Conflicting Salient Features of the Constitution

Dr. Ghufran Ahmed

ABSTRACT

The Constitution of the Islamic Republic of Pakistan, 1973 has various salient features. Among these salient features are its democratic character and the Islamic colour. The democratic character of the Constitution is reflected by the conferment of certain fundamental rights, and their enforcement mechanism by the Supreme Court and the High Courts exercising powers under articles 184(3) and 199 respectively. Likewise, the Federal Shariat Court has the jurisdiction under article 203D to declare a law void if the same is repugnant to the injunctions of Islam. It follows that a law to be valid must neither be inconsistent with the fundamental rights nor repugnant to the injunctions of Islam. Any singular declaration that a law is not inconsistent with the fundamental rights is not sufficient for the validity of that law so long as that law does not pass the test of repugnancy with the injunctions of Islam as well and vice versa. Nonetheless, on the basis of article 189 and article 203G read with other provisions of chapter 3A both the Supreme Court as well as the FSC have held that the decision of the either court is binding on the other. Consequently, they have shown reluctance to determine the fate of a law on the touchstone of the other test if one of the tests has been validly passed. One step further, a law declared void hence nonexistent under chapter 3A can still be revived and enforced by the Supreme Court under special circumstances. On the contrary, a law declared void by the Supreme Court cannot be enforced by any court.

Key words: Jurisdiction, Fundamental Rights, *Zaheeruddin* case, Article 203 D, Salient features, *stare decisis.*

1. Introduction

This paper evaluates two salient features concerning the validity of laws under the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution). The first is the inconsistency with the fundamental rights test regulated under Part II, Chapter 1 of the Constitution. While the second such test concerns the repugnancy with the injunctions of Islam. This last mentioned test is regulated under article 227 and Chapter 3A of the Constitution. The former is performed by a High Court or the Supreme Court exercising jurisdiction under articles 199 and 184(3)

respectively[1]. While the latter is performed by the Federal Shariat Court (FSC) exercising jurisdiction under article 203D. However, in certain cases where the jurisdiction of the Shariat Appellate Bench of the Supreme Court (SAB) under article 203(F) is invoked, the decision of the FSC may be maintained, modified or reversed by the SAB.

With respect to the invocation of jurisdiction of a High Court and the Supreme Court, it should be noted that the jurisdiction under article 199 can only be invoked when there is no other adequate and efficacious remedy available to an aggrieved person. On the other hand, article 184(3) does not require any such trapping. Thus, the remedy under the last-mentioned provision can be availed independent of any other alternative remedy or forum available to the petitioner though the so called public importance test has to be qualified.

2. Application of *Stare Decisis*

Under the scheme of the Constitution, all but a few laws have to pass each of the two tests simultaneously but independently. Thus, the successful clearance of the either test does not make the laws immune from the other test. However, under the doctrine of *stare decisis* as envisaged in the Constitution and practiced by the courts, the decision of the Supreme Court is binding on all courts under article 189. Similarly, the decision of the FSC is binding on a High Court and on all courts subordinate to a High Court under article 203GG. This obviously does not include the Supreme Court. However, the Supreme Court itself has held in *Zaheeruddin* case that in certain cases the decision of the FSC is binding even on the Supreme Court[2].

[1] The Supreme Court has been vested with various jurisdictions and powers under different constitutional provisions. These jurisdictions and powers include the original jurisdiction of the Supreme Court under article 184, appellate jurisdiction under article 185 to hear appeals against the final decisions of the High Courts, advisory jurisdiction under article 186 to give an opinion on a question of law of public importance to the President of Pakistan, power to transfer cases pending before different High Courts under article 186A, power to do complete justice under article 187 and power of the Supreme Court to review its own decisions under article 188 of the Constitution.

[2] *Zaheeruddin and others versus the State*, 1993 SCMR 1718 [Supreme Court of Pakistan]

In fact, this observation was made by Abdul Qadeer Chaudhry J. in the above referred case. It was held that the FSC is vested with exclusive jurisdiction under article 203D to decide the vires of a law on the touch stone of the Islamic injunctions. This fact is supported by article 203G. The last mentioned article creates a bar on all courts and tribunals in Pakistan including a High Court and the Supreme Court to exercise jurisdiction with respect to any matter which is in the jurisdiction or power of the FSC. In this scheme, if the FSC decides a case and its decision becomes final, it will be binding even on the Supreme Court. The decision of the FSC becomes final if it is not challenged in the SAB or it is maintained by the SAB. When the decision is maintained by the SAB, it is debatable whether the decision gets binding on the Supreme Court being a decision of the FSC or that of the SAB. In the former case, a lower court binds a higher court. While in the latter case, one bench of the Supreme Court binds the other bench of the same court.

It is against the established norms of precedent that a lower court binds a higher court. However, in the light of the judgment of the Supreme Court in *Zaheeruddin* case, this unique kind of precedent exists in the Constitution. Abdul Qadeer Chaudhry J. observed in this case that in the light of Article 203A read with Article 203 G, a finding of the FSC is binding even on the Supreme Court if the same is not modified in appeal[3].

