

Shariat Court's Intrusion: Protection of Civil Bureaucracy Against Arbitrary Treatment

Pakistan v Public at Large

PLD 1987 SC 304

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Introduction

The Shariat Courts of Pakistan have asserted their jurisdiction and intruded in a wide range of areas, which can be construed as laws generally applicable to all Muslims.¹ However, it has seldom been noticed that these areas are often much broader than those which generally form the mainstream discourse; one such area is the civil bureaucracy. The applicability of the Civil Servants Act 1973 (“CSA”) to all Muslims in the bureaucracy allows the Federal Shariat Court (“FSC”) to actively review and interpret the law for its consistency with Islam.² Consequently, many of the appeals on such matters end up before the Shariat Appellate Bench of the Supreme Court (“SAB”).³

Though there have been several decisions on the legal functioning of civil servants; the SAB’s decision of 1987 in *Pakistan v Public at Large* is rather momentous.⁴ Section 13(i) of the CSA allowed compulsory retirement of senior civil servants at the government’s discretion and Section 13(ii) empowered removal of bureaucrats on completing service of twenty-five years or more – without any grounds of misconduct or notice.⁵ By challenging the arbitrary removal of civil servants under these provisions of the CSA,⁶ the SAB bolstered the inviolability of their fundamental rights: to be heard and to have honour and reputation protected.⁷ This decision is particularly remarkable because it posed a significant challenge to the deeply entrenched military dominance at the time –

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¹ *Dr. Mahmood-ur-Rehman Faisal v Government of Pakistan* PLD 1994 SC 607: it was decided that the exclusion of Muslim Personal Law from the jurisdiction of the Federal Shariat Court, in Article 203B of the Constitution, only included those laws that applied ‘personally’ to specific sects and thus all other laws others fell within its jurisdiction.

² Civil Servants Act 1973 (Act No. LXXI of 1973) [“Civil Servants Act”].

³ For instance: *Pakistan v Public at Large and others* PLD 1986 SC 240, *Pakistan and others v Public at Large and others* PLD 1987 SC 304, and *Pakistan v Public at Large* 1989 SCMR 1690.

⁴ *Pakistan v Public at Large and others* PLD 1987 SC 304.

⁵ Civil Servants Act, s 13(i)-(ii).

⁶ *Ibid.*

⁷ *Pakistan* (n 4).

Shariat Court's Intrusion: Protection of Civil Bureaucracy Against Arbitrary Treatment even though the military rule ended a year later.⁸ It also allowed the SAB to impose requirements of due process and fair trial through deductive reasoning and progressive interpretation, while enforcement of fundamental rights was suspended. The SAB thus produced significantly broad legal interpretations of Islamic sources for its reasoning.

Facts and Judgment

This case⁹ came as an appeal filed by the Government from an earlier judgment of the FSC that had ordered a repeal of the impugned sub-sections in Section 13 in the CSA.¹⁰ It is important to remember that this judgment was given at a time when President Zia ul-Haq's martial law was prevalent and the Constitution of 1973 had been temporarily suspended.¹¹ With no constitutional rights to rely on, laws could not be challenged for being *ultra vires*. The only recourse available to question the validity of laws was thus arguing for their repugnancy to the injunctions of Islam, as previously done in *Farishta v Federation of Pakistan*.¹² Accordingly, the Respondents in this case, representing the public at large, contended that Section 13 sub-sections (i) and (ii) of the CSA were against the principles of *Sharia* for being arbitrary. In contrast, the Appellants, constituting the government of Pakistan, asserted that the provision could not be found prohibited under *Sharia* Law.

While rendering the majority opinion, Justice Muhammad Afzal Zullah began by shedding light on the contents of Section 13 of the CSA. He noted that the first two sub-clauses in Section 13 intended to truncate the civil servant's tenure, without issuing show-cause, the right to a hearing, or even an "enquiry or reasons for the finding of public interest."¹³ The third clause stipulated sixty years to be the ordinary age of retirement for civil servants.¹⁴ The juxtaposition in the impact of both these aspects was the central point of controversy in this case.

