JURISPRUDENCE OF THE FEDERAL SHARIAT COURT AND THEORY OF COLLECTIVE IJTIHAD IN CIVIL CASES

(A CRITICAL ANALYSIS WITH SPECIAL REFERENCE TO CASE LAWS)

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Abstract

The Federal Shariat Court (FSC) is a constitutional institution tasked with ensuring the alignment of Pakistani laws with the injunctions of Islam. This dissertation examines the concept of Ijtihād (independent juristic reasoning) within the FSC, specifically its practice of collective Ijtihād in civil cases. The research aims to assess the FSC‘s authority, methodology, and impact on the legal system of Pakistan, focusing on its interpretation of the Qur‘ān and Sunnah and its role in the Islāmization of laws. The study is driven by the following research questions:

1. *What is the concept of Ijtihād in Islamic jurisprudence, and does the FSC possess the authority to engage in Ijtihād?*
2. *Has the FSC established specific jurisprudential principles for interpreting the Qur"ān and Sunnah, and how consistently does it adhere to them?*
3. *What methods of Ijtihād validation were employed by earlier Muslim jurists, and does the FSC adopt these methods?*
4. *How does the FSC address differing views among the Schools of Sharī"ah?*
5. *How does the FSC"s practice of Ijtihād differ from earlier Muslim jurists, and what are the socio-legal impacts on Pakistan"s legal system and society?*

The objectives of this research are to **evaluate** the theory of **Ijtihād** in Islam, **assess** the **FSC** application of **Islamic jurisprudential principles**, and **analyze** its **methodology** in resolving **legal disputes**. Additionally, the research aims to **examine** the **socio-legal implications** of the FSC‘s practice of **Ijtihād** on Pakistan‘s **legal system**, particularly its impact on the alignment of national laws with **Islamic principles** and the broader societal consequences of such judicial practices.

This research adopts a qualitative methodology, incorporating the **IRAC (Issue, Rule, Application, Conclusion) framework** alongside content analysis, case studies, and comparative analysis. The content analysis examines FSC judgments, legal texts, and Islamic jurisprudential sources to evaluate the FSC‘s interpretation of Islamic law. Case studies provide an in-depth assessment of significant FSC rulings, applying the IRAC structure to systematically analyze legal reasoning. Comparative analysis contrasts the FSC‘s approach with classical Islamic juristic practices and those of other contemporary Islamic legal institutions, ensuring a structured and comprehensive evaluation.

Key findings suggest that the FSC‘s practice of collective Ijtihād has contributed to the Islāmization of Pakistan‘s legal system, although inconsistencies exist in its application. The FSC‘s rulings often diverge from classical juristic opinions, particularly in resolving differences among the Schools of Sharī‘ah. The research highlights the socio-legal impacts of the FSC‘s decisions, emphasizing the need for a more consistent and comprehensive approach to Ijtihād in the modern legal context.

The dissertation makes significant contributions to understanding the FSC‘s role in interpreting Islamic jurisprudence and its impact on Pakistan‘s legal system. It recommends further research into the FSC‘s role in shaping Islamic jurisprudence in Pakistan and suggests improvements in the court‘s methodology to enhance its effectiveness in aligning laws with Islamic principles.

Keywords: Jurisprudence, Federal Sharī‘at Court, collective ijtiḥād, civil cases, Islāmic law, Pākistān.

