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Sacred Semantics, Secular Substance: Article 184(3), *Suo Moto*, and the Expansion of Original Jurisdiction in Pakistan

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"The Constitution of Pakistan has yet to be framed by the Pakistan Constituent Assembly. I do not know what the ultimate shape of this Constitution is going to be, but I am sure that it will be of a democratic type, embodying the essential principles of Islam. Today, they are as applicable in actual life as they were 1,300 years ago."

– Muhammad Ali Jinnah[1]

"All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah . . . and no law shall be enacted which is repugnant to such Injunctions."

– The Constitution of the Islamic Republic of Pakistan[2]

"The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

– Justice Oliver Wendell Holmes, Jr.[3]

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1. Muhammad Ali Jinnah, *Pakistan and Her People–II*, *in* Jinnah, Speeches and Statements 1947–1948 123, 125 (2000).

2. Pakistan Const. art. 227.

3. Oliver Wendell Holmes, *Early Forms of Liability*, *in* The Common Law 3, 3 (Belknap Press of Harv. Univ. Press 2009) (1881).

Unlike the Supreme Court of the United States, the Supreme Court of Pakistan sees a significant proportion of its workload come from its original jurisdiction—the power to hear a case at its inception rather than on appeal. The Constitution of Pakistan empowers the judiciary to use this original jurisdiction to align the country's laws with religious principles. However, the judges of the Supreme Court, typically trained in the English common law tradition and shaped by the country's secular legal culture, lack the Islamic legal education and institutional will necessary to engage with substantive religious law. This tension highlights a recurring paradox in Pakistan's modern history: The difficulty of harmonizing its de facto secularized institutions with its constitutional aspiration of fusing modernity and religion.

This Note begins by outlining the Supreme Court of Pakistan's original jurisdiction powers and the evolution of its judge-made suo moto *authority. As background for the American reader, it then conducts a comparative analysis of Article III original jurisdiction jurisprudence in the United States. Lastly, it explores the extent to which the Supreme Court of Pakistan used religious rhetoric in gradually expanding its original jurisdiction powers during a critical period in the 1990s. It argues that—in contradiction to the existing scholarly literature on the topic—a close reading of the relevant opinions reveals that substantive, religiously inspired legal analysis was marginal, infrequent, surface-level, solely rhetorical, and never quite outcome-determinative. It finds that while it utilized religious language, the Supreme Court of Pakistan's substantive legal reasoning remained grounded in secular constitutional principles, echoing developments in countries like the United States and India.*

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Introduction

Over the summer break of the 1998 term, the Chief Justice of Pakistan, Muhammad Afzal Zullah, received a highly unusual telegram: an impassioned plea from bonded brick kiln workers belonging to the country's minority Christian community.[4] They were petitioning the Supreme Court for assistance in escaping a vicious cycle of debt entrapment and forced labor.[5] Chief Justice Afzal Zullah took the unprecedented step of admitting the telegram as a constitutional petition under Article 184(3) of the Constitution, invoking the Court's *suo moto* ("on its own motion")[6] powers to bypass procedural barriers.[7] He declared in his opinion that constitutional rights could be elucidated by principles "ensured . . . as basic human rights in Islam."[8] He insisted that "[t]here is no bar in the Constitution to the inclusion in such laws of . . . rights" derived from Islam, seemingly presaging a substantive engagement with religious law in the rest of the opinion.[9] Yet, the rest of the judgment relied entirely on existing constitutional provisions, with this brief cameo for Islam quickly overshadowed by the dispositive secular reasoning.

4. Darshan Masih v. State, (1990) 42 PLD (SC) 513, 519 (Pak.) ("On 30th July, 1988 during the long summer vacations the following telegram was received by the Honourable Chief Justice of Supreme Court . . . ").

5. *Id.* ("[W]e are brick kiln bonded labourers. We have been set at liberty through the Court. And now three amongst us have been abducted by our owners. Our children and women are living in danger . . . . The law gives no protection to us.").

6. American case law uses the comparable terminology of *sua sponte* ("on its own accord") or *nostra sponte* ("of our own accord"). In the American paradigm, however, the Case or Controversy Clause of Article III of the U.S. Constitution requires the existence of an aggrieved party petitioning the tribunal. *See* U.S. Const. art. III, § 2, cl. 1.

7. *Darshan Masih*, 42 PLD at 514 ("True a telegram has never been earlier made the basis by the Supreme Court of Pakistan for action, as in the present case; but, there is ample support in the Constitution for the same . . . . The question of procedural nature relating to the entertainment of proceedings and/or cognizance of a case under [Article 184(3)], have been dealt with in the case of Miss Benazir Bhutto (PLD 1988 SC 416). The acceptance of a telegram in this case is covered by the said authority as also by the due extension of the principles laid therein.") (internal quotation marks omitted).

8. *Id.* at 515.

9. *Id.*

The *Darshan Masih* case illustrates a broader paradox in Pakistan's judicial system. If we were to ignore Justice Holmes' warning, the "axioms and corollaries" of the 1973 Constitution of the Islamic Republic of Pakistan might make it appear as though Pakistan was destined to seamlessly integrate Islamic principles with democratic governance, its secular English common law inheritance with the fourteen-century-old Islamic faith of the vast majority of its citizens.[10] As Justice Holmes might have predicted, however, the nation's lived experience has proven markedly different.[11] In place of such a synthesized tradition, secular constitutional frameworks and precedents have been the driving force behind the practical functioning of Pakistan's judiciary and the vehicles for its jurisprudential shifts, shaped by the country's colonial legal heritage and the influence of neighboring India. This Note traces one manifestation of a recurring tension between Pakistan's constitutional aspirations to forge a synthesis between modernity and religious law and the secularized practices embedded in its legal system. This Note begins by analyzing in Part I the grant of original jurisdiction in the Constitution of the Islamic Republic of Pakistan and the evolution of its judge-made *suo moto* powers over the six decades since. As background for the American reader, Part II then delineates the alternative path traced by Article III original jurisdiction jurisprudence in the United States, characterized by its highly restrained invocation. The Note concludes in Part III with an in-depth study of the appeals to religion to expand the arena for original jurisdiction-based Public Interest Litigation[12] in Pakistan throughout the 1990s. It argues that, while religion was occasionally used as a rhetorical device to legitimate judicial activism, the enlargement of original jurisdiction authority during this period was largely driven by secular constitutional reasoning, mirroring patterns seen in neighboring India and resembling potential paths in secular systems like the United States. Through a study of twelve cases decided between 1990 and 1998, this Note demonstrates that the scholarly literature mischaracterizes this period as bringing about an "Islamisation of the legal and judicial discourse" in Pakistan. [13] Instead, these opinions reveal the role of Islamic legal reasoning to have been marginal, infrequent, surface-level, solely rhetorical, and never quite outcome-determinative. This suggests a gap between constitutional commitments to Islamic law and judicial

10. *See, e.g.*, Martin Lau, *Introduction to the Pakistani Legal System, with Special Reference to the Law of Contract*, 1 Y.B. Islamic & Middle E. L. 3, 3 (1994) [hereinafter *Introduction*].

11. *See* Holmes, *supra* note 3, at 3.

12. "Public Interest Litigation" refers to a unique form of legal action initiated to advance the rights or interests of marginalized groups in Pakistan and India, taking inspiration from 1960s civil rights litigation in the United States. *See, e.g.*, Maryam S. Khan, *Genesis and Evolution of Public Interest Litigation in the Supreme Court of Pakistan: Toward a Dynamic Theory of Judicialization*, 28 Temp. Int'l & Comp. L.J. 285, 285 (2014) [hereinafter *Genesis and Evolution*].

13. Martin Lau, The Role of Islam in the Legal System of Pakistan 98 (2006).

practice, echoing broader debates—such as those raised by Professor Intisar Rabb—about how courts in Muslim-majority countries navigate religious and secular legal principles.[14]

I. Original Jurisdiction in Pakistan

This Part of the Note outlines the constitutional grant of power undergirding Pakistan's expansive use of original jurisdiction, as well as the landmark cases that have helped to usher this model into vogue. The modern Supreme Court of Pakistan's approach to original jurisdiction—the power to hear a case at its inception rather than on appeal—follows the interventionist model of other South Asian judiciaries.[15] Comparatively greater proportions of the Supreme Court's workload over the last several decades have come in the form of original jurisdiction cases, often initiated via the *suo moto* ("on its own motion") powers of the Chief Justice and without petition from any party claiming standing.[16] These powers stem from the Court's expansive interpretation of the original jurisdiction granted it by Article 184(3) of the Constitution of the Islamic Republic of Pakistan, as well as the gradual broadening of the *suo moto* powers it has read into Article 184(3).[17]

Much of modern Pakistani jurisprudence stems from some combination of its English common-law heritage and influences from next door in India—which, in turn, find their roots in the common law.[18] Articles 32 and 226 of the Indian Constitution explicitly vested India's Supreme Court and High Courts with an original jurisdiction in 1950.[19] Relying on this jurisdiction, Indian courts soon innovated the distinctively South Asian concept of *suo moto* authority, or a

14. Professor Intisar Rabb has categorized Pakistan as an example of "coordinate" constitutionalization in her typology of "dominant," "delegate," and "coordinate" constitutionalizing. *See* discussion *infra* Part III; *see, e.g.*, Intisar Rabb, *The Least Religious Branch? Judicial Review and the New Islamic Constitutionalism*, 17 UCLA J. Int'l L. & Foreign Affs. 75, 77 (2013) [hereinafter *The Least Religious Branch*]; Intisar Rabb, *"We the Jurists": Islamic Constitutionalism in Iraq*, 10 U. Pa. J. Const. L. 527, 531 (2008) [hereinafter *"We The Jurists"*].

15. *See* Khan, *Genesis and Evolution*, *supra* note 12, at 285; Mohammad Nadeem et al., *Original Jurisdiction of the Supreme Court of Pakistan Article 184(3) of the Constitution of Pakistan, 1973*, 3 J. Soc. Scis. Rev. 1054, 1057 (2023).

16. *See* Shayan Manzar, *A Concoction of Powers: The Jurisprudential Development of Article 184(3) & Its Procedural Requirements*, Lahore Univ. Mgmt. Scis. L.J. 2021, at 1, 15. American case law uses the comparable terminology of *sua sponte* ("on its own accord") or *nostra sponte* ("of our own accord"). Within the lifespan of a case, *sua sponte* motions are not uncommon and are often used for various procedural purposes. Nevertheless, the Case or Controversy Clause of Article III of the U.S. Constitution ensures that American courts cannot take up entire cases without the existence of an aggrieved party petitioning the tribunal. *See* U.S. Const. art. III, § 2, cl. 1.

17. *See* Khan, *Genesis and Evolution*, *supra* note 12, at 294; *see also* Nadeem et al., *supra* note 15, at 1059.

18. *See, e.g.*, Lau, *Introduction*, *supra* note 10, at 3.

19. India Const. arts. 32, 226.

court's power to decide on matters or even begin proceedings without the existence of adverse parties or a "case or controversy."[20] The Indian judiciary was also fortified by other constitutional provisions—for instance, Article 142 empowered the Supreme Court to pass any order necessary "for doing complete justice in any cause or matter pending before it."[21] The cumulative effect of these clauses was to vastly expand Indian courts' authority beyond what they had enjoyed prior to 1950. In recent decades, India's Supreme Court has embraced original jurisdiction-based judicial activism to an even greater extent, taking on matters such as air pollution in Delhi in the 1990s and early 2000s[22] and COVID-19 measures over the last three years.[23]

Pakistan has followed suit. The country won its independence from Great Britain in 1947.[24] Over the subsequent quarter century, the supreme law of the land first consisted of the colonial-era Government of India Act of 1935, followed by two short-lived constitutions.[25] The first of these, the 1956 Constitution, contained both an original jurisdiction-related provision allowing for any person to move the Supreme Court for the enforcement of enumerated fundamental rights, with much of the text seemingly lifted from Article 32 of the Indian Constitution of 1950, and a separate and explicit grant of original jurisdiction for disputes between state and federal governments in Pakistan.[26] About two decades later, the 1973 Constitution brought about sweeping changes and ultimately gave Pakistan the form of parliamentary democracy that exists in the country today.[27] Importantly for the purposes of this Note, the 1973 Constitution expanded on the 1956 Constitution's original jurisdiction provisions via the introduction of Article 184. In particular, Article 184(3) articulated the original jurisdiction framework frequently applied in cases over the subsequent decades:

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20. *See generally* Archisman Chakraborty, *Writ Jurisdiction of the Supreme Court*, 2 Jus Corpus L. J. 935 (2022).

21. India Const. art. 142. Note that Article 187(1) of the Pakistani Constitution tracks the language of the clause in the Indian Constitution, stating that "[the] Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it." Pakistan Const. art. 187, cl. 1.

