(PC) 37 Calcutta 885(PC).

In Corpus Juris Secundum Volume II page 380 the term 'body politic' is explained as follows:—

"Body Politic. A term of ancient orgin, the collective body of a nation or state as politically organized, or as exercising political functions; the state or nation as an organized political body of people collectively; a corporation, a body to take in succession, framed as to its capacity by policy. It has been said that the phrase connotes simply a group or body or citizens organized for the purpose of exercising governmental functions; that such a group may be large or small, and that it may be a group within a group, including countries even though they are but agencies of the state. It may be formed by a voluntary association of individuals, and is social compact by which the whole people covenants with each citizen and each citizen with the whole people that all shall be governed by certain laws for the common good. Where the term is used as referring to the state, it signifies the state in its sovereign, corporate capacity, and applies to a body incorporated by the state and charged with the performance of a public duty, such as an institution of learning for the benefit of the people of a particular parish, or a corporate body created for the sole purpose of performing one or more municipal functions, or an incorporated board of trustees of a levee district, or a township declared by statute to be a body politic and incorporate. Also, it applies to the United States as a body capable of attaining the objects for which it was created, by the means which are necessary for their attainment."

Similarly 'Body corporate' is explained at Page 379.

"Body corporate. A term applied to corporations, Public and private, and, depending on the particular application, defined as meaning a corporation; a legal or artificial person substituted for a natural person; the collective number of individual proprietors who are incorporated; also a body constituted of all the inhabitants within the corporate limits of an incorporated area. However, it has been said that the use of the term does not necessarily imply the existence of a corporation with corporate powers, or of corporation within the meaning of a particular statute."

"Every body politic, or corporate, and person and persons" in S.65 of local (Turnpikes) Act. 1823 (4 Geo, 4C 95) was held to include parishes (R.V Burton, 9.L J M C 23).

No law to the contrary was shown by the learned Counsel. Thus the expression' body politic or corporate' includes even an artificial or juristic person. It also includes even an institution of learning for the benefit of the people of a particular parish. Waqf as seen above is a recognised juristic person and in some of its traits is analogous to religious trust. There can be no doubt that it is included in the definition of person in Art. 269 of the Constitution, and the ceiling placed on Waqf property is validated by Article 253. To that extent also the Regulation and Act. II of 1977 are immune from challenge in this Court.

The Constitution was agreed upon by almost all the members of the Parliament which included a number of Ulemas of different schools of thought. In order to obtain concensus every effort was made to make the Constitution Islamic in character and for this reason Article 227 was added to provide against passing of any law repugnant to Islamic Injunctions and against any existing law remaining so repugnant.

Now Article 253 is either in harmony with the general policy of legislation declared in Article 227 or it is repugnant to or inconsistent with it. The concensus of the ulemas points out to its being in conformity with Islamic laws. Assuming however, that the two provisions of Art. 227 and Art. 253 are repugnant inter se the principle of Leges Posteriores Priores Contrarias abrogant will have to be applied and 253 shall be treated to have effect notwithstanding any thing in Article 227.

I am of the view that the provisions of the Regulation and other expropriatory laws regarding ceiling on ownership

of land, acquisition of land for housing or other public purposes described in Article 24(3) and absence or inadequacy of Compensation in the relevant statutes are not within the jurisdiction of this Court.

No such objection would, however, be valid, nor such objection was taken, in regard to other provisions of the Regulation which place restrictions on partition of joint holdings (para 22) and on alienation of holding (para 24) and provide for certain rights of tenants (para 25). The only Constitutional provision which validates them is Article 269 but that validation is only partial and inconsequential for our purposes. The validation is regarding the competence of the authority enacting the Regulation. The ouster of jurisdiction of courts in that Article is overridden by the provisions of Article 203A and this court has jurisdiction to determine the question of repugnancy of these provisions with the Islamic injunctions notwithstanding anything in Art. 269. The other relevant provision is in Art. 268(2) which restrains the Parliament from altering, amending and even repealing these provisions except with the previous sanction of the President. But it does not present any difficulty since under Art. 203-D(3)(a) the President is bound to take steps to amend the Regulation so as to bring it into conformity with the injunctions of Islam if this Court arrives at a finding of its repugnancy with the Quran and the Sunnah of the holy Prophet. The Court's jurisdiction to go into the vires of paras 22, 24 and 25 of the Regulation is not ousted.

The Peshawar High Court (Shariat Bench) has already struck down from 25(3)(d) of the Regulation, provision regarding tenants right of preemption, in Niamat Ullah Khan, versus Government of Pakistan (PLD 1979 Peshawar 104).

This Court by a majority held in Mohammad Riaz versus Federal Government and other cases (PLD 1980 FSC 1) that the judgements of the Peshawar Shariat Bench are binding upon this Court. I gave my own judgment in that case for arriving at a different conclusion, I have reconsidered this point. I find no reason to make any departure from the view taken by me on this point I had rested my opinion in those cases interalia on the ground that this is a different Court, that the decisions of the Shariat Bench of the Peshawar High Court could be effective in its own territory and could not bind other High Courts that this Court even as Successor of other High Courts cannot be considered bound by the judgment of one High Court and that in any case a Bench of five judges cannot be held bound by a judgment of three judges even as a successor Court.

There is no provision in Article 203-A to Article 203J providing for finality of judgment nor is this court bound by any procedural law in exercise of its jurisdiction under article 203-D except to the extent described in Article 203E(1). Clause (2) of that Article on the other hand authorises this court "to conduct its proceedings and regulate its procedure in all respects as it deems fit". This provision is analogous to Article 191 which empowers the Supreme Court to make rules regulating the practice and procedure of the Court. Thus it is open to this Court also to make rules on the subject in exercise of power under Article 203-J. The only difference between the scope of power of the Supreme Court and this Court is that while the authority of that Court to frame rules on the subject is subject to the Constitution and the law the authority of this Court is not so subject in view of Article 203-A which gives efficacy to the provision of chapter 3-A of Part VII, any Constitutional provision notwithstanding. Now the supreme court is not bound by its own judgments. The Privy Council was also not bound by the previous decisions of the Board and could dissent from them. Attorney General of Ontario

and others versus Canada Temperence Federation and others (AIR 1946 Privy Council 88) Tooth versus Power (1891-AC. 284) Ridslade versus clifton (2PD 276) Road versus Bishop in Lincolne (1892 AC 644).

It was on consideration of the first and the last of these cases that the Federal Court of Pakistan held in Anwar versus Crown (PLD 1955 Federal Court 185 at page 209) that that Court on whom rested the ultimate responsibility of interpreting the law of the land was entitled to change its opinion and take a view different from the one it had hitherto held. This view was reiterated by the Federal Court in Mirza Akbar Ali verses Mirza Iftikhar Ali (PLD 1956 Federal Court 50).

The reference to the ultimate responsibility of the Federal Court in Anwar v. Crown is material only in the sense that the Federal Court's Judgements were otherwise binding upon all other courts by virtue of Section 212 of the Government of India Act. The ultimate responsibility only referred to the greatness of the responsibility of a Court which is a final arbiter on matters of law. Though a Single Bench of a High Court is bound by the interpretation on a point of law by decision of a larger Bench, and a smaller Bench is bound by interpretation of a bigger bench of the same High Court, yet a single judge of one High Court is not bound by the interpretation placed by another Single Judge of the same Court nor by one placed by even the biggest Bench of another High Court. In the absence of any limitation on the power of this Court the only inference can be that this court is also not bound by its decisions in another case.

In this connection I may refer to the distinction between the above principle and the power of review as drawn by the Federal Court in the case of Mirza Akbar Ali versus Mirza Iftikhar Ali. It was clarified that review is re-hearing of a decided case and is entirely different from re-consideration in a subsequent case of a question of law previously decided. If this

Court takes a different view in another case from the one taken on the same point of law in a previous case it will not be exercising any power of review which no doubt has to be statutorily and specifically conferred upon it. There is therefore, no reason why this Court should be bound by the decision given in a different case by the Shariat Bench of any High Court.

There is a more compelling reason for arriving at the same conclusion. The Court is seised of a subject, jurisdiction of which can neither be called original nor appellate nor advisory. It exercises a special jurisdiction which bears no analogy to any other jurisdiction. It is also open to it to determine its own procedure. Since it deals with matters of Shariat it would be more appropriate if it applies the principle of Shariah, in this respect.

Now in Shariah it is always open to a judge to change his view if new data comes to his notice or even if the reasoning in the previous case requires reconsideration. This is the principle of Rajoo (رجوع) or reconsideration. Since this Court is considering the question of repugnancy of laws with the Quran and the Sunnah of the Holy Prophet and the Principle 'to err is human' applies to its members also it would be but fair for it to rely upon the above principle of Rajoo in the course of regulation of its practice and procedure, and to correct its mistake suo moto. The judges are bound not only by their oaths of office but also by their belief in the hereafter not to allow their errors in matter of Shariah be perpetuated. In my view it is not only a matter of inherent power but of inherent responsibility to correct such errors. If the Courts have inherent power and jurisdiction, as held in Chief Kofei Forfei versus Barina Kwahena Seifat (PLD 1958 PC 79), to set aside its previous judgment if delivered without jurisdiction, there is no reason why this Court, whose powers are otherwise unfettered should be debarred from correcting its own error on Shariah matters, at least in another case.

Although most of these petitions can be disposed of only on points of jurisdiction I will, in order to avoid the possibility of remand, also deal with the arguments on merits. All matters in which the imposition of limitation on ownership of land, consequent forcible surrender of excess land to the Government, and total want or inadequacy of consideration are challenged were argued by Mian Fazal Hussain Advocate.(S.P.25 of 1979-Lah.), Ch. Mohammad Sadiq Advocate (S.P.I of 1980-Peshawar), Mr. Iftikhar Ali Sheikh advocate (S.P.44,54,55,56,57 and 58 of 1979 all of Lahore), Mr. S.M. Zaffar Advocate (S.P.4 of 1989-Lahore), Mr. Mohammad Ayub Bokhari, Advocate (S.P.5 of 1980-Lahore) Syed Rashid Ahmad, Advocate(S.P.36 of 1979-Karachi), Mr. Mohammad Ali Zaidi, Advocate (S.P.35 of 1979 Lahore), Raja Said Akbar Advocate (S.P.66-1979(Lah)Mr. Rashid Murtaza Qureshi (S.P.3-80-Lahore), Ch. Muhammad Nazir Ahmad Advocate (S.P.23 of 1980-Lah), Mr. B.Z. Kaikans and Maulana Maazul Rehman).

Their arguments centered round the following important points:

(1) That Islam recognizes private property as is evident from the following verses:

2:267...Give in charity of the good things that you earn and of what we have brought forth for you out of the earth...

33:27 And He made you heir to their land and their dwelling and their property.....

18:32And set forth to them a parable of two men; for one of them We made two gardens of grape-vines.....

18:34 And he possessed much wealth.....

18:42 And his wealth was destroyed.....

18:79 As for the boat, it belonged to some poor man.....

36:71 Do they not see that We have created cattle for them....

2:188 And do not swallow up your property among yourselves by false means neither seek to gain access thereby to the Judges, so that you may swallow up a part of the property of men wrongfully while you know.

7:128...Surely the land is God's; He causes such of his servants to inherit it as He pleases.....

(2) That property includes land:

33:27 ibid. 18;32,34 and42 ibid

4:2 And give to the orphans their property.....

4:5 And do not give away your property which God has made for you a (means of) support to the weak of understanding, and maintain them out of (the profits of) it,.....

4:7 Men shall have a portion of what their parents and the near relatives leave .....

Yahya Bin Adam is of the same opinion. He says (land is included in property) vide P.115, 116 of his book Kitab-ul-Kraraj.

(3) That Islam recognizes inequality in the ownership of property 4:32, And do not covet that by which God has made some of you excel others, men shall have the benefit of what they earn and women shall have the benefit of what they earn;

6:166 And He it is who has made you rulers in the land and raised some of you above others by (various) grades, that He might try you by what He has given you.....

16:71 And God has made some of you excel others in the means of subsistence, so those who are made to excel do not give away their sustenance to those whom their right hands possess, so that they should be equal therein; is it then the favour of God which they deny?

17:21 See how we have made, some of them excel others.

(4) Usurpation of others' property is the worst violation of the sanctity of private property rights enjoined by Islam and great is its retribution. Ibn omar related from the holy prophet: 'Whoever takes possession of any part of land without having a right to it, shall be as a punishment for it sunk down into the earth on the day of resurection, to the depth of seven earths'. See also Hamiltons' Hedaya P.533 under the heading: 'A wilfuly usurper is an offender'. It is stated:

> "It is to be observed that if any person knowingly and wilfully usurps the property of another, he is held in law to be an offender, and becomes responsible for compensation. If on the contrary, he should not have made the usurpation knowingly and wilfully..... he is also liable for a compensation, because a compensation is the right of man"...

(5) None should be deprived of his property except by way of trade for which mutual consent would be necessary.

4:29"O you who believe: do not devour your property among yourselves faslely, except that it be trading by mutual consent.

(6) These principles apply equally to the State in its relationship with a citizen.

(7) Waqf property cannot in any manner be taken over by the state.

(8) If the state usurps the property it shall have to compensate the owner and pay to him compensation which satisfies him even if the compensation demanded exceeds the market value of the property usurped. However the compensation should not be less than the market value.

Syed Iftikhar Hussain, the learned Deputy Attorney General confined his arguments only to the question of jurisdiction of this court. Sahibzada Akhtar Muneer Assistant Advocate General, NWFP, however argued at length on the merits of this problem. He referred to verse 284 of Chapter II:

"Whatever is in the heavens and whatever is in the earth is God's....." and submitted that it follows from the verse that man's right to land is only as a trustee and not an absolute right. Verse 13 of Chapter 45 shows that only the control of land is given to man and that also for the benefit of the entire mankind. The verse says:

> "And he has made subservient to you whatsoever is in the heavens and whatsoever is in the earth, all from himself...."

Lastly he quoted from the holy Quran verse 4:5:

> And do not give away your property which God has made for you a (means of) support to the weak of understanding, and maintain them out of (the profits of) it, and clothe them and speak to them words of honest advice"

and referred to the commentary by Allama Abdullah Yousuf Ali that though the verse relates to orphans but its language is general and connotes that the right of an owner of the property should be exercised for the good of the community. He also referred to the commentary of Maulana Maudoodi regarding the use of property

of an individual. He submitted that Islam is against accumulation of property (see chapter 102, chapter 104 verses 2,3, & 4, chapter 47 verse 38, and verse 267 of chapter 2) and favours equitable apportionment of all things on earth (see 4:10).

There is no doubt that though everything in the heavens and the earth is of Allah (2:284), He has made it subservient to humanity and given it under the control of men (4:5) and bestowed it upon them (24:33) so that they may exploit it (Distribution of Wealth in Islam by Mufti Mahammad Shafi, P.4). There is also no doubt that Islam recognizes private ownership of property including land and allows the owner to defend it by all means available, which may extend to the causing of death of the person seeking to usurp it. If he is himself killed in the encounter he is a martyr (Bokhari and Muslim) But this right in property exploited by him by lawful means is not absolute or arbitrary or boundless- 'It carries along with it certain limitations and restrictions which have been imposed by the real owner of wealth' (Distribution of Wealth in Islam P.4). God has also made some men excel others in the means of subsistence. The concept of equality in the ownership of wealth is also foreign to Islam. It accords complete freedom to man to earn his subsistence and the blessings of this world as well as of the next. It places no limits on the earnings of man as a free agent. It is left to his capacity, competence, accomplishment, skill, genius and tact to make the best use of the gifts of physique and mental alertness endowed upon him by Allah. The misuse of these gifts is, however, condemned. No one is allowed to devour the property of another. Usurpation by one individual of another person's property is disapproved. It is a sin and an offence.

Islam does not favour curbing private initiative and enterprise. It is, however, equally opposed to a social fabric which may disintegrate by the ever growing gulf between the rich and poor,

the haves and the have nots.

It recognises private ownership to the extent that it is beneficial to the Society. Those upon whom riches are bestowed are made the trustee of their wealth and are bound to spend and utilise it subject to limitation imposed on its use by the Bestower. For this reason Islam inculcates in the minds of its devotees and followers the virtue of moderation and temperateness and counterbalances the permission to earn without limit with checks which aim at reducing the inequality of standards of living between the rich and the poor. The first important check is on earning which should be within legal means. The stress on virtuous deeds in a Muslim Society tends to eradicate all chances of a Muslim earning his wealth through any dubious means. In fact making money in ways unlawful is anathema to the Muslim Ummah.

So is exploitation by one or another human being which would include one's aggrandisement at the cost of another or the addition to the wealth of a person in a manner which is detrimental to others (see P.52 and 59 of Islam Ka Iqisadi Nizam by Maulana Hifzul Rehman Sloharwi).

The permission to spend also extends only to well earned wealth. The command is "O you who believe: give in charity of the good things that you earn and of what we have brought forth for you out of the earth and do not aim at giving what is bad in charity while you would not take it yourselves unless you connive at it, and know that God is self sufficient, praiseworthy (2:267). The emphasis in this verse is on good earning. It is from the legitimate earning only that one can give in charity. It would follow that it should not be considered meritorious to spend in charity from what is earned by illegal means. No merit can come out of worthless spending. There are several traditions and juristic opinion to support this inference.

Another check is on accumulation of wealth and virtual withdrawal of money from currency.

"So that this wealth should not become confined only to the rich amongst you" (59:7).

"Woe to every slanderer who amasses wealth and considers it a provision (against mishap) He thinks that his wealth will make him abide.Nay he shall certainly be hurled into the crushing disaster, And what will make thee realise what the crushing disaster is? It is the fire kindled by God, which rises above the hearts. It shall be closed upon them, in extended columns"(Quran, Chapter 104).

"The desire of increasing riches diverts you until you come to the graves. Nay: you shall know, Nay: Nay: you shall know. Nay: if you had known with a certain knowledge you should certainly have seen the hell; then you shall see it with the eye of certainty; then on that day you shall be questioned about the boons". (Quran, Chapter 102).

"... and those who hoard up gold and silver and do not spend it in God's way, announce to them a painful chastisement.On the day when it shall be heated in the fire of hell, then their foreheads and their sides and their backs shall be branded with it; this is what you hoarded up youselves, therefore taste what you hoarded". (Quran, 9:35).

"Say: if you controlled the treasures of the mercy of my Lord, then, you would have withheld them for fear of spending....." (Quran) 17:100.

In chapter 102 "the desire of increasing riches" has reference to amassing of wealth.

Islam is opposed to niggardliness.

"And let not those who are niggardly in giving away that which God has granted them out of his grace think that it is good for them; nay, it is worse for them; they shall have that they were niggardly with they shall have hung about their necks on the resurrection Day". (Quran 3:179).

"Those who are niggardly and bid people to be niggardly and hid what God has given them out of His grace; and we have prepared for the unbelievers a disgraceful chastisement" (Quran 4:37)

"..... and God does not love any arrogant boaster; those who are niggardly and enjoin niggardliness on men...." (Quran 57:23 & 24)".

Quran prohibits wastefulness and extravagance as much as niggardliness. It enjoins temperateness and moderation in spending on one's own needs.

> "O children of Adam..... eat and drink and be not extravagant for he does not love the extravagant" (7:31).
>
> "And they who, when they spend are neither extravagant nor parsimonious, and (keep) between these the just mean."(25:67).
>
> "And do not make thy hand to be shackled to thy neck nor stretch it forth to the utmost (limit) of its stretching forth lest thou shouldst(afterwards) sit down blamed, stripped off". (17:29)

This last verse is indicative of the duty of moderation and enjoins upon a Muslim neither to be niggardly nor profuse and lavish.

And yet there are injunctions to spend as in 2:267 ibid or in 63:10 which is reproduced below:-

> "And spend out of what we have given you before death comes to one of you, so that he should say: My Lord why didst Thou not respite me to a near term, so that I should have given alms and been of the doer of good deeds!"
>
> "By no means shall you attain to righteousness until you spend out of what you love and whatever thing you spend, God surely knows it". (Quran 3:91)
>
> ".....whatever thing you spend, He exceeds it in reward ....." (Quran) 34:39).

It would be apt to quote on this point the view of Mufti Mohammad Shafi. He says at pp 4 and 5 of 'Distribution of Wealth'

> 'We must spend it where He has commanded it to be spent, and refrain from spending where He has forbidden. This point has been elucidated more explicitly in the following verse:
>
> 'Seek the other world by means of what Allah has bestowed upon you, and do not be negligent about

your share in this world. And do good as Allah has bestowed upon you, and do not seek to spread disorder on the earth'. (28:77)

"This verse fully explains the Islamic point of view on the question of property. It places the following guidelines before us:-

1) Whatever wealth man does possess has been received from Allah "Allah has bestowed upon you".