The decision went on to rely on an earlier case, in which the Supreme Court had mandated the FSC to rely on both the Quran and Sunnah to ascertain the validity of laws.¹⁵ It was elaborated that while examining a provision for its consistency with Islamic

⁸ Moeen H. Cheema, 'Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law' (2012) 60(4) *American Journal of Comparative Law* 875, 906-907.

⁹ *Ibid* (n 4).

¹⁰ *Re: The Civil Servants Act (LXXI of 1973)* PLD 1984 FSC 34.

¹¹ L.A. Times Archives, 'Zia to Revive, Change 1973 Pakistan Constitution' *Los Angeles Times*, (1985) <<https://www.latimes.com/archives/la-xpm-1985-03-03-mn-32770-story.html>> accessed: 21 September 2021.

¹² *Farishta v Federation of Pakistan* PLD 1980 Peshawar 47.

¹³ *Ibid* (n 4).

¹⁴ *Ibid*.

¹⁵ *Pakistan v Public at Large* PLD 1986 SC 240.

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injunctions: first, the FSC had to highlight the relevant text from the Quran and/or Sunnah; second, if the precise text was not available, certain deductive principles from the *Sharia* could be sought to determine repugnancy.¹⁶ The latter could be done through the various tools of interpretation: *Isthisan*, *Istidlal*, *Ijtihad*, *Ijma*, and *Qiyas*.

Once a principle had been derived, the impugned provision was to be analysed for its consonance with the established principle “on the touchstone of Islamic injunctions.”¹⁷ However, in the instant case, it was stressed that although the provisions of CSA directly found their basis in the Islamic text, the principles and deductions from other injunctions also needed to be considered for validity.

Justice Zullah delineated that in the contentious provision before him, there was an element of deliberate and premature retirement when a civil servant was precluded from completing his or her service until the stipulated age of sixty.¹⁸ This resulted in the deprivation of one's right to work. It also exposed the individual to societal stigma whereby their dismissal was associated with some disgraceful situation, even if they had been removed without fault.¹⁹

Accordingly, the SAB referred to verse 93 of Surah 10 of the Qur'an: “Nor repulse the petitioner (unheard).”²⁰ It was acknowledged that this verse was generally interpreted to emphasise on being charitable;²¹ however, the underlying reasoning was extended to confer a right to human dignity as well.²² Perhaps the idea was that a person should not simply be turned away without first being given a chance to state their side of the story – much like one asking for charitable aid. In fact, the sudden removal of a civil servant on the basis of “public interest” without affording them the chance to be heard resulted in implications that would necessarily besmirch their reputation in society.²³

Several provisions of the Qur'an and Sunnah were laid out to denote that protection of honour and reputation were inviolable rights in Islam. For instance, verse 70 of Surah 17 were brought to light, which stated:

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Civil Servants Act, sSection 13.

¹⁹ *Ibid* (n 4).

²⁰ Ibid.

²¹ For context, other translations include: ‘And as for the petitioner, do not repel [him]’ (Sahih International), and ‘Therefor[e] the beggar drive not away’ (Muhammad Sarwar).
<<https://corpus.quran.com/translation.jsp?chapter=93&verse=10>>

²² Ibid.

²³ Ibid.

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[N]ow, indeed, we have conferred dignity on the children of Adam, and borne them over land and sea, and provided for them sustenance out of the good things of life, and favoured them far above most of Our creation.²⁴

By placing reliance on such verses directly from the Quran, the judgment sought to strengthen its reasoning that these rights formed the essence of Islam and thus could not be negated.

Similarly, the aspect of due process has been heavily emphasized by Justice Zullah through numerous other injunctions of Islam.²⁵ These injunctions were derived from various commentaries and direct verses of the Quran, along with several illustrative cases decided by the Prophet (PBUH). Sunnah was directly interpreted to signify upon the principle of justice that is found to be in the spirit of Islam.²⁶ The arbitrary provisions in the Act were thus judged in accordance with the aforementioned “touchstone of Islamic injunctions.”²⁷

Additionally, it was reiterated that in interpreting Islamic injunctions, Quranic verses and Sunnah were meant to complement each other.²⁸ The SAB, therefore, delved into an abundance of examples from Islam, drawing heavily from juristic deduction and applying what it considered to be the “philosophy underlying Allah’s justice.”²⁹ The Court noted instances from the Quran – deducing from the examples of Hazrat Adam and Hazrat Dawood – and propounded that even on the Day of Judgment, man would be made aware of the accusations against them, offering them the opportunity to explain and make a plea of guilt or denial.³⁰ This example was rather compelling in response to the Government’s argument that it should be exempted from the ordinary rules of justice as it represented Allah.