22. *See, e.g.*, M.C. Mehta v. Union of India, AIR 1988 SC 1037 (India). *See generally* Geetanjoy Sahu, *Implications of Indian Supreme Court's Innovations for Environmental Jurisprudence*, L. Env't & Dev. J., 2008, at 1.

23. *See, e.g.*, In re: Cognizance for Extension of Limitation, Suo Motu Writ Petition No. 3 of 2020, (2020) 19 SCC 10 (India).

24. *See, e.g.*, Ayesha Jalal, The Struggle for Pakistan: A Muslim Homeland and Global Politics 36–39 (2014) (outlining series of events in 1947 that led to Pakistan's eventual independence).

25. *See, e.g.*, *id.* at 147.

26. Nadeem et al., *supra* note 15, at 1057.

27. Jalal, *supra* note 24, at 191–98 (outlining considerations that influenced various aspects of the 1973 Constitution).

(1) The Supreme Court shall, to the exclusion of every other court, have original jurisdiction in any dispute between any two or more Governments.[28]
(2) In the exercise of the jurisdiction conferred on it by clause (1), the Supreme Court shall pronounce declaratory judgements only.
(3) Without prejudice to the provisions of Article 199, *the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the fundamental rights conferred by chapter 1 of part II is involved, have the power to make an order* of the nature mentioned in the previous article.[29]

The text of Article 184(1) is typical of the scope of apex court original jurisdiction clauses in constitutions around the world.[30] However, Article 184(3) went beyond the American model by granting the Supreme Court the power to hear in the first instance any case concerning "question[s] of public importance" and "fundamental rights."[31]

While the text of Article 184(3) itself does not refer to the Court's power to act on its own, it has been read in by the case law delineated below.[32] Pakistani constitutional case law, following the lead of India, has long interpreted Article 184(3) as granting the Chief Justice *suo moto* powers, meaning that Article 184(3) cases can be litigated without assent from the parties and without any entity having to fulfill standing requirements.[33]

Article 184(3) was infrequently used in the early years. In 1975, the seminal *Manzoor Elahi v. Federation of Pakistan* decision tracked the language of the

28. Article 184(1) here refers to the various levels of governance existing in Pakistani federalism, comprising of both the central federal government and distinct bodies for each of the provinces.

29. Pakistan Const. art. 184, cl. 1–3 (emphasis added).

30. *See* discussion *infra* Part II; U.S. Const. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

31. Pakistan Const. art. 184, cl. 3.

32. Note that the Constitution's sole mention of *suo moto* powers concerns the Federal Shariat Court in a passage that was amended into the Constitution through a 1982 presidential order: "The Court may . . . *of its own motion* . . . examine and decide the question whether or not any law or provision of law is repugnant to the Injunctions of Islam, as laid down in the Holy Quran and the Sunnah of the Holy Prophet." Pakistan Const. art. 203D, cl. 1 (emphasis added); *see also* Manzar, *supra* note 16, at 8; Khan, *Genesis and Evolution*, *supra* note 12, at 285 n.47. This Note does not delve into decisions of the Federal Shariat Court or the Shariat Appellate Bench of the Supreme Court. While these institutions engage in more comprehensive religious legal reasoning than the regular benches of the Supreme Court, the latter hear cases much more frequently and have an exponentially greater impact on the Pakistani judiciary than the country's rarely used Shariat courts.

33. Manzar, *supra* note 16, at 15; *see also* the explanation of comparable terminology in American case law (*sua sponte* or *nostra sponte*) in *supra* note 6 and note 16.

constitutional provision to establish a two-part test for determining whether the Supreme Court could indeed exercise first-instance authority.[34] This framework required that the matter brought before the Supreme Court (1) be of public importance and (2) concern the enforcement of a fundamental right of a type stated in Article 184(3)—in other words, a fundamental right "conferred by chapter 1 of part II" of the Constitution.[35]

Many unsettled questions remained. Subsequent case law dealt with party standing requirements and considered whether the "fundamental right" prong was to be limited to violations of individual rights.[36] Many of the outstanding issues were resolved in 1988 through Prime Minister Benazir Bhutto's challenges to constitutional amendments enacted under General Zia-ul-Haq's martial rule.[37] In *Benazir Bhutto*, the Supreme Court widened its interpretation of Article 184(3) and ruled that parties bringing Article 184(3) lawsuits did not need to fulfill standing requirements when the case was one of public importance under the Supreme Court's original jurisdiction; *Benazir Bhutto* even opened the door to courts moving to remedy violations they anticipated would occur in the future.[38] Additionally, the Court expanded the scope of Article 184(3) protections to encompass not only individual rights but also the rights of groups and classes of people.[39] Lastly, it widened the ambit of fundamental rights by incorporating Article 2A, which affirms Pakistan's commitment to Islam, democracy, and fundamental rights, and the Chapter on Principles of Policy, which outlines the state's aspirational socio-economic and governance goals, into the step two process of determining whether a fundamental right was implicated.[40] This jurisprudential evolution, too, followed on the heels of similar developments in India.[41]

Then, in its 1990 *Darshan Masih* decision, the Court arrogated to itself the ability to consider matters without even the filing of a case.[42] The Chief Justice

34. (1975) 27 PLD (SC) 66 (Pak.); *see also* Manzar, *supra* note 16, at 12; Khan, *Genesis and Evolution*, *supra* note 12, at 344–45.

35. PAKISTAN CONST. art. 184, cl. 3. Articles 8 through 28 in Chapter 1 of Part II of the Constitution of Pakistan, mentioned here, enumerate all fundamental rights provided to the citizens of Pakistan. Article 184(3) refers explicitly only to these articles. *See* PAKISTAN CONST. arts. 8–28.

36. Ummar Ziauddin, *Judicialisation of Politics: 184(3) Constitution of Pakistan*, U. COLL. LAHORE HUM. RTS. REV., https://humanrightsreviewpakistan.wordpress.com/home/volume-i/judicialisation-of-politics-1843-constitution-of-pakistan/ [https://perma.cc/7LBW-CFYX] (last visited Mar. 2, 2025).

37. *See generally* Benazir Bhutto v. Federation of Pakistan, (1988) 40 PLD (SC) 416.

38. *Id.* at 421.

39. *Id.* at 419.

40. *Id.* at 420.

41. *See, e.g.*, *generally* Bandhua Mukti Morcha v. Union of India, AIR 1984 SC 802 (1983) (India); Mukesh Advani v. State of Madhya Pradesh, AIR 1985 SC 1363 (India).

42. *Darshan Masih*, 42 PLD at 513.

now had the power to initiate proceedings, direct police investigations, and subpoena implicated parties solely on the basis of information he received, even if it was from sources like letters written to the Court (*i.e.*, the "epistolary" jurisdiction pioneered in India) or media and newspaper reports.[43] These developments led to a much greater proportion of the Supreme Court's docket emerging from Article 184(3) cases.[44]

Darshan Masih vastly changed the scope of original jurisdiction jurisprudence in Pakistan. The Supreme Court, sitting as the court of first instance, has since authored decisions on a wide variety of topics, ranging from anticorruption[45] and public accountability,[46] to the protection of marginalized groups and women,[47] to environmental rights,[48] to the provision of basic necessities.[49] Given the aforementioned pathways by which these cases come to the docket and their tendency to be related to social justice, Article 184(3), original jurisdiction, and *suo moto* have all come to be associated with pro-poor Public Interest Litigation,[50] a label inspired by the synonymous legal movement in the United States in the 1960s.[51] Scholars who have used this term for the court's original docket have characterized it as a unique opportunity for the impoverished to gain access to the judicial system.[52] In particular, Dr. Maryam Khan has authored an extensive account of the "iterative process building up" Public Interest Litigation and how the country's contemporary judicial activism arises from a historical oscillation between judicial boldness and retreat.[53]

However, as Khan and others have discussed, such expansive use of original jurisdiction has also occasionally engendered abuses of power and threatened the country's separation-of-powers system.[54] The past two decades have been

43. *See id.; see also* Mehwish Batool, *Exploring the Legal Framework of Public Interest Litigation in Pakistan*, Paradigm Shift (Mar. 21, 2023), https://www.paradigmshift.com.pk/public-interest-litigation-in-pakistan [https://perma.cc/QU4V-2UY5].

44. Manzar, *supra* note 16, at 14–18.

45. Syed Mubashir Raza Jafri v. Employees Old Age Benefit Institutions, (2014) 47 SCMR (SC) 949, 954–79 (Pak.).

46. Anjum Aqeel Khan v. National Police Foundation, (2015) 48 SCMR (SC) 1348, 1352–73 (Pak.).

47. Batool, *supra* note 43.

48. Lahore Bachao Tehrik v. Iqbal Muhammad Chauhan, (2015) 48 SCMR (SC) 1520, 1525–44 (Pak.).

49. Shahab Usto v. Government of Sindh, (2017) 50 SCMR (SC) 732, 738–97 (Pak.).

50. *See generally* Mansoor Hassan Khan, Public interest Litigation: Growth of the Concept and its Meaning in Pakistan (1993) [hereinafter Public Interest Litigation].

51. *Id.* at 3.

52. Shyami Fernando Puvimanasinghe, *Towards a Jurisprudence of Sustainable Development in South Asia: Litigation in the Public Interest*, 10 Sustainable Dev. L. & Pol'y 41, 41 (2009); *see also* Khan, Public Interest Litigation, *supra* note 50, at 3; Khan, *Genesis and Evolution*, *supra* note 12, at 285.

53. Khan, *Genesis and Evolution*, *supra* note 12, at 290.

54. *See generally* Khan, *Genesis and Evolution*, *supra* note 12; Manzar, *supra* note 16.

witness to an unprecedented augmentation of the court's original docket, primarily because of the "hyper-activism" of two Pakistani Supreme Court Chief Justices—Chief Justice Iftikhar Muhammad Chaudhry and Chief Justice Mian Saqib Nisar.[55] On the back of the jurisprudential evolution outlined later in this Note, the Chaudhry and Nisar Courts expanded the original docket to encompass hundreds of cases[56] and issued interventionist decisions on arguably political questions like population control and dam construction.[57] In recent years, this abuse of original jurisdiction authority has been widely criticized by a wide variety of jurists, judges, and politicians. In one recent and memorable example of the zeitgeist against judicial activism in the country, Justice Syed Mansoor Ali Shah penned a dissent in *Poll Date of KP & Punjab* decrying the "one-man show" resulting from a concentration of *suo moto* power in the office of the Chief Justice.[58]

While this critical attitude among the court's senior justices suggested it would seek to be more restrained, legislative developments have since taken the matter out of the hands of the judiciary. In recent months, Article 184(3) emerged as an explicit target for statutory amendment by the country's legislature amid criticisms of the breadth of the Chief Justice's *suo moto* powers.[59] Last year, the Pakistani legislatures passed the highly controversial Twenty-Sixth Constitutional Amendment Bill on October 21, 2024, entirely remaking the balance of power between the judicial and legislative branches of government and arrogating much greater authority to Parliament.[60] Relevant here is the fact that the Amendment ordered the wholesale elimination of *suo moto* authority

55. Khan, *Genesis and Evolution*, *supra* note 12, at 285; *see* Declan Walsh, *Pakistan's Chief Justice Leaves a Mixed Legacy*, N.Y. Times (Dec. 13, 2013), https://www.nytimes.com/2013/12/14/world/asia/pakistans-chief-justice-leaves-a-mixed-legacy.html [https://perma.cc/5FZ9-YAK7]; *Pakistan's Top Court Is Eager to Take on Any Brief*, Economist (Mar. 28, 2018), https://www.economist.com/asia/2018/03/28/pakistans-top-court-is-eager-to-take-on-any-brief [https://perma.cc/YNF9-8J7Y]. Given that these cases were often disposed of through continuing mandamus, many continue to clutter the court's docket despite the retirement of these two Chief Justices long ago.

56. Khan, *Genesis and Evolution*, *supra* note 12, at 285.

57. *See* Manzar, *supra* note 16, at 22–23; Nadeem et al., *supra* note 15, at 1061–62.

58. *See* Hasnaat Malik, *Dissenting Judges Urge SC to Revisit CJP's 'One-Man Show'*, Express Trib. (Mar. 27, 2023), https://tribune.com.pk/story/2408420/dissenting-judges-urge-sc-to-revisit-cjps-one-man-show [https://perma.cc/HRS6-9DJF].

59. *See, e.g.*, Nadir Guramani & Umer Mehtab, *President Zardari Signs off on Changes to SC (Practice and Procedure) Act, 2023*, Dawn (Sep. 20, 2024), https://www.dawn.com/news/1860024 [https://perma.cc/3DES-QW7Z].

60. *See, e.g.*, *Pakistan: 26th Constitutional Amendment is a Blow to the Independence of the Judiciary*, Int'l Comm'n Jurists (Oct. 21, 2024), https://www.icj.org/pakistan-26th-constitutional-amendment-is-a-blow-to-the-independence-of-the-judiciary/ [https://perma.cc/YJE3-VLK9] (statement from the International Commission of Jurists criticizing the constitutional amendment).

from the Chief Justice's toolbox.[61] It remains to be seen whether Pakistan's top judges will attempt to strike down the Amendment.