2) Man has to use it in such a way that his ultimate purpose should be the other world-"seek the other world"

3) Since wealth has been received from Allah, its exploitation by man must necessarily be subject to the commandment of Allah.

4) Now, the Divine Commandment has taken two forms:-

   (a) Allah may command man to convey a specified portion of 'wealth' to another. This commandment must be obeyed, because Allah has done good by you, so He may command you to do good by another - "do good as Allah has done good by you"

   (b) He may forbid you to use this "wealth" in a specified way. He has every right to do so, because He cannot allow you to use "wealth" in a way which is likely to produce collective ills or to spread disorder on earth-"do not seek to spread disorder on the earth".

It will be clear that if on the one hand Islam imposes no restriction on earning of wealth, on the other hand it prohibits niggardliness as well as extravagance and accumulation as well as waste. However wealthy a Muslim may be he is commanded to adopt the course of moderation in spending on the satisfaction of his own wants and to spend the surplus on the well being of his fellow men. This is further elucidated by various verses which point out that the needy are sharers in the wealth of the wealthy.

> "And those in whose wealth there is a fixed portion, for him who begs and for him who is denied (good)"(70:24& 25)
>
> "And in their property was a portion due to him who begs and to him who is denied (ggods)" (51:219)
>
> "They will question thee concerning what they should expend. Say: 'The abundance'/i.e. surplus" (2:219)

It is abundantly clear from the last quoted verse that whatever is left surplus after spending on one's own necessities and after discharging his obligations should be spent on the needy in God's way. (Islam Ka nazarya-i-milkiyat Vol.1/P.262 by Dr. Mohammad Najat Ullah Siddiqi). This is borne out by the following traditions cited on the same page and the page following in the above book.

> "Shaddad related the tradition to us from Abu Amama that the holy prophet said: 'o son of Adam it is better for you to spend your surplus wealth (in the way of God) and it is evil to hoard it . It is not objectionable to spend the same on yourself to the extent of meeting your necessary requirements. You should start spending on those whom you are obliged to look after. And the hand which gives is better than the hand which takes" (Muslim, chapter on Zakat and also Tirmizee).
>
> "Abu Saeed Khadri relates this tradition that once we were travelling with the Holy prophet when a rider came and looked to his right and left. The prophet said 'One who has a spare riding animal should give it to him who has no animal to ride. Anyone who has surplus money ought to give it to a traveller who cannot afford. He mentioned several things in this connection from which we had to conclude that we have no right to keep (hoard) over and above that which we require "(Muslim, Kitab-ul-Luqta, Abu Dawood, Kitab-ul-Zakat).

According to Hazrat Ali the wealthy persons of a community are to blame for the starvation or nakedness of all poor persons of that community. (Kitabulamwal by Ab Ubaid P. 595)

It is for these reasons that Hazrat Abu Zar Ghaffari considered it a duty to distribute among the needy all that he could spare before he went to sleep in the night.

I have already referred to the verses of the holy Quran about the rights of the needy in other's wealth (70:24 & 25; 51:10) There are traditions from the holy prophet about the enforceability of the right of a guest to the satisfaction of his wants for a night. See Muslim, Kitab-ul-Luqta; Bokhari, Kitab-ul-adab; Abu Daud. During iztirar (exigence, emergency or pressing necessity) it is permissible for a person to eat from the property of others even without permission. Hazrat Umar for this reason suspended the Hadd(quranic punishment) for theft during famine.

According to a tradition related by Yahya Bin Adam in his book 'Kitab-ul-Kharaj' a person was refused water by the owners of a pond and as a consequence died of thirst. Hazrat Omar awarded Diyat (bloodwit) to his legal heirs against the owners of the pond. There is no reason why this analogy should not apply to a person dying of starvation as a result of the callous refusal of persons of means to give him food. It can also be inferred from this judgment of Hazrat Omar that those who fail to perform their duty of looking after their needy fellowmen can be compelled to perform it by legislative sanction. In Islam Ka nazaria-i-milkiyat by Dr. Mohammad Najat Ullah Siddiqi Vol. 2P. 116 is cited the opinion of Ibn-e-Hazam from Almahilla, Vol.6 P.156.

> "It is the duty of rich persons in every country to maintain and support their needy. They may be compelled by the Sultan to do so in case the income from Zakat or property set apart for such common use is not sufficient. Arrangement will thus be made to enable them to obtain necessary diet, necessary clothes for summer and winter and houses which may ensure their privacy and protect them from rain heat, and sun".

The holy prophet also stated as reported by Fatima binte Qais that apart from zakat also there are rights in your porperty. See Tirmizi kitab-ul Zakat; Musnad Darmi Kitab-ul-Zakat. This is also reported from Ibn Omar.

Islam does not approve of concentration of wealth in the hands of a few affluent persons. This policy is revealed in Surah Al-hashr (59:7) which means:

> "Whatever God has restored to His Apostle from the people of the towns, it is for God and for the Apostle, and for the near of kin, and the orphans and the needy and the wayfarer, so that it (the riches) may not go on circulating among the rich of you".

During the life time of the holy prophet and Hazrat Abu Bakar when Muslims were either living in penury or were not well off some lands of the conquered territories were distributed among the Muslims. These were already cultivated lands.

The holy prophet did not distribute the lands among the rich only. He distributed all the lands of Banu Nadhir after their expulsion from Medina, among the needy only as enjoined in the above verse. But during the caliphate of Hazrat Omar when the Ummah had been basking in affluence the policy was changed. He refused to distribute the lands of the conquered territories among the combatants and non combatants alike and left them in the possession of the actual cultivators on condition of their paying Kharaj. Thus all these lands were nationalised.

It appears that notwithstanding this policy the gulf between the rich and the poor widened by the end of Hazrat Omar's reign. May be the famine of the 18th Hijra had taken its toll from the less affluent and that might be one of the reasons of the growing economic inequality. It appears that in order to meet this problem Hazrat Omar intended to distribute the surplus wealth of the rich among the poor. There is a tradition from Abu Wail to this effect. He reported that Hazrat Omar said.

> "If I had an opportunity to do what I had already done (to continue my policies) I would have taken from the rich their surplus wealth and distributed it among the needy". (Islam ka nazaria-i-milkiyat, Vol.2.P.150 by Dr. Mohammad Najat Ullah Siddiqi quoted from Tibari's History p.2774 and AlMuhalli by Ibn-e-Hazam, Vol.6p. 158, Islam men Adle Ijtimai

by Syed Qutab Shahid/p.478)

Dr. Taha Hussain in his book Abu Bakar Aur Farooq-i-Azam has quoted a policy statement of Hazrat Omar made during the famine:

> IWe shall eat as much as can be available from the bait-ul-mal ffor the commonest of Muslim, and if the baid-ul-mal is left without any provision, we shall make it the responsibility of each household to feed the members of the others household so that they may share among themselves what is available'.

In this connection reference may with advantage be made to the commentary of Maulan Mahmud Ul Hassan on the verse "هو الذي خلق لكم ما في الارض جميعا"

> "Everything in the world appears to be in the ownership of the entire humanity in view of the command "He created everything in the earth for you' which means that the divine object of creating them was to arrange for the satisfaction of human wants. Nothing is, therefore, in the ownership of any one individual. In fact everything is in the collective ownership of mankind and every human being is a sharer thereof. In order to obviate mutual conflict and disputes possession has been made a cause for ownership and for so long as any person is in absolute and permanant possession thereof no other person will have a right to interfere. However such an owner in possession should hand over to others what is surplus to his requirements since on account of the original ownership the rights of others are also involved in it. It is for this reason that even after the payment of Zakat it is not approved that any person should hoard property beyond his needs and the prophets and the pious have desisted from this course. On the other hand some of the companions of the holy prophet and their immediate successors (Tabieen) considered it unlawful (for a muslim) to keep with him more than what is sufficient to fulfil his needs. However there is no doubt that this cannot be approved. The reason is that on account of collective ownership his possession shall be treated to be on behalf of all the owners. It should be treated to be analogous to 'booty' which is treated to be owned by all those participating

> in war but every one of them is entitled to avail of it according to his need. You should know what he is if he keeps in his possession something more than is required by him immediately (meaning that he will be guilty of misappropriation) (Eizaulaula p. 268 quoted from Islam ka Iqtisadi Nizam by Maulana Hifzul Rehman Seoharwi, pp. 45 and 46.

Maulana Hifzul Rehman Seoharwi is also of the opinion that "if the income of the Baitul Mal be insufficient for satisfaction of wants of individuals it is open to the Caliph to compel the rich to make up the deficiency even though they might have paid all their dues (zakat etc)." Islam ka Iqtisadi Nizam p.77.

These instances and opinions establish that legislative action can be taken by the state to make its citizens in times of dearth share their wealth with the poor and needy in the community.

It appears that according to custom also the tribe was duty bound to help its members in time of stringency. At p. 142 of the above book it is stated that when Hazrat Omar received the fatal wound he asked for an account of his indebtedness to the bait-ul-mal. Finding that he had to pay eight thousand dirhams he directed his son to pay this amount after his death from his inheritance and from his own (son's) property and if something still remained payable he should demand its payment from his tribe i.e. Qureish". In my judgment in Mohammad Riaz. V, Federal Government and others (S.P. 132 of 1979-Lahore) PLD 1980 F.S.C. decided on 23-9-1980 pertaining to murder and hurts I had pointed out that Diyat was payable in certain cases by Aqila or the group to which a person belonged. It now appears to me that the liability to payment by Aqila is also based at least partially on the right of a person to demand payment of his debts from his kith and kin or members of the tribe.

It would be abundantly clear that private ownership of wealth though sacrosanct in Islam, is not absolute in the popular sense of the term. Its object is to develop the sense of free enterprise within lawful means. It considers abominable any attempt to earn money or acquire property by unlawful means. It would follow that there can be no possible objection to the confiscation of ill gotten wealth

by the State. It was on this principle that half of the wealth earned by Government Servants during their tenure of office was confiscated during the period of Hazrat Omar, in case they failed to account for it.

According to Quranic injunctions and the Sunnah of the holy prophet the right to spend from one's money and property extends to the satisfaction of his necessities in manners neither niggardly nor extravagant and to meeting the requirements of his dependants. The balance should be spent on the poor and the needy. Islam is opposed to hoarding or accumulation of wealth and its concentration in the Hands of only the rich of the community. It should therefore be open to the state to take such steps as are found necessary to stop these vices. Similarly just as the state in its capacity as supra-guardian has a right to look after the management of property of the minor and the insane it can also takeover the management of properties of persons to whom verse 5 of chapter 4 relates i.e. sufaha (plural of safih). the translation of this verse is:

> "And do not give away property which God has made for you a (mean of) support to the weak of understanding, and maintain them out of (the profits of) it, and it and clothe them and speak to them words of honest advice".

The principle under which a safih (سفیہ) can be restained from the illegal or unethical use of his property is called Hajar (حجر). There is unanimity on Hajar among the jurists who agree on the definition of safih as a person who does not manage his property well and spends his money extravagantly, absurdly and on matters unlawful and sinful.

The idea underlying islamic injunctions concerning the acquisition and use of individually owned property is public good or welfare of the ummah or a community. Consequently legislation can be made for regulating in the public interest, such acquisition and use, no doubt giving allowance to the right of an individual owner to utilise his property by all lawful means.

It was on this principle of public good that the grant of land made by the holy prophet to bilal bin haris was revoked by Hazrat Omar since the grantee could not reclaim the land and bring it into cultivation. On this point Mr.S.M.Zafar argued that this narrative is given in Kitab-ul-amwal by Abu Ubaid. It, however, appears from Kitab-ul-Kharaj by Qazi Abu Yousaf and book of the same name by Yahya Bin Adam that Bilal was not compelled to surrender land but had assented to the revocation of the grant.

Nothing turns on this argument. The consent of or raising of no objection by the grantee to the revocation cannot give to the revocation the character of an absolutely voluntary surrender. It would have been such a suffender if the offer had come from Bilal in the absence of any command from the Caliph. The words attributed to Hazrat Omar by Yahya Bin Adam establish the principle of validity of the forfeiture of the grant for a public purpose or for failure of the grantee to abide by the conditions of the grant. The author says at p.112 that Hazrat Omar had told Bilal that if the grant had been made by him or by Hazrat Abu Bakar he would have dispossessed him of the land. This statement is sufficient support for the principle laid down in Abu Ubaid's book, Kitab-ul-amwal.

I agree, however with the argument that this is an instance of revokation of grant of state land and that this principle will not apply to the acquisition of property individually owned or to placing limitation on ownership of any property. I would directly deal with the law of expropriation of private property in Islam.

This is an established principle that the power of the State extends to acquisition of property for public purpose. In para 1216 of the Mujelle the rule is thus stated:

> "In the time of necessity by command of the Sultan, a man's mulk property can be taken for its value..."

Hazrat Omar demolished the houses of those who had refused to sell them for the extension of Masjid Nabwi(Baladhri, Fatuhul Baldan p.58 quoted in Islam ka Nazraria-i-milkiat by Najt Ullah, vol 2 p.232) Hazrat Usman also did the same. The value fixed by the state

agency was however paid by each caliph.

Hazrat Omar expelled Najran tribe from Yemen to Iraq after confiscating their land and ordered first allotment of land to them in Iraq in lieu of their own lands evacuated in Yemen.

These are instances of acquisition on payment of compensation fixed by the state and furnish sufficient answer to the argument by some learned counsel that the amount of compensation should be the amount demanded by the erstwhile owners.

There is at least one instance in which no compensation was paid for the acquired property. It is the case of expropriation of privately owned land by Hazrat Omar for its use as common grazing ground (Hima). The Caliph turned down the protests of the owners who not only pleaded their ownership of the land but also emphasised that for generations they had been fighting for it before their conversion to Islam. According to Shah Waliullah (see page 151 of his book Fiqh Omar, translated by Maulana Abu Yaya Khan, 2nd edition).

> "the basis of reconciliation as is agreed upon by Imam Shafei and other jurists is, that it is unlawful for the ruler of the time to confiscate any land for his own benefit but expropriation for the cattle of Baitulmal and for reforming(or removing) the distress and affliction of the Muslim Ummah is lawful".

According to the translator this fact is relevant for justifying the land reforms. The translator of kitabul Amwal by Abu Ubaid treats this tradition as conclusive of the justification and validity of land reforms in Pakistan. Another instance is that of advice of Imam Abu Yousaf to the Caliph in answer to a question whether the Imam can fill up with earth and close a canal constructed by any wali or Amir if on account of lack of maintenance its banks are so littered with earth that the common pathway on it is obstructed and the nearby houses are likely to be damaged. Whereas the Imam did not favour this in the case of an old canal his answer about the new canal is based on public policy. He says in Kitab-ul-Kharaj p.322 (urdu translation by Dr. Najat Ullah Siddiqui in the name of Islam ka Nizam-i-mahasil) that if the advantages of a new canal turn the balance in favour of its being maintained,

it should not be closed but in case the disadvantages are found overwhelming it should be ordered to be levelled upto the surface of the earth.

This instance is revealing since it allows the Imam to expressly or impliedly encroach upon the property or property right of one or the other.. The filling and levelling of the canal is an invasion of the right of ownership of the canal, while allowing the canal to be maintained to the disadvantage of owners of nearby houses and the passers by amounts to causing damage to the owners of those houses and those who had the right to use the path or the road running along the canal. And what is important is that there is no mention of payment of any compensation either to the owner of the canal or to the owners of the houses.. The object of this advice is to let public expediency weigh against private interest.. It cannot be laid down as a universal rule that acquisition of land must always be subject to payment of compensation.

In his book Masàla-i-milkiat-i-zamin Maulana Maudoodi has described the imbalance in society created by the concentration of landed property in the hands of only a few families who either obtained them as a reward for perfidy or treachery to the nation from the British Government or had obtained them even earlier by doubtful means.. In these circumstances, he concludes that it would be in accordance with shariah to place a limitation on the ownership of land and to acquire surplus area on payment of its equitable value and to distribute it among tenants on fair price. This is also the view of Maulana Hifzul Rahman Seoharwi at p.240 of his book Islam ka Iqsadi Nizam. He is in favour of expropriation of land and its distribution among tillers on condition of payment of fixed rent to the Government.

Dr.Najat Ullah Siddiqui says that an Islamic state can interfere with individual ownership with the object of elimination of injury from the community and on political considerations of public welfare (see p.240 of his book Islam ka nazaria-i-milkiyat vol:2). At p.245 he justifies the limitation of ownership of property and cites a precedent from Hazrat Omar who had prohibited

the construction of more than three houses by an individual.

Reference may also be made to the view in Islami Manshoor of All Pakistan Jamiat Ul-Ulama-i-Islam at P.40:

> "The Sharia has not fixed any maximum limit on the ownership of land but if individual ownership of big tracts of land becomes a cause of mischief in the social economic set up and the social welfare programme and the religious and national interests be in jeopardy or likely to suffer it would be open to the Government to place or fix a limit on the ownership of land in the light of the principles of Shariah".

This valuable opinion of the Ulema clinches the matter. I am in full agreement with these opinions. The principle of reconciliation referred to by Shah Waliullah in the case of expropriation of land by Hazrat Omar for purpose of Hima (grazing ground) is fully applicable to Martial Law Regulation 115. The expropriated land is not to vest in the President or the Prime Minister nor has it been confiscated for their personal use. It vests in the Government for public purposes which includes its distribution among tenants or actual cultivators of land. Hazrat Omar limited the ownership of house property to three houses which proves that the Imam (the state) can put such limitations on individual ownership. The objects of the statute are diminution if not complete elimination of the curse of feudalism, reduction of concentration of wealth in the hands of a few big landlords, lessening the evil of absentee landlordism and giving an impetus to the newly created category of small landowners as well as the old land-owners to get the maximum output from their lands. These objects are the same as enjoined in Quranic verse 77 of Chapter 28;

> " And do good as Allah has done good by you, and do not seek to spread disorder on the earth"

These are all laudable objects and consequently no objection can be taken to the validity of the Regulation.

Some of the renowned Ulema have held in a historical

review of the tenures in the Indian sub-continent that all the lands therein are State owned and not individually owned. A resume of their fatwass is given in Islam Ka Iqtasadi Nizam by Maulana Hifz ul Rehman Seoharwi at pages 299 to 303. The Ulemas named there are Sh. Jalal, Maulana Mohammad Aala and Shah Abdul Aziz. Professor Rafi Ullah Shahab also reproduces these fatwas(verdicts) in his book Islami Riasat Ka Maliati Nizam, pages 72 to 74. At page 75 he quotes the opinion of Mufti Mohammad Shafi to the same effect and his conclusions that the Government of Pakistan being the Mutawalli of all lands in Pakistan can distribute them among the citizens of the country and can construct on them mosques, schools, and buildings for social welfare and can also give the lands to other citizens of the country for this purpose.It will be necessary to do this exercise for the proper appreciation of their point of view though in the end the exercise may have only an academic value.

While dealing with the history of tenure in the sub-continent one has to start with the Hindu period then switch over to the state organization during the Muslim rule. This is to be followed by the Sikh rule and ultimately by what transpired during the British period. It is not necessary to quote many books since "The land System of British India" by Baden Powell is the last word on the subject. The quotations on this subject are from that book only.

HINDU PERIOD

> "The whole country occupied by the tribe or clam who selected and conquered the locality, was first divided out into large territories or divisions, and the central and largest(or at any rate the best)one was assigned to the head chief called 'Raja'.
> Round about him, other estates, graduated in size, were occupied by lesser chiefs, heads of tribal groups or sections. These would be represented by such titles as 'Thakur' 'Rana', 'Rao', 'Babu'. Every one of these held his estate on certain terms of service to the Raja, which I will pass over without more detail than to say that a fine was paid on succession; that homage was done; that, on summons, the chief had to attend

with his force; that he was expected to aid with such contributions as were, in times of difficulty, required. In some parts the most distant of the 'estates were in hilly country; and here the chief was more independent than the rests, and was expected to keep the passes, and prevent the descent of heighbouring hostile tribes and robbers to harass the dominions of the Raja and his chiefs". (Vol.I P.250)

"It will be observed that just as the Raja took this share for his own 'Khalsa' or demesne lands, so did the separate chiefs in their estates; the Raja took no grainshare in them. Exactly in the same way, where the Raja made a grant (or in later days a sale) of a part of his own demesne lands to a countier or a general, etc., the grantee took the share (and perhaps some of the other taxes and tolls) which would otherwise have gone to the king.

"This fact is at the bottom of a great deal connected both with land-tenures, and the land-revenue. And we have already seen how, from the Raja's grants and from the break-up of the territories, village landlord communities have arisen". (Vol:1, P.251).