The SAB cited *Asma Jilani v The Government of the Punjab*,³¹ wherein it was held that as sovereign representatives of the citizens, the government remains subject to the “law” and principles of justice.³² In defining the meaning of “law”, the SAB stated that

²⁴ Ibid.

²⁵ Ibid: the SAB quoted from *Maqalat-e-Seerat (Part-I)* 9th National Seerat Conference 1984 and from the *Commentary of the Holy Qur'an* by A. Yusuf Ali, (S. 16 V-19) Note 21.

²⁶ Ibid.

²⁷ Ibid: After assessing the contents of the impugned Section 13, Justice Zullah proposed that: “The question arises whether such law is valid on the touchstone of the Islamic injunctions.”

²⁸ Ibid: SAB relied on *Pakistan v Public at Large* (n 15) to assert that Quran and Sunnah were to be read together and consistently to bring forth Islamic injunctions.

²⁹ Ibid.

³⁰ Ibid.

³¹ *Asma Jilani v The Government of the Punjab* PLD 1972 SC 139, 182.

³² Ibid.

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this had a "divine origin" as is found in Islam.³³ Accordingly, it was found that individual rights prevailed over public interest in Islam. Public interest is thus intertwined with discharging a duty of public trust, on behalf of the Government.

Furthermore, contrary to the Government's contention that it had a consensual contractual relationship with civil servants, the SAB suggested that in issuing retirements based on "public interest" there was no relevance of consent.³⁴ Such retirements had to be made on factual determinations and protecting civil servants against such arbitrary concerns was in line with Islam.³⁵ Justice Zullah further rejected the Government's reference to a master-servant relationship and the analogy to a husband pronouncing *talaq* without justifiable cause.³⁶ Firstly, these inferences could easily be distinguished from the case at hand: the present case concerned a public matter as opposed to a private interest. Secondly, if some similarities were to be drawn, even matters of unjust pronouncements of *talaq* were frowned upon.³⁷ Hence, arbitrary treatment was unacceptable in any event.

By laying out these arguments in conjuncture with the meticulously derived Islamic injunctions, the SAB held the provision in question – concerning removal of civil servants, without reason and without a chance of hearing – to be repugnant. It was ordered that minimum safeguards were to be provided through the issuance of show-cause notices, the affording of responding opportunities, or by making special provisions for permissible exceptional cases.³⁸ Similarly, this decision was also deemed applicable to Cantonment employees, invoking the importance of equal treatment and protection across the board – a striking aspect in itself.

Background and Prior Law

Just like most other laws and systems of Pakistan, the bureaucratic structure of civil services was also inherited from the colonial period. The influence of powerful civil and military bureaucratic dynamics has caused considerable political instability since Pakistan's inception.³⁹ Though there have been efforts to reform the structure, these have been slow and ineffective, while repeatedly being overshadowed by those in control.⁴⁰

³³ *Ibid* 235.

³⁴ *Ibid* (n 4).

³⁵ *Ibid*.

³⁶ *Ibid*.

³⁷ *Ibid*.

³⁸ *Ibid*.

³⁹ Andrew Wilder, 'The Politics of Civil Service Reform in Pakistan', (2009) *Journal of International Affairs* 63(1) in *Pakistan & Afghanistan: Domestic Pressures and Regional Threats* (2009) 19-37, 20.

⁴⁰ *Ibid*.

The civil services of Pakistan thrived most during the “political vacuum” that followed the decade of 1948-1958: seven fragments of political parties struggled as the country saw nine unstable governments in the next few years.⁴¹ Thereafter, the bureaucracy went through several periods of power struggle, each period affected by the political and military stakeholders of the time.