Surprisingly, Abdul Qadeer Chaudhry J. did not refer to article 203GG that actually makes the decision of the FSC a binding precedent. However, according to this provision the decision of the FSC is a binding precedent subject to articles 203D and 203F. As far as mentioning of article 203F is concerned, it is very understandable that the appellate forum may alter the decision of the FSC. In such a case, the decision of the appellate forum and not that of the FSC will rule the field. But “subject to article 203D” is confusing. The FSC exercises original jurisdiction under

[3] Ibid, 1764

this provision. On the other hand, according to article 203E (9), the FSC can review its decisions and orders. Where the FSC reviews its earlier decision that had been given under article 203D a question arises as to whether the binding decision will be the one that has been given later under article 203E (9) or the earlier given under article 203D. It is hardly refutable that the later decision shall be binding and not the earlier since the earlier does not exist anymore. In these circumstances, article 203GG should not be subject to article 203D. Rather, it should be subject to article 203E.

It is important to note that there is no provision in chapter 3A which makes the decision of the SAB binding on other courts. However, it has been held that the SAB is a bench of the Supreme Court[4]. Therefore, the decision of the SAB is binding on other courts under article 189 of the Constitution as a decision of the Supreme Court. This brings the discussion to an important question whether a decision of the SAB is binding on the Supreme Court itself. If this question is answered in affirmative, a subsidiary question arises in what capacity the SAB binds other benches of the Supreme Court. There may be two possibilities of so doing. One, the SAB binds other benches of the Supreme Court as any other larger bench of the same court binds an equal or a smaller bench of that court. Two, the SAB being a special bench binds even the other larger benches of the Supreme Court within the scope of its exclusive jurisdiction.

The Supreme Court has held in *Zaheeruddin* case as well as in *Mst. Aziz Begum* case that the Supreme Court is bound by the decisions of the SAB[5]. Both these cases are discussed and analysed below. However, before this discussion and analysis, it is important to note that the decision of the FSC or the SAB is binding only to the extent of Islamic perspective. While the

[4] In *Re: Said Kamal Shah*, PLD 1990 Supreme Court 865

[5] *Zaheeruddin and others versus the State*, 1993 SMR 1718 [Supreme Court of Pakistan], *Mst. Aziz Begum and others versus Federation of Pakistan and others*, PLD 1990 Supreme Court 899

decision of the Supreme Court is binding on the SAB as well as the FSC in all respects other than the Islamic perspective.

The above exposition of the doctrine of *stare decisis* has led to hold in various cases that the successful clearance of the either tests makes such laws constitutionally valid. Thus, we observe that the courts have restrained from exercising jurisdiction with respect to certain laws which have passed the either test. This paper analyses whether a court otherwise having jurisdiction to determine the validity of a law can lawfully restrain itself from exercising such jurisdiction with respect to a law that has been adjudged by another court sitting in different jurisdiction. Another very important issue to be analysed below is whether the adjudication with respect to the validity of a law by the FSC has the same force as that of a decision of the Supreme Court.

3. Constitutionality of the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984

Zaheeruddin and others versus The State is a very important case in the context of the present research and needs to be analysed in detail[6]. This case was decided by the Supreme Court exercising its appellate jurisdiction under article 185 of the Constitution. The Court consisted of a full bench of five members who gave a split judgment as shall be analysed below. In this case, the Court decided a number of appeals against different orders passed in different cases decided by two High Courts, the Lahore High Court and the one exercising jurisdiction in the province of Baluchistan.

On 26.04.1984 an Ordinance numbering XX of 1984 was issued by the President of Pakistan. This Ordinance was called the Anti-Islamic Activities of the Qadiani Group, Lahori Group and Ahmadis (Prohibition and Punishment) Ordinance, 1984. Section 3 of this Ordinance inserted two provisions in PPC. These provisions are Sections 298B and 298C of the PPC.

[6] Ibid

It should be noted that according to article 260(3) (b) of the Constitution persons of the Qadiani group or the Lahori group who call themselves Ahmadis or by any other name are included in the definition of a non-muslim. These non-muslims are the followers of Mirza Ghulam Ahmad of Qadian, a place in India. That is why they are called Ahmadis after his name or Qadiani referring to his place of birth.

The basic difference in the belief of these non-muslims and the Muslims is that the former do not believe in the finality of the prophet-hood of Muhammad (PBUH) which amounts to the denial of explicit teachings of the Holy Quran. This belief is so dangerous that it makes the entire teachings of Islam questionable. When the Prophet of Islam is not considered the last and the final messenger of Allah, any person claiming to be his successor and the messenger of Allah will have the full authority to bring any changes in the true teachings of Islam.