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Abbreviations and Acronyms

APNS	All Pākistān Newspapers Society
CII	Council of Islāmic Ideology
CJ	Chief Justice
CJP	Chief Justice of Pākistān
CLC	Civil Law Cases
CPC	Civil Procedure Code 1908
CUP	Cambridge University Press
DB	Division Bench
DBA	District Bar Association
DC	Deputy Commissioner
DG Khan	Dera Ghazi Khan
DMMA	Dissolution of Muslim Marriages Act, 1939
FCJ	Family Court Judge
FG	Federal Government
FSC	Federal Sharī'at Court
Gen.	General
GoNWFP	Government of NWFP
GoPunjab	Government of Punjab
GWA	Guardian and Wards Act, 1890
ICT	Islāmabad Capital Territory
IIIT	International Institute of Islāmic Thought
IIIT	International Institute of Islāmic Thoughts
IIU	International Islāmic University
IRAC	Issue, Rule, Application, Conclusion
IRI	Islāmic Research Institute
IRP	Islāmic Republic of Pākistān
LDA	Lahore Developent Authority
MFLO	Muslim Family Laws Ordinance, 1961
MoF	Ministry of Finance
NA	National Assembly
OUP	Oxford University Press
PIL	Public Interest Litigation
PLD	Pākistān Legal Decisions
PM	Prime Minister
PUP	Princeton University Press
QSO	Qanun-e-Shahadat Order 1984
SAB	Shariat Appellate Bench
SCMR	Supreme Court Monthly Law Review
SCP	Supreme Court of Pākistān
SECP	Security and Exchange Commission of Pākistān
TPA	Transfer of Property Act
WPFCA	West Pākistān Family Courts Act, 1964

Chapter 1
Introduction

1.1 Introduction

Pākistān was brought into existence based on Islāmic ideology as a national homeland for Muslims. The first Constituent Assembly of Pākistān was driven by the same spirit to formulate a broader set of outlines of Islāmic ideology, which they expressed in the form of the ‗Objectives Resolution' that they passed on March 12, 1949. This historic resolution, among other things, established the parameters for the future course of Pākistān's constitution. As a result, Pākistān's Constitutions from 1956 to 1973 officially declared it as an ‗Islāmic Republic' and maintained this name.

Being an Islāmic Republic[1], (hereinafter referred to as IRP), the Pākistān's state has incorporated in its Constitution the principles that no law shall be enacted that is repugnant to the Qur'ān and Sunnah, and that all existing laws shall be brought into conformity with the Islāmic Injunctions as laid down in the Qur'ān and Sunnah[2]. In order to fulfill this Constitutional obligation, the FSC has been established[3] in 1980. Subsequently, the creation of the Shariat Appellate Bench (SAB) within the SCP marked another crucial development in Pākistān's legal history. The FSC is authorized to assess and decide whether the existing laws comply with the teachings of Islām or not. By virtue of this mandate, the FSC is applying all the means of interpretation to adjudicate upon the different but addressing significant issues of varying nature to harmonize Pākistān's laws in accordance with the teachings of Islām is of paramount importance.

The FSC should not be bound to adhere strictly to the literal meanings of the Qur'ānic texts & Sunnah, when working towards the reconstruction of laws in alignment with the teachings of Islām but should consider the spirit of Qur'ān & Sunnah in its entirety, as held by the FSC that: ―The interpretation of the Qur'ān and Hadith must take into account the evolution of human society and its requirements at a specific point in time. This approach should be undertaken in a manner that

[1] Article 2, of the IRP's Constitution, 1973.
[2] Ibid, Art.227 (1).
[3] Ibid, Art.203 C.

preserves the original intent and purpose of the Holy Qur'ān‖[4]. And while deliberating upon the solution to the issues of the Modern Era, the FSC has also been employing the Ijtihād (independent reasoning) of all Muslim Jurists impartially, rather than relying on any particular Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah. This approach has led to the emergence of a novel Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah that amalgamates the intellectual, theoretical, and legal contributions of the entire Muslim Ummah. This phenomenon has been duly noted by the FSC, in *M Riaz v. FoP* that ―*Doctrinal methodology of various jurists may have a persuasive value and full assistance be had from them, but the court is not bound by any sect. If a view of another sect is compatible with modern requirements, it would be logically realistic to adopt it as affording guidance*‖[5]**.** This methodology by the FSC played a vital role in the advancement of Ijtihād in the Pākistān's régime's context, more effective and fruitful.