When General Ayub Khan seized the presidency from Iskander Mirza through a coup in 1958, he was quick to place his military officers in key civilian positions.⁴² During this regime, the administration was proving to function without the civil bureaucracy's interference. Apprehending complete exclusion from the state's affairs, the bureaucracy allied itself with the military power to survive.⁴³ The civil servants temporarily accepted their new roles, and while their cooperation with the military made state functioning easier, it also paved the way back for the civil bureaucracy's influence.⁴⁴ After taking ample measures to remain extant, by 1962 the civil services of Pakistan had reinstated its place as an integral and elite state functionary.⁴⁵

In 1971, after coming to power Prime Minister Zulfiqar Ali Bhutto promised to weaken the bureaucracy by giving elected representatives the power to regulate unelected representatives, thus causing the services' politicisation.⁴⁶ Within three months of taking control, Bhutto compulsorily retired 1,300 civil servants and then imposed extensive administrative reforms hoping to leave the elite state functionary enervated.⁴⁷ The Civil Servants Ordinance of 1973 (“CSO”) was aimed at regulating the appointment of civil servants and removing the previous Constitutional protections against compulsory retirements, reduction of ranks and dismissals.⁴⁸ Through this law, Bhutto introduced a policy of “lateral recruitment.”⁴⁹ Close relatives and associates of the new Prime Minister were then appointed to take over the services.⁵⁰

Thereafter, the civil services went through a further phase of militarisation under Zia's regime, which prioritised military control over the civil bureaucracy.⁵¹ Resultantly,

⁴¹ Shahid J. Burki, ‘Twenty Years of the Civil Service of Pakistan: A Reevaluation’ (1969) University of California Press. 9(4) 239-254, 243.

⁴² Ibid 247

⁴³ Ibid 248.

⁴⁴ Ibid.

⁴⁵ Ibid 251.

⁴⁶ Wilder (n 39) 21-23.

⁴⁷ Ibid 22.

⁴⁸ Found in the interim Constitutions of 1956, 1962, and 1972.

⁴⁹ Wilder (n 39) 22.

⁵⁰ Ibid.

⁵¹ Ibid 23-25.

it is not surprising that those in power and those representing the state have heavily influenced the structure of civil services. It is significant to underline that the state controllers' measures were mainly focused on circumscribing the independence of the civil bureaucracy by reforming aspects of appointments, postings, tenure, retirement, and pensions.

The bureaucratic institution is heavily influenced by the political powers in play and this is precisely where the role of the judiciary becomes imperative. As noted earlier, *Pakistan v Public at Large* results from an appeal against one of the FSC's earlier judgments in *Re: The Civil Servants Act (LXXI of 1973)*.⁵² Similar to Justice Zullah, on behalf of the FSC, Chief Justice Aftab Hussain had laid out that Sections 13(i) and 13(ii) of the CSA were arbitrary and against the principles of *Sharia* with regards to equality and protection under the law.⁵³

Interestingly, however, Chief Justice Hussain opined by first discussing the elevated treatment of civil servants and the protection they were owed in the *Sharia*.⁵⁴ He referred to the following tradition:

[T]hey (your bond-men or servants) are your brothers. God has assigned them to your control. So, whoever has his brother under his control shall feed him from what he himself partakes and clothe him with what he himself wears and shall not impose on him a task harder than him (he can himself perform). If you impose such work on him, help him also in doing it.⁵⁵

This reference is noticeable in the way it is interpreted to highlight the protection of bureaucratic employees in the name of public interest.

It was further propounded that such discretionary treatment of civil servants was blatantly against the express injunctions of Islam, which could not be interpreted as empowering a head of state to such unquestionable extents.⁵⁶ Chief Justice Hussain's opinion has much to do with accentuating the stature of bureaucratic employees and denoting their sheer importance. Therefore, while the significance ascribed to respecting equality before the law – as voiced through *Sharia* – is a characteristic shared by both

⁵² *Ibid Act* (n 10).

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid*: FSC cited Bukhari (Urdu translation) Volume I, page 98.

⁵⁶ *Ibid.*

Shariat Court's Intrusion: Protection of Civil Bureaucracy Against Arbitrary Treatment decisions,⁵⁷ a subtle difference can be drawn in the approach taken by both courts. The SAB denotes an implication for protection offered to a much broader range of employees.