It is believed that this sect emerged in 1889 at the behest of the imperial power. The basic aim behind this conspiracy was to divide the Muslims of the sub-continent so that they get weaker and weaker to resist the imperialists with full power. Since this sect was formed and encouraged to divide and weaken the Muslims of the region, the Ahmadis disguised themselves into the cloth of Islam and posed to be true Muslims. That is why, they planned and insisted to use the titles, epithets and descriptions reserved for certain holy personages, places of worship of Muslims and certain Islamic rituals and ceremonies.

The object of declaring such persons non-muslims was to safeguard and protect the holy personages of Islam, the sanctity of important teachings and rituals of Islam. These non-muslims had been using specific titles and epithets for their own clergies, places of worship and religious rituals that had actually been reserved for the Islamic personages, places of worship and holy rituals. In this background, it was provided by Section 298B(1) that if a person of the Qadiani

group or Lahori group whether called Ahmadis or by any other name refers, addresses or uses any title or epithet for any person, place of worship or religious ritual or ceremony reserved for the Muslims and specific to Islam, s/he shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.

In the light of this provision, it is banned for such non-muslims to refer or address any person other than a Caliph of Muslims or a companion of the Holy Prophet (PBUH) as Ameer-ul-Momineen, Khalifat-ul-Momineen, Khalifat-ul-Muslimeen, Sahaabi or Razi Allaho Anho. Similarly, the title of Ummul-Momineen is banned for any person other than a wife of the Prophet (PBUH). Likewise, the title Ahle-bait is reserved for the family members of the Prophet (PBUH). Hence, the use of Ahle-bait is also forbidden for any person who does not belong to the family of the Prophet (PBUH). In the like manner, a place of worship of such non-muslims cannot be termed as Masjid.

The Muslims offer prayers five times a day. The call to prayer is called Azan in Islam. Section 298B(2) declares that if such non-muslims use the term of Azan for their call to prayers or use a similar call to prayer as used by Muslims, it is an offence under the last mentioned provision. This offence is punishable in the like manner as provided by Section 298B (1) i.e. imprisonment of either description which may extend to three years and fine.

Section 298C declares that a non-muslim of the above description cannot pose himself/herself to be a Muslim either directly or indirectly. Similarly, it is forbidden by law to declare the faith of such non-muslims as Islam. Since the faith of such non-muslims is a distorted form of Islam, the law forbids them to preach their religion. Because by preaching their religion or inviting other people to accept their faith they are not actually spreading their religion but, in fact, distorting the true picture and teachings of Islam. This, of course, must be strictly prohibited and banned in a

State where Muslims are in majority. Moreover, the Constitution vide article 2 declares Islam to be the State religion. Finally, it is prohibited by law for such non-muslims to outrage the religious feelings of Muslims in any manner whatsoever. All these acts have been made punishable under Section 298C with imprisonment of either description for a term which may extend to three years and with fine.

The above discussed Ordinance of 1984 was challenged in the FSC by way of different Shariat petitions invoking the jurisdiction of the FSC under article 203D in *Mujibur Rehman* case[7]. It was claimed by the petitioners that the law made by the said Ordinance is *void ab initio* and a nullity in the eyes of law being repugnant to the injunctions of Islam. The FSC after hearing lengthy arguments and analyzing all aspects of the case gave a very exhaustive judgment on the subject. The petitioners were unable to impress the FSC and make a case in their favour. Consequently, the FSC dismissed all these petitions. It was found by the FSC that none of provisions of the Ordinance is repugnant to the injunctions of Islam. The Ordinance, therefore, was declared a valid law as far as the jurisdiction under article 203D is concerned[8].

The above decision of the FSC was challenged in the SAB under article 203F by the petitioners before the FSC invoking the appellate jurisdiction of the SAB[9]. It is interesting to note that the appeals in the SAB against the decision of the FSC were not disposed of on merit. Rather, the appellants withdrew their appeals without arguing the case on merits. Nonetheless, the effect of the withdrawal of the appeals by the appellants is that the decision of the FSC in *Mujibur Rehman* case holds the field. Consequently, the Ordinance providing for the prohibition of the

[7] *Mujibur Rehman and 3 others versus Federal Government of Pakistan and another,* PLD 1985 FSC 8
[8] Ibid
[9] *Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan,* PLD 1988 Supreme Court 167 [Shariat Appellate Jurisdiction]

anti-Islamic activities of the Ahmadis and punishments thereto still remains a valid law as far as its Islamic perspective is concerned.

It is interesting to note that the same Ordinance was challenged before the High Court by invoking the constitutional jurisdiction of the Court under article 199 by filing two separate constitutional petitions. One of these petitions numbering 2591/84 was filed on 30.05.1984 i.e. a little more than a month after the promulgation of the Ordinance on 26.04.1984. The other petition numbered 2309/84 and the same was amended on 06.06.1984 by the petitioners to pray for the suspension of the Ordinance till the final disposal of the said petition. It was generally claimed by the petitioners that the said Ordinance is *ultra vires* of the Provisional Constitutional Order, 1981 as the same is inconsistent with the fundamental rights particularly those provided by articles 19, 20 and 25 providing for the freedom of speech, freedom of religion and equality before the law respectively[10].