"In this case, the Raja's grain-share passed on to the conqueror, or succeeding power. If the Raja had been killed in battle, or had fled, there was no one to share or diminish it; it was simply collected by the state machinery of the conquering king or emperor; if the Raja survived under the conquerer as a subordinate noble, he was probably installed by royal grant as a 'Zamindar' or 'Taluqdar'; and continued to collect the grain-share as before, but had now to pass on a portion-perhaps the greater portion---- to the treasury of the conqueror; and he made his own wealth by other privileges which in the end left him richer than before; he was allowed to cultivate the waste, and take the profits for himself; he was gradually allowed to bargain with the State for a fixed revenue payment and keep the difference between that contract sum and what he could collect from the 'raiyats'. Then it was that the idea of the right of reassessing the revenue-share from time to time, ill-defined as that practice was, inevitably occured to him; and when, under our own rules, the title in the land was secured to the Zamindars, the power of raising the assessment soon developed into the 'Landlord' , and his right of 'enhancing' the 'rents', which proved such a source of burning discussion for after years". (Vol 1 P.252)

"I must remind the reader that all this was matter of custom---- that curious and often undefinable feeling that things ought to be in a certain way because they always have been so. The Custom, however, has always to give way before the necessities of the ruler; and that is why, in-spite of all that can be quoted from law-books, we find that, in modern times, all native States claimed, and still claim to be de facto owners of every acre of soil in their States, and have taken as much land-revenue as they could get without seriously starving the people". (Vol:1 P.246)

Muslim Period

"The (Muslim) theory was that the inhabitants of a country might be regarded as 'milli' or peaceful, 'zimmi', or subdued infidels; and 'harbi' those in arms against the Muslim; and the treatment of a conquered country may be briefly described in the words of an author quoted in Colonel Galloway's Law and Constitution of India:--- When the Imam (leader of the faithful) conquers the country by force of arms, if he permits the inhabitants to remain, he imposes the Khiraj on their lands and he adds that the land then remains the property of the conquered.

"Some authors considered Khiraj to be of different kinds --the term in itself meant the whole of the surplus produce after deducting the cost of production.

"But there was also the more lenient form of 'Khiraj mukasima, or division of produce, by which the sovereign took one-fifth or so. This was of course, the exact counter part of the old Hindu grain-share.

"The tax converted into money was called 'Khiraj-muwazifa.' or simply 'wazifa; and this was (originally) regulated by the ability of the cultivator to pay.

"On such general principles, it is not surprising that the Muhammadan rulers exercised considerable latitude in assessing their revenue; and that no particle of evidence can be adduced for the proposition that by 'Law and constitution' of India, Akbar's Settlement, or any other, constituted a standard to which every one could appeal, and beyond which he could not lawfully be enhanced. As a matter of fact, in the best days of Mughal rule, moderation and control over collecting officers were duly observed; but no ruler ever dreamt that he might not from time to time as he chose--(there was no other principle) revise the assessment. Good rulers did so by a formal measurement and moderate additions. Indifferent rulers did so by the easier expedient of merely adding on 'cesses' (known in revenue language as 'hubub' and 'abwab'). Bad rulers simply bargained with farmers for fixed sums, thus both compelling and encouraging the farmer to raise the assessment on the

cultivators, or, in other words, delegating to the farmer the proper functions of the State Officer in revising assessments" (Vol:1, PP.267, 268).

"Whether the Muhammadan Government consciously imitated the Hindu system of appointing certain chiefs to manage special territories---especially frontier and mountain-tracts-I cannot determine; but at a very early stage they adopted the plan of granting to court-favourites, to ministers of state, and to military officers, the right to collect the revenue of a certain area of country, and to take the amount collected, either to support their state and dignity, or---- in the case of military chiefs---- to equip a body of troops, to be available for the royal service.

"The Mughal empire recognized a definite portion of its dominions as that which was directly managed by the emperor's officers, and another area as that available for the assignment of the revenue spoken of. And when certain offices or titles were conferred, a fixed grant went with them as an appanage. Such grants were called 'Jagir'. They were at first always for life, and resumable with the office. Nearly all later governments have adopted the 'Jagir' but chiefly to support troops, or to reward a service of some kind. They are still granted by our own Government, but as a reward for services in the past, and not with the obligation of military service. In time it was thought below the dignity of the ruler to resume, and so the grant became permanent and hereditary. Possibly this stage was hastened by the fact that the governments-both Hindu and Muhammadan--- had always been accustomed to grant smaller holdings of land, free of revenue , to pious persons, to support temples, mosques, schools, or bridges and tanks, and these were called 'inam', or 'maafi', and were usually hereditary and permanent (as long as the object was fulfilled). As the inam was permanent, so the jagir grew to be in many cases. Possibly, also, it was the decline of power which caused jagirs to be irregularly granted, and thus to become permanent. When a disorganized government desires to reward a worthy servant (or an unworthy), it generally has its treasury empty, and the easiest plan (though true policy would suggest a cash pension for life or lives) would be to give a man a grant by way of assignment, and allow him to collect what revenue he could off the area.

"A great number of assignments of revenue in this way grew into landlord-tenures, very much as the 'Zamindar'

estates did. This was much facilitated by the fact that the grantee was allowed, and indeed expected, in many cases, to conduct the revenue- administration in his own way, andoof course he had (or assumed) the full right to all unoccupied or waste land in the 'Jagir', and had many opportunities of ousting refractory land-holders- buying up their lands, taking them as security for arrears of revenue, and so forth. 'Jagirs' were sometimes granted with the express object of the grantee settling the waste and then, naturally, he would be looked on as the landlord of the whole".(Vol:1 P.189,190).

Sikh Period in the Punjab

"Looking at land-tenures from the point of view of the revenue relations with the State, the Punjab might almost be called the land par excellence, of muafidars and of Jagirdars. It is true, here also, that many of their interests are more matters of money assignment than of any direct connection with land; but still, in other cases, they are sufficiently territorial to be dealt with as tenures.

"A number of 'Jagirdars' have beem handed on to our Government from the sikh rule. It was the policy of that State to deal direct with the villages, and they therefore checked the growth of all such tribal chiefs and others as would, in other places, have absorbed all subordinate right and become great and absolute landlords. But they could not entirely ignore either the local chiefs, or those belonging to their own confederation. They adopted the plan of making revenue-assignment, or allowances, and calling the grantees 'Jagirdars', generally requiring some military service,i.e. that they should be ready to take the field with a body of foot and horse-which constitutes the real meaning of a 'Jagir'. Then again a large number of Jagirs have been handed down to our own Government not as created by the Sikh rulers, but as representing the remains of the chief-ships and dignities of that Government(see p.606,ante)

"So that, what with religious and charitable free-grants and with all the historical jagirs of past times, the proper-tion of Panjab land-revenue assigned is very large. Many 'Jagirs' have been granted as rewards, or simply for the support of members of old and honourable families, or the spiritual heads of sects, like the Sikh 'Bedi' class or the Mussalman Saiyad and Makhdum.' (vol 2 pages 698,699)

British Period

" There can be no doubt that in the latter part of the eighteenth century, when British administation began, the different native rulers who preceded us, had asserted rights as the universal landowners. That being the case, our Government susceeded, legally, to the same claim and

title.

"If it were determined that Government might be justly regarded as owner of the land, then of course what it took from the actual cultivator might be regarded as rent; and Government was further entitled to take the whole of the remaining produce of land, after allowing the cultivator the costs of cultivation and the profits of his capital. If not, it was rather a question of words whether the Government revenue was a rent or a tax." (vol 1, p.217)

"The Zamindars, who had gradually, since the beginnin-g of the eighteenth century, been allowed to contract for the revenue of large areas of country, were the only really well established revenue machinery which remained in existence- A century's growth had given them such a hold, that they had not only become virtually landlords, so that to ignore them would have been unjust from the point of view of private interest in the estate but from the revenue point of view, their aid was indispensable (vol:1 p.283).

"The British system recognized that the revenue must be collected by means of local men of influence and wealth, who took charge of considerable estates, larger or smaller, according to circumstances; and that, in order to give these persons confidence, they must be endowed formally with such an interest as made them legally and in name, what most of them were de facto, proprietors' or 'landlords! The king's subjects or 'raiyats,' then became the tenants of the new landlords." (vol:1 P.285).

These are the main features of the history of tenure in the sub-continent. It is unnecessary to go into the details of tenures which vary from place to place but it would be necessary to add that though the rulers whether Hindu, Muslim or Sikhs asserted rights as owners of land the British Governments granted big tracts of land as revenue free Jagirs and revenue paying zamindaris to a large number of person as a reward for their treachery to the cause of the sub-continent and/or loyalty to a foreign government. The Jagirs having been abolished by Martial Law Regulation 64 of 1959, most of the present day zamindaris are either of decendants or remnants of one time revenue or rent collectors who became self styled zamindars during disturbances or who were grantees from the British Government. The present day

Zamindari system,however, came into vogue during the British period when the middle man was recognized as an owner of the land. Yet there afe a large number of persons who became owner of lands reclaimed by them under the conditions of grants made by the Government before indepêndence as well as after independence. Evan under Shariah these reclaimers would be entitled to proprietary rights. A large number of landowners are those who have purchased in good faith lands from their previous owners.

From this history it is not possible to make a uniform declaration of validity or invalidity about the ownership of land. Each case will have to be decided on its own merits. It is not therefore possible to justify or invalidate reform simply on historicity of the issue. Moreover onee the right of the ruler to confer right of ownership of land on others (which is a well established principle in shariah as regards state lands or lands not owned by any person) is conceded the conferment or recognition of ownership rights on the middleman by the British Government would be unexceptionable. In any case the continuance of laws recognising that ownership in post independence period by the Government of Pakistan would amount to validating that ownership which is recognized even by the Regulation and other laws of expropriatory nature. It is therefore now too late to rely upon the doctrine evolved by Imam Abu Yousaf against the introduction of a middle man between the state and the cultivator of the land for the collection of Kharaj. (Islam ka nizam-i-mahasil by Dr. Mohammad Najat Ullah Siddiqi P.346). The argument would therefore be of no force.

The institution of big landlords or of absentee landlordism has always been a source of oppression against the cultivator. It was therefore one of the blessings of the conquest of Hazrat Omar that, as stated in Alfaruq by Maulana Shibli Nomani., P. 257, "he abolished the oppressive system of Zamindari and ownership of land". The reduction of ownership of individual holding being thus a step towrds elimination of an oppresive system is unobjectionable in Shariah.

It cannot be laid down as a rule that waqf properties can in no circumstances be acquired. Will it not be open to the Government to acquire Waqf property for construction of a dam if it is the only site appropriate for the purpose? May be the waqf is for the benefit of the public but it cannot be doubted that the construction of the dam would be generally much more beneficial. Apart from the principle

of Masaleh Mursala of Shariah the principle of interpretation, "Necessities (Zarurat) make forbidden things canonically harmless" (vide rule 21 at p.6 of the Mujelle) will be applicable to such acquisition.

The principle of Ghasb on which reliance was placed by the learned counsel for the petitioner is not applicable to acquisitions of property by the State for public purpose as distinguished from confiscation by the Imam for personal use. This distinction has already been pointed out on the authority of Shah Waliullah from Fiqh Omar with regard to the expropriation by Hazrat Omar of land owned by Muslims for use as grazing ground without payment of any compensation.

This brings me to the question whether acquisition should always be subject to payment of full compensation. No hard and fast rule can be laid down. The above quoted instance of Hazrat Omar acquiring land of Muslims owners for use as a grazing ground without payment of any compensation justifies in extra ordinary circumstances non-payment of compensation for acquired land. Such circumstances may include the financial stringency of the state. The acquisition for analogous reason may be justifiable on payment of nominal compensation. Another circumstance may be the policy of the Government to repel damage or fasad in the body politic by reducing the impact of concentration of wealth in the hands of a few who do not discharge the Quranic obligation of spending for the good of the humanity. Obviously payment of compensation in such a case frustrates the objects of acquisition and substitutes in the hands of a few one kind of wealth for the other. But apart from cases of such dire necessity the payment of full compensation which should be equal to the market value of the land, should be the rule. It is not therefore possible to strike down any law as being bad for either absence of provision of any compensation or for providing for payment of only a nominal value.

The next question which was raised in S.P.5 of 1980-Peshawar is of the validity of Paragraphs 22, 24 and 25 of the Regulation. This matter was argued by Mr. Nabi Gul Advocate and Maulana Ghulam-ul-Rehman.

Para 22 places a permanent embargo on partition of a joint holding with an area equal to or less than that of subsistence holding or with an area equal to an economic holding. Subsistance holding is defined as meaning an area of thirty

two acres of land in the province of Baluchistan, sixteen acres of land in the province of Sind and half a square or half a rectangle or twelve and half acres of land whichever is more, elsewhere. In order to attract the provisions of para 22 and 24 such holding must be within one estate or mauza or deh. Economic holding is defined as comprising within an estate or mauza or deh an area of sixty four acres of land in the Provinces of Sind and Baluchistan and an area of two squares or two rectangles or fifty acres (whichever is more) elsewhere.

Para 22 also probibits the partition of an area larger than a subsistence holding but smaller than an economic holding or an area larger than an economic holding so as to reduce any plot along with the area already held or possessed by an owner to less than a subsistence holding or an economic holding as the case may be.

The learned Counsel argued that Islam makes an owner of property the sole judge of its use. In favour of the unrestricted and absolute right of an owner to partition joint property he placed reliance upon verses 7 and 8 of chapter 4 as also verse 32 of the same chapter. Verses 7 and 8 pertain to inheritence of 'men', 'Women' and 'relatives' to a portion of the property left by the deceased owner. The word 'portion' or 'division' only relates to the concept of resolving the nominal share in immovable property to which an heir would be entitled under Shariah. Verse 32 is against covetousness and declares that "men shall have the benefit of what they earn and women shall have the benefit of what they earn". These verses are not relevant to the question. His quotations from Hadis were as much off the point.

Now there can be no doubt that the right to partition goes along with the right of ownership of immovable property but for the reasons already noted the State does have the authority to restrict the right in the larger interest of the

Ummah. These restrictions have been placed to put a step to further fragmentation of holding and to retain them as viable units for cultivation. It cannot be doubted that such a step was necessary for boosting agricultural economy. In order to further the interest of the joint owners provision has been made in para 23 for management of impartible joint holding as a single unit. It provides that in the event of a dispute regarding the management the cosharers may select one of them as manager by drawing of lots or may get a manager appointed through the collector of district. This para thus introduces the idea of cooperative farming which is necessary for stepping up the programme of improvement in agricultural economy.

Paragraph 24 puts a ban on sale, mortgage or gift of any portion of land which may reduce the holding of an owner to less than a subsistence holding or an economic holding, as the case may be, but it allows an owner to sell his entire holding. The object of this paragraph is also similar to the object underlying Paragraph 22 and as such the paragraph cannot be declared repugnant to Islamic Injunctions.

The real attack of the learned counsel as well as Maulana Ghulam ul-Rehman was on para 25 which prohibits the ejectment of the tenant except for (1) default in the payment of rent,(2) sub-letting the holding, (3) user of the property in a manner which renders it unfit for the purpose for which he holds it and (4) his failure to cultivate or arrange for the cultivation of the land in accordance with the terms of the tenancy or otherwise in accordance with the customary manner in the locality. These grounds are to a large extent identical with the grounds of ejectment of an occupancy tenant in S. 39 of the Punjab Tenancy Act, 1978, with the difference that firstly in the case of the latter it was necessary for the landlord to obtain a decree for arrears of rent and the ejectment for default of such tenant was dependent upon that decree remaining unsatisfied and secondly the occupancy tenant

subject to any written contract between him and the landlord had the right to sublet his holding for a period not exceeding seven years.

Para 25 further provides for the payment of land revenue, taxes, cesses, surcharge and other levies on land by the owner of the land and also makes him liable for payment of water rate and for providing seed for cultivation of the holding. It further provides for sharing of the cost of fertilizers and pesticide required for the holding, equally by the owner and the tenant. It also restrains the owner or person in possession of the holding from levying any cess on or taking any free labour from his tenant. Clause (d) of its sub para 3 confers the first right of preemption on the tenant in respect of the land comprised in the tenancy.

The legality of grant of preemption right shall be considered separately. On the other points the learned Counsel and the jurisconsult both based their arguments on those traditions of the Holy Prophet which denounce the crop-sharing system. Maulana Ghulam-ulRehman, however, added that though Imam Abu Hanifa's view rested on these traditions but on account of change of circumstances this system was validated by Imam Abu Yousuf and Imam Mohammad. He laid stress upon the right of the owner, rather his obligation, to let out land to a tenant for a specified period. He submitted that in case no period is specified the tenancy will be presumed to be for a crop only. In support of this he placed reliance on Fatawa Alamgiri and Hedaya.

The traditions of the holy prophet on this subject can be classified into the following categories:

1. By the terms of the treaty the holy prophet agreed to let the lands of Khyber remain in possession of the inhabitants thereof on condition of their paying half of the produce.
2. The holy prophet prohibited such tenancies in which the tenant agreed to give to the owner the whole produce of any fixed portion of the holding and to

bring the produce of the rest of the holding to his exclusive use.

3) The holy prophet discouraged some persons from carrying on cultivation on account of their preoccupation with Jihad (Mishkat published by mohammad Saeed & Sons, Vol.2 P.40 Hadis 2847.)

Maulana Hifzul Rehman Seoharwi cites instance of similar orders by Hazrat Omar from Nizam ul alam wal Umam by Tantawi Vol 2 pages 183, 184, at pages 244 and 245 of his book Islam ka Iqtisadi Nizam.

> "When, during the reign of Hazrat Omar (the state) abounded in wealth and allowance was fixed for (maintenance of) all people and registers began to be maintained, the salaries of Government Officers and Qazis were fixed, hoarding of wealth was prohibited, Zamindari was forbidden and the vocation of agriculture and tenancy was banned. It was (primarily) for the reason that allowances of the people, of their children and even of their slaves had been fixed. The object was that all the Mussalmans should be prepared to be mobilized with the Army for war and no one may be restrained by the exigencies of the vocation of agriculture or by their sloth created by a luxurious and ostentations living. This order was extended even to Zammis. If anyone of them was converted to Islam, all his property was distributed among other Zimmis who would become liable for the payment of its kharaj. The muslim convert was allowed to retain only his movable property and cattle. His allowance was fixed from the Baitul Mal. Omar Bin Abdul Aziz renewed this system during his reign since he used to follow Hazrat Omar in each matter".

Maulana Seoharwi has also cited at p. 245 two traditions. One is from Abdulla Son of Hubaira that "Hazrat Omar S/O Khattab issued a proclamation to all the officers of the army in Egypt that since the allowances of all Muslims and their children had been fixed, no Muslim should carry on the vocation of cultivation or agriculture". The second case is of shanik who started cultivation of land on the pretext that his allowance was insufficient for his needs. On receipt of a report from Omar bin ul As, Hazrat

Hazrat Omar summoned him and threatened him with exemplary punishment, and pardoned him after the repented.

4) He prohibited Mukhabra or crop sharing.

5) He discouraged letting out of land.

6) He encouraged Self cultivation.

It is agreed that the lands of Khyber were left with their previous occupants subject to payment by them of half share of the produce. It is also agreed that the agreement in category (2) was prohibited. There is however difference of ppinion on the right of the owner to let out his land to tenants. Those who are opposed to it distinguish the Khyber precedent (category I) as being a case of treaty with a conquered people who agreed to pay Kharaj in the form of share of produce. Tawoos and Hasan Basri are altogether opposed to it though it appears to be true that a number of the companions of the holy prophet including Hazrat Ali used to cultivate lands of others on condition of sharing the produce. Imam Shafei, Imam Abu Hanifa and many other Jurists including Imam Malik do not consider it illegal to let out land on fixed rent basis whether payable in terms of cash or silver or payable in the form of a fixed quantity of grain, cloth or any other commodity but they are opposed to mukhabra i.e. sharing of produce in any form. Rabeea is of the view that fixed rent cannot be obtained in the form of grain or produce of the land. (Commentry by Imam Nawawi in Sahih Muslim, published by Sh. Ghulam Ali and Sons, Vol. 2 P. 950. See also Mowatta Imam Mohammad P.378 for the view of Imam Abu Hanifa). The view of Imam Abu Hanifa, Imam Malik, Imam Shafei and others is not shared by Imam Abu Yousuf, Imam Ahmad and Ishaq. It appears from Kitab ul Kharaj translated by Dr. Mohammad Najat Ullah Siddiqi in th-e name of Islam Ka Nizame Mahasil,Page 312,that Imam Abu Yousuf preferred the opinion of Ibn Abi Laila on this point and considered crop sharing system to be valid. Since the traditions of the holy prophet on this point are conflicting Imam Abu Yousuf

considered those traditions to be preferable which supported his view. The submission of Maulana Ghulam ul Rehman that Imam Abn Yousuf validated crop sharing tenure on account of change in the circumstances, is not correct.