This Part introduced how the Supreme Court of Pakistan has interpreted and slowly expanded its grant of original jurisdiction powers. As background for the American reader and to provide an example of a much more modest system of original jurisdiction, the next Part briefly outlines the Supreme Court of the United States' Article III original jurisdiction jurisprudence.

II. Original Jurisdiction in the United States

While Pakistan's Supreme Court model of original jurisdiction expanded very quickly and has now claimed authority over a broad array of cases for its original docket, the Supreme Court of the United States has long taken a more restrained approach under Article III.[62] It may be jarring to American readers today, but the notion of an apex constitutional court possessing original jurisdiction was first articulated in the United States Constitution in 1787.[63] Article III enumerates the kinds of cases that the Supreme Court of the United States could hear in the first instance—without having to wait for a case or controversy to rise up on appeal from state supreme courts or inferior federal tribunals:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[64]

61. Note that much confusion still exists regarding the current status of *suo moto* and the possibility of judge-initiated proceedings by the Supreme Court's newly constituted constitutional bench under the auspices of the Twenty-Sixth Amendment. It appears that the apex court judges intend to preserve a narrower form of *suo moto* authority via the constitutional bench. *See, e.g.*, *Constitutional Bench Can Also Take Suo Motu Notice: SC Judge*, Express Trib. (Nov. 15, 2024), https://tribune.com.pk/story/2509775/constitutional-bench-can-also-take-suo-motu-notice-sc-judge [https://perma.cc/FZ4L-72WK]; Pakistan Const. art. 184, cl. 3 ("In the Constitution, in Article 184, in clause (3), for full stop at the end, a colon shall be substituted and thereafter the following proviso shall be added, namely:—Provided that the Supreme Court shall not make an order or give direction or make a declaration on its own or in the nature of *suo motu* exercise of jurisdiction beyond the contents of any application filed under this clause."). *See generally What is the 26th Constitutional Amendment?*, Dawn (Oct. 20, 2024), https://www.dawn.com/news/1866480 [https://perma.cc/943R-2B7J].

62. *See* discussion *supra* Part I.

63. *See, e.g.*, *The Original Jurisdiction of the United States Supreme Court*, 11 Stan. L. Rev. 665, 665 (1959) [hereinafter *Original Jurisdiction*].

64. U.S. Const. art. III, § 2, cl. 2.

The Framers famously spent very little time debating the provisions in Article III.[65] Their hurried decision to grant this nascent third branch of government original jurisdiction seems to have been motivated by a desire to create an elevated forum for settling extraordinary disputes arising between states or involving foreign officials.[66] Moreover, in contrast with many original jurisdiction clauses written into "maximalist" constitutions later in history, Article III's grant only concerned the identity of the parties and not the subject matter of litigation; the Supreme Court has since insisted on strict adherence to these identity requirements.[67]

The Court has paired the relatively limited scope of this jurisdiction with a highly restrained and infrequent exercise of its discretion to hear cases through it. Two-and-a-half centuries of American original jurisdiction jurisprudence have emphasized that the power to elevate a case to the country's highest court and thereby deprive parties of their right to appeal ought not to be exercised liberally. In several decisions, the Court has said it will only "sparingly" utilize its original jurisdiction.[68] In *Marbury v. Madison*, decided in 1803, Chief Justice Marshall held that Congress could not expand the scope of the Court's original jurisdiction by statute.[69] Meanwhile, the Court's early decisions granted concurrent jurisdiction for some of the matters mentioned in the Constitution's original jurisdiction clause to other federal courts.[70] It has insisted since then that such cases first come up through the inferior judiciary.[71] The few original cases that the Court fielded in its first century and a half largely consisted of suits between multiple states, often concerning border disputes, water rights,

65. *See, e.g.*, *Original Jurisdiction*, *supra* note 63, at 665 n.3.

66. This avoided the inconvenience of having an ill-suited state or lower federal judge—who could be influenced by parochial biases or appear to not match the prestige of the case—preside over the proceedings first. Such a worry was also in line with the Framers' attempt to extricate litigation not solely arising within one state from the local court system by establishing a parallel federal judiciary. This approach, they thought, had the virtue of eliminating any potential biases of state judges against diverse parties or the federal government from the mix. *See generally* Peter Irons, A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution 58–59 (2006).

67. Chief Justice John Marshall wrote seminally in *Cohens v. Virginia* that the "[original] jurisdiction of the Court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing." Cohens v. Virginia, 19 U.S. 264, 393 (1821).

68. The word "sparingly" has often been used in this context. *See, e.g.*, Wyoming v. Oklahoma, 502 U.S. 437, 450 (1992); Maryland v. Louisiana, 451 U.S. 725, 739 (1981); United States v. Nevada, 412 U.S. 534, 538 (1973); California v. S. Pac. Co., 157 U.S. 229, 261 (1895).

69. 5 U.S. 137, 175–76 (1803).

70. *See, e.g.*, Bors v. Preston, 111 U.S. 252, 255 (1884); Ames v. Kansas ex rel. Johnston, 111 U.S. 449, 464–65 (1884); Rhode Island v. Massachusetts, 37 U.S. 657, 721–22 (1838).

71. *See, e.g.*, Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493,503–05 (1971); Georgia v. Penn. R.R., 324 U.S. 439, 464–65 (1945); Massachusetts v. Missouri, 308 U.S. 1, 19–20 (1939).

pollution, and taxation.[72] Litigation on these grounds was highly infrequent. By 1959, the Court had written opinions in only 123 original cases.[73]

Recently, the Court has further restricted its original docket. Beginning with *Ohio v. Wyandotte Chemicals Corporation* in 1971, it began to turn down cases that fell within its original jurisdiction, ruling that they were better suited for other fora and that its mandated responsibility as a court of first instance had to be weighed against its heavy appellate workload.[74] It then introduced a test examining the "seriousness and dignity" of claims brought on original jurisdiction grounds,[75] and even declined to field cases where its jurisdiction was both original and exclusive.[76] In recent terms, the original docket has been limited to one or two cases out of the eighty the Court hears on average in a year.[77]

This model of restraint could not be further from the Pakistani paradigm. As the previous Part demonstrated, the Supreme Court of Pakistan's original jurisdiction jurisprudence expanded much more quickly and has now claimed authority over a significantly broader array of cases for its original docket than ever seen in the history of the U.S. Supreme Court.[78] While the U.S. Supreme Court has remained largely bound by the Framers' vision of an apex court only occasionally intervening in the first instance, Pakistan's judiciary has managed to use original jurisdiction as a tool for garnering greater authority, on occasion by reference to Islam. The next Part takes a more granular look at one of the periods crucial to the Supreme Court of Pakistan's accomplishment of this feat, examining how Islamic references were used in the 1990s to legitimize this expansion, though often in a largely symbolic manner.

72. The portion of Article III, Section 2, Clause 2 relating to foreign officials has fallen into disuse compared to cases "in which a State shall be Party." U.S. CONST. art. III, § 2, cl. 2. There have only been two original jurisdiction cases related to foreign officials in the Supreme Court's entire history. *See* Vincent L. McKusick, *Discretionary Gatekeeping: The Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 MAINE L. REV. 185, 187 (1993). For an explanation of how the Supreme Court's original jurisdiction ultimately came to focus on inter-state disputes, and how different states have fared in such litigation—Minnesota remains undefeated—see Jay D. Wexler & David Hatton, *The First Ever (Maybe) Original Jurisdiction Standings*, 1 J. LEGAL METRICS 19 (2012).

73. *Original Jurisdiction*, *supra* note 63, at 665.

74. *See Wyandotte Chemicals Corp.*, 401 U.S. at 497–500; McKusick, *supra* note 72, at 197.

75. *See* McKusick, *supra* note 72, at 197.

76. The Court has also occasionally declined review due to the presence of complex factual questions that it says are more suitable for trial courts. *See, e.g.*, Washington v. Gen. Motors Corp., 406 U.S. 109 (1972); *Wyandotte Chemical Corp.*, 401 U.S. at 504.

77. McKusick, *supra* note 72, at 197.

78. *See* discussion *supra* Part I.

III. The Marginal Influence of Islam on Original Jurisdiction in 1990s Pakistan

The U.S. Supreme Court kept its original jurisdiction narrow. Pakistan's Supreme Court did the opposite. This Part examines how Islamic legal reasoning in the 1990s shaped that expansion—or if it did at all. It begins by outlining Professor Martin W. Lau's argument that this period marked the "Islamisation of the legal and judicial discourse,"[79] and then conducts a case-based analysis assessing whether Islamic principles played a substantive role in judicial decision-making. Through this analysis, this Note argues that while religious rhetoric was frequently invoked to legitimize judicial activism, Islamic legal reasoning remained largely symbolic rather than outcome-determinative. Such use of religious language highlights an unresolved tension in Pakistan's judicial identity, where the judiciary's secular common-law foundations often override the country's constitutional commitment to Islamic governance.

The Public Interest Litigation that came to dominate the Supreme Court of Pakistan's original docket was made possible by jurisprudential developments imported into the country from India.[80] Nevertheless, Pakistani judges and lawyers sought to shape their arguments in Article 184(3) cases in light of the local culture, often by connecting them to messages of egalitarianism and liberation drawn from Islam.[81] The Supreme Court's decisions embraced faith-based, purposivist rhetoric, declaring often that their objective was to enact some permutation of "democracy, tolerance, equality and social justice," but interpreted "according to Islam."[82]

The most extensive literature on the intersection between religion and the Supreme Court of Pakistan's original docket has been authored by Professor Lau. Professor Lau argues that Public Interest Litigation cases were "closely linked to the Islamisation of the legal and judicial discourse" beginning in the 1990s and made it "commonplace for judges to . . . apply fundamental rights in

79. Lau, *supra* note 13, at 98.

80. *Id.*

81. Khan, *Genesis and Evolution*, *supra* note 12, at 295.

82. Shahida Zahir Abbasi v. President of Pakistan, (1996) 48 PLD (SC) 632, 634–35. These declarations reproduce language from the preamble to the 1973 Constitution, and such goals have found their way into many decisions since. *See* Mian Muhammad Nawaz Sharif v. President of Pakistan, (1993) 45 PLD (SC) 473, 480 ("The people of Pakistan have willed to establish an order wherein the State shall exercise its powers and authority through the chosen representatives of the people; wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed"); Al-Jehad Trust v. Federation of Pakistan, (1996) 48 PLD (SC) 324, 402 [hereinafter *Al-Jehad Trust I*] ("Preamble to the Constitution says that the principles of democracy, freedom, equality, tolerance and social justice as enunciated by Islam shall be fully observed and independence of judiciary fully secured.").

an 'indigenised' manner, namely by interpreting them in the light of Islam."[83] He points to opinions at the Supreme Court and provincial superior court levels stressing the significance attached to the position of "a Qazi of a Muslim State."[84] The "Qazi" was bestowed, in this view, with an expansive power to manage the inferior judiciary and initiate investigations against anyone in the country, even its most powerful citizens.[85] This account attaches great weight to the impact of Islamic substantive law on these decisions. According to this view, faith-based legal reasoning engineered new constitutional rights, helped to preserve judicial independence, and served as the determinative factor in the Supreme Court decisions from this time.[86] Drawing on the cases examined in this Note, Professor Lau goes so far as to identify this period as pivotal to an increased use of religious law in the country, stating that "since the early 1990s it has become commonplace for judges to make references to Islamic law and to apply fundamental rights in an 'indigenised' manner, namely by interpreting them in the light of Islam."[87] Professor Lau's view that religious arguments were important to the success of Public Interest Litigation in Pakistan has been propagated by subsequent scholarly literature on the topic; for instance, Dr. Maryam Khan's otherwise adept account of the rise of judicial power in Pakistan cites Professor Lau's writings on the topic as "detailing the important contribution of Islamic arguments to the advent of Public Interest Litigation in Pakistan."[88]

As a matter of fact, the Islamic legal reasoning in these opinions was marginal, infrequent, surface-level, solely rhetorical, and never outcome-determinative. This Part of the Note analyzes a dozen cases decided between 1990 and 1998 that allegedly demonstrate the "Islamisation of the legal and judicial discourse," a shift that scholars like Professor Lau argue took place during this period. The 1990s were a defining era in Pakistan's constitutional and political history—marked by the country's return to civilian rule after years of military dictatorship under General Zia-ul-Haq and a judiciary that sought

83. LAU, *supra* note 13, at 98.

84. "Qazi" is the Arabic and Urdu word for judge, often used in the Islamic law context. *Id.* at 100–01; *see* Al-Jehad Trust v. Manzoor Ahmad Wattoo, (1992) PLD 44 (Lah.) 875, 895–96 (Pak.) (referencing a Muslim Qazi's authority to investigate powerful citizens and politicians without obstruction); *Al-Jehad Trust I*, 48 PLD at 339 (stressing the Chief Justice's powers in light of "how much respect and binding force is given to the opinion of the Qazi" in Islamic law related to the appointment of subordinate judges).