It was contended by the petitioners that the restrictions imposed by Section 298B PPC regarding the use of certain expressions is an unlawful curtailment on the freedom of speech. Similarly, the restrictions imposed by Section 298C PPC on the propagation and preaching of one's faith and religion to others is a negation of the freedom of religion. Finally, Ahmadis should be treated like other non-muslims in all matters. The law provides freedom to other non-muslims to express their holy personages, places of worship and religious rituals and ceremonies by whatever name they like. Likewise, they enjoy legal freedom to profess, practice and propagate their religion. Therefore, the restrictions imposed by Sections 298B and 298C of the Penal Code amount to discrimination within non-muslims and the same is forbidden by article 25 of the Constitution.

[10] It should be borne in mind that the Constitution was held in abeyance pursuance to the Proclamation of Martial Law of the 5th day of July 1977. After the Proclamation, the Laws (Continuance in Force) Order, 1977 was promulgated which, *inter alia*, provided that the State shall be governed as nearly as may be possible in accordance with the provisions of the Constitution that has been held in abeyance. After that a number of President's Orders (P.Os) were issued. The Provisional Constitutional Order, 1981 was one such Order.

Nevertheless, both the above mentioned constitutional petitions were dismissed *in limine* considering the judgment given by the FSC in *Mujibur Rehman* case under article 203D a bar on the maintainability of the petitions. Intra court appeals (ICA) were filed without success against the orders in both the petitions. The appeal bench hearing the arguments against the order passed in constitutional petition No. 2309/84 made very important observations while disposing of the ICA. The bench did not consider the said judgment of the FSC under article 203D a bar on the maintainability of the petition. Rather, the bar of making inconsistent laws with the fundamental rights provided by the Constitution was considered non-existent at the time of the promulgation of the Ordinance and at the time of hearing the ICAs.

It was observed by the appeal bench that the Constitution of 1973 providing the fundamental rights is not enforced in its entirety. The Constitution had been held in abeyance by the Proclamation of the Martial Law of the 5th day of July 1977. While article 2(1) of the Laws (Continuance in Force) Order, 1977 provided that the State shall be governed as nearly as may be in accordance with the provisions of the Constitution subject to this Order or any other law made by the President or the CMLA. However, article 2(3) of the same Order suspended all the fundamental rights provided by the original scheme of the Constitution.

In pursuance to the above referred Proclamation and the Order, another Order called the Provisional Constitution Order, 1981 was promulgated by the President on 24 March 1981. This Order adopted certain provisions of the 1973 Constitution. But importantly no provision of the Constitution providing the fundamental rights was adopted. The effect of this all according to the appeal bench is that the fundamental rights still remain suspended. Thus, no law could be declared void on the sole ground that the same was inconsistent with the fundamental rights provided by the 1973 Constitution. The appeal bench, nonetheless, was pleased to observe that

had the fundamental rights been in force, the arguments of the appellants would have been worth examination. These observations of the appeal bench have been taken note of in the judgment of Shafiur Rehman J. in *Zaheeruddin* case[11].

The above part of the judgment is very significant. It clearly suggests that the High Courts and the Supreme Court are competent to determine the fundamental rights perspective of a law even if the Islamic perspective of the same has been determined under chapter 3A. Thus, each court has its own scope of jurisdiction and the exercise of jurisdiction by one court within its scope does not bar the other to exercise the jurisdiction within the scope of the other court.

Apart from the above discussed two constitutional petitions, another constitutional petition No. 2089/89 was filed in Lahore High Court under article 199. This petition challenged three different orders dated 20.03.1989, 21.03.1989 and 25.03.1989 passed by the Punjab Government, District Magistrate Jhang, and the Resident Magistrate, Rabwa respectively. The background of this petition is that in March 1989 the Ahmadis wanted to arrange centenary celebrations of their religion publically. This was likely to outrage the feelings of the Muslims and disturb the public peace and tranquility particularly in the presence of Sections 298B and 298C PPC on the book.

In order to avoid all this, the Home Secretary, Government of the Punjab banned the centenary celebrations of the Ahmadis throughout the Province of the Punjab by issuing an order dated 20.03.1989 in exercise of his powers under Section 144 Cr. PC. Similarly, the District Magistrate Jhang also exercised his powers under the last mentioned provision to ban a number of activities of the Ahmadis which were likely to create disorder in public peace and outrage the feelings of the Muslims in the district Jhang by issuing an order dated 21.03.1989. The said order was to last

[11] *Zaheeruddin and others versus the State,* 1993 SCMR 1718 [Supreme Court of Pakistan], 1740

till 25.03.1989. The Resident Magistrate, Rabwa extended the said orders on 25.03.1989 till further orders.

All the above orders were challenged being repugnant to article 20 of the Constitution which had been revived in 1985. The Lahore High Court dismissed the said constitutional petition No. 2089/89 mainly holding that article 20 does not provide absolute freedom of religion. Rather, this freedom is subject to law, public order and morality.