I may, however refer to some traditions in which self-cultivation is preferred. It is repprted in Sahih Muslim from Jabir that "the prophet (PBH) directed that an owner of land should either cultivate it himself or give it to his brother for this purpose but he should not charge any compensation (for its use)". According to Imam Nawawi it is not lawful for a person to charge rent for land which is surplus to his own use. He should give it to the needy who can utilise it.

There is another tradition from the same source that "we used to let out land on basis of mukhabra (sharing of produce). The Prophet (PBH) said that "a person who has land should either cultivate it himself or give it for cultivation to his brother or let it lie fallow".

There are similar traditions no 2176 and 2177 at page 810 of Vol.I of Sahih Bokhari published by Mohammad Saeed and Sons in which the stress is on self cultivation of land.

At.P.26 of Islam aur Nizam-i-Jagirdari wa zamindari by Maulana Manazir Ahsan Gilani is reported a tradition that when four persons combined to cultivate land the prophet (PBH) did not award any share to the owner whose investment in the cultivation was in the form of land only. Mr. S.M. Zafar read from Kitab Ul Kharaj by Yahya bin Adam P P.95 and 96 in which the author has on the authority of Abu Daud denied the authenticity of this tradition.

The principle of this tradition appears to be fully in conformity with the traditions about the merits of self cultivation. So far as the criticism in Yayah Bin Adam's book is concerned, I may point out that Abu Daud the famous

compiler of Hadis was born in the year 200 Hijra and he was only three years of age when Yahya bin Adam died.

It appears to me that there is no conflict in either of these traditons. The general order to the owner was to cultivate the land himself and to give the surplus land gratis for utilisation to his brother Muslim. The traditions prohibiting the letting out of land have to be viewed in the light of this general order. But there were a number of owners of land who were either required to participate in Jihad or had no means to cultivate their lands. There were also minors and may be cripples and invalid persons. As seen above some mujahids were discouraged from following the vocation of agriculture. The permission to let out the land might have been granted to such persons and the Hadis from Ibn Abbas about the legality or permissive nature of Mukhabra might have relation to some such person. This finds support from Afzal-ur-Rehman's Economic Doctrines of Islam Vol II, P.171:

> "A study of the history of the early caliphate shows that most of the people, who gave their lands for cultivation on crop-sharing basis, were engaged in the defence of the country or in other public utility or social welfare work. They let their land for cultivation to the tenants because, owing to their pre-occupation in the service of the community, they could not themselves cultivate it".

Similar is the inference drawn at P.174.

But in the Hadis of Ibn Abbas also which is relied upon in support of the system, giving of land to a brother Muslim for cultivation is more meritorious than letting it out on Mukhabra basis. Letting out of the land was thus allowed in certain cases but the emphasis on self cultivation remained.

This exactly was the policy of Hazrat Omar who eliminated the middle men from the conquered lands and after nationalising them let them remain in possession of the actual cultivators.

There is one other precedent also in which Hazrat Omar insisted upon self cultivation. Hazrat Omar expelled a tribe from Yemen and rehabilitated them in Iraq. All the Amirs of Syria and Iraq were directed to help them in setting on lands with direction that "whatever land is brought by them under self cultivation should be treated as given to them in lieu of land abandoned by them" (P.274, 275 of ISLAM KA NIZAM-I-MAHSIL by Mohammad Najat Ullah Siddiqui). "The order makes self cultivation a condition for this allotment. In fact the doctrine that mawat (dead or unreclaimed)land will vest in the person who reclaims it is also based on the same principle of self cultivation, since if mawat state land is given for reclamation to tenants the tenant would be able to claim the ownership in preference to and to the exclusion of the person who brought him on the land.

Another principle that emanates from these traditions is that with the change in the circumstances of the community the policy of land tenure may also change. Just as the command of the prophet (PBH) changed with the circumstances of any member of the community on the question whether he should cultivate the land himself or let it out on fixed rent or on payment of a share of the produce, the ruler or the State also can adopt any system suitable to the community. This finds support from Kitabul Kharaj of Imam Abu Yousuf who validated the departure from the precedents set up by the Hazrat Omar in respect of Kharaji lands (see chapter II, Article (fasal) 3 of Islam Ka Nizam-i-Mahasil by Mohammad Najatullah Siddiqi).

Mawardi is of the view that "all land vests in God. It is under the supervision and administration of the Caliphate (state) and the possession of tenants and owners is as trustee". (see Chapter 17 of Ehkam-i-Sultania P.404). He states that once Hazrat Omer said, "all the lands are ours" (of the state) (ان الارض للہ)

He further states on the authority of Hazrat Ali that he told a new convert to Islam, "Indeed your land is ours (of the state)" (ان ارضک فیئنا)

Mawardi quotes from Abu Bakar Jassas:

> "The state has plenary authority to administer land which it is difficult for the people to reclaim to the detriment of the interest of the society" (Alehkamul Quran, Vol.3 P.533),

Allam Eini once said:

> "Land is within the scope of the authority of the State" (Eini Vol.I P.29)

Mawardi describes the difference of opinions and their source about the right of a stranger to cultivate without permission of the owner, lands which after reclamation had again become barren and uncultivable. (see. P.411 of Ehkam-ul Sultania). Imam Shafei's view is that such a person does not become owner of the land whether the name of the owner be known or unknown. According to Imam Malik the ownership of land after fresh reclamation will in either case vest in the stranger. But Imam Abu Hanifa was of the view that the stranger will be treated an owner only if the erstwhile owner is unknown.

About Waqf land Mawardi's opinion is that "land being the concern of the Caliph and the Baitulmal (state), the Caliph (state) can change conditions of a waqf also in the interest of welfare of the Caliphate" (P.408). The insistence is on bringing all the land under cultivation and on getting the optimum benefit out of it. Thus Omar bin Abdal Aziz directed his Governors not to leave any land uncultivated, (Islam our Nizam Jagirdari Zamindari P.68) or no land in their territory should be left uncultivated. Ibid P.69.

These weighty quotations establish the predominance of the State's authority over land. The State can change the conditions of a waqf for reasons of state or public policy. According to the opinion of Imam Malik which appears to be more in consonance with public policy, land once reclaimed by the owner can be granted by the State to others for fresh reclamation if it turns barren and the owner does not take any interest in making it

cultivable. Abu Bakar Jassas also appears to hold the same view. It would therefore follow that the state can impose restrictions on the ejectment of a tenant, which would not only encourage self cultivation as ordained by the Prophet (PBH), and thus discourage absentee landlordisim but also give an incentive to the actual cultivator to derive the maximum benefit from the land under his tenancy and thus assist in the fulfilment of the States goal of achieving self-sufficiency in the production of the food grain.

The conditions of further investment by the landlord in the form of seed, fertiliser and water are not new. In fact lands were given to tenants on condition of such further investment during the period of the prophet (PBH) too. Hasan Basri who was opposed to the system of sharing of crops by the landlord and the tenant said that there could be no objection to this system if the landlard shared in the expenses of cultivation. This was also the view of Ibu Sireen. According to him all the expenses of cultivation should be borne by the owner of the land (Islam aur Nizame Jagirdari wa Zamindar by Maulana Manzir Ahsan Gilani pages 57 and 58, also see Ain ul Hedaya Vol. IV P.110 above its justification in Shariah).

Forced labour is not permitted by Islam. The prophet (PBH) enjoined that the Wages of a labour for the work done by him should be paid before the sweat of his body is dried. The Prophet (PBH) said that "God says that he will argue with three kinds of people on the Day of judgment..... and the one who engaged a labourer and got his work completed but did not pay his just Wages" (from Bokhari Vol. I P.501 No.2095 quoted at P.126 of Vol.2 of Economic Doctrines of Islam by Afzal ul Rehman) Dr. Afzal ul Rehman also cites the following:

"Hafiz Ibn Hajar Asqalani and Badr ud Din Aini commenting on this Hadith say that to take labour from some one without paying his remuneration is a grave sin because it shows that

(makruh) and forbidden (mamnu or haram). The strict principle is that what is not forbidden or obligatory is pardonable (afw). The 'obligatory' cannot be shunned while the 'forbidden' cannot be acted upon. The 'recommended' vests a discretion in a momin but that action being divinely approved its negation should be avoided and keeping in view the conditions in a particular society the state has the authority to legislate to make the nation follow the recommended course since it cannot be but for its benefit. The 'reprehensible'action is to be avoided as far as possible.. It is within the scope of 'indifferent' (mabah) or pardonable (afw) that the State has full authority to legislate as the field therein is absolutely unoccupied.. The basic duty which I have to perform is to find out whether the field in matters of pre-emption is totally occupied by what is obligatory(wajib) in the sense that a departure from it is absolutely forbidden (haram) or is even reprehensible (makruh).

In the Hedaya (Hamilton) the origin of the three rights is as follows:—

"The right of Shaffa holds in a partner is founded on the precept of the Prpphet, who has said, 'The right of Shaffa holds in a partner who has not divided off and taken separately his share'-The establishment of it in a neighbour is also founded on a saying of the Prophet.'The Neighbour of a house has a superior right to that house, and the neighbour of the lands has a superior right to those lands, and if he be absent the seller must wait his return provided, however, that both participate in the same road; and also, 'A neighbour has a right, superior to that of a stranger in the lands adjacent to his own'- Shafei is of the opinion that a neighbour is not a shafee; because the prophet has said, Shaffa relates to a thing in joint property, and which has not been divided off."

All schools of thought except the Hanafi agree that the right of pre-emption vests only in the partners in the property. They rely only on the precept of the prophet (PBH).

"The prophet has ordered pre-emption in case of every

property as had not been divided, but when the property is divided and boundaries marked out, there is no preemption".

In Mawatta of Imam Malik this precept is reported from Saeed bin-ul-Musayyab and Abdul Rehman. Two other traditions reported in Mawatta are:

(I) "A question was put to Saeed bin-ul-Massayyab in regard to the command about preemption. He said 'preemption is in land and house and the right of preemption accrues to the partner only".

(II) "Hazrat Osman said 'there is no preemption when boundaries are fixed in the land, nor is there right of preemption in wells and date trees".

These precepts are also reproduced in Mowatta of Imam Mohammad with slight variation in form or the names of the reporters. These traditions exclude the other two categories of preemptors, participator in appendages and immunities of roads, and neighbours. The participators in appendages and immunities are also excluded from the right by another tradition reported in Adalat-i-Nabi Ki Faisle, P. 229. According to Abu Ubaida "the Prophet (PBH) decided that there is no right of preemption in the site in front of a house, in the passage between two houses and in the place on one side of the house used for flowing the water".

The words there is no preemption "when the boundaries are marked out" in one precept or the words: "When boundaries and passages have been marked out" in the other are definitely words of prohibition which could have been interpreted as forbidding any addition to the categories of preemptors provided there had been no tradition recognising right of preemption of a neighbour. In view, however, of other traditions about a neighbour sharing a common road or simply a neighbour, the above mentioned words can only be interpreted to mean as they have been interpreted by Hanafi Jurists, that as between partners the right of preemption based on ground of

partnership ceases after the property is partitioned and boundaries are marked. In the absence of traditions recognising the right of neighbours, I would have found no difficulty in agreeing with the arguments of the learned counsel about the limitation on the state's authority to legislate any further in the field of preemption. But that limitation is removed in view of my agreement that the participators in immunities and appendages and other neighbours are also recognised by the Sunnah of the Holy prophet as having the right of preemption. And there are no words of limitation in those traditions forbidding addition of another right.

The Hanafi jurists also have not limited the right to what was decided by the prophet (PBH). The precept from which the category of Shufi Khalit (participator in immunities and appendages) has been discovered by the jurists of Hanafi view is about neighbours "who participate in the same road". And yet by use of analogy the right has been extended by the jurists to neighbours who participate in other immunities e.g. water.

The tradition on which the right of Shufee Khalit is based visualises the ownership of the neighbours on the common road but the jurists have extended it to persons having no share in the road but having only a right to use the road. The following examples will establish the point:

I) A person has an inn in which there is a masjid, and the owner of the Inn has separated it from the inn and he permits the people to offer their prayers in it. The people have acted accordingly, and it is thereby transformed into a public masjid. Thereafter the owner of the inn sells all the apartments to different persons so that now it becomes a darb, (lane or track). Subsequently one of its apartment is sold. According to Imam Mohammad, the owners of other apartments are entitled to preempt it. This is according to Fatawa Qazi Khan. (The Muslim Law of Preemption by Mohammad Ullah Ibn. S. Jung P.96). Obviously this is not a case of co-ownership in the darb, and yet the principle of Shafee Khalat has been applied to it.

2) The case of ziqaq (lane) on the back of which there is a wadi (valley) has two aspects: (a) if the site of the valley is in somebody's ownership, and the people had turned it into a Wadi (valley), then as regards the law of preemption the case of such a valley and the masjid built at the extreme land of the land are the same. (as in illustration (I)(b) ....." (ibid P.96 & 97). This is also a case in which Wadi was owned by one person only.

3) It is mentioned by Imam Sheikh Abdul Wahid Shaibani that if one of the houses of Ziqaqs of Bokhara, at the back of which there is a valley is sold, then all the people of ziqaqs are its preemptors and it will not be considered as a public place.(ibid P.97). This is also a case like the cases cited above. The principle of these precedents was correctly summed up as follows:—

"It is not necessary ..... that the person claiming the right of preemption should be a partner in the substance of the thing. For this reason enjoyment of pathway or road or watercourse gives the right". Mohammad an Law by Amir Ali Vol.I. P.737)(see also Tyabji's Mohammadan Law pp.710 where it is said that Khalit is not necessarily owner of heritage, dominant or servient to land).

Obviously this is an extension of the right to persons only enjoying the facility of a pathway owned by others though the tradition of the holy prophet is limited to cases where the pathway is jointly owned.

Imam Mohammad appears to extend the right even to persons who do not own any existing property but enjoy only a right to construct over the property of others. The principle is that if one person owns the first storey of a house which would include land and the other person owns the second storey, on the sale of one floor the owner of the other will have a right of preemption on ground of vicinage. If the lower storey is sold and before the owner of the upper storey exercises his right of preemption the upper storey falls down , he can according to Imam Mohammad still exercise his right of preemption, though according to Imam Aboo Yousuf the right lapses. Similarly if the house contiguous to the two storeyed house is sold and the two storeyed house falls the right of preemption

will accrue according to Imam Mohammad to the owner of either storey though according to the opinion of Imam Aboo Yousuf it shall accrue only to the owner of the lower storey who still remains owner of the land and the owner of the second storey shall be excluded since he does not own any existing property. The view of Imam Mohammad in either case is based on the ground that the right of preemption accrues not on ground of actual ownership of the existing property but on ground of an existing right to construct it. (Fatawa Alamgiri printed by Nowal Kishore press, Vol. 4 P.9). The actual words in Fatawa Alamgiri are:

امام محمد کے نزدیک حق شفع بسبب استقرار عمارت کے ہوتا ہے نہ بسبب نفس عمارت کے

These instances establish extension in the right of preemption by resort to qiyas or analogical reasoning which is nothing else but a form of Ijtihad. There is no reason to tie down the hands of the state in a field in which the jurists have exercised the right of Ijtihad.

Imam Shafei held the right of preemption to be repugnant to analogy as it involves the taking away possession of another's property contrary to his inclination; where it must be confined solely to those to whom it is particularly granted. Hedaya P. 548. In his view recourse should not be taken to qiyas in order to make the right more extensive since it violates the right of private contract which involves mutuality and assent of the parties. He, however does not rest this assertion on the ground of shufee shareek (partner in the property) being the only category of preemptor recognised by Sunnah to the complete exclusion of any other category. Thus according to Imam Shafei also there is no bar to the extension of the right to other categories except on the ground given by him. Such juristic opinions which are not based on any text (Nas) of the Quran or Sunnah are not binding on the State which has to legislate keeping in view the requirements

he has made a free man his slave. And to make a free man slave is obviously a grave sin. They have argued like this: To take service and work from some one without paying his due remuneration is like selling a free man for one's livelihood. This is because he gets his own work done without any remuneration which is like making living out of the sale of that person. And also because if one does not pay wages to any one for his work it means that he regards him his slave."

Ibn Hazam clearly states that "it is illegal to receive any service from the cultivator other than mentioned in the rent contract, e.g. to ask him to help in the building of a house, or cleaning a house, or doing its repair, or to build the walls of a garden and similar other jobs; even the inclusion of any of these things in the conditions of the contract, renders it null and void. Al Mahalla Vol VIII P.234.

This is because "it comes down to us from the tradition of the Holy Prophet that there is only one obligation on the cultivator and that is this that he should plough and cultivate the contractual land with his labour or capital to obtain its produde" ibid.

Maulana Maudoodi justifies impositionx of restrictions on ejectment of tenant. (Maashiyat-i-Islam, 220 &221). The opinion in Islami Mansoor of All Pakistan Jamiat Ulema-i-Islam is as follows:-

> "Hazrat Imam Abu Yousaf and Hazrat Imam Mohammad permitted the letting out of land on the basis of sharing of crops. If it may not be possible to reform the system of agriculture in the country in the light of the suggestions made above, the State would be justified in prohibiting such tenancies in accordance with the views of Imam Abu Hahifa, Imam Malik and Imam Shafei and in directing the owners of the land either to cultivate their lands themselves or give it on fixed term lease on payment of rent(other than rent in the from of share of produce)(i.e.ijara)."

The same is the view of Abdul Rahman Al jagiri cited by

Maulana Hifz-ul-Rahman in his book Islam ka Iqtisadi Nizam and by Afzal-ur-Rahman in Economic Doctrines of Islam vol II pp. 179,180.

"In view of the existing conditions of the time, it is possible for us to co-ordinate the two opinions and select the one which is more beneficial and useful to the people...."

In these opinion is the recognition of the validity of changing the tenure for welfare of the Ummah. The reform of the agrarian structure by the Regulation has not only affected the absolete monopolistic system in land tenures but has also provided the necessary motivation for better and intensive cultivation of land. This is of utmost importance in a country which has to import large quantities of foodgrain to meet the dietary requirements of its people. The object of agrarain reform is not sought to be achieved only by expropriation of large states and redistribution of land or by prevention of eviction of the tenant or by reducing his cost of production; the Government has also taken steps to give the cultivators special credit facilities for purchase of agricultureal machinery, installation of tube wells, purchase of fertilisers and seed. The Government imports seeds of improved quality with the object of securing the maximum produce from each acre of land. It has set up its own farms for experimenting in the production of better seed and better quality crops. It appoints staff for tendering better advice to cultivators in methods of cultivation. It constructs big dams to ensure regular supply of water for irrigation as well as reclamation of waste lands. The forced contribution by the landlords in the field of agrarian reform and in the vanquishment of poverty and in the bolstering up of rural evonomy of the country is thus very small. That contribution is only at the grass-root level and was necessary to grab for activating the heretofore static agrarian system. The protection against eviction and the facility of more investment by the landlord in the form of seed, fertiliser and pesticide and payment of water rates and the restraint on tenants being treated

as serfs in para 25 of the Regulation are/not repugnant to the Holy Quran and the Sunnah of the Holy Prophet.

In the last category are the rest of the cases in which the provisions of different pre-emption laws are challenged.. The N.W.F.P.pre-emption Act has been challenged only in one petition Peer Qutab Shah Vs.the State, S.P.27 of 1979-Peshawar firstly on the ground of its being applicable to non-Muslims also and secondly for the reason that the period of limitation of one year is too long.

In the majority of cases belonging to this category the challenge is to the validity of para 25(3) (d) of Martial Law Regulation 115 which confers upon a tenant 'the first right of pre-emption in respect of the land comprised in his tenancy.

In some cases the provisions of the Punjab Pre-emption Act e.g. its sections 5,8,15,19,20,30 and provisions of Articles 10 and 120 of the Limitation Act have also been challenged.

These cases were argued by Mr.Hassan Ahmad Khan Kamyar Mr.Riaz Anwar, Mr.Mushtaq Raj, Mr.Muhammad Anwar Bhuttar Mr.Najmuddin, Raja Aziz-ud-Din, Mr.Ahmad Saeed Sheikh, Khwaja Mushtaq Ahmad and Chaudhary Muhammad Afzal Wahla Advocates. The Peshawar case was argued by Peer Qutab Shah petitioner. The opposite point of view was placed before the Court by Syed Iftikhar Ahmad Deputy Attorney General, Mr.Enayat Elahi Khan Advocate General,N.W.F.P and Sahibzada Akhtar Munir Assistant Advocate General N.W.F.P.