It is noteworthy that the higher courts of Pākistān have previously made substantial contributions to the realm of Ijtihād before the inception of the FSC. The Superior Courts have put aside the doctrine of Taqlīd[6] and started to give attention to the doctrine of Ijtihād. They have even gone beyond the principles of Talfiq and Takhayyar and have effectively exercised the right of Ijtihād, whenever and wherever necessary, in order to construe the prime sources of Islāmic Law directly, untrammeled by any existing opinion. This was done as early as 1959 when it was held by the LHC, that ―if we possess a clear understanding of the meaning of a verse in the Qur'ān, it becomes our responsibility to implement that interpretation, regardless of what may have been stated by jurists‖.[7] In another case, it was held ―the jurists' opinions were deserving of the highest respect and should not be easily disregarded, yet the right to hold differing viewpoints can never be denied‖[8]

1.2 Problem Statement

The Federal Shariat Court (hereinafter referred to as the FSC) has assumed a central role in interpreting Islamic law in Pakistan, particularly in relation to contemporary

[4] M Riaz etc v. FoP, PLD 1980, FSC 1.
[5] Ibid, 1.
[6] Obediently following a predecessor mujtahid.
[7] Mst.Balqis Fatma v. Najimulikram, PLD 1959, Lahore, 566.
[8] Mst. Khurishid Jan v. Fazal Dad, PLD 1964, (WP), Lahore, 558.

issues. However, the extent of its authority to exercise Ijtihād, the principles it follows, and the impact of its interpretations on the socio-legal system remain underexplored. This study aims to address the gap in understanding the jurisprudential basis of the FSC‘s Ijtihād, the consistency of its application, and its effects on Pakistan‘s legal and social landscape.

1.3 Thesis Statement

The FSC of Pakistan has established significant jurisprudential principles that enable it to exercise the duty of Ijtihād in interpreting the Qur"ān and Sunnah, addressing contemporary legal and social issues. This Ijtihād plays a pivotal role in shaping Pakistan"s legal and social systems. The core focus of this study is to critically analyze the FSC"s approach to Ijtihād, examining its jurisprudential foundations, the scope of its interpretations, and the broader implications on Pakistan"s socio-legal framework.

1.4 Research Problems

The research is grounded in the following inquiries::

I. What is the concept of **Ijtihād** in Islamic jurisprudence, and does the **FSC** possess the authority to engage in Ijtihād? What are the grounds for this authority, and to what extent is the FSC‘s practice of Ijtihād comprehensive or limited?
II. Has the FSC established specific jurisprudential principles for interpreting the **Qur‘ān** and **Sunnah**? How consistently does the FSC adhere to these principles in its verdicts, and what are the implications of its interpretations?
III. What methods of **Ijtihād** validation were employed by earlier Muslim jurists, and does the FSC adopt these same methods in its rulings? How does the FSC reconcile differences in legal interpretations?
IV. How does the FSC address cases where there are differing views among the various **Schools of Sharī‘ah**? What methodology does the FSC employ to select and justify one view over others in its decisions?
V. In what ways does the FSC differ from the views of earlier Muslim jurists in its verdicts, and what factors influence these differences?
VI. What are the socio-legal impacts of the FSC‘s practice of **Ijtihād** on Pakistan‘s legal system and society at large?

1.5 Objectives of Research

The current study aims to:

I. **Evaluate the concept and theory of Ijtihād** in Islam, examining its role in the interpretation of the **Qur'ān** and **Sunnah**, as well as its historical development within the Islamic legal system.
II. **Analyze the methods and principles** of **Ijtihād** suggested by various Islamic schools of thought, and to assess how the FSC applies these principles in determining the repugnancy of laws with Islamic injunctions.
III. **Examine the FSC's methodology** in resolving differences of opinion among the diverse **Schools of Sharī'ah**, and to evaluate how the court justifies its preference for certain views over others.
IV. **Assess the consistency and impact** of the FSC's practice of **Ijtihād**, evaluating its influence on Pakistan's legal system and society, while identifying the challenges and benefits associated with its application.