85. Professor Lau contends that the justices writing these opinions frequently fell back on the vaunted authority of judicial arbiters in Islam, especially in controversial and politicized cases dealing with the role of the judiciary in Pakistan's separation-of-powers system. *See* LAU, *supra* note 13, at 104.

86. *Id.*

87. *Id.* at 98.

88. *See, e.g.*, Khan, *Genesis and Evolution*, *supra* note 12, at 296 n.66.

to slowly expand its role amid political instability. Against this backdrop, the Supreme Court's engagement with Islamic rhetoric reflected not only legal developments but also broader tensions in Pakistan's struggle to define the relationship between religion, democracy, and judicial authority.[89] This Part argues that, quite apart from the view that the period featured judicial Islamization, the Supreme Court largely failed to utilize the potency of the constitutionally sanctioned religious substantive law at its disposal. In the end, the expansion of original jurisdiction in Pakistan occurred in a secularized manner akin to the process in India, and not too different in its secular moorings from what the original docket of the Supreme Court of the United States may have looked like had it elected to broaden its powers via a more frequent exercise of original jurisdiction.

By providing a more precise account of the "waxing of judicial activism" in the 1990s, the arguments in this Note build on Dr. Maryam Khan's project of "contextualiz[ing the growth of judicial power] . . . within its historical antecedents" and resisting a "static theory"-like interpretation which presents Chief Justices Chaudhry and Nisar as fundamentally breaking from a supposedly submissive Pakistani judiciary prior to their tenures.[90] While acknowledging that the ambit of original jurisdiction grew in this period, this Note highlights the flaws in the arguments that attribute this expansion to religiously inspired legal reasoning. The true causes of the Pakistani judiciary's assertiveness in the 1990s must be found elsewhere—such as in the political shifts that allowed the country's democratic institutions to partially wrestle free of military control.[91]

Furthermore, this Part explores Pakistan's success (or lack thereof) in adhering to its Islamic constitutionalist aspirations. This gap between constitutional ideals and judicial practice in Pakistan strikes at the very legitimacy of Pakistan's legal system—if the judiciary selectively invokes religious principles without substantively applying them, it risks eroding public trust in both its authority and the coherence of the legal order. Thus, this Part critically

89. LAU, *supra* note 13, at 98–99; *see also* JALAL, *supra* note 24, at 259–98 (2014) (outlining political developments over the course of the decade following the death of Pakistan's military autocrat Muhammad Zia-ul-Haq in 1988 and various Supreme Court decisions on executive-judicial relations from this time).

90. For a more detailed exposition of Khan's critiques of "a static view of judicial power that presents a highly dichotomized before and after picture of judicial politics;" her embrace of "a temporalized view of judicialization;" her attempts to "explain the evolving nature and shifting goal posts of judicial activism in successive cycles;" and her emphasis on the "deep interconnectedness of the past and the present in judicial discourse," see Khan, *Genesis and Evolution*, *supra* note 12, at 288–93; *see also* Walsh, *supra* note 55; *Pakistan's Top Court Is Eager to Take on Any Brief*, *supra* note 55.

91. *See, e.g.*, JALAL, *supra* note 24 , at 259–98 (2014) (outlining political developments over the course of the decade following the death of Pakistan's military autocrat Muhammad Zia-ul-Haq in 1988 and various Supreme Court decisions on executive-judicial relations from this time).

examines the limited interplay between "secular courts and classically trained Muslim jurists"[92] demonstrated by the paucity of Islamic legal reasoning in the opinions analyzed below. In doing so, it draws from Professor Intisar Rabb's scholarship on how courts in various Muslim countries engage with Islamic law and attempt to synthesize religious principles with liberal constitutionalism.[93]

Professor Rabb has categorized Pakistan as an example of "coordinate" constitutionalization in her typology of "dominant," "delegate," and "coordinate" constitutionalizing.[94] Put differently, this means that the Pakistani model incorporates "Islamic law, laws of democratic processes, and liberal norms," all on equal footing.[95] The opinions analyzed below demonstrate how, in 1990s original jurisdiction cases, the Supreme Court's limited interaction with classical religious law led to the marginalization of Islamic jurisprudence, even when the Court claimed to be applying religious principles. Thus, the case study explored here suggests that even Islamic constitutional models that mandate a degree of coordinate constitutionalizing can, in reality, subordinate religious laws to the liberal norms ingrained in the judicial culture interpreting them.

A. Darshan Masih v. State

The 1990 *Darshan Masih* decision is widely regarded as the first case to expand the scope of nonsecular legal reasoning in Article 184(3) jurisprudence.[96] *Darshan Masih* was significant not only in altering the Supreme Court's approach to the procedure of original jurisdiction cases, but also in its alleged contribution to an "Islamic human rights jurisprudence" in Pakistan.[97] The case concerned the treatment of the country's brick kiln workers, some of whom contacted the Supreme Court via telegram with allegations that they were

92. Rabb, *The Least Religious Branch*, *supra* note 14, at 77.

93. *See, e.g.*, *id.*; Rabb, *"We the Jurists"*, *supra* note 14, at 527.

94. Rabb, *"We the Jurists"*, *supra* note 14, at 531 ("Analyzing existing practices, I distinguish between three different types of constitutionalization of Islamic law: dominant constitutionalization—where a constitution explicitly incorporates Islamic law as the supreme law of the land; delegate constitutionalization—where a constitution incorporates Islamic law but delegates its articulation to the jurists; and coordinate constitutionalization—where a constitution incorporates Islamic law, laws of democratic processes, and liberal norms, placing them all on equal footing. Iran is an example of the first, where jurists effectively control the government and all interpretive legal decisions; Gulf Arab states are an example of the second, where interpretive authority over Islamic family law in particular is vested in the juristic classes; and Egypt and Morocco are examples of the third, where the government and interpretive decision makers have devised schemes of differing relationships with the jurists.").

95. *Id.*

96. *See, e.g.*, LAU, *supra* note 13, at 95–97; Batool, *supra* note 43; Manzar, *supra* note 16, at 14. This case is also famous for heralding the arrival of *suo moto* authority in the Supreme Court of Pakistan's jurisprudence, as discussed above. *See* discussion *supra* Part I; *Darshan Masih*, 42 PLD at 513–91.

97. LAU, *supra* note 13, at 95–97.

being forced to work without pay.[98] They claimed they were targeted due to their religious minority background; permanently trapped in a vicious cycle of debt bondage on account of the high interest rates on their loans; forced to work without adequate workplace safety measures in place; and given squalid accommodations.[99] The kiln owners were in turn accused of intimidating laborers to prevent their departure[100] and colluding with local police to obstruct the investigation into their conduct.[101]

Chief Justice Afzal Zullah's first innovation was in obviating procedural standing requirements to admit the telegram itself as a writ petition.[102] Approaching the case in an inquisitorial manner, Chief Justice Afzal Zullah mediated between the parties and issued an opinion that declared that constitutional rights could be elucidated by principles "ensured, in addition, as basic human rights in Islam."[103] He insisted that "[t]here is no bar in the Constitution to the inclusion in such laws of these rights" derived from Islam.[104] This sort of capacious reasoning was a departure from the court's jurisprudence which had confined itself to fundamental rights listed in "chapter 1 of part II" of the Constitution.[105] According to the Chief Justice, this religiously-inspired substantive law would then take the form of "an independent *inalienable* right, with self-operating mechanism for *its* enforcement as well."[106]

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98. *Darshan Masih*, 42 PLD at 513 ("The Chief Justice of Pakistan received the following telegram . . . 'We plead for protection and bread for our family we are brick kiln bonded labourers.'").

99. *Id.* at 529 ("The labourers complained about individual forced labour and the labour malpractices.").

100. *Id.* at 513 ("[W]e are brick kiln bonded labourers. We have been set at liberty through the Court. And now three amongst us have been abducted by our owners. Our children and women are living in danger . . . . The law gives no protection to us.").

101. *Id.* at 521 ("It was feared that perhaps the Police, in order to avoid the charges of illegal intervention/detention and pressure at the behest of the owners, had resorted to registration of a case and had also arrested some persons; and, the remaining were also thought to be under some type of detention . . . .").

102. *Id.* at 514 ("True a telegram has never been earlier made the basis by the Supreme Court of Pakistan for action, as in the present case; but, there is ample support in the Constitution for the same . . . the questions of procedural nature relating to the entertainment of proceedings and/or cognizance of a case under [Article 184(3)], have been dealt with in the case of Miss Benazir Bhutto . . . . The acceptance of a telegram in this case is covered by the said authority as also by the due extension of the principles laid therein.") (internal citations and quotation marks omitted).

103. *Id.* at 546; *see also id.* at 523 ("I encouraged both the sides to enter into some dialogue in Court. Accusations and counter-accusations started.").

104. *Id.* at 515.

105. PAKISTAN CONST. art. 184, cl. 3. This is the approach that the plain text of Article 184(3) seems to contemplate. As mentioned in *supra* note 35, Articles 8 to 28 in Chapter 1 of Part II of the Constitution enumerate all fundamental rights provided to the citizens of Pakistan. Article 184(3) refers explicitly only to these articles. *See* PAKISTAN CONST. arts. 8–28; *see also supra* note 29 and accompanying text.

106. *Darshan Masih*, 42 PLD at 515 (emphasis in original).

While this opinion advanced a theory of extra-constitutional Islamic reasoning, it was itself ultimately devoid of even an attempt to apply it. Chief Justice Afzal Zullah admitted that numerous existing secular constitutional provisions provided the relevant framework for addressing the case, including established protections for the security of persons, the freedom of movement, the freedom of trade, equality for women and children, and prohibitions on forced labor, child labor, and human trafficking.[107] After the above reference to "basic human rights in Islam," the opinion did not proceed to delineate how any specific principle derived from the Islamic legal tradition might alter the scope of existing constitutional protections.[108] Hence, even in this purportedly groundbreaking decision, Chief Justice Afzal Zullah stopped short of describing what an Islamic human rights-based paradigm might entail or how it could operate alongside or beyond constitutional text. While it invoked a potentially transformative framework, the opinion relied on Islamic references more to embellish the legitimacy of established rights than to reshape or expand the legal doctrine itself. Islam's substantive impact on the merits of the decision was negligible.

Chief Justice Afzal Zullah continued to expound on this natural law-like[109] principle of substantive rights drawn from Islam in subsequent cases, insisting in one instance that Islamic human rights "stand at [a] higher pedestal as compared to the internationally recognised Human Rights . . . [so] when interpreting the fundamental rights and their scope as conferred by Chapter I in Part II, corresponding or extended right[s] in Islamic jurisprudence would obviously be kept in view."[110] As in *Darshan Masih*, despite Chief Justice Afzal Zullah's rhetorical invocation of Islamic human rights here, the case itself did not develop an Islamic legal framework or expand constitutional protections based on Islamic principles, making it difficult to classify as an example of

107. *Id.* ("The question as to whether this is a case of enforcement of Fundamental Rights has not been raised. Everybody accepted that it is so. The provisions of Article 9 relating to security of person; Article 11 in so far as it relates to forced labour, traffic in human beings and child labour; Article 14 relating to dignity of man; Article 15 ensuring freedom of movement; Article 19 relating to freedom of trade, business or profession; and, Article 25 relating to, equality, particularly in the protection of law and bar against discrimination on the basis of sex, as also the safeguards for women and children, amongst others, are applicable to the various aspects of the matter.").

108. *Id.*

109. *See, e.g.*, Adrian Vermeule, Common Good Constitutionalism 8 (2022). In advocating for a modern version of the natural law tradition, Professor Vermeule explores how principles derived from moral or philosophical traditions may sometimes act as interpretive tools operating alongside constitutional text. He argues that law is inherently tied to *ius gentium* (the law of nations—"the general law common to all civilized legal systems") and *ius naturale* (the natural law—"principles of objective natural morality").

110. Lau, *supra* note 13, at 108 (citing Human Rights Case No. 1 of 1992, (1993) PSC 1358 (Pak.)).

Islamization in judicial discourse. Hence, the Chief Justice's project of incorporating Islamic human rights into Pakistani jurisprudence did not meaningfully alter Supreme Court jurisprudence.

Professor Lau has described Chief Justice Afzal Zullah as representing the "high watermark of 'Islamic human rights' jurisprudence" in Pakistan.[111] The tide receded quickly thereafter.