Before dealing with the question whether it is permissible to extend or limit the categories of persons having right of pre-emption I would like to dispose of the points raised in the Peshawar petition No.27 of 1979.In support of his argument against the conferment of right of pre-emption on Non-Muslim in respect of sale or purchase of property by Muslims,Peer Qutab Shah petitioner placed reliance on Quranic verses, 4:141;22:41;21;104;105, and some direct traditions.

The Quranic verses have no bearing on the question of Shufa. The traditions which make no reference to shufa are also not material. As regards the direct traditions which are to the effect that there is no pre-emption for a christian or for a heretic it will be sufficient to say that some of the jurists do not treat them as authentic. The Hanafi Fiqh puts Muslims and Zimmis(non-Muslims in a Muslim State) on the same footing in matter of pre-emption . Muslim Law of Pre-emption by Mohammad Ullah ibn S.Jung p.9 Digest of Mohammaden Law by Baillie, p.477. The relevant paragraph in Baillie is as follows:

> "Islam on the part of the pre-emptor is not a condition. So that Zimmees are entitled to exercise the right of pre-emption as between themselves or against Muslim...."

The Hanafi view is also reproduced in Mohammadan jurisprudence by Abdul Rahim p.275 and Islamic Law in Theory and Practice by Aziz Ahmad, p.466. This view is more in accord with reason and tends to support the need for applicability of one public law to Muslim and non-Muslim citizens of a State alike. Decision of Qazi Shuraih in favour of a Christian pre-emptor can be seen in Akhbar-ul-Qazat by Qazi Waqi. Vol II p.389.

I agree with the learned Advocate General, N.W.F.P that the law of limitation whether in the Limitation Act, Punjab Pre-emption Act, or the N.W.F.P. Pre-emption Act is a branch of law of procedure of a court and is excepted from the jurisdiction of this court.. This view was also taken by the Shariat Bench of the Peshawar High Court in Molvi Bilal Hussain Vs. Government of Pakistan, S.P.18 of 1979(Judgment per my learned brother, Karim Ullah Durrani) decided on 1-10-1979, with which I respectfully agree.

Even on merits this point has no force. The Muslim jurists classify the claim of pre-emption into three demands. (1) Talab-i-mowasibat which is a claim made by the pre-emptor immediately on being apprised of the transaction of sale and

is based upon the saying of the prophet (pbh)'The right of Shufa is established to him who prefers the claim without delay, (2) Talab takreer wa Ishhad i.e. claim by affirmation before witnesses and (3) Talab-i-Khasoomat or institution of litigation. The period of limitation with which this court is confronted in the above petition pertains to this last claim.

There is a difference of opinion about the amount of delay permissible in the institution of the suit. I may, however explain that all jurists agree, in view of the tradition of the prophet(pbh), that if the pre-emptor is absent the period does not start till his return. The difference arises only in a case where a person is not absent. This difference of opinion is described in Hedaya by Hamilton, p.551:

"If the Shafee delay making claim by litigation, still his right does not drop according to Haneefa. Such also is the generally received opinion; and decrees pass accordingly, There is likewise one opinion recorded from Abu Yousaf to the same effect. Mohammad maintains that if the Shafee postpone the litigation for one month after the taking of evidence, his right drops. This is also the opinion of Ziffer and it is related as an opinion of Aboo Yousaf, that the right of the Shafee becomes null if he delay the litigation after the Kazee has held one court, for, if he willingly, and without alleging any excuse, omit to commence the litigation at the first held by the Kazee, it is presumptive proof of his having declined it. The reasoning on which Mohammad founds his opinion in this particular is, that if the right of the Shafee was never to be invalidated by his delaying the litigation, it would be very vexatious to the buyer; for he would be prevented from enjoying his property, in the apprehension of it by the claim of the Shafee, "I have therefore (says Mohammad) limited the delay that may be admitted to one month, as being the longest allowed term of procrastination". In support of the opinion of Haneefa, it is urged that the right of the Shafee being firmly established by the taking of evidence, it cannot

be extinguished but by his own rejection, openly declared...." It would be noticed that the opinion of Imam Mohammad is only a juristic opinion not supported by Quran or Sunnah of the prophet (PBH). On the other hand the concensus is on the point that delay is not perse fatal to the suit. This opinion is also juristic. Now if the jurists can fix a period of limitation, as was done by Imam Mohammad who was of opinion that an end should be put without any long delay to the vexation that is likely to be caused to the purchaser of the property, it is difficult to understand why the State or Sultan cannot fix a period of limitation for the suit. And all the enactments dealing with limitation have strangely enough fixed generally a period of one year which is in conformity with the opinion of Imam Malik. I am also in full agreement with the view that if the State has the right to appoint a judge or a Qazee which it undoubtedly has, it must follow that it also has the right to prescribe the category of cases which the judge or the Kazee will have a right to hear and consequently can fix the period of limitation subject to which the judge or the Qazi may hear cases of any particular category. For all these reasons the period of limitation is not repugnant to the Quran or the Sunnah. This settles the question of validity of the limitation period in other enactments also.

On the question of pre-emption the argument of the learned counsel for the petitioners were focussed exclusively on the three categories of pre-emptors recognised by Hanafi jurisprudence. It was argued that in shariah the right of pre-emption is limited to (1) a partner in the property of the land sold, (II) a partner in the immunities and appendages of the land (such as the rights to water, and to roads): and (III) to a neighbour. The important question therefore, is whether the state is bound to limit the right only to these three categories or it has the authority to add to them or further curcumscribe them. This will involve consideration of the pivotal question of the authority of the state to, and the limits within which it can legislate.

There are five categories of actions in Islamic Law: obligatory (wajib) recommended (mustahab), indifferent (mabah), reprehensible

of the society and [illegible] the interest and [illegible] the welfare of its citizens. Moreover I have already demonstrated that the Hanafi jurists did exercise their right of Qiyas or Ijtihad in this field.

It was argued on the basis of juristic opinions that a pre-emptor must be an owner of property in order to be able to claim a right of pre-emption. This principle does originate from the traditions; and is unexceptionable to the extent that the traditions of the prophet (PBH) go. But if once right is conceded to the State to add to these categories in the interest of public welfare the ownership of property cannot be considered to be a basic requirement of the right of pre-emption. It has already been noticed that according to Imam Mohammad also the right of pre-emption does not accrue to a person owning only the upper storey of the house, which along with the building under it is demolished, on account of ownership in the property but accrues only on account of a right to construct his building over the first storey if ever constructed by another person on his own land. This right to construct or reconstruct building on another's building does not amount to ownership of any property but at most amounts to a right on or in another person's property. The rule on which reliance is placed is not a static rule. On the other hand on the analogy of the above mentioned view of Imam Mohammad a tenant having an interest in the property can be held to be a partner in the property and would fall in the first category.

It is also incorrect that this was a right granted for the first time by Shariah. The right already existed among the Arabs as a customary right. It was only maintained by the prophet (PBH). In support of this proposition, Mr. Mohammad Anwar Bhuttar cited from a dictionary named Aqrabul Mawarid and another book Sharh Mowatta (commentary of Mowatta by Imam Malik) by Muntaqi. In the Dictionary against the

word 'shufa' it is stated on the authority of Utbi that if any person intended to sell his house during jahilyat he would make an offer to him for (exercise of) his right of preemption. According to the above mentioned commentary on Mowatta he would offer it to the neighbour or cosharer. The word قضیٰ which in the above context would mean decision also points out to the fact that the prophet might have referred to the right of preemption in reply to queries made by interested parties who knew the Jahilya custom and might have been uncertain about its validity in Shariah.

It is not therefore correct to say that this is a purely Islamic institution. In the Indo-pak subcontinent the emphasis on its Islamic character is laid on account of its introduction during the Mughal reign and on account of its adoption by the British Judges on the principle of justice, equity and good conscience. Mr. A.A. Qadri in his book Islamic jurisprudence (published by Tripathi Ltd) has disagreed with the notion that the law of preemption is peculiar to the Islamic System. He has discussed this point at pp 250 and 251:

> "The law of preemption is not only peculiar to the Islamic system. It was also recognised in the Roman law and other systems. In the Roman law, it sanctioned a compulsory relation between the vendor and a person determined, binding the vendor to sell to that person if he offered as good condition as the intended vendee. It arose from agreement and from the sanction of written law, but was protected solely by a personal action and gave no right of action against the vendee to whom the property has been passed. The Hindu system of the Ancient India recognised the law of preemption and permitted it to be exercised upon the sale of land in favour of full brothers, sapindas, samanodkas, sagotras, neighbours, creditors and one's co-villagers in a respective order. The Hindu system vested the right among members of one village in a text, which declared the assent of townsmen, of kinsmen, etc. as requisite of transfer of a landed property. The German law also recognises the right of preemption

as a form of obligation attached by written or customary law to a particular status which binds the purchaser from the obliged to hand over the subject matter to the other party to the obligation on receiving the price paid with his expense. The option was exercisable the moment at which the property was handed over to the purchaser. The law was called restractrecht (jus retractus) and the right as ex-jure vicinitatis in the German law....."

"In India, the law was introduced largely by the Moghul Empire, and still now separate customary law of pre-emption are prevalent in different places, which have been given shapes of legislative enactment".

The Punjab Land Administration Manual has traced the history of the present statutory provisions about pre-emption in paragraphs 16 to 23. I may reproduce only paragraphs 16 and 18 about the source of this law in the Punjab:

16" The origin of preemption is clearly explained in 'Tribal Law of the Punjab'. 'It has been usual to regard this as a village not as a Tribal custom, and as originating in the Mohammadan Law. I think that this is quite an erroneous view, and that pre-emption is merely a corollary of the general principle regarding the succession to, and the power of disposal of land. In these matters the holder of the estate for the time being is subject, generally speaking to the control of the group of agnates who would naturally succeed him... They can, as a general rule, altogether prevent alienation by adoption or gift, or by sale for the holder's benefit: it would be only a natural rule that when a proprietor was compelled by necessity to sell, these agnates would be offered the opportunity of advancing the money required, and thus saving what is really their own property" (Tribal Law in the Punjab by Roe and Rattigan pp. 82 and 83)

18. "The customs governing preemption were also recorded in village administration papers drawn up at settlements made before the passing of the Punjab Laws Act IV of 1872.
"In nearly all the old Wajib-ul-arz we find a provision securing this right either to the next heirs, or to the agnates generally and after them to all members of the village community to the exclusion of stranger"
(Tribal Law of the Punjab ibid p. 88).

Preemption in the Indo-Pak sub-continent is thus partly Islamic and partly customary which means that it emanates partly from Arab Customs and partly from local Customs. The same position obtains in the Punjab in that S. 16 of the Punjab Preemption Act, 1913, which deals with the right of preemption in Urban immovable property is based on the Islamic Law of preemption while S. 15 which deals with that right in agricultural land and village immovable property was founded on the agnatic theory of village customs, till its amendment in 1954.

The affinity between the Islamic Law and the Punjab customary law cannot be lost sight of. The institution of pre-emption in both the laws is the growth of tribal custom. The prophet (PBH) maintained the right of cosharers in the property and the neighbours thereof as prevalent in Arabian society during the period of ignorance (Jahilya). The tribal custom of giving preference to the next heirs or to the agnates even though they did not own any land generally was introduced in S.15 of the Punjab Pre-emption Act.

Now it is an established principle of interpretation of Islamic Law that Fatwa (order) changes with the change in Urf (custom) and Adah (usages) whether the change be the result of passage of time or alteration of place. (Elam-ul-Muwaqqieen by Ibn Qayyam Vol. 2 P.843). The following principles about the validity of custom are laid down at

pages 7 and 8 of the Mujelle'.

36 Custom is of force.

37 The use of men is evidence according to which it is necessary to act.

38. A thing impossible by custom is as though it were in truth impossible.

39. It cannot be denied that with a change of time, the requirement of law change.

40. Under the guidance of custom the true meaning is abandoned.

41. Custom is only given effect to, when it is continuous or preponderant.

42. That is esteemed preponderant which is commonly known and not that which rarely happens.

43. A thing known by common usage is like a stipulation which has been made."

45 What is directed by custom is as though directed by law.

These rules collected in mujelle demonstrate the weight and importance of custom and rule 39 depicts at least one aspect of the change of custom by passage of time.. The principle that the requirements of law change with the change of times clearly refers to change of custom. This is the same rule as cited from Elam ul Muwaqaeen.

In a recent publication Maulana Mohammad Taqi Ameeni has considered the importance of custom as a virtual source of law in Islam. At P. 274 of his book 'Fiqh Islami Ka Tareekhi Pas Manzar' he reproduces the following opinions of the jurists:

1. The proof of anything by usage is like its being proved by Nas (text of the Quran or Sunnah).

2. What is provable by usage will be treated in Sharia to have been proved by sharia reasoning.

At P.275 is stated the rule that 'order should be passed according to the usage of time even though it be against the opinions of jurists of the early ages' (cited from

Raddul Mukhtar).

At P. 277 the rule is thus stated:

> "Orders based on custom shall change with the change in custom because they could last or endure with the custom".

This principle, which would naturally follow if custom is the rule, is of utmost importance.

Another question which arises is whether the Ummah is bound by Arabian customs even though its members have their own customs which may be different but are not repugnant with the Quran and the Sunnah. This is answered by Maulana Mohammad Taqi Amini on the authority of Raddul Mukhtar Vol.4:

"The prevailing custom will be acted upon because it is not repugnant to Nas but is in accord with it."

Maulana Mohammad Taqi Amini concludes from the opinion that it is not necessary for member of a country to adopt the customs of people belonging to other countries and for them commands may differ in view of their changed customs and usages.

The other customs based on agnatic theory were abolished in respect of inheritance and alienation by the West Punjab Muslim Personal Law (Shariat) application Act,1948 and ultimately by the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962. The distinction between agriculturists and non-agriculturists created by the Punjab Alienation of Land Act, 1901 in order to keep rural property in the ownership of classes recognized as agriculturists, became a dead letter by a notification issued in 1950 notifying all the residents of Punjab as agriculturists. This policy should have been taken to its logical conclusion by withdrawing the right of pre-emption of customary law heirs or agnates of the vendor. But the legislature maintained the old policy and amended section 15 by the Punjab preemption (Amendment) Act, 1954 giving the first preference among Muslims to the "persons in order of

succession who but for such sale would be entitled, on the death of the Vendor to inherit the land or property sold". The custom based on agnatic theory having been abolished there was no justification for maintaining these provisions in favour of the anticipated heir.

However if once the right of the state to add to the categories is conceded it would not be possible for this Court to declare invalid the above provisions or the other provisions of Section 15 which have been challenged before this Court. However the Government should consider whether it would be in the interest of public welfare to maintain these provisions.

It has already been noticed that the State can compulsorily acquire property of individuals generally on payment of compensation, and in exceptional cases even without payment of compensation. The State can also safeguard the interest of the tenantry and grant protection to them against eviction. It is not permissible for an individual even though he may be the head of the State to make any incursion in the property rights of an individual for the advancement of his personal interest but the State has the authority to make such incursions in the interest of its people. There is no reason why the State cannot confer for the advancement of national welfare, right of preemption on the tenants.

While dealing with the right of preemption Allama Ibn Qayyam stated that the right could not be given to a lessee of property. The only reason which he gives for this proposition is that the right of a lessee is not a permanent right and as such there is nothing common between it and an ownership right. This ground is no longer relevant as the tenants have now been granted permanent right of enjoyment of property which cannot be taken away except when he fails to abide by the conditions of his tenancy as provided in para 25 of the Regulation. Now the tenants have been granted right of perpetual possession over and enjoyment of the land under their tenancies and such rights are also heritable.

The landlord has no right to force his opinion or will on the tenant in regard to the manner of cultivation of the land except when it is contrary to the terms and conditions already settled, or if not so settled, contrary to the manner of cultivation customary in the locality. The present day tenant has therefore been given an interest in the land. The only disability to keep him from claiming ownership of any character is that he has no power of alienation. But it does not derogate from his interest in the land which correspondingly reduces the interest of the owner since land in possession of a tenant cannot fetch that value in the market which land in the actual possession of an owner can fetch. The tenant is now no more merely a partner in the produce; in a way he becomes a partner in the interest of the land itself. The right of preemption has been conferred upon him so that he may acquire the right of the landlord which virtually consists only of the right to alienate the land, and a share in the produce. Reference has already been made to the opinion of Imam Mohammad extending the right of pre-emption to the owner of the second storey of a house which is entirely demolished though he was not owner of any land or even the roof on which the second storey was constructed. He based the right of pre-emption not on ground of actual ownership of any property but only on the right to construct the second storey over the property of another. This analogy will apply to a tenant also who can be given right on account of his permanent heritable interest in land.

The right of the State cannot be curtailed for another reason also. There is unanimity on the point that the object of pre-emption is to remove zarar or damage. It cannot be laid down as a rule that what is harmful to the society as a whole in one age shall always remain harmful to it. The zarar may change with the passage of time. What is zarar (harm) to a neighbour in a homogeneous society where one knows the other may not be a zarar in a society where the immediate neighbours

may remain strangers to one another notwithstanding their residence in contiguous houses. Such examples are not rare in new localities established in the urban areas of big cities. Similarly the zarar of absentee landlordism which, as already seen, hardly fits in with the concept of land tenure in Islam, may become too great and compel the State to devise ways and means of its elimination. Cannot the state in the first case suspend the right of pre-emption of a neighbour at least in such localities or suspend on the same reasoning the right of absentee joint owners? Similarly cannot the state confer right of pre-emption on the person actually in possession in preference to the absentee, if the zarar can be removed by such suspension or grant rather than by following the old rules of pre-emption? The answer should obviously be in favour of such suspension or fresh grant. If the intention is to repel zarar the method of repelling it may change with the lapse of time. In any case where the exigencies of the state so require and the harm to the interest of the public may be minimised only by not caring for the harm to the interest of individuals, preference will be given to the elimination of public harm on the following rule laid down in the Mujelle, P.6.

> "26. To repel a public damage (zarar) a private damage is preferred. The prohibition of an unskilful doctor is a branch from this rule".

There is thus no doubt that in the larger interest of the public the State can not only grant the right of pre-emption to new categories or classes but can also withdraw the concession or suspend the right for repelling or minimising public zarar. This will be justifiable on another principle too. While dealing with the question of the validity of other clauses of para 25 of the Regulation I had peferred to the opinion of the Ulema as contained in the Manshur All Pakistan Jamiat al Ulama-i-Islam. There was a difference of opinion on the validity of tenancy on condition of sharing of crops. Imam Abu Hanifa, etc held it to be invalid while Abu Yousaf found the same to be valid. There are traditions in favour of each point. In the Manshoor

it is suggested that if other measures fail the Government may declare such tenancies invalid. This was also the opinion of Abdul Rahman Aljaziri.

Now the opinions differ on the scope of right of Shufa, the majority view being in favour of such right accruing to a cosharer in the property and only the Hanafi view widening the scope not only on the basis of precepts of the prophet (PBH) but also by resort to Qiyas. It can be said on the same analogy that the Government if need be, may limit the right of pre-emption to cosharers only. This will be an additional reason for shortening its scope.

It has already been noticed that Hazrat Omar had imposed the limitation on ownership of more than three houses by one individual. It follows that a person who was owner of three houses could not claim right of pre-emption in regard to a fourth house. This furnishes an instance of indirectly denying to such persons a right of pre-emption.

The prophet (PBH) also exempted certain categories of property from the exercise of any right of pre-emption for example, the site in front of a house, a passage between two houses, place on one side of the house used for flowing the water (Adalati-Nabawi Ki faisle page 229). The reason is obvious. There could not be any Zarar (harm) in transactions regarding such properties. Similarly in view of the provision of the regulation and Act II of 1977 which placed limitation on the right of person to own land beyond the specified limit, and which has been held to be valid it would not be possible for an owner to exercise a right of pre-emption in respect of land which would add to his property so as to make it exceed the maximum limit.

These instances of limitations on the exercise of right of pre-emption justify the imposition of restriction on this right in cases where no Zarar (harm or damage) accrues by its non exercise or where Zarar is likely to accrue by its exercise. In view of this the state cannot

be denied the authority to exempt properties from the exercise of right of pre-emption either by legislation or by subordinate legislation.

Now section 5 of the Punjab Pre-emption Act exempts commercial properties like shop, Sarai or Katra from the operation of the Act. There is no specific tradition of the prophet (PBH) conferring right of pre-emption on such properties. The specific right of pre-emption has been held to accrue on sale of house, garden, or land only. For this reason the provision is not repugnant with Sunnah of the prophet. Even otherwise no Zarar is caused by the sale of such properties to strangers. The legislature's authority on this point cannot be questioned.