Moreover, the Punjab Civil Servants Act of 1947⁵⁸ contained provisions similar to the CSA. The FSC reaffirmed its previous decision to declare these invalid as well.⁵⁹ Additionally, the FSC established that the test for categorizing employees requires a "reasonable classification" based on "intelligibility" that relates to the "object and purpose" of the legislation.⁶⁰ Upholding this test, the SAB also noted that premature retirements were violative of the injunctions of Islam, when done so without due notice of action or without the opportunity of show cause against such action.⁶¹

In this sense, the Shariat Courts have reiterated the role of preserving the rights of civil servants while aiming to implement due process and a right to be heard. However, the SAB's approach in the use of the Quran and Sunnah in this instance may be independent of the precise traditions of jurisprudence and legal interpretation. Here, *Sharia* may have become integral simply to impose broad protection of a seemingly integral state institution with the underlying idea of emphasizing the SAB's role in public interest.

Analysis

As noted earlier, the SAB's holding in this case was similar to the one previously determined by the FSC.⁶² However, in contrast to the later judgment, the prior decision seems to highlight additional aspects on limiting the Government's influence and strengthening the bureaucracy's independence and stature. On the other hand, while agreeing with the FSC's equality-based reasoning, the SAB went further to highlight the elements of "natural justice" and declared *Adl*, *Qist*, and *Ihsan* to be "components of complete justice in Islam."⁶³ This not only reflects equal treatment and protection against arbitrariness, but also indicates that such rights cannot simply be discarded at the discretion of the state or its dominant ruler.

⁵⁷ *Ibid* (n 10); and *Pakistan and others* (n 4).

⁵⁸ Punjab Civil Servants Act 1947, s 12.

⁵⁹ *Muhammad Ramzan Qureshi v Federal Government* PLD 1986 FSC 200.

⁶⁰ *Ibid*.

⁶¹ *Ibid* (n 4).

⁶² *Ibid* (n 10).

⁶³ Marin Lau, 'The Role of Islam in the Legal System of Pakistan' (Martinus Nijhoff Publishers 2006) 183 ["Lau"]: he highlights the Shariat Court's attempt at propounding on human rights and equality through such decisions); *Ibid* (n 4).

Martin Lau argues that the issue in both these cases was less about the right to equality and more about circumscribing the discretionary powers of the government.⁶⁴ He does, however, recognise that such cases illustrate how “the Islamic review of legislation could incorporate a constitutionally guaranteed fundamental right.”⁶⁵

Moreover, the FSC and SAB's later judgments can help refute the aforementioned argument made by Lau regarding the limited concern for the right to equality compared to controlling governmental influence. These judgments effectively demonstrated the Courts' inclination towards protecting civil servants and other types of employees when there was no military governance to fight against.

In the case of *Pakistan v Public at Large*,⁶⁶ the SAB was asked to review the FSC's decision which held a provision of the West Pakistan Water and Power Development Authority (WAPDA) Act, 1958 to be repugnant to Islamic injunctions.⁶⁷ The impugned provision laid out grounds for the removal of WAPDA employees at the hands of the Government, but did not provide for the issuance of a show-cause and subsequent hearing.⁶⁸ The SAB reiterated its 1987 decision to emphasize that the disclosure of any grounds for removal via show-cause notice was necessary to be in line with Islamic injunctions.⁶⁹ In this case, the SAB extended the right to be heard to employees of a semi-autonomous public authority and offered protection against the chairman of WAPDA, even after the military regime had ended.

Even in recent years, it seems that the FSC has leaned towards providing civil servants a generous level of protection. For instance, in the case of *Professor Kazim Hussain v Government of Pakistan*, the FSC stressed upon the equal treatment of the civil servants, specifically in the context of their benefits.⁷⁰ In this case, it was stated that even if two civil servants were married to each other, they would be given separate house-rent allowances in their individual capacities, as any other arrangement would be discriminatory.⁷¹ This decision directly considered the question of equal treatment regardless of gender and guaranteed equal benefits to a female civil servant separate from her marriage to another civil servant.

⁶⁴ Ibid 178-179; Ibid (n 4); *Re*: Ibid (n 10).

⁶⁵ Lau (n 63) 178-179.

⁶⁶ *Pakistan v Public at Large* 1989 SCMR 1690.

⁶⁷ Ibid; West Pakistan Water and Power Development Authority Act (XXXI of 1958), s 6.