B. The Four Horse-Trading Opinions

The following Subsection analyzes four landmark opinions, also pointed to by Professor Lau as evidence of Islamization, handed down by the Supreme Court from 1993 to 1998. They are grouped together here on account of the fact that they deal with the recurring theme of "horse-trading" in Pakistani politics and make references to similar Islamic textual authorities. Horse-trading in this context referred to a controversial practice by which candidates would run for election under the banner of a political party and then cross the aisle, often for personal gain. Such maneuvers were seen as undermining party cohesion and the democratic process. Each of these cases—*Mian Muhammad Nawaz Sharif v. President of Pakistan* in 1993, *Sardar Muhammad Muqeem Khoso v. President of Pakistan* in 1994, *Pir Sabir Shah v. Shad Muhammad Khan* in 1995, and *Wukala Mahaz v. Federation of Pakistan* in 1998—invoked religious principles to frame the constitutional principles at play.

1. Mian Muhammad Nawaz Sharif v. President of Pakistan

The 1993 *Nawaz Sharif* case involved the Supreme Court attempting to resolve a constitutional crisis that began in April 1993, when President Ghulam Ishaq Khan dismissed Prime Minister Nawaz Sharif's government for corruption and political instability.[112] Central to the dissolution order were allegations of horse-trading, so the Court addressed the constitutionality of defections. As this case was brought under Article 184(3), the Supreme Court here was exercising its original jurisdiction to adjudicate the constitutional validity of the Prime Minister's dismissal and the broader implications of political defections. While it ultimately held that the dissolution order was invalid, Chief Justice Nasim Hasan Shah's 10-1 majority decision was nevertheless quite critical of the practice of horse-trading.

111. Lau, *supra* note 13, at 108.

112. *See, e.g.*, Edward A. Gargan, *President of Pakistan Dismisses Premier and Dissolves Parliament*, N.Y. Times (Apr. 19, 1993), https://www.nytimes.com/1993/04/19/world/president-of-pakistan-dismisses-premier-and-dissolves-parliament.html [https://perma.cc/3T38-VRFU].

Chief Justice Shah identified three reasons why such defections were unconstitutional: First, they violated the confidence reposed in the candidate by the electorate; second, they prevented electors from weighing in on the democratic process until the next election; and third, they eroded the "normative moorings of the Constitution of an Islamic State," since sovereignty belonged to Allah and elected officials were merely exercising authority as a "sacred trust" on behalf of the people.[113]

The majority opinion exhorted lawmakers to be mindful of the "sacred trust" bestowed upon them via the third of these reasons. Nevertheless, it acknowledged that the first two secular grounds were sufficient to render the defections unconstitutional.[114] Chief Justice Shah noted that "[e]ven by 'purely' secular standards, carrying on of the Government in the face of such defections, and on the basis of such defections, is considered to be nothing but 'mockery of the democratic Constitutional process.'"[115] By the Court's admission, then, the invocation of divine sovereignty did not play a dispositive role. By including the religious justification at the analysis' tail end and giving it an exhortatory flair, the Court in this segment of the opinion appeared more interested in a pious scolding of parliamentary conduct than in substantive legal reasoning. This can be demonstrated by its reliance on secular democratic principles—such as electoral integrity and parliamentary accountability—to invalidate defections, with its references to Islam serving only to emphasize moral expectations rather than dictate legal standards.

Nawaz Sharif featured an additional ceremonial hat-tip to Islamic principles, quickly dismissed once more in favor of dispositive case law. A counsel for the Prime Minister, Yahya Bakhtiar, contended in oral arguments that Article 58(2)(b)—which grants the president dissolution powers—contravened the principle of divine sovereignty.[116] Bakhtiar may have hoped to counter the

113. *Nawaz Sharif*, 45 PLD at 772 ("In the first place, if the member has been elected on the basis of a manifesto, or on account of his affiliation with a political party or on account of his particular stand on a question of public importance, his defection amounts to a clear breach of confidence reposed in him by the electorate. If his conscience dictates to him so, or he considers it expedient, the only course open to him is to resign, to shed off his representative character which he no longer represents and to right a re election. This will make him honourable, politics clean, and emergence of principled leadership possible. The second and more important, the political sovereign is rendered helpless by such betrayal of its own representative. In the normal course, the elector has, to wait for years, till new elections take place, to repudiate such a person. In the meantime, the defector flourishes and continues to enjoy all the wordly [sic] gains. The third is that it destroys the normative moorings of the Constitution of an Islamic State. The normative moorings of the Constitution prescribe that sovereignty over the entire universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.") (internal citation and quotation marks omitted).

114. *Id.*

115. *Id.* (internal citation and quotation marks omitted).

116. Pakistan Const. art. 58, cl. 2.

cursory religious references to how politicians were exercising authority as a "sacred trust" on behalf of the people with Islam-based arguments for the other side in the case. He cited to a litany of sources: Article 2A; the recognition in the preamble to the 1973 Constitution that "sovereignty over the entire Universe belongs to Almighty Allah alone;" Jinnah's vision of a "Muslim democracy;" and a treatise by C.G. Weeramantry outlining the subordination to the divine in Islamic governance. He then argued that no individual, not even the president, had the unilateral authority to override the "sacred trust" vested in the people's representatives.[117]

While acknowledging this impassioned plea, then-Justice Ajmal Mian's concurrence swiftly sidestepped any substantive engagement with Bakhtiar's argument, signaling instead that the religious considerations could be assessed "in an appropriate case at the appropriate time."[118] Chief Justice Mian acknowledged the religious argument but opted not to dwell on it, noting that the effect of Article 2A had already been considered by a Full Bench in previous rulings.[119] In concluding that "it will suffice to observe" that the matter had been settled by prior Supreme Court decisions, he underscored that established secular precedents were sufficient to resolve the case at hand.[120] This fleeting reference to Islamic principles, while rhetorically potent, played no substantive role in the final judgment, underscoring a recurring judicial approach in which religious arguments were briefly acknowledged but ultimately subordinated to secular constitutional analysis.

2. Sardar Muhammad Muqeem Khoso v. President of Pakistan

A year after *Nawaz Sharif*, the *Muqeem Khoso* Court took up the issue of misconduct by elected representatives. Then-Justice Ajmal Mian's majority opinion disqualified Sardar Muhammad Muqeem Khoso, a member of the National Assembly, for using political influence to expedite a loan disbursement for a fish

117. *Nawaz Sharif*, 45 PLD at 681–82 ("Mr. Yahya Bakhtiar who also appeared for the petitioner adopted somewhat different line of arguments than Mr. Khalid Anwar by urging that under the Preamble of the original Constitution, which has now become substantive part of the Constitution by incorporating Article 2A, the sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised within the limits prescribed by Him is a sacred trust. According to him sub-clause (b) of clause (2) of Article 58 of the Constitution is repugnant to the above basic Islamic concept Of sovereignty . . . .").

118. *Id.* at 683 ("The above broader proposition of law now urged by Mr. Yahya Bakhtiar can be examined in an appropriate case at the appropriate time.").

119. *Id.*

120. *Id.* ("There seems to be marked distinction between the Islamic concept of sovereignty and the modern concept of sovereignty enunciated by the various celebrated authors/scholars. However, it will suffice to observe that the effect of incorporation of the preamble as a substantive part of the Constitution has been considered by a Full Bench of this Court [in prior decisions].").

farm project.[121] As this case was heard under its original jurisdiction pursuant to Article 184(3), the Court acted as the primary and first-instance arbiter of Khoso's disqualification. Khoso had sidestepped procedural requirements that required incremental payments to be made only after project milestones were verified, securing the release of funds in two large installments rather than twelve smaller ones.[122] Although the underlying conduct did not directly implicate horse-trading, the Court categorized Khoso's fraud as a similar abuse of power, condemned it in equally strong terms, and utilized Islamic reasoning akin to the analysis in *Nawaz Sharif*.

Justice Mian's opinion briefly invoked the Preamble to the 1973 Constitution and Article 2A to frame Khoso's actions as violative of the "sacred trust" placed in elected representatives, in defiance of the same "sovereignty over the entire Universe belong[ing] to Almighty Allah alone" that the majority in *Nawaz Sharif* had referenced in the preceding year.[123] Justice Mian warned that the sort of actions Khoso had engaged in would result in "heavenly and worldly punishment."[124] He linked this unaccountability to other widespread "betrayal[s] of trust," such as horse-trading, all of which had to be "checked and discouraged at all levels."[125] The reader would be forgiven for expecting such language to presage a more thoroughly religious legal analysis. Instead, the rest of the decision rested entirely on secular statutory provisions. Relying on Section V of the Parliament and Provincial Assemblies (Disqualification for Membership) Act of 1976, other relevant parliamentary laws, and the country's Code of Civil Procedure, the Court grounded its judgment in the preexisting statutory scheme for public accountability and administrative integrity. It cited numerous public accountability precedents related to misconduct and abuse of power, all of which were decided over the preceding decades without significant

121. Sardar Muhammad Muqeem Khoso v. President of Pakistan, (1994) 46 PLD (SC) 412, 417 ("[T]he appellant was elected as a member of the National Assembly from the Constituency No.NA 156 Jacobabad in the election held in 1988. It seems that he submitted an application dated 20 5 1989 (Exh.ll) for a loan of Rs.19.54 million along with two copies of a feasibility report for setting up a fish farm . . . .").

122. *Id.* at 417–22.

123. *Id.* at 435 ("I may point out that under the Objectives Resolution which has now become substantial part of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the Constitution) by virtue of Article 2-A thereof, sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan through their chosen representatives within the limits prescribed by Him, is a sacred trust.").

124. *Id.*

125. *Id.* at 435 ("This betrayal of trust is now popularly known as horse trading. This cancerous disease in the polity of the country is contributing a lot in destabilizing the democratic institutions and thereby adversely affecting the economic growth of the country besides affecting the good name of the country adversely in the comity of nations. The above tendency is to be checked and discouraged at all levels.").

reference to religious law.[126] Hence, the fleeting rhetorical references to Article 2A and the Preamble to the Constitution constituted the only religious language in an opinion that ran for dozens of pages.

Professor Lau cites this case as evidence of "the positive impact of Islamic law on the substantive body of Pakistani law," on account of how the religious reasoning in this case is supposed to have strengthened public accountability standards in the absence of firmly enshrined secular anticorruption law.[127] However, a closer reading of the case indicates that its Islamic rhetoric was highly cursory and largely decorative. Brief references to divine sovereignty and sacred trusts fade away in an otherwise thoroughly secular analysis. The judgment's substantive grounding remained squarely in procedural and statutory principles rather than in Islamic jurisprudence.

3. Pir Sabir Shah v. Shad Muhammad Khan

The 1995 *Sabir Shah* decision declined to address allegations of defection that threatened the stability of Chief Minister Pir Sabir Shah's North-West Frontier Province ("NWFP") Administration. Authored by Chief Justice Sajjad Ali Shah, the *Sabir Shah* majority opinion decided the case on jurisdictional grounds, ruling that the Constitution gave the task of resolving the defection dispute in this case to the Chief Election Commissioner—the appointed chair of the Election Commission of Pakistan—and that Section 8-B of the Political Parties Act of 1962 (containing provisions related to the disqualification of elected representatives for defection) was unconstitutional for contradicting the Constitution.[128] Put differently, the majority opinion declined to frame the conduct in question as an instance of horse-trading akin to the situations addressed in earlier decisions discussed in this Note.[129]

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126. *Id.* at 424–25 (citing to Hamidul Huq Chowdhury v. Governor General of Pakistan, (1953) PLD (FC) 279 (Pak.), a 1953 case addressing public accountability and the disqualification of officials based on secular legal principles, and Muhammad Saeed v. Election Petitions Tribunal, West Pakistan, etc., (1957) PLD (SC) 91, a 1957 case discussing the criteria for election disqualification without reference to religious law) (internal citations omitted).

127. LAU, *supra* note 13, at 102 ("[A]s significant as the positive assertion of jurisdiction was the substantive relief granted. Accountability of public officials, despite not being firmly enshrined in any law, was one example of the positive impact of Islamic law on the substantive body of Pakistani law.").

128. Pir Sabir Shah v. Shad Muhammad Khan, (1995) 47 PLD (SC) 66, 110 (Pak.) ("For the facts and reasons stated above, we hold that section 8-B of the Political Parties Act, 1962 is ultra vires the Constitution to the extent of forums only, which are in conflict with Article 63 of our Constitution in which forum of the Chief Election Commissioner is specifically provided, which is final as no other forum of appeal is provided therein. High Court is competent forum where vires of section 8-B of the Political Parties Act, 1962 can be challenged on other grounds. The Chief Election Commissioner is competent to hear references which can be disposed of by him on merits . . . .").

129. *Id.* at 109–10.