In all the above discussed cases, the jurisdiction of the High Court was directly invoked under article 199 of the Constitution. However, in the following cases the appellate and revisional jurisdiction of the High Court was invoked under the provisions of the Cr. PC. A number of criminal cases were registered against different persons by different complainants under Section 298C PPC. All such cases were registered in the police stations of Quetta city.

Interestingly, the allegations against the accused persons were very similar. It was alleged in different FIRs that the accused persons were wearing badges of *kalima Tayyaba* and on inquiry such persons posed themselves to be Muslims while, in fact, they were known to be Ahmadis. The act of wearing the badges and posing to be Muslims by Ahmadis constituted an offence under Section 298C PPC according to the FIRs. On trial all the accused persons were convicted under the said provision and were awarded different sentences by the trial courts.

All these convictions and sentences were challenged in the High Court invoking its appellate jurisdiction. Contrarily, the prosecution considered that the sentences awarded by the trail courts were insufficient and did not match the gravity of the offence. Consequently, revision petitions were filed in all cases in order to get the enhancement of the sentences. The High Court, however, maintained the decisions of the trail courts in all the cases and dismissed both the appeals as well as the revisions.

All the decisions of both the High Courts passed in above discussed three constitutional petitions as well as in criminal cases were challenged before the Supreme Court invoking its appellate jurisdiction under article 185. The Supreme Court disposed of all these cases by a consolidated judgment reported as *Zaheeruddin and others versus The State and others* (1993 SCMR 1718) [Supreme Court of Pakistan].

The most important point for determination before the Supreme Court in this case was the constitutionality of the Ordinance No. XX of 1984. The Supreme Court was asked to determine the fundamental rights perspective of the said Ordinance. It should be recalled that the FSC had already declared the same a valid law and the decision of the FSC had been maintained by the SAB. In these circumstances, another very vital question was whether the Supreme Court could exercise jurisdiction to determine the fundamental rights perspective of the Ordinance when its Islamic perspective had already been determined under chapter 3A.

The arguments presented before the Supreme Court were more or less similar to those advanced earlier before the High Courts. However, at the time of hearing of these cases before the Supreme Court in 1993 the Constitution was in force in its entirety. Thus, the fundamental rights test could be applied if there was not any other bar in the exercise of the jurisdiction by the Court.

One such bar was pointed out by Dr. Syed Riaz-ul-Hassan Gilani, Senior Advocate Supreme Court representing the Federal Government in this case. His contention was that the Ordinance No. XX had been directly challenged before the FSC in *Mujibur Rehman* case being repugnant to the injunctions of Islam and the fundamental rights[12]. In this case, the FSC had declared the said Ordinance a valid law. Similarly, the SAB in *Capt. Retd. Abdul Wajid* case while disposing of

[12] *Mujibur Rehman and 3 others versus Federal Government of Pakistan and another*, PLD 1985 FSC 8

the appeal against the decision of the FSC in *Mujibur Rehman* case upheld this Ordinance[13]. Therefore, in these factual circumstances the Supreme Court could not determine the vires of the said Ordinance otherwise. This argument was based on the authority of the decision of the Supreme Court in another case reported as *Mst. Aziz Begum and others versus Federation of Pakistan and others*[14]. The arguments of the senior counsel on this point as reported in *Zaheeruddin* case say that once the FSC had given its verdict and the same had not been modified in the appeal, the Supreme Court cannot review it any further[15].

This argument was not accepted by two members of the bench. The dissenting judges were Shafiur Rehman and Saleem Akhtar JJ. Both these judges decided the appeals on merits though each wrote his separate judgment. Shafiur Rehman J. allowed the appeals and set aside the convictions and sentences awarded under Section 298C PPC in various criminal cases while Saleem Akhtar J. allowed the appeals and remanded the same for retrial. It was held by these judges that certain restrictions such as the use of the terms Azan and Masjid for call to prayer and place of worship respectively could not be lawfully imposed. Similarly, the restriction to invite other people to accept Qadiani faith was unreasonable. Thus, such restrictions imposed by Sections 298B and 298C PPC inserted by Section 3 of Ordinance No. XX of 1984 were held to be inconsistent with the fundamental rights provided by various articles of the Constitution. To that extent these provisions were declared *ultra vires* of the Constitution being inconsistent with the fundamental rights hence void.