Section 7 makes the right of pre-emption in urban immovable property subject to the existence of a custom in the Urban area concerned. Section 8 authorizes the Board of Revenue to exempt properties from the operation of the Act. In view of the findings in favour of the authority of the Government of the State to limit the right of pre-emption no fault can be found with these provisions. The reference to custom in S.7 is also justifiable because such custom was the rule in homogeneous societies in all areas and introduction of strangers in such localities was likely to introduce an element of heterogeniety in the society. But this principle will not be applicable to new settlements in which even the neighbours sometimes are virtually unknown to one another.

It was argued alternatively that at least the three categories of pre-emptors recognised by the Hanafi law should be given preference over tenants. But this argument is without any legal basis. If it be open to the State to increase or decrease the classes of pre-emptors it will also be valid if the state gives preference to a newly created category. The question of preference to a newly created class will depend on the respective amount of Zarar (damage). If for example, it

it be considered expedient to repel public zarar of absenteeism it would be of no avail to prefer an absentee cosharer over a cultivating tenant.

S.19 and 20 provide for service of notice to preemptors by an owner about his intention to sell his property for a specified amount of money and offering to sell it to the preemptors. The arguments on the vires of these sections are without force in view of the tradition in Muslim:

> "On the authority of Ibn Jurayj that, Ibn Zubayr informed him that he heard Jabir, son of Abdullah saying:
>
> "The Prophet of Allah has ordained pre-emption regarding every joint property (be it) a land or a house or a garden, and that it is not proper that one should sell it without having offered it to his cosharer who may take it or leave it, but if he refuses, then he may be taken to have permitted sale of it" (tradition No.VI at Page 427 of the Muslim Law of Preemption by Mohammad Ullah Ibn S. Jung.

All these petitions are dismissed without any order as to costs.

IN THE FEDERAL SHARIAT COURT

JUDGMENT

Salahuddin Ahmed, Chairman:

I have perused carefully and with interest the scholarly judgment of Aftab Hussain J and I agree with the order passed by him.

I also fully agree with his view that this Court is not bound by the judgment of the Peshawar High Court reported in P.L.D. 1979 Peshawar 104. The Federal Shariat Court is itself an independent Constitutional Court designed to work within its own sphere as provided in the Constitution and as prescribed by its own rules framed under Article 203J of the Constitution. Article 203E(2) provides that the Court shall have power to conduct its proceedings and regulate its procedure in all respects as it deems fit. Article 203D defines the power, jurisdiction and functions of the Court. Article 203F provides an appeal to the Supreme Court from a final decision of the Federal Shariat Court under Article 203D. It will thus be noticed that subject to the appeal provided for under Article 203F this Court is wholly independent of any Court.

There is no law that binds a Court to accept a precedent of a different Court except, of course, under Article 189 of the Constitution in regard to the decision of the Supreme Court. In the case of the same High Court such a course is adopted according to the Rules framed by itself in the interest of uniformity of decisions so far as the particular Court is concerned. This is what the Supreme Court said in P.L.D. 1963 S.C. 296 (308.F). Again in the case

reported in P.L.D. 1966 S.C.854, where a full Bench of the High Court of East Pakistan consisting of 5 judges sought to over-rule a decision of the same Court given by a special Bench of 3 judges, the Supreme Court held that in accordance with the rules of the Court and in keeping with the tradition and practice it should not have interfered with the decision of the Special Bench. The Supreme Court was, inter-alia of the view that High Court functioned as one Court. The observations made by the Supreme Court, therefore, have no application to the Federal Shariat vis-a-vis an earlier decision of a High Court.

The Federal Shariat Court has neither made any rules on the line of the High Court nor has had time develop any convention or tradition yet.

Besides under Article 189 of the Constitution it is only the decision of the Supreme Court on a question of law or based upon or enunciating a principle of law that may be said to be binding on the Federal Shariat Court.

A question has arisen as to what is the consequence of a law or any part of it having been declared by the erstwhile Shariat Bench of a High Court to be repugnant to the Injunctions of Islam in view of Article 203D(3)(b) of the Constitution, which says: "such law or provision shall, to the extent to which it is held to be so repugnant, cease to have effect on the day on which the decison of the Court takes effect. Under Article 203D(3)(a) it has been provided that the President or the Governor as the case may be, shall take steps to

amend the law as to bring such law or provision into conformity with the Injunctions of Islam.

In the case of P.L.D Peshawar 104 Clause (d) of paragraph 25 of M.L.R.115 was held to be repugnant to the Injunctions of Islam with immediate effect, that is, 2nd July, 1979. In the first place reading Article 203D as a whole it appears clear that a reasonable time should have been allowed by the Court to the President or the Governor to make the necessary change. This the Court did not do. As a matter of fact no time at all was given to make the change, for the order of the High Court was directed to take effect immediately. This order prima-facie appears to be without jurisdiction.

In the second place only the said clause (d) may be regarded as having ceased to have effect. With this exception the rest of the law vis MLR.115 remained good.

In the third place the Constitution does not contemplate a vacuum as is evident from the following relevant extracts of Article 268:-

(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 adaptation, until altered, repealed or amended by the appropriate Legislature

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

(3) In this Article, "existing Laws" means all laws (including Ordinance, Order-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, of having extra-territorial validity, immediately before the commencing day.

Therefore, until the law in question is actually changed it shall continue to have force with the necessary adaptation, if any.

The Federal Shariat Court is bound to determine whether it has jurisdiction to deal with MLR 115, and the Court is entiled to come to its own decision about it irrespective of the decision of a High Court.

I fully agree with Aftab Hussain J that the High Court had no jurisdiction to interfere with MLR 115, and he is supported by PLD 1975 S.C. 397.

Finally the decision of the Peshawar High Court is under appeal before the Supreme Court and until a decision is given by the Supreme Court the Federal Shariat Court was at liberty to consider the questions and arrive at its own decision.

I have also perused the observations of the two learned members, Agha Ali Hyder and Zakaullah Lodhi J.J. For the reasons stated herein, with due defference to them, I am unable to agree with them.

Chairman

IN THE FEDERAL SHARIAT COURT

JUDGEMENT

MR. JUSTICE AGHA ALI HYDER, MEMBER

I have perused the Judgement proposed to be delivered by my learned brother Aftab Hussain J and agree with him, that all the petitions be dismissed. However I would like to add a few words in regard to certain observations made by my brother, while dealing with the merits of Shariat Petitions concerning grant of pre-emption rights to the tenants which are in conflict with the decision of the Shariat Bench of the Peshawar High Court in Niamatullah Khan vs Government of Pakistan reported in PLD 1979 104. I might as well mention that there is already an earlier Judgement of this Court, wherein it was held as per majority, that the Judgements of a Shariat Bench of the various High Courts bind us. My learned brother has indicated, that it is still open to us to change our view. To my mind it is not possible. It has to be remembered that our decisions in Shariat cases are subject to appeal before the Shariat Bench of the Supreme Court. The proper course for him would have been to express doubts about our earlier decision and leave the matter to be raised before the Supreme Court as indicated in the Province of East Pakistan vs Dr. Azizul Islam PLD 1963 S.C. 296. The Supreme Court did not approve even a full Bench of a High Court (consisting of 5 Judges) overruling the pronouncement of a Special Bench (consisting of 3 Judges) in the Province of East Pakistan vs Sirajul Haq Patwari PLD 1966 S.C. 854 observing ".....being charged with the high function of interpreting and pronouncing upon the validity of laws, and being thus itself a source of law, the High Court should avoid giving a decision directly inconsistent with that given by itself earlier, and thus speaking with two voices on a point of law, where no question arose of resolving inconsistency between two or more earlier decisions".....; as it "functioned as One Court". However no prejudice is involved as in view of the earlier judgement, the petitions do not lie.

agha ali Hyder

MEMBER-I

IN THE FEDERAL SHARIAT COURT

JUDGMENT

ZAKAULLAH LODI, J.

I had the advantage of going through the judgment proposed to be delivered by my learned brother Mr. Justice Aftab Hussain. As to the first set of petitions questioning the fixation of ceilings of land, and raising objections to compulsory acquisition of land without compensation etc. and arbitrary fixation of compensation, I find myself in full agreement with him in so far as his exposition of constitutional provisions and resultant finding as to the incompetency of these petitions is concerned. I have, however, different approach on the subject of economic system of Islam. But as these petitions merit dismissal due to the bar of jurisdiction I need not touch this subject at the moment.

Next comes Shariat Petition No.5/1980, and some other petitions challenge the validity of paragraph 25 of Martial Law Regulation 115. I agree with him as far as the findings on merits of the cases are concerned. But as I am further of the view that these petitions merit dismissal due to the bar created by the Peshawar High Court (Shariat Bench) Judgment and merit dismissal, I need not say any thing on merits of the case. In an earlier case (S.P. No.15/1980 and other connected petitions) I was of the view that this Court being the successor of the Shariat Benches and enjoying same powers and jurisdiction was debarred from re-examining the points decided by any one of the Shariat Benches. As I still maintain that view, I may point out that the only course open to a court of parallel jurisdiction is to express

its doubts about the earlier judgment and leave the question of the reconciliation of two views open to the final court which in our case is Shariat Bench of Supreme Court. (See PLD 1963 S.C. 308 and PLD 1966 S.C. 854). These petitions are therefore dismissed as not maintainable.

With regard to other questions raised and other petitions in these petitions, I agree with my learned brother in entirety.

(ZAKAULLAH LODI)
Member-III.

S.P.NO.2/79(Lahore) and 66 other Petitions.

Karimullah Durrani,J/Member: I have read with great interest the masterly exposition of the concept of holding of property and wealth in Islam by my learned brother Sh.Aftab Hussain, M. in his painstaking Judgment. While I am in full agreement with the views expressed by my learned brother on this topic, I have, with profound respect, my reservations on the following subjects:-

(a) The jurisdiction of this Court in regard to impugned laws.

(b) The right of pre-emption conferred on the tenants under clause (d) of sub para (3) of para 25 of the Martial Law Regulation 115 of 1972.

(c) The competency of the State to exempt any property or a sale from the exercise of right of pre-emption.

(d) Repugnancy or otherwise of certain provisions in the Punjab Pre-emption Act,1913 to the Injunctions of Islam.

(e) The competency of the State for the acquisition of Waqaf Property.

(f) The competency of the State to forbid partition of joint holdings and to deprive an individual of right to sell his property.

(g) The competency of the state to make Legislation where rule of law has been laid down by Holy Quran and/or the Sunnah of the Holy Prophet (Peace be upon Him), and

(h) effect of the declaration of repugnancy of certain laws by the erstwhile Shariat Bench of the High Court of a Province.

2. I would therefore, like to add a few lines to elaborate the above mentioned points of difference with the leading Judgment proposed to be delivered.

3. As the last mentioned subject also governs the questions mentioned at (b),(c) and (d) above, I will first deal with this question.

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4. In "Mohammad Riaz Versus State and other connected petitions" decided by this Court on 23.9.1980 (P.L.D 1980 Federal Shariat Court page 1) this Court has held by the majority view that a declaration made by the Shariat Bench of a High Court in the exercise of jurisdiction conferred upon it by Article 203A of the Constitution of 1973 vide President's Order No.3 of 1979 is of binding effect and holds the field.

5. I was of the view, as already explained in the above quoted Judgment, that the affect of the declaration of repugnancy of law or a provision of law by the Shariat Bench of a High Court results in rendering the repugnant law ineffective from the date the said declaration is specified by the Bench to take its effect. In this view of the matter Clause (d) of Sub Para (3) of Para 25 of the Martial Law Regulation, 115 of 1972 has ceased to be effective from the date specified in "Haji Namat Ullah Khan Versus the Government of NWFP", decided on 2.7.1979 by the Shariat Bench of the Peshawar High Court (P.L.D 1979, Peshawar,104). The jurisdiction conferred on the Federal Shariat Court vide President's Order No.1 of 1980, under Article 203-D of the Constitution is to examine a law or a provision of law as it exists at the time of said examination. An objection has been taken to the validity of the decision in Haji Namat Ullah Khan's case on the ground that as the Court was required to specify a date for the decision to take effect therefrom, so that the relevant authorities may bring in the consequential lagislation and as the Bench had ordered the decision to take immediate effect i.e. from the date of pronouncement of the Judgment, the declaration by the Bench was without jurisdiction. I fail to understand the logic of this argument as by striking down clause (d) of Para 25(3)

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of Martial Law Regulation,115 the Bench merely declared the right of pre-emption conferred on a tenant in land under the said provision repugnant to Injunctions of Islam. Consequently, this clause became ineffective from the decision. It did not create lacuna in the scheme of the Martial Law Regulation in question. As such there was neither occasion nor reason for bringing in consequential legislation. The decision in question has already been published in the official Gazette of the NWFP and has taken its effect, if not from the date of the decision, then from the date of its publication in the Gazette. The decision, therefore, does not suffer from defect on this account. As the impugned clause of Martial Law Regulation, 115 is no more a valid law in view of the above mentioned Judgment, the petitions challenging the same would therefore, not be competent. The petitions having been filed after the date of the said decision of the Peshawar High Court are, therefore, held incompetent while those preferred prior to that have become redundant. All the petitions challenging Para 25(3)(d) of Martial Law Regulation, 115 are, therefore, to be consigned to the record.

6. Similarly, the provisions of Section 5 and 7 of the NWFP, Pre-emption Act, 1950 came under consideration of the Shariat Bench of the Peshawar High Court on which I also sat as a Member. These petitions were "Malik Said Kamal Versus the Government of NWFP" and "Syed Masood Shah Versus the Government of NWFP" bearing Nos.S.P.21 of 1979 and S.P.26 of 1979, respectively and were decided on 1.10.1979. The said Shariat Bench declared both these provisions of law repugnant to the Injunctions of Islam as laid down by the Holy Quran and Sunnah of the Holy Prophet(Peace be upon Him). Section 5 of N.W.F.P. Pre-emption Act

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reads as under:-

5. "Property exempted from pre-emption.---No right of pre-emption shall exist in respect of the sale of, or the fore closure of, a right to redeem:-

(a) a shop, serai, katra or club;

(b) a dharamsala, mosque, church or other similar charitable institutions or buildings;

(c) agricultural land or village immovable property, consisting of an area measuring not more than two kanals purchased by a resident of the village in which such land is situated, where he neither owns a house nor a vacant site measuring more than one kanal, for constructing a house for his own occupation;

(d) agricultural land or urban immovable property, consisting of an area measuring not more than ten marlas purchased by a resident of the town in which such land or property is situated, where he neither owns a house nor a vacant site measuring more than five marlas or constructing a house for his own occupation".

7. The next Section under reference, No.7 ibid, is as follows:-

7. "Power of Government to exempt transactions from pre-emption:-

(1) Notwithstanding anything contained in this Act, a right of pre-emption shall not exist in respect of any sale made by or to the Government or by or to any local authority or to any company under the provisions of the Land Acquisition Act, 1894, or in respect of any sale sanctioned by the Deputy Commissioner under section 3(2) of the Punjab Alienation of Land Act,1900;

(2) The Provincial Government may declare by notification that in any local area or with respect to any land or property or class of land or property or with respect to any sales no right of pre-emption shall exist".

8. Sections 5 and 8 of the Punjab Pre-emption Act, 1913 are similar in substance to the above re-produced two Sections of the NWFP Act. These Sections are, therefore, for the same reasons held repugnant to the Injunctions of Islam.

Cpm Contd...P/5.

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9. "In Islam the law preceded the state, both logically and in terms of time. The State existed for the purposes of enforcing the law" says Dr.S.M.Haider in one of his recently published articles on implementation of Fiqh and Shariah and while enforcing law whether the State can legislate on the subjects which are governed by divine law or can it lay down a rule of law expanding or restricting the existing law. The answer, to my mind, is in the negative. In this regard yet another pessage from the same article of the above named Scholar may also be quoted with advantage:-

> "The source of Islamic law is the will of God. Islamic law is an ethical or moral system of rules. There has always been close connection between Islamic law and theology. Islam is a religion of both belief and action. Islamic law derives its source from the Divine Revelation through the Holy Prophet.Being Divine, these sources are believed to be sacred, final, enternal and hence immutable. Nothing can be qualified as good or bad except in relation to Allah's will".

The recognised sources of law in Islam are (1) The Holy Quran, (2) Sunnah of the Holy Prophet Muhammad(Peace be upon Him), (3) Qiyas, and (4) Ijma. The latter two can only come into the field when the former are completely silent on the subject. When a rule has been laid down by the former two or either of these neither Qiyas will be permissible nor the question of Ijma would arise (see 33:36). The legislative function of a State in the field of (نص)nass has nowhere been recognised by the Muslim Jurists. The Imam or for the matter of that State as a matter of right enforces only that which is divinely ordained. It does not have the authority to lay down a rule of law on a subject which is already covered by the Holy Quran and Sunnah. The State or Imam can only enforce their will as a rule of law, where no provision is available in "Nass". It or he cannot suplement Shariat. The total sum of the competency of a Muslim State or Imam on the subjects covered by (نص) is confined to the sub-ordinate legislation. In

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other words, it or he may frame rules for the implementation of law. For an example, a rule may legitimately be framed for the mode of execution of a murderer by way of Qisas, but the State would have no authority to deviate from the principle of Qisas by legislation.

10. The concept of State, in Islam is entirely different from all other concepts of State prevailing in the World. Here a State, an Imam or a Legislature of any kind does not enjoy authority to convert حرام into حلال or vice-versa. Nor can it take away any right conferred on an individual by (نص).

11. The following passage from Abdul Malik Arfani's book (جدید اسلامی ریاست قرآن کریم کی روشنی میں p.117) may be referred in this context:-

"اسلام میں قانون کا منبع اللہ ہے۔ اسلامی ریاست کا کام یہ ہے کہ وہ قوانین الٰہیہ کو اپنے دائرہ اختیار میں نافذ کرے اور افراد و حکومت سے ان کی پابندی کرائے۔ ان قوانین کو مکمل طور پر نافذ کرے اور ان کے مقاصد کے حصول کے لیئے فروعی اور تفصیلی احکام کی ضرورت پڑتی ہے۔ روزمرہ زندگی میں بے شمار امور ایسے ہیں۔ جن کے متعلق قوانین بنانے کی ضرورت پڑتی ہے۔ لیکن ان کا ذکر قوانین خداوندی میں نہیں ملتا۔ اس لیئے ریاست (یا حکومت) کو جو اللہ کی طرف سے اس کے اختیارات استعمال کر رہی ہوتی ہے۔ مسلسل قانون سازی کرنا پڑتی ہے۔ یہ قانون سازی اللہ کی مقرر کردہ حدود کے اندر رہ کر

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ہی کی جا سکتی ہے۔ چند اہم حدود حسب ذیل ہیں۔

قرآن! کوئی قانون اللہ تعالیٰ کے نازل کردہ قوانین کے خلاف نہیں ہونا چاہیئے۔

وَاَنِ احْكُمْ بَيْنَهُمْ بِمَآ اَنْزَلَ اللّٰهُ — ان پر اللہ کے نازل کردہ قوانین کے مطابق حکومت کرو اور ان

وَلَا تَتَّبِعْ اَهْوَآءَهُمْ — قوانین کے مقابلے میں ان کی خواہشات پر نہ چلو۔

(۵/۴۹)

وَمَنْ لَّمْ يَحْكُمْ بِمَآ اَنْزَلَ اللّٰهُ — اور جو لوگ اللہ کے نازل کردہ قوانین کے مطابق

فَاُولٰٓئِكَ هُمُ الْكٰفِرُوْنَ۔ (۵/۴۴) — حکومت نہیں کرتے وہ گویا ان قوانین کا انکار

کرتے ہیں

فَاصْبِرْ لِحُكْمِ رَبِّكَ وَلَا تُطِعْ — اپنے رب کے حکم پر مستقل مزاجی سے قائم رہ اور

مِنْهُمْ اٰثِمًا اَوْ كَفُوْرًا — قانون خداوندی کے نافرمان اور منکر کا کہنا نہ مان۔

(۷۶/۲۴)

اسلامی مملکت میں مجلس شوریٰ، اسمبلی، پارلیمنٹ بلکہ ملک کی اکثریت بھی کسی رائے شماری یا ریفرنڈم کے ذریعے کسی ایسی چیز کو جائز قرار نہیں دے سکتی۔ جس سے اللہ نے روکا ہو یا جسے ناپسند کیا ہو اور کسی ایسی چیز کو ناجائز قرار نہیں دے سکتی۔ جس کو اللہ نے جائز ٹھہرا رکھا ہو۔"

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12. Dr. Muhammad Hamidullah in his book "The Muslim Conduct of State", while dealing with the international law of Islam, says:-

> "Here a brief expose of the origin of law according to Muslim Jurists may profitably be added. They say that man must always do what is good, and abstain from what is evil, and take scrupulous care of the intermediary grades of plausible, permissible and disliked(مکروہ، مباح، مستحب، قبیح اور حرام، حسن اور فرض واجب). It is, however, not easy to distinguish betwee good and evil, especially when the matter concerns the subtleties of a complex civilised life beyond the pale of ordinary common-place things. Practical needs would have required the possession of the power to legislate(or lay down definitely grades of good and evil of each and every matter)in the hands of Man, either individual, as jurisconsult, or collectively organised, i.e.a State.Yet mere reason, regarded as the touchstone of good and evil, is not without grave difficulties. For it is possible, and also a matter of fact- so argue Muslim jurists - that different persons opine differently regarding the same things. The belief in Messengers of God is useful even from the point of view of jurisprudence, in so far as the awe and respect due to their persons lead to the acceptance of certain fundamentals without further dispute, wherefrom other and further details may be elaborated. For this reason the certain chosen human Guides to help them in the conduct of life. These selected and chosen ones pointed out what God commanded, God the real Sovereign and Lawgiver, regarding good and evil. Muhammad has been acknowledged by the Muslims as the Messenger of God; and whatever he gave them in his lifetime, commands as well as injunctions, in the name of his Sender, God, was accepted by the Muslims as undisputably final and most reasonable. These Divine Commands, known as the Quran and the Hadith-as we shall see later in detail-served practically all the needs of the Muslim community of that time. But human needs multiplied later in such a manner that no express provision seemed to be available for some of the new matters in either the word or the deed of the Messenger, who himself had passed away, disconnecting the link whereby Man could receive Commands from his Lord.The consequent result would have been fatal and the fabric of Fiqh would soon have collapsed under the strain, had not there been express provision in the law itself for further elaboration. Credit must also not fail to be given to the Muslim jurists, after the death of the Prophet, who not only discerned this

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> elasticity of the Divine Law, but also utilised it to its fullest extent. In time there emerged a complete system of law which served all the purposes of the Imperial Muslims, even at the height of their widest expansion from the Atlantic to the Pacific Oceans". (PP 5-6).