Several justices used their dissenting opinions to criticize this approach from an Islamic lens, though they ultimately grounded their dissents in statutory and constitutional objections. Justice Saad Saood Jan's dissent, responding to an even briefer discussion of Islamic law in the majority opinion, declared that "the contention that the law discouraging defection or withdrawal is un-Islamic has amused me."[130] Then-Justice Ajmal Mian's dissent reproduced three verses of the Quran mandating that believers fulfill their oaths.[131] He concluded:

> [I]f a member takes votes on the representation that he belongs to a particular political party which projects certain objects in its manifesto and then for personal gains he defects or withdraws from such political party, he commits breach of trust in terms of the above Surahs.[132]

Both opinions' Islamic language was eclipsed by Justice Saeeduzzaman Siddiqui's sweeping dissent. Taking umbrage at the idea that Islam wanted elected representatives to "not [be] bound by the discipline of a political party,"[133] Justice Siddiqui devoted several pages to discussing four Quranic verses and three *hadiths*.[134] He concluded:

> The narration of above Islamic Principles make [sic] it clear that Islam requires the believers to carry out their promises . . . . A person who seeks election as a candidate of a political party on its ticket, holds out to his party and the electorate his abiding faith on the manifesto of this party. His defection from the party after election, therefore, amounts to his refusal to carry out his promise and commitment besides constituting a

130. *Id.* at 121 ("The contention that the law discouraging defection or withdrawal is un-Islamic has amused me. Islam places great emphasis on the Muslims keeping their word. My learned brothers, Ajmal Mian and Saeeduzzaman Siddiqui, JJ., have quoted several Ayats from the Holy Qur'an and some Ahadiths on the subject I need not burden my note by reproducing the same. As already pointed out, a member who has been elected to the Assembly by holding out to his constituent that he belongs to a political party and subscribes to a particular manifesto can hardly be said to be acting in accordance with the true Islamic tradition if after winning the election he switches his support to another political party with a different manifesto solely with the object of making some petty mundane gain.") (Jan, J., dissenting) (emphasis in original).

131. *Id.* at 156–57 ("Mr. Khalid Anwer, learned counsel for the appellant, has invited our attention to . . . some Hadith from the book 'Al-Hadis' in English translation of commentary of Mishkat-ul-Masabih by Alhal Maulana Fazlul Karim. It will suffice to reproduce the relevant portions of the English translation of the above Surahs . . . .") (Mian, J., dissenting).

132. *Id.* at 158.

133. *Id.* at 241 (Siddiqui, J., dissenting).

134. A *hadith* is a saying of the Prophet Muhammad, and the second most authoritative textual source for Islamic law after the Quran. *See, e.g.*, Muhammad Baqir al-Sadr, Lessons in Islamic Jurisprudence 5–13 (Roy P. Mottahedeh trans., 2003); *see also Sabir Shah*, 47 PLD at 242–43 (Siddiqui, J., dissenting) ("'Defection' in its concept and political parlance refers to an act of political opportunism to obtain immoral gains and worldly advantages through exploitative approach of one's representation and political status. Such acts cannot be justified on any known principle of Islamic polity. Islam ordains the believers to stand by their promises and fulfil their commitments [as demonstrated by a succession of Islamic quotations].").

> breach of the trust reposed in him by his electorate. Such an act of defection cannot be justified on any known principle of morality much less on any recognised Code of Islamic Polity.[135]

While Justices Mian and Siddiqui's opinions mark the first analyzed instance of references to multiple Islamic principles backed by textual evidence, this sort of Islam-based reasoning was found exclusively in the dissents. Moreover, as with the other cases discussed, the bulk of the legal reasoning in the *Sabir Shah* opinions—whether majority or dissenting—was firmly grounded in secular statutory analysis. The opinions revolved around their differing interpretations of Section 8-B of the Political Parties Act of 1962 and its provisions relating to the disqualification of elected representatives for defection. The Court navigated constitutional questions in addition to statutory ones: It repeatedly cited Article 63 of the Constitution, which outlines the rules for the disqualification of National Assembly members and the authority of the Chief Election Commissioner to decide on these matters. Ultimately, the majority noted that defection was condemnable even under purely secular standards. Even the dissents, with their slightly longer treatments of Islamic sources, rooted their analysis firmly in the bedrock of existing statutory and procedural provisions and the established terrain of case law. For all three *Sabir Shah* opinions analyzed here, then, Islamic references did not seem to make much of an impact on the legal outcome. Each opinion simply emphasized different Islamic principles in accordance with the outcome it sought to reach.

4. Wukala Mahaz v. Federation of Pakistan

The last of the horse-trading cases came a few years later with *Wukala Mahaz* in 1998. This case dealt with similar issues as *Sabir Shah*, but with a fresh twist provided by the 1997 Fourteenth Amendment's enactment of provisions on horse-trading. *Wukala Mahaz* debated whether the procedures for disqualification outlined in Article 63A—which had been inserted into the Constitution by the Fourteenth Amendment—infringed upon the independence of elected representatives and concentrated too much power in the hands of party leaders. Chief Justice Mian authored a 6-1 majority opinion upholding the validity of the constitutional amendment.[136]

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135. *Sabir Shah*, 47 PLD at 242.

136. *See* Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan, (1998) 50 PLD (SC) 1263, 1319. Note that this case also features a concurrence by Justice Raja Afrasiab Khan, who concurred to write at length about the historical context and Islamic impetus for the formation of Pakistan in the decades prior to 1947. Quoting extensively from the country's founding fathers to conclude that the "very basis for creation of Pakistan is, therefore, Islam . . . . [I]f there were no Muslims in the sub-continent, no question for creation of Pakistan could have arisen in this part of the world," Justice Khan insisted that the constitutional provisions at question must be interpreted to "reflect the historical background of the creation of Pakistan"

Justice Siddiqui took this opportunity to transplant his *Sabir Shah* dissent's reasoning into the text of a concurrence. Citing to the same four Quranic verses and three *hadiths* of the Prophet Muhammad as in his *Sabir Shah* opinion, he reproduced the entirety of his passage quoted above,[137] arguing that the Islamic sources "make it clear that Islam requires the believers to carry out their promises and commitments whenever made."[138] Defections were thus deemed repugnant to Islam.

Interestingly, Chief Justice Mian, writing for the majority, showed little inclination to match Justice Siddiqui's determination to duplicate the Islamic reasoning from his *Sabir Shah* dissent. Aside from a brief conclusory statement that "[i]t is also in consonance with the tenets of Islam and Sunnah . . . to honour . . . commitments if the same are not in conflict with the teachings of Islam and Sunnah," the majority opinion did not make mention of Islam at all.

Of all four horse-trading cases, *Wukala Mahaz* was the least interested in Islamic legal reasoning. Aside from the single cursory reproduction of prior case law passages on Quranic and prophetic sources, none of the opinions delved into Islamic law. Instead, the opinions revolved around the interpretation of Article 63A as amended into the Constitution, Articles 238 and 239's rules governing the constitutional amendment process, arguments related to Article 19 freedom of speech protections, and the Political Parties Act of 1962. In conducting such analysis, *Wukala Mahaz* remained entirely secular, with only a passing nod to Islamic reasoning.

5. Summary Analysis of the Horse-Trading Cases

Taken together, these four horse-trading cases illustrate how the Supreme Court of Pakistan's Islamic language was largely peripheral, serving to frame moral critiques of political misconduct rather than shaping substantive legal outcomes. While religious language was occasionally used to buttress the broader principles of accountability and democratic governance at stake, the Court's rulings ultimately rested on secular statutory and constitutional authorities governing disqualification, party discipline, corruption, and legislative integrity. This pattern reinforces the broader argument of this Note: Despite the perception of an Islamization in judicial discourse of this time, the

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and in recognition of the country's differences from India. *See id.* at 1407–24 (Khan, J., concurring). At the end of this prolonged digression, however, Justice Khan simply mentioned that he "respectfully agree[d] with the view expressed by the Hon'ble Chief Justice in the leading judgment" and did not explicate how this history affected his substantive legal analysis. *See id.* This is a paradigmatic example of the sort of legal reasoning seen in many cases analyzed in this Note: numerous abstract references to Pakistan as a peculiarly Islamic republic, coupled with no substantive legal consequence to such proclamations.

137. *See supra* notes 132–35 and accompanying text.

138. *Wukala Mahaz*, 50 PLD at 1314 (Khan, J., concurring).

Supreme Court's actual jurisprudential shifts in the 1990s were driven primarily by secular legal frameworks and the historical context, rather than by a meaningful application of Islamic law.

C. Khalil-uz-Zaman v. Supreme Appellate Court

The 1994 *Khalil-uz-Zaman* case dealt with Islamic criminal law. The petitioner, Khalil-uz-Zaman, was convicted under Section 302(a) of the Pakistan Penal Code ("PPC") for the murder of his wife, Aasia Parveen.[139] Zaman was sentenced to death by the Lahore Special Court for Speedy Trials under Section 302(a)'s *qatl-e amd* (intentional murder) provisions, which were an attempt to codify *qisas*, the Islamic principle of retributive justice mandating retaliation in kind for certain crimes.[140] In the instant case, *qisas* called for the death penalty for the crime of intentional murder. As this case was brought under the Supreme Court's original jurisdiction, the Court acted as the court of first instance in reviewing the petitioner's conviction, given the important fundamental rights related to the right to life and due process that were at stake.

Justice Muhammad Munir Khan wrote for the unanimous two-judge bench to overturn the death sentence.[141] The Court pointed out that the PPC's Section 306(c) explicitly created an exemption from *qatl-e amd* punishments for cases where the *wali* (legal heir) of the deceased was a direct descendant of the offender.[142] In this case, the petitioner's daughter, Amina, was the legal heir of her mother, the murder victim. The Court ruled that the petitioner was thus statutorily ineligible to receive *qisas*.[143]

While most of Justice Khan's opinion was devoted to discussing the obvious legal error in the lower court decisions, the concluding three paragraphs quoted several *hadiths*, emphasizing the importance of procedural protections in a court of law with the "inten[tion] to strike a note of warning for all the Courts in the country to exercise utmost care and caution while dealing with the life and liberty of citizens because slight carelessness on their part may deprive an accused person/citizen of his life and may cause irreparable hardship and damage to his family."[144]

Despite this religious sentiment and the decision's rare citations to *hadiths* about procedural due process when life and liberty interests are at stake, these references to Islamic law were partitioned off from the rest of the opinion. The Court conducted its statutory analysis, albeit one based on Islamic provisions,

139. Khalil-uz-Zaman v. Supreme Appellate Court, (1994) 46 PLD (SC) 885, 885–86 (Pak.).
140. *Id.*
141. *Id.* at 893.
142. *Id.* at 890–91.
143. *Id.*
144. *Id.* at 893.

then remarked that "before parting with the judgment, we would like to observe that the question of convicting the accused . . . requires utmost care on the part of the Courts," and only afterward discussed due process safeguards in Islam. In American parlance, the portion of the decision that quoted *hadiths* was about as dicta as possible. The invocation of Islamic principles, though rare and notable, did not shape the legal outcome, which, predictably, rested in its lion's share on Section 306(c). Instead, Islamic rhetoric served as a reminder to judicial arbiters to exercise greater caution in cases involving the death penalty, underscoring the gravity of such decisions without altering the statutory framework underpinning the ruling.

D. The Al-Jehad Trust Cases

In the mid-1990s, the Supreme Court decided two monumental constitutional law cases that outlined the principles of the Pakistani separation of powers system and dealt with the importance of divine sovereignty and "consultation" in Islam.[145] Referred to in this Note as *Al-Jehad Trust I* and *Al-Jehad Trust II*, these decisions were issued in successive years (1996 and 1997) and dealt with nearly identical issues related to the independence of the judiciary, the appropriate role of the executive, and the constitutional principles guiding the appointment of judges.[146] Both cases were brought as constitutional petitions by a public interest organization, Al-Jehad Trust, challenging the government's process for judicial appointments and transfers.[147]

1. Al-Jehad Trust I

Chief Justice Sajjad Ali Shah wrote for a unanimous 4-0 bench.[148] Focusing on the requirement in the Constitution that the executive "consult" with the Chief Justice on judicial appointments, he held that the Prime Minister was required to heed the Chief Justice's advice absent extenuating circumstances.[149] Chief Justice Shah warned against executive overreach in judicial appointments, insisting that interference could compromise the impartiality and autonomy of the judiciary.[150] Moreover, he declared that judicial appointments violative of

145. This conception of separation-of-powers would largely stay in place up to the drastic revisions made by the Twenty-Sixth Constitutional Amendment in October 2024. *Compare Al-Jehad Trust I*, 48 PLD at 324, *and* Al-Jehad Trust v. Federation of Pakistan, (1997) 49 PLD (SC) 84, 124–47 [hereinafter *Al-Jehad Trust II*], *with supra* Part II (highlighting the differences between the pro-judicial branch model of the Al-Jehad Trust cases and the parliamentary supremacy model of the controversial Twenty-Sixth Amendment).

146. *See Al-Jehad Trust I*, 48 PLD at 373–411; *Al-Jehad Trust II*, 49 PLD at 105–06.

147. *See Al-Jehad Trust I*, 48 PLD at 367; *Al-Jehad Trust II*, 49 PLD at 105–06.

148. *Al-Jehad Trust I*, 48 PLD at 410–11.

149. *Id.* at 409–10.