On the other hand, the majority of the judges accepted the arguments advanced by Syed Riaz-ul-Hassan Gilani. Rather, it was contended on behalf of the appellants that the finding of the FSC in

[13] *Capt. (Retd.) Abdul Wajid and 4 others versus Federal Government of Pakistan,* PLD 1988 Supreme Court 167 [Shariat Appellate Jurisdiction]
[14] *Mst. Aziz Begum and others versus Federation of Pakistan and others,* PLD 1990 Supreme Court 899
[15] *Zaheeruddin and others versus the State,* 1993 SCMR 1718 [Supreme Court of Pakistan], 1745

Mujibur Rehman case is of no consequence as far as this Court is concerned. This contention of the appellants was refuted by the majority. The majority judgment was authored by Abdul Qadeer Chaudhry J. and agreed by Muhammad Afzal Lone and Wali Muhammad Khan JJ. The judgment of the FSC in *Mujibur Rehman* case and that of the SAB in *Abdul Wajid* case were considered final authority on the issue. It was held that the judgment of the FSC is binding even on the Supreme Court if the same is either not challenged or challenged but maintained by the SAB. In this regard reference was made to the provisions of chapter 3A more particularly to articles 203A and 203G. Nonetheless, all the appeals were decided purely on merits. The merits of the appeals for the purposes of the present research are not important and thus not analysed here. What is important for us is whether the Supreme Court can exercise jurisdiction to decide the fundamental rights perspective of a law when the Islamic perspective of the same has been determined under chapter 3A. The findings of Abdul Qadeer Chaudhry J. in this respect are worth mentioning here when he opined that the findings of the FSC cannot be ignored[16].

As far the arguments of Syed Riaz-ul-Hassan Gilani are concerned, he based his arguments on the authority of *Mst. Aziz Begum* case. It is, therefore, considered expedient to analyse this case before analyzing the majority and minority views in *Zaheeruddin* case.

3.1 *Mst. Aziz Begum Case*

Mst. Aziz Begum case was decided by a full bench of the Supreme Court consisting of five judges on 02.06.1990[17]. All the judges were unanimous in their decision. Shafiur Rehman J. agreeing with other members preferred to give his separate reasons. In this case, a constitutional petition No. 1-R of 1988 under article 184(3), a couple of civil appeals and a number of civil review petitions were disposed of by a single judgment. Each of these cases is not desired to be

[16] Ibid, 1764

[17] *Mst. Aziz Begum and others versus Federation of Pakistan and others,* PLD 1990 Supreme Court 899

discussed here in detail. However, the constitutional petition under article 184(3) will be analysed after the analysis of the points desired to be evaluated in this case.

All these cases revolved around pre-emption matters. Even the relief claimed by the petitioner in the constitutional petition concerned the right of pre-emption. In particular the claims were based upon Sections 15 and 30 of the Punjab Pre-emption Act, 1913. The enforcement of these provisions after the judgment of the SAB in *Said Kamal Shah* case and the judgment of the Supreme Court in *Aziz Ahmad* case was also under consideration[18].

Various provisions of different laws dealing with the right of pre-emption were declared null and void being repugnant to the injunctions of Islam in *Said Kamal Shah* case by the SAB. The decision of the SAB was to take effect on 31.07.1986. Meanwhile, it was desired that a new law of pre-emption be enacted though no such law could be made within this time. This led to the placement of different interpretations on this judgment by different courts while disposing of pre-emption matters. Consequently an uncertainty in the application of the law of pre-emption was created.

In *Mst. Aziz Begum* case the appellants/petitioners approached the Supreme Court with the contention that their claims regarding pre-emption matters were rejected by relying upon certain cases placing interpretation on *Said Kamal Shah* case. These relied upon cases had been overruled in 1989 by the Supreme Court vide its judgment reported as *Ahmad versus Aziz Ahmad etc*. The effect of this overruling according to the appellants/petitioners is that their claims stand revived.

Given the uncertainty created by the judgment in *Said Kamal Shah case*, the Shariat Appellate Bench of the Supreme Court had initiated proceedings in a *suo moto* Shariat review petition and

[18] *Government of N.W.F.P. through Secretary, Law Department versus Malik Said Kamal Shah,* PLD 1986 Supreme Court 360 [Shariat Appellate Bench], *Ahmad versus Aziz Ahmad etc.,* PLD 1989 Supreme Court 771

gave a final judgment on 26.05.1990 in the said petition[19]. This judgment clarified that Sections 15 and 30 of the Punjab Pre-emption Act, 1913 have ceased to have effect in their entirety from 31.07.1986. Therefore, no pre-emption suit can be continued based on these provisions after the said date. However, if any pre-emption suit based on these provisions has been decreed before the said date, proceedings can continue in that case.

In the light of this judgment of the SAB, the Supreme Court held that the judgment given in *suo moto* Shariat review proceedings was a final verdict on the issue. It is in the light of this judgment of the SAB that the uncertainties created by the judgment in *Said Kamal Shah* case are to be settled and the pre-emption matters are required to be disposed of accordingly.

Faced with this position, the appellants/petitioners contended that the SAB had no jurisdiction to initiate *suo moto* Shariat review proceedings to clarify its earlier verdict given in *Said Kamal Shah* case. This argument, however, had already been responded in the said *suo moto* Shariat review petition. It had been held that the Shariat Appellate Bench of the Supreme Court is and remains a bench of the Supreme Court. Therefore, the SAB had jurisdiction to initiate *suo moto* Shariat review proceedings under article 188 of the Constitution as any other bench of the Supreme Court could exercise this jurisdiction.