13. It is only in the field not covered by امر and نہی that by Qiyas or Ijma a rule of law or regulation can be enforced by the person in authority. A further reference to the above quoted Book of Dr.Muhammad Hamidullah from its page 74 would be of advantage.-

> "When even the branches of law, like our own subject, International Law, acquired the status of independent and full-fledged sciences, they still retained their ethical values; their provisions had to have the sanction from the Quran or the Sunnah or the Orthodox Practice".

14. Ijtihad can only be permissible in that field where no rule or injunction from 'Nass' is available. Even in such a condition Ijtihad takes guidance by anqlogy from the Holy Book, Sunnah or practice of the companions of the Holy Prophet. State in Islam is subservient to divine law. The converse is not allowed. The State as an entity, which is usually susceptible to every sort of political pressure, does not possess necessary pre-requisites or qualifications of a Mujtahid. The right of Ijtihad can only be exercised by the consensus of duly qualified persons of learning well versed with Divine Law. Whether such a body can be made available through the constitutionally provided institutions like Assemblies of chosen representatives, Boards of Ulema, Ideology Councils or Research Institutes is a question, the importance of which cannot be denied but at the same time it is not for us to answer herein within the limited scope of the matter under discussion, as it is not for this Court to supply the solution. This Court can only decide competency for

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legislation of a certain body in the given circumstances relative to the law impugned before it. But the competency of the framer of the Martial Law Regulation, 115 to enter into legislation in a field already covered by the Quran and Sunnah can certainly be examined as the same has been challenged in the petitions before us. Such a person as that did, certainly, not possess those qualifications and insight in matters pertaining to Deen which would make him a substitute to that body of persons or a person, who could make contributions towards the evolution of Islamic law by Ijtihad and carry with it or him the rest of Uma in Ijma thereon. Similarly, the mere signing of a Constitution by a limited number of Ulema guided by the political whims and controlled by their parties could not impart that sacrosanctity as to the Constitution, to accord it the status of Ijma-e-Uma.

15. If an unlimited right of Ijtihad is conceded to an institution like state or a body of persons not duly qualified for the purpose, then it will amount to opening of the flood gates of religious anarchy in the field of law of Islam.

16. Now I will proceed to examine the impugned provisions of the Punjab Pre-emption Act, 1913 in the above stated context. My learned brother has very correctly traced the history of rule of pre-emption prevailing in the ancient nations as well as in Arabia before the advent of Islam. It is also correct that the Holy Prophet Mohammad (Peace be upon Him) had not retained this custom as a whole. Two Ahadis available on this branch of law are found one each in the compilations of Imams Bukhari and Muslim, from Jabar (God be pleased with him) are to the effect that right of pre-emption is between the co-owners till the

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property is partitioned and the ways are separated and when this happens there is no pre-emption. Yet another Hadis from the same source as quoted by Ahmed, Tirmizi, Abu Dawud, Ibn Majah and Darmi is to the effect that the most preferential right of pre-emption vests in the next door neighbour and if he be absent he should be awaited for, but this right will be available only when both of them share a common way. There also appears in Sahih Bukhari a saying of the Holy Prophet(Peace be upon Him) narrated by Abu Rafi while offering the sale of his 'bait' to Sa'd Ibn Abi Waqqas in whose 'Dar' it was situate "that the neighbour has the greatest right on account of his being near in proximity". It is from the above quoted Ahadis and some others on the topic that Hanafi school of thought has recognised the right of pre-emption in co-shares, a contiguous owner and a participant in the emanaties and appendages such as right of way or to discharge water ~~appendages~~, as against the leaders of the other three Sunni schools of thoughts who have ascertained from some of the Ahadis this right vesting only in co-sharers. Similar is the view of law in Fiqh Jaffaria. The trend of all Muslim schools of thought with the solitary exception of Hanafi sect is towards confining the pre-emption right to the most restricted rather a single class of persons. The expansion of the categories of pre-emtors in the Hanafi Fiqh is based only on the interpretation of different Ahadis and by accepting all these Ahadis as authentic whereby this right has been recognised as vesting in the neighbour and the participator in the appendages etc. as well as in the co-sharers. It was neither Qiyas nor Ijma of any sort which conceded the right of pre-emption to the former two categories besides the

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co-sharers. In the same context is the direction of Hazrat Umar (May God be pleased with Him) to his Judge/Qazi Shuraih for allowing a contiguous owner the right of pre-emption in the same manner as he was recognising this right in a co-sharers. It was not the promulgation of a regulation of his own by Umar but was done on the basis of the Ahadis referred to above on the right of pre-emption of a contiguous owner and which Ahadis might not have reached the ear of the Qazi. It is also clear that throughout the long period of Islamic history no Jurist or a Ruler has attempted to enlarge the scope of pre-emption to the sale of a property. Rather the emphasis had all along been on the restriction of this right. This restriction would be found to have wisdom behind it. Islam attaches great sanctity to the contracts entered into and made between the two persons:

يَا أَيُّهَا الَّذِينَ آمَنُوا أَوْفُوا بِالْعُقُودِ

Translated into English:-

O ye who believe !

Fulfil (all) obligations. (5:1)

لَيْسَ الْبِرَّ أَنْ ... وَالْمُوفُونَ بِعَهْدِهِمْ إِذَا عَاهَدُوا ...

Translated into English:-

It is not righteousness that you .....
but it is righteousness to believe
in Allah ..... to fulfil the
contracts which ye have made .....

(2:177)

Now a sale is a contract between the seller and the buyer which is freely and willingly entered into. This contract must be performed by both the parties. In the same manner the right to sell and the right to acquire property is also an unalienable right of an individual.

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Pre-emption is a sort of curb on the exercise of this right by a stranger to the contract of sale. This interference with the exercise of free will and personal rights can only be allowed to forestall a greater evil. The right of pre-emption is therefore, very correctly described by Jurists as a means to avoid "Zarer" (harm). As otherwise it would not be premissible to debar two parties from performing their obligations under a contract. I am, therefore, of the view that the right of pre-emption cannot be so enlarged as to bring a new category of its beneficiaries in those classes of persons who have been conferred this right by Sunnah of the Holy Prophet(Peace be upon Him).

17. In petition No.64 of 1979, sub-clause thirdly of clause (c) of Section 15 of the Punjab Pre-emption Act, 1913 has been assailed on the ground that according to the Shariat, the right of pre-emption vests in (1) co-sharers (2) participants in the appendages, and (3) contiguous owners. As against these three categories, a new category of the owners in the estate has been created as pre-emptors by the impugned provisions of law. A similar question has been raised in S.P. No.16 of 1979 and a number of other petitions. In petition No.14 of 1980, (Lahore), Sections 3,5,6,7,8,9,11,15,16,18,19,20 and 30 of the Punjab Pre-emption Act, 1913 and also Article 10 and 120 of the Limitation Act have been assailed on various grounds as mentioned therein. In S.P. No.18 of 1980, sub-clause secondly of clause (c) of Section 15 of the said Act has also been challenged along with the above mentioned sub clause thirdly, of Section 15 of the Punjab Pre-emption Act. This clause confers the right of pre-emption on the owners of the "Patti" or other sub division of the estate within the limits of which land or property is situate. The various Sections of the Punjab Pre-emption Act 1913(herein-after called the Act). Assailed in S.P No.14 of 1980 are to the following effect. Section 3 of the Act defines, "agricultural land" and several other expressions used in the enactment. I fail to find an element of repugancy to the Injunctions of Islam in the said

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definitions. Section 4 of the Act is also a defining Section whereby meanings are given to the right of pre-emption and the application thereof in the context of the Act. This Section is also not repugnant to the Injunctions of Islam. Section 5 of the Act exempts a Shop, Saria, Katara, Daram Sala, Mosque and other similar buildings from the right of pre-emptic These properties are also exempted from the exercise of the right of pre-emption alongwith same other properties by virtue of Section 5 of NWFP Pre-emption Act. As stated above, this corresponding Section in the Sister Legislation already stands declared repugnant to Quran and Sunnah by the Shariat Bench of Peshawar High Court in the cases of "Malik Said Kamal and Syed Masood Shah". Similarly, Section 6 of the Act would be repugnant to the Injunctions of Islam to the extent that the right of pre-emption has been subjected to the provisions or limitations of the Act. Section 7 of the Act is also repugnant to the Injunctions of Islam because it takes away the right of pre-emption in respect of the Urban Immovable Property situate in town or sub division where at the time of the commencement of the Act, right of pre-emption did not exist under the custom. This subjection of the right of pre-emption to the prevalent custom is certainly foreign to the rules govering the law of Pre-emption in Islam. Section 8 of the Act is akin to Section 7 of the NWFP Pre-emption Act, which as stated above, stands declared repugnant to the Injunctions of Islam by the Shariat Bench of Peshawar High Court. For the same reasons, the impugned Sections in these petitions would also be repugnant. Validity of Sections 9 and 11 of the Act qua Injunctions of Islam has also been challenged but the reasons advanced on behalf of the petitioners for declaring these Sections repugnant are not very convincing. The State in Islam is fully competent to acquire any private property for the public good and I have not come across any provision in "Figh" of any school of

thought where-under a citizen has been allowed to pre-empt a sale to the Government. Section 11 of the Act is a matter pertaining to the procedure of the Courts. Hence, exclusion of the jurisdiction of this Court. Section 16 and 18 of the Act have been challenged on the same ground as of the invalidity of the above mentioned impugned clauses of Section 15 of the Act.

18. As will be seen from the foregoing discussion, I am of the opinion, that the state or for the matter of that a legislature is not competent to enlarge the scope of pre-emption law or to confer the right of pre-emption on an additional category of persons apart from those in whom this right has been recognised by different Ahadith of the Holy Prophet(Peace be upon Hih). I would, therefore, have no hesitation in declaring the impugned clauses of Section 15 of the Act along with Section 16 and 18 ibid to the extent of the said clauses repugnant to the Injunctions of Islam. The provisions of Sections 19 and 20 of the ~~Punjab Pre-emption~~ Act have also been challenged by the petitioner which relate to the notice of the sale by the intending seller to the pre-emptor. It has been conceded on the part of the petitioner that so far as the provision of notice is concerned, it is rather in conformity with the rules of Fiqh. Their objection is to the mode of service of notice which according to them is un-Islamic. I do not find any force in this contention. Moreover, the method or manner of service of notice is a procedural matter. These Sections are therefore, not repugnant to the Injunctions of Islam.

19. Now, coming to Section 30 of the Act read with Articles 10 and 120 of the Limitation Act, I do find myself in complete agreement with my learned brother, Sh.Aftab Hussain,J, in that these provisions of law fix the period of Limitation for instituting a Suit for

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pre-emption which is not foreign to 'Muslim Fiqh' on pre-emption and also that these relate to the procedure of a Court and are, therefore, excluded from the jurisdiction of this Court.

20. As regards the ouster of jurisdiction of this Court qua the laws protected by the Constitution, such as Martial Law Regulation No.115 etc; by virtue of the definition placed on the expression 'Law' for the purposes of Chapter 3-A of the Constitution vide President's Order No.1 of 1980, I, once again, with profound respect, do not find myself in agreement with my learned brother, Sh. Aftab Hussain, Member. The reasons prevailing with me in coming to the conclusions contrary to his are that the exclusion of Constitution from the expression 'Law' in defining clause attached to Article 203-B of Chapter 3A of the Constitution would not be read in isolation of the other provisions of the said Chapter. This Chapter begins with Article 203A which is in the following words:-

> "The provisions of this Chapter shall have effect notwithstanding anything contained in the Constitution".

The incorporation of the above reproduced 'Non-Obstante Clause' in the Chapter governing the composition and jurisdiction of this Court has to be given effect. A Constitution does not in this respect differ from any other Statute. "The Constitution being essentially in the nature of a statute, the general rule governing the construction of statutes in the main apply to the construction of the Constitution also". States Bindra in his work on Interpretation of Statutes and General Clauses Acts (3rd Edn Pages 612-13). He, on the authority of Prigg V Pennsy-Ivania (16 Pet(U.S.)539),

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further proceedes in this context:-

> "It is undoubtedly true that a constitutional provision is frequently better understood by a knowledge of the evil which led to its adoption. It is settled by high authority that in placing a construction on a Constitution or a Clause or part thereof, a Court should look to the history of the times and examine the state of things existing when the Constitution was framed and adopted, in order to ascertain the prior law, the mischief, and the remedy".

21. On the authority of the above, it would be legitimate to look into the history of the incorporation of Chapter 3A in to the Constitution and the prevailant conditions in the country at the time as also to the compelling forces behind the changed outlook of the powers to be vis-a-vis the laws of the country. I would not prefer to go into the detailed discussion on the past constitutional history. Suffice it to say that to adopt ourselves to the Islamic way of life had all along been the avowed goal of the various Governments who from time to time had sway over the destiny of the Nation. Every effort in framing the Constitution in the begining was thwarted by the intensity of the controversy raging between the secular minded class and the so-called theocrats of the country. The first Basic Principles Report of the 1st Constituent Assembly foundered on this rock. The Second Report of the same Assembly was, in 1954, not allowed to see the day of its becoming basis of a Constitution. The late lamented Prime Minister of the time, Chaudhri Mohammad Ali, at last succeded in 1956, to get a workable Constitution (later on abrogated) adopted on the cost of parity against the majority of erstwhile East Pakistan and of the merger of the Provinces in the West Pakistan. The desire of the people of Pakistan to introduce by law Islamic way of life for themselves found expression in the said Constitution by making provisions for the appointment of a Commission to recommend:-

i) as to the measures for bringing the existing law into conformity with the Injunctions of Islam, and

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ii) as to the stages by which such measures should be brought into effect.

This Commission was also to compile in a suitable form, for the guidance of the National Assembly and the Provincial Assemblies, such Injunctions of Islam as could be given legislative effect. Under its Article 198, it was the duty of the National Assembly to enact laws in respect of the Injunctions so compiled. The Commission was replaced by the Advisory Council of Islamic Ideology and the Islamic Reasearch Institute in the Constitution of 1962. "In the desire to introduce Islamic ways of life, the distinction between laws that are constitutional in character and those that are not, has throughout been overlooked, the emphasis having always been on non-Constitutional Islamic Laws, with the result that nobody can claim that the Constitution at any stage was or is an Islamic Constitution in the sense of its being an instrument laying down an Islamic mode of Government". (Monir's Commentary on the Constitution of Islamic Republic of Pakistan(1962) P 529).

22. Almost similar provisions as of the Constitution of 1962 were retained in the Constitution given to the country by its first ever directly elected Assembly in 1973. But in spite of the continuation of the Reaserch Institute and the Ideology Council and of the retention of provisions for taking steps to enable the Muslims of Pakistan, individually and collectively, to order their lives according to the demands of their Religion (Art 31 etc.) as a Principle of State Policy, no practical step was taken to ensure compliance of the Constitutional Obligation as enjoined upon the State under Article 227 to bring all existing laws of the country in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.

23. Then there developed a tendency in the process of working of all different law Commissions set up for the

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purpose of simplification of legal process in Pakistan to consider sacrosanct all procedural law including the Civil and Criminal Codes, as it was thought that interference in the law relating to procedure of Courts would help bring in chaos and would result in bringing the hornet's nest about the Courts' ears. The Muslims of Pakistan got so fed up with the lethargy of the men in power from Islamisation of laws and with their mere lip service to the cause of Islam during all those long years of the rule of the framers of the Constitution, that it compelled them to express their will to have an Islamic legal order in the country in no less louder voice than mass agitation in the streets which resulted in the collapse of the Government of the day. It was this will and desire of the people of Pakistan, which although had remained dormant during the next two years, was very much alive in the heart of the common man that received at last expression in the Presidents Order No.3 of 1979, and brought into being, on 10.2.1979, ~~erstwhile~~ Shariat Benches of the Superior Courts which were empowered to strike down law or a provision of law found repugnant to the Injunctions of Islam. This order was replaced, on 26.5.1980, by the President's Order No.1 of 1980, whereunder this Court was set up for the whole of the country in place of four Shariat Benches of the High Courts of the Provinces.

24. The above was "the history of the times" and the "state of things" which are to be looked into and examined in order to ascertain the purpose and the intent of the constitutional change under consideration and to grasp the wisdom behind the existance of the Non-Obstante Clause in the very beginning of the relative Chapter (Article 203A) and in the exception to the exercise of jurisdiction by this Court of the Constitution provided by the definition of 'Law' under

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Article 203-B. When looked upon in this light, it would not be difficult to find the real intention behind the definition in question as to not to permit the Constitution, the procedural law relating to Courts and Tribunals and the fiscal laws etc; mentioned therein to undergo the scrutiny by this Court as to their validity vis-a-vis the Shariat.

25. The definition class is, therefore, to be read with the other provisions of the Constitution in the light of the Non-Obstante Clause. Bindra in his above quoted book has a passage on the construction of different provisions of a Constitution, which is:

> "The Constitution must be considered as a whole, and so as to give effect, as far as possible, to all its provisions. It is an established cannon of constitutional construction that no one provisions of the Constitution is to be separated from all the others, to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and to be so interpreted as to effectuate the great purposes of the instrument. An elementry rule of construction is that, if possible, effect should be given to every part and every word of a Constitution and that unless there is some clear reason to the contrary, no portion of the Fundamental Law should be treated as superfluous. If the plain meaning of the uncontradicted constitutional provision is to be diregarded, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would without hasitation unite in rejecting the application".(P 616).

26. Keeping in view the complete background of the constitutional history of Pakistan and the universal will of its people to arrange their lives in accordance with the Principles of Islam one cannot but come to the irresistible conclusion that this end could only be achieved with Islamisation of Laws. As the intent of the framers of every Constitution, past as well as of the present one, had all along been to exclude constitutional and fiscal laws from the pale of Islamisation of laws, it is not very difficult to find that the intent was to exclude these laws from change, Hence this exception from the term 'Law' as used

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in Chapter 3-A, of the Constitution, I am fortified in this deduction by the following passage from Bindra's Interpretation (Page 614); based on Lake County V Rotlins (130 US 662) and a number of other cases from American jurisdiction:

> "The fundamental principle of constitutional construction is to give effect to the intent of the organic law and the people adopting it!

"If the basic legislative intent is to promote or advance the people's standards of justice and propriety, then it is surely proper for the courts to be concerned with such intent. All laws should, as a result, be construed with reference to this intent. On this basis, the application of the doctrine of equitable construction, be it known by that name or some other, may be sustained!(Statutory Construction by Crawford, page 299).