150. *Id.* at 393–94.

the consultation process contravened Articles 177 and 193 of the Constitution and undermined public confidence in the judiciary.[151] Lastly, the unanimous court stressed that seniority should be the most important factor in judicial appointments.[152]

Chief Justice Shah's inquiry into the meaning of "consultation" meandered into the Islamic legal tradition. He spoke of "the exalted position of the Judiciary as envisaged in Islam,"[153] made a conclusory assertion that "Islam gives . . . very wide powers . . . to the Chief Justice including all appointments of subordinate Judges under him,"[154] and cited numerous instances from Islamic history that demonstrated "how and on what criteria Judges/Qazis were appointed and how they were respected."[155] In one passage, Chief Justice Shah spoke glowingly of the deference that Islamic heads of state had allegedly afforded to their polities' judicial officials:

> Islamic history also shows that rulers were God- fearing, humble, polite, benign, unsarcastic and righteous, and did not claim any air of mundane superiority . . . . In one case when Amirul Momineen [the "Leader of the Faithful," or the Muslim ruler] appeared in the Court of Qazi who got up from his seat as a gesture of deference, Amirul Momineen disapproved it on the ground that it was inconsistent with the dignity and independence of the Court.[156]

Two concurring opinions—one by Justice Manzoor Hussain Sial and the other by then-Justice Ajmal Mian—similarly underscored the respect afforded to the judicial branch by Islam, the importance of the Islamic ideal of justice, and the attributes distinguishing it from the "remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo-Saxons."[157]

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151. *Id.* at 401–02.

152. *Id.* at 409.

153. *Id.* at 326 ("The word 'consultation' used in the Constitutional provisions relating to the Judiciary is to be interpreted in the light of the exalted position of the Judiciary as envisaged in Islam and also in the light of the several provisions in the Constitution which relate to the Judiciary guaranteeing its independence.").

154. *Id.* at 326.

155. *Id.* at 402.

156. *Id.* at 402–03.

157. *See Al-Jehad Trust I*, 48 PLD at 332 (Sial, J., concurring) ("The constitutional provisions relating with the appointments and transfers of Judges of the superior Courts, therefore, need to be examined in the light of the Islamic concept of justice. Islam had always attached unparalleled importance to the concept of justice. The persons, who administered justice, had been men of deep insight, God-fearing, honest and men of integrity. In the light of the Islamic background, where Judiciary had been highly respected and the verdict of the Qadis enjoyed great esteem, coupled with the role assigned to it in the framework of the Constitution . . . ."); *Al-Jehad Trust I*, 48 PLD at 349, 424 (Mian, J., concurring) ("Islam enjoins that, while selecting the Judges, the authority should select the people of excellent character, superior calibre and meritorious record having deep insight and profound knowledge . . . . The reason being that the foundation of Islam is on justice. The concept of justice in Islam is different from the concept of

While these opinions made significant mention of Islam, the passages containing religious language remained largely illustrative and aimed at underscoring the importance of judicial independence rather than introducing substantive legal rules derived from Islamic jurisprudence. While the opinions—led by the concurrences—admittedly cited Islamic history to a greater extent than in other cases analyzed in this Note, their Islam-based reasoning ultimately proved marginal to the merits. Chief Justice Shah's core arguments hinged on his interpretation of Articles 177, 193, 200, and 209 of the Constitution, which govern judicial appointments, the composition and independence of Pakistan's Supreme Judicial Council, and the process of "consultation." He declared that these secular constitutional provisions alone were sufficient to dispose of the case:

> [The] words "after consultation" employed in Arts. 177 & 193 of the Constitution of Pakistan connote that the consultation should be effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play.[158]

Moreover, the principal theme throughout the majority opinion did not relate to Islam, but rather to a kind of compartmentalist and formalist philosophy occupied with ensuring that the aforementioned constitutional provisions be interpreted in a manner aligned with the overall constitutional framework of checks and balances.[159] The passages discussing such compartmentalist ideas ran for dozens of pages, of which nearly all analyzed secular constitutional ideas about how the various constitutional articles should be synthesized.[160] Ultimately, *Al-Jehad Trust I* was decided on the justices' views of the constitutional and legal obligations of the executive and judicial branches concerning judicial independence and the imperative to keep appointments free from extraneous influences, with Islamic principles playing only a minor, illustrative role.

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the remedial justice of the Greeks, the natural justice of the Romans or the formal justice of the Anglo Saxons. Justice in Islam seeks to attain a higher standard of what may be called 'absolute justice' or 'absolute fairness.'").

158. *Al-Jehad Trust I*, 48 PLD at 333.

159. *See, e.g.*, *id.* at 326, 331 ("The Legislature has to legislate, the Executive has to execute laws, and the Judiciary has to interpret the Constitution and laws. The success of the system of governance can be guaranteed and achieved only when these pillars of the State exercise their powers and authority within their limits without transgressing into the field of the others by acting in the spirit of harmony, cooperation and coordination . . . . [The a]ct of appointment of a Chief Justice or a Judge in the superior Court is an executive act. No doubt this power is vested in the Executive under the relevant Articles of the Constitution, but the question is, as to how this power is to be exercised. Conventions can be pressed into service while construing a provision of the Constitution and for channelising and regulating the exercise of power under the Constitution . . . .").

160. *See, e.g.*, *id.* at 373–411.

2. Al-Jehad Trust II

In the successor *Al-Jehad Trust* case, Chief Justice Sajjad Ali Shah again wrote for a unanimous bench, this time by a 5-0 margin.[161] While *Al-Jehad Trust I* had dealt with the baseline principles regarding judicial appointments that were to mold Pakistan's separation of powers, *Al-Jehad Trust II* responded to specific challenges arising after the first decision related to transfers, the bypassing of seniority-based promotion, judicial vacancies, and the binding nature of Supreme Court judgments.[162] Chief Justice Shah's opinion in *Al-Jehad Trust II* reiterated many of the points from the prior year, and the Court ultimately produced a similar decision as *Al-Jehad Trust I*, focusing on the independence of judges, noninterference from other branches of government, and judicial autonomy.[163]

The Islamic references that had appeared in *Al-Jehad Trust I* proved even more scarce this time. Aside from a brief invocation of divine sovereignty and state appointment procedures from *hadiths*—primarily in the form of cross-references to quotations from *Al-Jehad Trust I*—Islam did not make much of a showing in Chief Justice Shah's reasoning.[164] As with the first decision, *Al-Jehad Trust II* parsed the language of Articles 177, 193, 200, and 209 to ensure that judicial independence was preserved through the creation of a meaningful process of consultation.[165]

3. Summary Analysis of Al-Jehad Trust Cases

Together, *Al-Jehad Trust I* and *Al-Jehad Trust II* illustrate how the Supreme Court invoked religious rhetoric while ultimately relying on secular constitutional reasoning to decide each case. Despite references to divine sovereignty and historical Islamic judicial traditions, the Court's substantive legal framework remained grounded in Articles 177, 193, 200, and 209 of the Constitution, with Islamic principles playing only a supplementary role. These cases further

161. *Al-Jehad Trust II*, 49 PLD at 147.

162. *Id.* at 124–47.

163. *Id.*

164. *See, e.g.*, *id.* at 188 ("[In] my opinion in the Judges' Case (Al-Jehad Trust I) . . . I have made the following observations . . . the act of appointments of Judges is 'a sacred trust.' In other words, the other appointments of the State functionaries are equally sacred trust. The above inference was drawn by me on the basis of an [sic] Hadith (Rawiat) attributed to Hazrat Abu Bakr (Razi Allah Anho) . . . speak[ing] of all State appointments. The same seems to be in consonance with the concept of State in Islam, which is enshrined in the Preamble of our Constitution, which has now become part of the Constitution by virtue of Article 2A, namely, that the sovereignty over the entire Universe belongs to Almighty Allah alone and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust.") (internal citations omitted).

165. *Id.* at 139–47.

support the broader argument of this Note: While religious language was occasionally deployed to lend legitimacy to judicial activism, the expansion of original jurisdiction and the Court's assertion of its authority were fundamentally rooted in secular constitutional interpretation rather than any substantive application of Islamic law.

E. Benazir Bhutto v. President of Pakistan

The *Benazir Bhutto* case similarly exemplifies how the Supreme Court used its original jurisdiction to directly weigh in on a high-stakes constitutional dispute with significant political ramifications. Brought under Article 184(3), this "mega-political"[166] case concerned the dissolution of the National Assembly by President Farooq Leghari, raising questions about executive authority, democratic stability, and the limits of presidential power. Dealing with a challenge to the authority of President Farooq Leghari to dissolve the legislative bodies and dismiss Prime Minister Benazir Bhutto and her cabinet, the Supreme Court dealt systematically with the justifications provided in the President's November 1996 order to dissolve the Bhutto government.[167] Chief Justice Sajjad Ali Shah, writing for a 6-1 majority, ultimately upheld the dissolution order, in part because of the Bhutto Administration's use of wiretapping and its consequent violations of the constitutional right to privacy.[168]

The sole portion of the lengthy majority opinion dealing with religious principles came in its discussion of how intelligence agencies had violated citizens' privacy rights.[169] Chief Justice Shah outlined the copious evidence

166. Khan, *Genesis and Evolution*, *supra* note 12, at 312.

167. Benazir Bhutto v. President of Pakistan, (1998) 50 PLD (SC) 388, 434–38 ("reproduc[ing] verbatim" the text of the President of Pakistan's dissolution proclamation, which accused the Bhutto government of depriving thousands of Pakistanis of their right to life in violation of Article 9 of the Constitution; interfering in the independence of the judiciary guaranteed by Article 2A of the Constitution; assaulting the judiciary through an ostensibly anticorruption reform-related bill; engaging in widespread wiretapping in violation of the fundamental right of privacy guaranteed by Article 14 of the Constitution; interfering with the good governance required by the Constitution through nepotism and corruption; inducting a Minister into the cabinet who had criminal proceedings ongoing against him; and disobeying the President's order to have the Cabinet review the sale of nationalized gas field shares). Note that while their names are similar, this case is distinct from the *Benazir Bhutto v. Federation of Pakistan* cases discussed in *supra* Part I of this Note, which were decided a decade earlier. *See* Benazir Bhutto v. Federation of Pakistan, (1988) 40 PLD (SC) 416.

168. *Bhutto*, 50 PLD at 567–68.

169. *Id.* at 616 ("Factually voluminous record exists which shows that such illegal activities were being carried on systematically on a large scale. The transcript of those recorded conservations having special interest of the petitioner were delivered by the officials of IB to her in sealed envelope.").

in the record of the Bhutto Government's use of wiretapping[170] and dismissed the Prime Minister's claims of ignorance as feigned.[171] Then came the treatment of the President's assertion[172] that wiretapping on a massive scale violated "the fundamental right of privacy guaranteed by Article 14"—that "the dignity of man and, subject to law, the privacy of home, shall be inviolable."[173] Turning to religion, the majority opinion emphasized that wiretapping "was not only in derogation of the fundamental right [within Article 14] but was also violative of what had been ordained by Allah Almighty."[174] It buttressed its analysis of the constitutional provisions with Quranic scriptural support:

> O ye believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other.[175]

True to form, the Court promptly discarded its interest in Islamic textual sources. Chief Justice Shah began a wide-ranging discussion that referenced Watergate,[176] English common law maxims,[177] conducted a lengthy survey of Fourth Amendment jurisprudence in the United States[178] and similar case law

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170. *Id.*

171. *Id.* at 502, 618 ("It is further stated in the petition that on a few occasions she even brought this complaint to the notice of the President who did not bother much about these fears. This is all she had to say about telephone tapping so innocently as if as Head of Government she did not know who was doing the tapping . . . . [F]rom the pleadings it seems clear that the acts of telephone-tapping and eavesdropping were within the knowledge of the petitioner and the President.").

172. *Id.* at 615 ("We now take up the sixth ground of the Dissolution Order which reads as follows: 'And whereas the Prime Minister and her Government have deliberately violated, on a massive scale the fundamental right of privacy guaranteed by Article 14 of the Constitution. This has been done through illegal phone-tapping and eaves-dropping techniques. The phones which have been tapped and the conversations that have been monitored in this unconstitutional manner includes [sic] the phones and conversation of Judges of the superior Courts, leaders of political parties and high-ranking military and civil officers.'").

173. PAKISTAN CONST. art. 14, cl. 1

174. *Bhutto*, 50 PLD at 618–19.

175. *Id.* at 619 (quoting THE QURAN 49:12 ('Abdullāh Yūsuf 'Alī, trans., ed. 2000) ("O ye who believe! Avoid suspicion as much (as possible): for suspicion in some cases is a sin: And spy not on each other, nor speak ill of each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it . . . . But fear Allah: For Allah is Oft-Returning, Most Merciful.").

176. *Id.* ("Not too far is the incident of Watergate when the President of America for conducting and interfering with the telephones and communications system of the Opposition had to resign and he was thrown out of office.").

177. *Id.* at 624.