1.6 Needs, Significance & its Relevance

Ijtihād is a highly rational form of research and an utmost intellectual endeavour aimed at uncovering legal principles through all viable sources of valid interpretation within Islāmic law. It makes the Islāmic legal system dynamic and plays a vital role in its evolution. All reformists and jurists are agreed that Ijtihād should be continued to help in the evolution of Islāmic law and to answer Contemporary questions faced by Muslim society.

It is a fact that the basic purpose of the establishment of the FSC is also to examine the consistency or inconsistency of the Pākistān's Laws on the touchstone of the Islāmic Injunctions[9]. This authority of the FSC is exclusive, momentous, and binding in nature, for the implementation of Islāmic law.

Under this authority, the FSC while adjudicating upon the issue before it for examination, Determining whether or not something conflicts with the the Islāmic Injunctions requires extensive effort and the exercise of judgement through the process of reasoning to arrive at a verdict in accordance with the spirit of shari`ah. The significant question revolves around the application of jurisprudential principles by the FSC during this diligent effort to ascertain the Islāmic Injunctions. This is

[9]Art.203 D, The Constitution of the Islāmic Republic of Pākistān, 1973.

particularly important as the Court cannot be constrained to adhere to a specific Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah as was in the petition of *Mujibur Rehman v. The FoP*,[10] the FSC has come out with a forthright statement without mincing any words that the Courts are not bound by the doctrine of Taqlīd in Public law.

The fact that texts from the Qur'ān and Sunnah pertaining to legal matters are limited is acknowledged, whereas the scope of new challenges and issues is boundless. It is also a fact that many issues were brought up before the FSC, with respect to them there was no direct order in Qur'ān & Sunnah, in spite of this the FSC has decided the question, of whether the particular Whether a matter is in repugnancy with the Islāmic Injunctions or not. There is another important question about all such types of verdicts by the FSC based on Ijtihād and to what extent?

Keeping in view the above-mentioned Central Idea, the needs and relevance of this research are as follows:

1) To explore the existence of jurisprudential principles of the FSC and determine the status and nature of Ijtihād in light of these principles by providing a systematic analysis of these principles as well as their impacts on the legal and social system of Pākistān.
2) To facilitate a better understanding of FSC's work by removing the confusion with respect to Ijtihād's validity, to highlight the significance, characteristics, and wisdom behind Ijtihād. It will increase society's confidence in the progress of the FSC.

1.7 Literature Review

Concerning the concept of Ijtihād in the Islāmic legal system the Muslim jurists, however, showed great concern thereto and discussed its basic principles in their treaties. Likewise, ImāmMālik his book *Al-Muwaṭṭā,* and Imām Abū-Ḥanīfah in his book: *Kitāb al-Rāy"*. The most comprehensive, systematic writing on the subject matter, however, belongs to Muḥammad bin Idrīsal-Shāfi'ī, who established general principles of Ijtihād and defined sources of Islāmic law. In this way, the Muslim jurists presented a notable work on the concept of Ijtihād, along with the above said

[10]Mujib ur Rehman v. The FoP, PLD 1985 FSC 8.

Muslim jurists, various other Scholars and writers presented their valuable work on the subject of Ijtihād since the early development of jurisprudence till to now.

But the application of the concept of Ijtihād in the verdicts of The FSC is a relatively novel subject and has not garnered significant scholarly focus in this era. Generally, various books, articles, and other resources discuss different facets of the FSC‘s activities. Some of them are cited and mentioned herein below:

I. **Jurisdiction of Shriah and FSC‘s jurisdiction, (in IRP), the Diagnostics & the Dialectic:** by Shahazdo Sheikh. In this book he has discussed in detail the FSC‘s jurisdiction, as provided by the IRP‘s Constitution, 1973 and proceeded to examine it using the guidance of Islāmic Sharī‘ah.

II. **The FSC and Legislations (1980-2015):** This thesis was written by Muhammad Numan at MS level in International University Islāmabad. In the said research, he discussed and explained the historical background, formation, structure, procedure, limitations and legislations of the FSC of Pākistān.