In these circumstances, the Supreme Court dismissed the constitutional petition, both the appeals and all the review petitions. The Court was pleased to observe that the order of the SAB in *suo moto* Shariat review proceedings is an order passed by a court of competent jurisdiction. In the presence of such an order no court or tribunal including the Supreme Court can properly exercise any jurisdiction or power regarding any matter which is within the power or jurisdiction of the

[19] In *Re: Said Kamal Shah,* PLD 1990 Supreme Court 865

SAB. The Supreme Court, therefore, cannot enforce any claim or grant any relief that is based on the non-existent provisions[20].

On the basis of the above observation of the Supreme Court in *Mst. Aziz Begum* case, Syed Riaz-ul-Hassan Gilani formed the above discussed arguments in *Zaheeruddin* case. However, the analysis of the circumstances of *Mst. Aziz Begum* case and the above observation made therein reveal that the arguments of the leaned counsel are not well formed. Both the cases are distinguishable on facts as well as circumstances.

The fundamental rights jurisdiction is altogether a different jurisdiction. It should be noted that under the scheme of the Constitution, a law can only validly remain on the statute book if it passes two tests. One test is with respect to the fundamental rights while the other is with respect to the injunctions of Islam. Thus, a law must neither be inconsistent with the fundamental rights nor repugnant to the injunctions of Islam. Both these tests must be passed simultaneously but separately. It means that passing one test does not make the other test inapplicable. It is so because each test is to be applied by a distinct court exercising its own jurisdiction.

There is only one possibility that a law can still be a valid law even if it does not pass these tests or either of them. In such a case, the law must be given protection under clause 3 of article 8 to avoid the inconsistency with the fundamental rights test or it must be excluded from the definition of law as provided in article 203B(c) to avoid the test of repugnancy with the injunctions of Islam. Here comes the application of articles 189 and 203GG of the Constitution and the same is analysed after concluding *Zaheeruddin* case.

In *Zaheeruddin* case the impugned Ordinance having been declared a valid law by the FSC and maintained by the SAB was challenged being inconsistent with the fundamental rights. It means the Ordinance had successfully passed one test but was still to pass the other. In these

[20] *Mst. Aziz Begum and others versus Federation of Pakistan and others,* PLD 1990 Supreme Court 899, 909

circumstances, the judgment of the FSC and the SAB cannot bind the Supreme Court sitting in other jurisdiction. On the other hand, in *Aziz Begum* case the provisions of the pre-emption law did not pass the test of repugnancy with the injunctions of Islam and thus failed at this stage. These provisions, therefore, could not be enforced.

Finally, before reverting to *Zaheeruddin* case, the constitutional petition No. 1-R of 1988 is analysed briefly. In this petition, the petitioners claimed that they have a fundamental right to get their pending cases decided in accordance with the provisions of Section 15 of the Punjab Pre-emption Act, 1913. This fundamental right is based on article 25 providing equal protection of law to all the citizens. However, the above analysis shows that in 1988 Section 15 of the said Act had ceased to have effect. Therefore, leaving apart other requirements of article 184(3), the relief claimed by the petitioners could not be provided to them. Consequently, the fate of the said petition was not different from other cases.

In the following lines, the majority and minority opinions in *Zaheeruddin* case and the exercise of jurisdiction by the FSC in *Mujibur Rehman* case with respect to the fundamental rights discussed above are analysed. A thorough reading of *Mujibur Rehman* case reveals that the FSC not only applied the repugnancy test of the injunctions of Islam on the provisions of the impugned Ordinance but also the inconsistency test of the fundamental rights. At pages 120 to 122 of the judgment the impugned Ordinance was evaluated in the light of article 20 of the Constitution. In this regard, the FSC held that the impugned Ordinance is covered by the exception provided in this article with respect to maintenance of public order and law. To this extent, the FSC erred in giving its judgment. It is well known that the FSC does not enjoy jurisdiction to determine the fate of a law on the touch stone of the fundamental rights. This jurisdiction is enjoyed by a High Court and the Supreme Court under articles 199 and 184(3)

respectively. It leads to the obvious conclusion that the last mentioned courts can exercise jurisdiction to apply the fundamental rights test even where the FSC or the SAB has already applied the repugnancy test of the injunctions of Islam. That is why Shafiur Rehman J. had to say that the respondents mainly argued their case on a wrong assumption. They could not differentiate between the forums of attack on the Ordinance. The forum for the vires of the Ordinance with respect to the injunctions of Islam is the FSC where the case is to be argued in the light of the injunctions of Islam and not in that of the fundamental rights. While in the present case the forum for the vires of the Ordinance with respect to the fundamental rights is the Supreme Court where the case is to be argued in the light of the fundamental rights and not in that of the injunctions of Islam[21].

The majority opinion seems to have considered this point too. It is perhaps for this reason that the majority opinion was by and large based on pure merits of the case.