⁶⁸ Ibid (n 66).

⁶⁹ Ibid [4].

⁷⁰ *Professor Kazim Hussain v Government of Pakistan* PLD 2013 FSC 18.

⁷¹ Ibid (24).

More importantly, arguments for invoking “*Maslaha* in the context of *Maqasid al Sharia* [objectives of Sharia]” further support the progressive approach that serves to implement human rights principles.⁷² This is evident from Justice Afzal acknowledging the “importance of the Supreme Court’s previously approved “Rules of *Maslaha* and *Urf* amongst others.”⁷³ *Maslaha* refers to the purpose of law, literally translated as “a cause or source of something good,” and *Urf* generally refers to established principles or customs.⁷⁴ In this particular case, these rules were not applied because the issue was easily resolved by a direct reliance on the Quran and Sunnah.⁷⁵

While such judgments can be praised for setting progressive trends, there are concerns against the arbitrary overuse of *Sharia* and Islamic sources, which may result in vague interpretations. For instance, it has been noted that the FSC “often struggles to evolve a coherent and comprehensive framework for determining the ‘injunctions of Islam,’” and the various conflicting judgments highlight inconsistencies in the use of jurisprudential traditions and legal interpretation.⁷⁶

Conclusion

The irony of this judgment is worth noting: in hopes of carrying out an extensive Islamisation of laws in Pakistan in 1980, Zia established the FSC. Consequently, the same Court was intent on challenging his state of control. Moeen Cheema rightly asserts that the SAB’s decision of 1987 is imperative for its firm stand against the suppression of fundamental rights and arbitrariness under the prevailing military regime.⁷⁷ He states:

Shariat courts began to fill the vacuum even at that early stage and advanced a jurisprudence of Islamic rights, the right to hold the government and public officials accountable, the right of access to justice and an independent judiciary, the right to equality, and the establishment of due process rights.⁷⁸

⁷² Shannon Dunn, ‘Islamic Law and Human Rights’, *The Oxford Handbook of Islamic Law* (first published online in 2015) 9.

⁷³ *Pakistan* (n 4): Justice Zullah quoted from *Pakistan v Public at Large* (n 15).

⁷⁴ Felicitas Opwis, ‘Maşlaḥa in Contemporary Islamic Legal Theory.’ (2005) *Islamic Law and Society* 12(2) 182–223; Ansari Yamamah, ‘The Existence of Al-Urf (Social Tradition) in Islamic Law Theory’ (2016) *IOSR-JHSS* 21(12) 43-48.

⁷⁵ *Ibid.*

⁷⁶ Shahbaz Ahmed Cheema, ‘Non-Repugnancy Decisions of the Federal Shariat Court of Pakistan: An Analysis of Politico-legal Ramifications’ *LUMS Law Journal* 2020 7(1) 48-73, 52.

⁷⁷ Moeen H. Cheema, ‘Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan’s Law’ (2012) 60(4) *American Journal of Comparative Law* 875, 906-907.

⁷⁸ *Ibid.*

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Consequently, while the underlying implication might have been to challenge state power, the subsequent decisions, like the SAB's *Pakistan v Public at Large* and FSC's *Kazim Hussain v Government of Pakistan*, are a testament to the inviolability of human rights.⁷⁹ These rights can be construed through Islamic traditions, regardless of the political conditions.

However, there are several layers and connotations that can be derived from the Shariat Court's decisions on matters of civil servants. Perhaps the most crucial implication is that in certain instances, Islamic injunctions may be used to validate important principles of natural justice, like the principle '*audi alterum partem*.'⁸⁰ However, it is true that the urgency to protect the bureaucratic institution of the State is higher, and public interest is a significant factor in consideration. Nevertheless, it cannot be negated that these rights – accrued via principles of Islamic natural justice – should not be specific to a category of individuals. It is also pertinent to point out that with such a broad interpretation of Islamic traditions without following any set rules of legal interpretation in Islamic jurisprudence, an arbitrary use of *Sharia* for mere repugnancy decisions can become prevalent.

⁷⁹ *Pakistan v Public at Large* (n 66); *Professor Kazim Hussain* (n 70).

⁸⁰ Translated: "let the other side be heard as well."