178. *Id.* at 620 ("This rule is a result of interpretation of Fourth Amendment to the, Constitution of the Untied States [sic], which secures the right of a person in his house against 'unreasonable search and seizure'. The words 'unreasonable search and seizure' have been interpreted to cover interception of the telephone.").

from India,[179] and extensively unpacked *Katz v. United States*.[180] Most impactfully, the majority conducted a highly purposivist rereading of Article 14's phrase "privacy of the home:"

> One may on strict interpretation of the words "the privacy of home" say that such guarantee is restricted to privacy of home and not office or any other premises outside home. This would be a restricted, illogical and completely out of context interpretation. The Constitution is to be interpreted in a liberal and beneficial manner which may engulf and incorporate the spirit behind the Constitution and also the Fundamental Rights guaranteed by the Constitution. The dignity of man and privacy of home is inviolable, it does not mean that except in home, his privacy is vulnerable and can be interfered or violated. Home in literal sence [sic] will mean a place of abode—a place where a person enjoys personal freedom and feels secure. The emphasis is not on the boundaries of home but the person who enjoys the right wherever he may be. The term 'home' connotes meaning of privacy, security and non-interference by outsiders which a person enjoys. According to Ballentine's Law Dictionary, "in ancient law French, the word (home) also signified a man."[181]

Hence, while the Court briefly argued via "Qura'nic [sic] Injunctions and Islamic traditions,"[182] the bulk of its analysis even in the most religiously-inspired portion of the decision relied explicitly on a variety of other legal sources.[183] When viewed in light of the numerous pages devoted to these alternative legal sources, the reader cannot help but be left with the impression that the fleeting reference to a single religious scriptural authority in the decision contributed little to its substantive legal analysis.

F. Mehram Ali v. Federation of Pakistan

The 1998 *Mehram Ali* case is another example of how the Supreme Court used its original jurisdiction under Article 184(3) to adjudicate issues of public importance with reference to Islam, this time dealing with the constitutionality of antiterrorism-related legislation enacted in the prior year.[184] Writing for a unanimous 5-0 majority, Chief Justice Ajmal Mian struck down several provisions of the Anti-Terrorism Act for violating fundamental constitutional

179. *Id.* at 623 ("In a recent judgment of Supreme Court of India in People's Union for Civil Liberties (PUCL) v. The Union of India and another a petition was filed under Article 32 of the Constitution of India, which is equivalent to Article 184(3) of our Constitution by a voluntary organisation, in the wake of the report on 'Tapping of politicians phones' by the Central Bureau of Investigation (CBI) . . .") (internal citations omitted).

180. *Id.* at 622–23. *See also generally* Katz v. United States, 389 U.S. 347 (1967).

181. *Bhutto*, 50 PLD at 621.

182. *Id.* at 619.

183. *Id.* at 618–24.

184. *See* Mehram Ali v. Federation of Pakistan, (1998) 50 PLD (SC) 1445, 1461–61.

rights and undermining judicial independence.[185] He found that provisions authorizing the police and the armed forces to use lethal force based on subjective threat assessments infringed on Article 9's guarantees of life and liberty.[186] Similarly, the Court invalidated measures related to trials in absentia, warrantless searches, confessions made to police officers, and the delegation of some judicial functions to executive-controlled antiterrorism courts.[187]

Islamic principles appeared in a brief portion of the Court's treatment of one such Anti-Terrorism Act provision. In addressing the admissibility of confessions made to police officers—instead of the previously required judicial magistrates—under Section 26 of the legislation, the Court fleetingly referenced a *fiqh* treatise that emphasized the importance of voluntary, frequent admissions of guilt for self-incriminating testimony to be admitted in Islamic courts.[188] Even this brief discussion began with Chief Justice Mian relying on the secular Articles 13(b) and 25 of the Constitution to rule confessions to police officers inadmissible.[189] Only then did he declare:

> At this juncture, it will not be out of context to refer to a treatise titled "Kitab-ul-Fiqa" (Volume 5) by Abdur Rehman Al-Jaziri, translated by Manzoor Ahsan Abbasi, in which it has been highlighted that under Islamic Jurisprudence a confession cannot be accepted lightly and that it has certain mandatory requirements . . . [U]nder Hanfi School of thought[,] a confession is admissible if an accused person admits his guilt/crime four times at four different places. The author has referred to a Hadith attributed to Hazrat Abu Huraira (May God be pleased with him) that our Holy Prophet (Peace be upon him) was not inclined to accept the confession of a person for having committed Zina with a woman and asked him to go away, but he came back four times and made confession and even then our Holy Prophet (peace be upon him) asked him certain questions in order to

185. *Id.* at 1496–97.

186. *Id.* at 1474; *see also* PAKISTAN CONST. art. 9 ("No person shall be deprived of life or liberty save in accordance with the law.").

187. *Mehram Ali*, 50 PLD at 1482–94.

188. *Id.* at 1490–91.

189. These constitutional safeguards protect individuals from being forced to incriminate themselves. *See* PAKISTAN CONST. arts. 13, cl. b; art. 25; *see also Mehram Ali*, 50 PLD at 1490 ("That section 26 of the Act provides that notwithstanding anything contained in Qanun-e-Shahadat Order . . . a confession made by a person accused of any offence punishable under section 7 or section 8 of the Act . . . before a police officer not below the rank of a Deputy Superintendent may be proved against such person. The above provision seems to be violative of Articles 13(b) and 25 of the Constitution. It may be observed that clause (b) of Article 13 of the Constitution confers a fundamental right by providing inter alia that no person shall, when accused of an offence, be compelled to be a witness against himself. Indeed a judicial confession is recorded by a Magistrate which is admissible as a piece of evidence, but keeping in view the state of affairs obtaining in the police force, we cannot equate a police officer with a Magistrate. Additionally, there are very strict requirements [with] which a Magistrate is required to comply before recording a judicial confession of an accused person.") (internal citations omitted).

> ascertain, whether the person was in fact guilty of Zina in order to award punishment of Hadd.[190]

This reference to a treatise constitutes one of the only attempts in the analyzed cases to cite to a text from the fourteen centuries of the Islamic legal tradition outside of the primary corpus provided by Quranic verses and *hadiths*; it quoted a compendium of rulings summarizing the positions of different Sunni jurisprudential schools authored by a twentieth-century Egyptian scholar.[191] Nevertheless, the cursory nod to Islamic text and its lack of an impact on the much lengthier substance of the secular constitutional analyses in Chief Justice Mian's decision reinforces the pattern seen in the other cases of this period—religious references, while occasionally invoked for rhetorical or illustrative purposes, played a negligible role in shaping the court's legal reasoning.

G. Sindh v. Sharaf Faridi and Shahida Zahir Abbasi v. President of Pakistan

Lastly, two additional cases have been cited as evidence for an Islamization of Supreme Court decisions in the 1990s. For the 1994 *Sharaf Faridi* decision, for instance, Professor Lau declares that "t[]he most direct application of Islamic law or, to be more precise, the Objectives Resolution and Article 2-A, occurred in the case of *Government of Sindh v. Sharaf Faridi* which ordered the government to separate the judiciary from the executive."[192] For the 1996 *Shahida Zahir Abbasi* decision, Lau similarly argues that "t[]he close link between Islam and human rights was perhaps best summarised by Justice Saiduzzaman Siddiqui in 1996" in his treatment of the Objectives Resolution and liberal Islam-based interpretive approaches.[193]

Both these cases contain next to no mention of Islam. Far from engaging in any explicitly religious reasoning or even discussing how Islamic principles—such as the principle of divine sovereignty cited by many other decisions in this Note—underlie the Objectives Resolution, these opinions simply gestured in passing toward the Objectives Resolution. *Sharaf Faridi*, for instance, only cited to the judicial independence provisions of Article 2A, which are not related to the more religious language seen earlier in the Note.[194] In *Shahida Zahir Abbasi*, Justice Saiduzzaman Siddiqui briefly spoke positively of "the Objectives Resolution (Article 2A), the Fundamental Rights and Directive Principles of State Policy," which aimed at "achiev[ing] democracy, tolerance, equality and social

190. *Mehram Ali*, 50 PLD at 1490–91.
191. *Id.*
192. The Objectives Resolution, originally adopted in 1949, outlines Pakistan's commitment to Islamic principles, democracy, and fundamental rights. LAU, *supra* note 13, at 103.
193. *Id.* at 107.
194. *See* Government of Sindh v. Sharaf Faridi, (1994) PLD 46 SC 105, 107–16 (Pak.).

justice according to Islam."[195] No other portion of either opinion mentioned Islam, or any specific Islamic provision being applied. Hence, these two decisions contain even less extensive discussion of religious law than the sparse references of the opinions analyzed before them.

Conclusion

The path charted by the Supreme Court of Pakistan in expanding its original jurisdiction powers in the 1990s illustrates the tension between the country's secular legal system and its more ambitious constitutional aspirations to fuse a twentieth-century nation-state and its English common law legal tradition with Islamic principles. Contrary to a scholarly narrative that characterizes this period as one of an "Islamisation of the legal and judicial discourse,"[196] the dozen cases examined above indicate that substantive, religiously inspired legal analysis was highly marginal to the merits of the court's original jurisdiction cases. This Note paints a portrait of a legal system that chose not to use constitutionally sanctioned religious law to expand judicial powers and advance judicial independence, reserving it instead for ornamental rhetorical purposes. It highlights how a coordinate constitutionalizing model—in other words, a model that "incorporates Islamic law, laws of democratic processes, and liberal norms, placing them all on equal footing"[197]—can lead to the subordination of seemingly unworkable religious laws to the liberal constitutional norms ingrained in the judicial culture applying them.

Ultimately, the Supreme Court of Pakistan's expansion of original jurisdiction, though framed in religious language, mirrored the secularized reasoning seen in systems like India and the United States. To achieve a true synthesis of its dual constitutional aspirations—one that would allow the judiciary to consistently, predictably, and inclusively apply the religious principles encoded in the Constitution framed by the people of Pakistan's elected representatives—the Pakistani judiciary must work much harder; otherwise, its legal system will continue to default to the secular common-law framework that has run the country since its founding.

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195. *Shahida Zahir Abbasi*, 48 PLD at 634–35 ("Supreme Court while construing the provisions of Article 184(3) of the Constitution does not follow the conventional interpretative approach based on technicalities and ceremonious observance of rule or usage of interpretation. Keeping in view the avowed spirit of the provision, Supreme Court, prefers the interpretative approach which received inspiration from the triad of provisions which saturated and invigorated the entire Constitution, namely, the Objectives Resolution [contained in the preamble to the 1973 Constitution] (Article 2A), the Fundamental Rights and Directive Principles of State Policy so as to achieve democracy, tolerance, equality and social justice according to Islam. This liberal interpretative approach opened the door of 'access to justice to all.'").

196. Lau, *supra* note 13, at 98.

197. Rabb, *"We the Jurists," supra* note 14, at 531.

IV. Appendix I: Original Jurisdiction Cases Analyzed

Case	Citation	Description
Darshan Masih v. State	(1990) 42 PLD (SC) 513	Treatment of brick kiln workers; brief reference to "basic human rights in Islam," but no substantial application of Islamic law.
Mian Muhammad Nawaz Sharif v. President of Pakistan	(1993) 45 PLD (SC) 473	Constitutionality of defections; short Islamic reference to the "sacred trust" possessed by elected representatives.
Sardar Muhammad Muqeem Khoso v. President of Pakistan	(1994) 46 PLD (SC) 412	Misconduct by elected representatives; limited treatment of Islamic principles of "sacred trust" and divine sovereignty.
Pir Sabir Shah v. Shad Muhammad Khan	(1995) 47 PLD (SC) 66	Political defections; Islamic legal reasoning in dissents on the importance of keeping promises, using Quran and *hadith* references.
Wukala Mahaz v. Federation of Pakistan	(1998) 50 PLD (SC) 1263	Political defections; brief mention of Islamic principles through citations to *Sabir Shah*.
Khalil-uz-Zaman v. Supreme Appellate Court	(1994) 46 PLD (SC) 412	Islamic criminal law on *qisas* and retributive justice in murder cases; secular statutory law applied to determine eligibility for punishment.
The Al-Jehad Trust Cases	(1996) 48 PLD (SC) 324; (1997) 49 PLD (SC) 84	Judicial independence; Islamic references to the role of judges, but core reasoning based on secular constitutional principles.
Benazir Bhutto v. President of Pakistan	(1998) 50 PLD (SC) 388	President's authority to dissolve National Assembly; brief reference to Islamic privacy protections.
Mehram Ali v. Federation of Pakistan	(1998) 50 PLD (SC) 1445	Constitutionality of antiterrorism law; brief reference to Islamic due process principles, but ruling based on constitutional law.
Sindh v. Sharaf Faridi	(1994) PLD 46 SC 105	Judicial independence; no mention of Islam.
Shahida Zahir Abbasi v. President of Pakistan	(1996) PLD 48 (SC) 632	Islamic principles in Objectives Resolution; very limited mention of Islam.