4. Conclusion

It should be noted that article 203G does not create any obstacle in the exercise of jurisdiction by the Supreme Court under article 184(3) of the Constitution. Because the bar created by article 203G on the exercise of jurisdiction by the Supreme Court or a High Court is limited to matters within the power or jurisdiction of the FSC. This provision, therefore, implies that the Supreme Court or a High Court are barred from exercising jurisdiction to determine the vires of a law on the touch stone of the injunctions of Islam. On the other hand, the FSC, as is known, has not been vested with the jurisdiction to decide the vires of a law on the touch stone of the fundamental rights under any legal or constitutional provision. Hence, it is misapprehended that article 203G on its own creates a legal obstacle in the exercise of jurisdiction by the Supreme

[21] *Zaheeruddin and others versus the State*, 1993 SCMR 1718 [Supreme Court of Pakistan], 1756

Court under article 184(3). In fact, this issue came to surface because of the above analysed observations made by Abdul Qadeer Chaudhry J. in *Zaheeruddin* case.

As far as article 203GG is concerned, its application is that the decision of the FSC is binding on all courts to the extent it determines the vires of a law on the touch stone of Islamic injunctions. Thus, where the FSC determines that a certain law is repugnant to the injunctions of Islam hence void, its decision will be binding on all courts. No court including the Supreme Court or a High Court will have jurisdiction to enforce the provisions of that particular law because that law will cease to have effect as soon as the decision of the FSC takes effect. Moreover, the fundamental rights perspective of that law need not be determined since it has failed to pass the first test so the second test need not be applied. It should be noted, however, that it is true only where the exercise of jurisdiction is proper[22].

On the other hand, if the FSC declares a particular law not to be repugnant to the Islamic injunctions, the decision of the FSC will still be binding. However, the effect of this binding decision will be different from the one discussed in the above paragraph. In this case, the law has successfully passed the first test; therefore, neither the Supreme Court nor a High Court will have jurisdiction to declare that law void being repugnant to the injunctions of Islam. However, the other test i.e. the fundamental rights test still remains to be applied. In case, that law fails the second test, it will cease to have effect being *ultra vires* of the Constitution. In this case, the decision of the court will be binding on the FSC pursuance to article 201 or article 189 as the case may be.

The above analysis may suggest that the two tests prescribed for the validity of a law are of equal force. It is correct to a certain extent but it is not the whole truth. There is a very fine difference

[22] Proper exercise of jurisdiction in the present context means that the FSC has determined the vires of a law which has not been excluded from the definition of law under article 203B(c).

between these two tests. This difference pertains to the difference in the powers, functions and jurisdiction of the courts applying these tests[23].

The Supreme Court applying the fundamental rights test has twofold jurisdiction under article 184(3). One aspect of this jurisdiction is the power of the Court to declare a law void being repugnant to the fundamental rights. The other aspect of this jurisdiction is that the Court can redress the violations of the fundamental rights provided by the Constitution and enforce the same. Moreover, being the apex court and the guardian of the Constitution, the ultimate right of interpretation of a constitutional provision rests with the Supreme Court. Thus, the Supreme Court cannot allow rendering a constitutional provision redundant.

The FSC, on the other hand, applying the Islamic injunctions test is vested with jurisdiction under article 203D only to determine the vires of a law on the touch stone of the injunctions of Islam. Nowhere in the Constitution is provided a set of Islamic injunctions to be enforced by the FSC. Likewise, article 203B(c) excludes the Constitution from the definition of law in respect of which the FSC has to exercise all its powers and jurisdiction.

What follows from the above discussion and analysis is that a law declared void by the Supreme Court under article 184(3) being inconsistent with the fundamental rights cannot be upheld by the FSC or the SAB under chapter 3A in any case. On the contrary, a law declared void by the FSC under article 203D or by the SAB under article 203F being repugnant to the injunctions of Islam can still be upheld by the Supreme Court if the following conditions are present:

i. The FSC or the SAB has exercised jurisdiction under article 203D or 203F respectively with respect to a law not covered by the definition of law as provided in article 203B(c).

[23] The fundamental rights test can be applied by the Supreme Court as well as a High Court. Nonetheless, in the context of present research the analysis is restricted only to the jurisdiction of the Supreme Court.

ii. The exercise of jurisdiction by the FSC or the SAB has made one or more articles of the Constitution redundant.

iii. The law in respect of which jurisdiction has been exercised is essentially required for the enforcement of the fundamental rights.

In the above circumstances, the decision of the FSC or the SAB will amount to *coram non judice* and to have been taken without jurisdiction thus per *incuriam*. Consequently, the Supreme Court will be fully entitled to exercise jurisdiction to set aside the effects of the judgment of the FSC or the SAB and make the entire provisions of the Constitution effective. Similarly, the other requirements of article 184(3) are also satisfied in the above circumstances. The promulgation of a law essentially required for the enforcement of the fundamental rights clearly suggests that the matter involves questions of public importance related to the enforcement of the fundamental rights.