This definition clause, therefore, is an exception to the general meaning and import of the terms 'law' for the purpose of exercise of jurisdiction by this Court. The definition in question being an exception it has to be treated as such, regardless of this being relevant to the constitution or to any other branch of law, as mentioned therein, and would have to be given its meaning and scope confined within the limits permissible to an exception. Crawford on the office of the exception states :

> "As we have hitherto stated, the appropriate and natural office of the exception is to exempt something from the scope of the general words of a statue, which would otherwise be within the scope and meaning of such general words. Consequently, the existence of an exception in a statute clarifies the intent that the statute should apply in all cases not excepted!

This exception in question has, therefore, to be kept confined to the literal meanings of the word used.

27. Now, if the term constitution used in the exception in question is so construed as to bring all protections provided by the constitution to certain laws and those enabling powers as it confers upon the legislature to enact those laws which in the absence of those

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powers, would be ultra vires of one or the other provisions of the constitution, these provisions would come in an irreconcilable conflict with the Non-Obstante clause provided for the application of the newly brought in Chapter in the constitution. In this position, the exception would become ineffective and void. A saving clause"if it is in irreconcilable conflict with the body of the statute of which it is a part, it is ineffective, o: void" (ibid page 612).

28. The Constitution under Article 268 accords protection to all laws existing at the time of its enforcement in that the whole of the Statute Book is preserved and is allowed to hold the field untill it is repealed or amended by due process of Legislation. A clear departure has been made under Article 203-D from that manner which is recognised by the rest of the Constitution in that a body foreign to the field of legislation, namely this Court has been empowered to strike down law or a provision of law out of not only those which were preserved and recognised as valid by the Constitution but also from that corpus juris which has to come into being after the enforcement of the Constitution. Then the Constitution has yet another set of provisions whereunder certain laws are made immune of change or repeal even by the Legislature in the normal course of its working unless the machinery provided by the Constitution for their amendment or repeal comes into motion. Martial Law Regulation 115 and the Muslim Family Laws Ordinance, 1961 fall under this category. Yet a third set of species of laws has been envisaged by the Constitution whereby, as stated above, that has been made lawful for the Legislature, which otherwise would have fallen under the mischief of Article 227 or would have been in conflict with the Chapter on Fundamental Rights and Principles of Policy of the State. The various Articles of the

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Constitution relevant to the above stated categories of law have been enumerated and their import has fully been explained by the learned Member, Sh.Aftab Hussain,J. in his Judgement.

29. Had it been the intention of the framers of Chapter 3-A of the Constitution to keep intact the whole scheme of the Constitution vis-a-vis the laws of the country from the perview of Article 203-D, they could have certainly incorporated some other words in the Chapter in question instead of merely creating exception of Constitution from the definition of law under Art 203-B. The moment it is conceded that any existing law is capable of being struck down as repugnant to Injunctions of Islam under Article 203-D, this jurisdiction comes in direct conflict with one or the other provision of Constitution in that all laws get their preservation and protection from the Constitution and that machinery or the method for any repeal or amendment is provided therein. As such machinery or method has to be bypassed, the exclusion of Constitution from the term law would only be construed to mean the Constitution minus the manner or the machinery created by it for such repeal or amendment. It may be contended that a mere declaration of repugnancy by this Court is not tentamount to striking off a law which has to be done by some other authority. The effect of such declaration provided under Article 203-D (3) (b) is a complete answer to this contention. This clause reads:-

> "(a) .....
>
> (b) such law or provision 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 the Court takes effect"

This virtually is the repeal without the intervention of any Lagislative body or person. By the same token, all other protections and safeguards imparted to laws such as the above stated two pieces of Legislation do not come in the way of the exercise of jurisdiction under Article 203-D.

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30. As it was but obvious that any construction put on the word 'Law' with the exception of Constitution would tend to bring the newly incorporated part of the Constitution in conflict with its other provisions, the Legislator by way of abundant caution deemed it fit to insert a Non-Obstante clause by way of Article 203-A in the Chapter under discussion.

31. Now what could be the effect of this clause if the term 'law' as defined is to be taken to mean law excluding Constitution with all its effects on the existing laws, safeguards and protections provided by it to certain laws and with all methods prescribed by it for the repeal or amendment of a law except that it will be rendered redundant. But can any provision of law or a Constitution be allowed to be devoid of its effect?

32. It has earlier been discussed that for the purposes of construction of diverse or different provisions of Constitution the principles could not be different than those applied in case of other Statutes. Organic law does not differ with any other branch of law in this respect.

In KORO Vs. The State (P.L.D 1963 Karachi 256 at page 267) it was held:

> "....that the Legislature does not use the words redundantly without any meaning".

Similarly in "Municipal Committee Vs. Gul Baran" (PLD 1972 Quetta 89 at Page 94), a learned Judge of Baluchistan High

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Court has thus stated this provision of Law.-

> "The cardinal principles in interpretation of laws are that an effort has first to be made to reconcile the various provisions of law and to find out if all the provisions can stand effectively by themselves. The other principle is that if there is a provision appearing to be redundant in the light of the remaining provisions, the law to that extent must yield to the controlling provisions."

Maxwell on Interpretation of Statutes (11th Edition Page 12) states:

> "It is but a corollary to the general rule of literal construction that nothing is to be added to or to be taken from a Statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express. It is a strong thing to read into an Act of Parliament words which are not there, and, in the absence of clear necessity, it is a wrong thing to do. We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself."

33. The effect of Non-Obstante Clause has been explained by Baindra at page 720 of his book in the follwoing terms :-

> "It should first be ascertained what the enacting part of the section provides on a fair construction of words used according to their natural and ordinary meaning and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in relevant existing law which is inconsistant with the new enactment. The enacting part of a statute must, where it is clear, be taking to control the non-obstante clause both cannot be read harmoniously, for, even apart from such clause a later law abrogates earlier laws clearly inconsistant with it."

A Non-Obstante Clause in the similar words as of Article 203-A, which found its place in an Indian Legislation, namely Money lender's Act, came under consideration of the Calcutta and Punjab High Courts of India in Nawab Bahadur Vs. Rameshwarlal (A.I.R 1949 Cal 323) and Sarup Sing Vs. Bhagwan Dass (A.I.R 1952 Punjab 21). It was held that :

> "The form of the words used may be regarded merely as a convenient method of repealing inconsistant provisions of such statutes as in the Interest Act or the Contract Act without making any express reference thereto. . . . . ."

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"Similarly, the use of these words ..... may be reasonably regarded as modifying or amplifying for the benefit of borrowers (subject to the limitations contained in the Section) any statute of general application relating to procedure, such as the Code of Civil Procedure, which would not otherwise give borrowers the measure of relief contemplated by Bengal Money Lenders Act".

34. I am, therefore, of the view that the incorporation of Article 203-A in the relevant Chapter confers jurisdiction on this Court to declare a law or a provision of law repugnant to Injuctions of Islam despite the fact that such law or provision has a protected existance under any other provision of the Constitution. This jurisdiction also covers those laws which have been rendered intra-vires of the different provisions of Constitution by special provisions in the Constitution and which could have been ultra-vires of the lagislative powers of the lagislature in view of other principles laid down elsewhere in the Constitution. The jurisdiction of this Court is ousted against the Constitution only in that a provision of the Constitution and not the effect thereof has not been made amendable to the examination by this Court under Article 203-D. The only exception to this rule are those laws which are enacted under the express command of the Constitution or framed for giving effect to the directives contained therein. The Representation of Peoples Act is one of those enactments which was enacted for bringing into being the Parliament required by the Constitution to be set up.

35. To sum up, the Constitution and those laws which are framed in compliance with the requirements of the Constitution or those which are promulgated to give effect to its necessary and expressed intendments are excluded from the expression 'Law' but this exception does not include Constitutionally protected law. Hence the jurisdiction of this Court against the later.

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36. To my mind the above is the only construction which can make the Non-Obstante Clause reconcilable with the definition of law as given under the said Article.

37. I am fortified in this view of the matter by the maxim LEGES POSTERIORES PRIORES CONTRARIES OBREGNOT which has incidently been applied in the contrary manner in the leading Judgement. This maxim was interpreted in a case from English jurisdiction (King's Bench) in the following words:

> "The Rule is xx that if the provisions of a later Act are so inconsistant with or repugnant to those of an earlier Act that the two cannot stand Together, the earlier stands impliedly repealed by the later."
>
> (Hall Vs. Arnold (1950) 2. K.B.543)

38. Keeping in view the above interpretation of the Maxim, there could be no escape from the conclusion that the framer of Chapter 3-A in the Constitution intended by including this Chapter in the Constitution to bring in such a change in the scheme of Constitution as would render conflicting provisions of the Constitution enforced prior in time to the introduction of this Chapter, on 26.5.1980, as ineffective and in case the two cannot stand together this Chapter will have to be construed as repealing those provisions. In applying this maxim, the deciding factor would be the time of enactment of a later Act or Chapter and not its placement in the body of a Statute.

39. Having held the jurisdiction of the Court not barred qua Martial Law Regulation 115, I would now, turn to deal with S.P No.25 of 1979(Lahore), wherein the petitioner, Qizalbash waqf, Lahore has challenged the definition of "person" given in para 2(7) of Martial Law Regulation 115 which reads as under :-

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2.(7)"person" includes a religious, educational or charitable institution, every trust, whether public or private, a Hindu undivided family, a company or association or body of individuals, and co-operative or other society, but does not include a Local authority, a univeristy established by law, a body incorporated by a Central or Provincial law, or an educational institution, (a livestock farm or a co-operative farming society) exempted by Federal Government from the operation of this Regulation".

40. A similar definition has been appended to the Land Reforms Act 1977 under its Section 2(7).

41. By virtue of the above definitions every trust, whether public or private, has been included in the definition of person and thereby made subject to the mischief of the said laws.

42. It has been contended that the petitioner is a Waqf created by late Nawab Nasir Ali Khan Qizilbash, the grand-father of the present "Mutwali", Nawab Muzaffar Ali Khan Qizilbash for arranging mourning and taking out processions in memory of حضرات آئمہ اطہار according to شیعہ rites and also for other religious and educational needs of اثنا عشریہ community. It consisted of 40 squares or 1,020 Acrees of irrigated land situate in Lahore and in its subrubs plus some urban property in Lahore, etc;. Because of the definition in question, this waqf also became an effectee of the MLR 115 and the Land Reforms Act, 1977. An area equal to 830 Acrees was resumed from the waqf without compensation under the former while an additional area of 80 Acrees was taken away under the later Act. It has been contended on behalf of the petitioner that a Waqf having been dedicated to God does not fall under any category of personal property of an individual land owner and as its ownership vests in God Almighty, its acquisition by the Government under any pretext, Law or Regulation for any purpose whatsoever was repugnant to the Injunctions of Islam.

43. Mr.Fazal Hussain Advocate, on behalf of the petitioner has relied upon Verses 178 to 181 of Chapter II of the Holy Quran and also on a number of احادیث of the Holy Prophet

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(Peace be upon Him) from the compilations of Imam Bokhari and Imam Malik etc; as well as on a number of احادیث of the Holy Prophet(Peace by upon Him) and اقوال معصومین from صحاح الشیعہ of the Shia sect.

44. Verses 177 to 179 of سورۃ البقرۃ do not seem to be relevant to the topic under discussion. Verses 180 and 181 of the said Chapter rendered into english by Alama Abdullah Yusuf Ali are as follows :

180. "It is prescribed,
When death approaches
Any of you, if he leave
Any goods, that he make a bequest
To parents and next of kin,
According to reasonable usage;
This is due
From the God-fearing!"

181. "If anyone changes the bequest
After hearing it,
The guilt shall be on those
Who make the change.
For Allah hears and knows
All things!"

Although, the learned counsel has not relied on Verse No.182 of the same سورۃ. This Verse is also relevant to the above quoted Verses. Rendered into english by the same translator it reads as under:-

182. "But if anyone fears
Partiality or wrong doing
On the part of the testator,
And makes peace between
(The parties concerned).
There is no wrong in him:
For Allah is Oft-Forgiving,
Most Merciful!"

45. The sanctity of bequest made by a Muslim has been fully described in the above quoted verses and to bring about a change in the bequest after having knowledge of the intention of the maker has been termed as guilt. Verse 182 allows change in the bequest for making peace between the effected parties if any partiality or wrong doing is found on the part of the testator. These Verses clearly relate to the wills made in favour of a stranger or a relation. Apart from the above, these Verses do not lay down a rule in regard to the creation of a waqf The law on the creation, utilization and other related matters

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waqfs is almost one and same in every School of Muslim Thought, which is derived from the Sunna of the Holy Prophet (Peace be upon Him) and from the practice of his Compenions and Imams (May God be pleased with them). The Hadith No.43 in Chapter No.37 relating to waqf in Sahih Bokhari (with urdu translation published by Muhammad Saeed and Sons, Karachi Vol:2, page 54), relates to a piece of land situate in "Khayber" , which was acquired by Hazrat Umar(May God be pleased with him). Hazrat Umar after this acquisition came to the Holy Prophet(Peace be upon Him) and asked for instructions in relation thereto saying that he has acquired a piece of land a better of which has never been possessed by him. The Holy Prophet(Peace be upon Him), told him that if he so wishes, he can retain the trees and give fruit in Alms. Hazrat Umar, thereafter, bequeathed this land on the condition that the trees would neither be sold nor gifted away nor would be acquired in inheritance. But the fruit will be utilized for consumption of the poors and others mentioned therein and also that the Mutwali can only eat out of it according to his needs or let a friend of him eat the same, if thereby he has no desire to collect money. The same Hadith with a slight variation from the same narrator finds its place in the compilation of Imam Muslim.

46. From the above quoted Ahadith, the principle of a waqf being not capable of sale, gift or inheritance was derived by the Jurists. The second principle is الوقف لا يملك in other words, the waqf is not owned by any person as the ownership of a waqf vests in God.

47. The same Hadith is included by Alhaj Malana Fazal Karim in his translation of Mishkat, namely "Al Hadith (page 320). It also finds mention in Tahzeeb-ul-Ahkam as Hadith No.550 at page 30 of Najaf Ashraf Publication.

48. There are also a number of Alhadith in Sahah-i-Arbaa of Jafariya school of law wherein it is enjoined that a waqf can only be utilized in accordance with the object of the waqf

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and that purpose of a waqf, after it has been executed and appropriated cannot be changed. Abdul Qasim Khooi in Vol. II of Manhaj-ut-Talebin lays down as Maselas No.1153 and 1154 that a waqf by a Shia wakif can only be utilised for the benefit, of the poor and needy of Shia Community.

49. Hanafi view on the ownership of waqf as per 'Hedaya' page 231 is as follows:

> "According to the two disciples (Qazi Abu Yusuf and Imam Mohammad) Waqf signifies the appropriation of a particular article, in such a manner as subject it to the rules of Divine property, whence the approperiator's right in it is extinguished, and it becomes a property of God by the adventage of it resulting to his creatures. The two disciples, therefore, hold appropriation to be absolute; and, consequently, that it cannot be resumed, or disposed of by gift or sale; and that inheritance also does not obtain with respect to it."

50. Shia law of Wakoof as compiled by Baillie, in his Digest of Mohummudan Law (Vol II page 215) inter alia is :-

> " A wukf for musalih, or works of general utility, such as bridges and musjids, or places of worship, is quite valid; for such a wukf is, in truth, a settlement on all Mussulmans, though some only can participate in their advantages."

51. On how a wakf in the way of God is to be applied, the same compilation states as under:-

> "When a person has made an appropriation "In the way of God," it is applied to whatever is productive of reward in future state, such as religious warfare, the greater and lesser pilgrimages, and the erection of Musjids or places of worship, and bridges. So, also, if he should say "In the way of God, and way of reward, and way of good" the purposes are all considered as one or the same, and there is no necessity for dividing the proceed of the wukf into three different parts."

The wakf property does not cease to be a wakf even after its destruction neither can it be sold even after its demolition There is only one exception in Fiqh Jafariya when a wakf can be utilised for any other purpose than that described

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by the wakif and that is the case of parishable goods when the wakf property is liable to waste by its parishable nature, before the object of the wakf can be achieved. In such a case as this it would be utilised in a manner which is similar or akin to that it was dedicated for. For an example when a wakif makes an appropriation of some vegetable or fruit for the consumption of a particular class of poors or wayfarers and it cannot reach the beneficiaries before its going waste, it would be lawful to utilise the same in feeding some other poors or needy than the original beneficiaries.

52. In the above state of law, Sunni as well as Shia, it could never be permissible to the State to resume a wakf for the purpose of selling the wakf property in utter disregard of the object of wakf to individuals and thus convert divine property into personal property of a class of persons. No doubt some Jurists have recognised in the State right to resume even wakf property in case of dire need, but in such a case the State has to keep alive the object of wakf by providing alternate means to keep the wakf in perpetuity. The right to acquire wakf property without compensation or on payment of compensation has not been conceded to the State. The wakf belongs to God Almighty. Then who is to receive, except the successor waqf, compensation on His behalf. A wakf in Islam is a perpetual endowment and has to be utilised in strict accord with the object of wakf declared by the wakif. The Islamic law on wakoof if so stringent that when some water is dedicated for drinking purposes and no water is available besides it for ablution, no one is allowed to use the wakf water in ablution for saying prayers. Such person must say his prayers after performing 'Tayammam!

53. The definition of person in the impugned provision of law to the extent of including therein a Muslim trust; whether public or private' is for the reasons stated above, repugnant to the Injunctions of Islam as laid down in the Holy Quran and the Sunna. Anyoth

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provision in the impugned laws empowering the acquisition of Muslim wakf for the purpose of settling the wakf property upon a person or a class of persons would also be repugnant to the Injunctions of Islam. I would, therefore, allow this petition.

54. Lastly, a challenge has also been thrown to the power of the State under Martial Law Regulation 115 in placing restriction on partition of joint holdings (Sec 22) and restriction on alienation of holdings (Sec 24) on the ground of these being repugnant to the Injunctions of Islam.

55. Reliance has been placed in this context on a number of verses of the Holy Quran from Chapter IV and other Chapters cwhereby law of inheritance, etc; has been laid down.

56. The modes of acquiring property recognised by Islam are by:

a) earning,

b) inheritance, and

c) gift.

"Acquisition of property by the individual, whether male or female, is recognized by Islam as one of the basic laws regulating human society:

"Men shall have the benefit of what they earn" (4 : 32). Both sexes have also an equal right to inheritance of property; "Men shall have a portion of what the parents and the near relatives leave and women shall have a portion of what the parents and the near relatives leave" (4 : 7). No limitation is placed upon the property or wealth which an individual may acquire or give away. The Holy Qur'an speaks even of heaps of gold being in the possession of a man which he may give away to a woman as her dowry "And if you have given one of them a heap of gold, take not from it anything"(4 : 20). Islam is thus opposed to Bolshevism, which recognize no individual right of property; but it is at the same time socialistic in its tendencies, inasmuch as it tries to bring about a more or less equal distribution of wealth!

("The Religion of Islam" by Maulana Muhammad Ali, 1950 Edition, page 690).

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57. After having acquired property a Muslim becomes its full owner and has an inalienable right to sell, bequeath or otherwise part from it. He cannot even disinherit his presumptive heirs, as every one of the heirs, on the demise of the last full owner, acquires his share by operation of law. He certainly would have a right to get his share apportioned and separated from the property of others. Similarly, he has been envested with the right to sell his property. This does not need an elaborate discussion as these rules of Islamic law are elementary. Any embargo on these rights would be interference in the domain of private rights and privileges recognised as vesting in an individual by Shariah.

58. The State or a legislative body of citizens, in Islam, cannot by legislation take away or place curbs on a right conferred on or conceded to an undividual by the devine law. According to Sharia, no person or institution is competent to convert what is permissible into that which is forbidden. To take exclusive possession of his properties or to part with it by sale or gift, etc; is a recognised right of an individual which can not be taken away by legislation. The impugned provisions of law are therefore, clearly repugnant to Injunctions of Islam. I would therefore, have no hesitation in declaring the above quoted paras of Martial Law Regulation 115 (Para 22 and 24) to the extent these take away the rights under discussion repugnant to Injunctions of Islam.

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59. As far the rest of the matters involved in these petitions are, in spite of my difference of opinion on the ouster of jurisdiction of this Court with my learned brother Sh.Aftab Hussain, Member, I fully concur with him on their merits and on the conclusions drawn by him on the concept of Sharia on amassing wealth and property by individuals. All those petitions which challenge the provisions of Martial Law Regulation 115 and Land Reforms Act 1977 to the extent of resumption of private holdings of land for the purpose of Reforms are to be dismissed.

Member IV

FEDERAL SHARIAT COURT

ORDER OF THE COURT

In view of the opinion of the majority all the petitions are dismissed.

Chairman

Member I

Member II

Member III

Member IV

Islamabad the 13th December, 1980

(APPROVED FOR REPORTING)