III. **The FSC Annual Report, Islāmabad, 2002:** The report encompasses the rulings of the FSC on a range of Islāmic matters. Additionally, it emphasizes the FSC‘s contributions and provides an overview of the court‘s yearly performance.

IV. **―The FSC‘s Role to Determine the Scope of the Islāmic Injunctions and Its Implication‖:** This research article, authored by Shahbaz Ahmed Cheema (Assistant Professor at University Law College, University of Punjab), delves into the role of the FSC in characterizing the boundaries of the Islāmic injunctions and the ensuing consequences. The article elaborates on the court‘s jurisdiction and explores the influence of the SAB‘s instructions and guidance within this context[11].

V. **Pākistān FSC‘s Collective Ijtihād on Gender Equality, Woman‘s Rights and the right to family life:** This an article written by IhsanY, published in the journal ―Islām and Christian-Muslim relation‖, also available on the

[11] Cheema Shahbaz A, ―The FSC‘s Role to Determine the Scope of ‗Injunctions of Islām‘ and Its Implications,‖ *Journal of Islāmic State Practices in International Law* 09, no. 02 (2013): 95.

web, describes the methodology of the FSC in the context of Ijtihād and the need of collective Ijtihād[12].

VI. **―An Appraisal of Methodology for Islāmization of Laws in Pākistān‖:** This research article was written by Ghazala Ghalib Khan (Lecturer Law, IIUI) and was published in ―Islāmabad Law Review II: 1-2 (2018)‖[13].

In this Article, she described that the the IRP‘s Constitution, 1973 assigned the significant responsibility of Islāmization to both the Council of Islāmic Ideology and the FSC. However, it was noted that neither of these institutions possesses the necessary protocol in accordance with the principles of Islāmic jurisprudence. Nonetheless, the Council of Islāmic Ideology retains the authority to suggest the Islāmization of laws[14] , and the FSC is also given power to adjudicate upon the Islāmic status of existing laws as well. She discussed the need for some defined set of rules that may be followed by Constitutional Institutions for the Islāmization of existing laws. This research is based on the principles of Islāmic jurisprudence, CII annual reports, and selective case laws from the FSC.

VII. **―Impacts of Limited Jurisdiction of FSC on the Islāmization of Laws in Pākistān: A Critical Analysis In The Light of Case Laws‖:** This is an article written by Mariam Hafeez and was published in the journal ―Islāmabad Law Review II: 1-2 (2018).‖ This article defines the distinct character, significance, and role of the FSC and discusses its impact on the process of Islāmization of laws in Pākistān. The nature of the FSC‘s authority within the context of the Pākistān‘s judicial system is examined. The discussion emphasizes the constitutional limitations placed on the jurisdiction of the Court, highlighting their ambiguous nature. Additionally, the effect of these jurisdictional restrictions on the diversity of decisions made by the Courts is pointed out. Furthermore, the article notes that the

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[12] Ihsan Y, ―Pākistān Federal Sharī‘at Court‘s Collective Ijtihād on Gender Equality, Rights of the women and the Right to Family Life,‖ (2014) 25 *Islām and Christian-Muslim Relations* 181-192.

[13] Ghazala Ghalib Khan, ―Application of Talfīq in Modern Islāmic Commercial Contracts,‖ *Policy Perspectives* 10, no. 2 (2013): 154.

[14] The CII, as a constitutional body directs and makes recommendations for the GoP on Islāmic legislation, and does not pronounce fatwa officially, but it may never compromise on giving the right of Ijtihād as learned Muslim Scholars, who have a thorough knowledge of ijm‘ā‘ and Qisas and adherence to the Islāmic injunctions, as declared in the Holy Qurʾān and the Hazrat Muhammad (ملسو هلآ هيلع هللا ىلص)‘s Sunnah, and Fiqh.

primary function of the Court, i.e., the Islāmization of laws, faces significant impediments. These hindrances arise not only from the constitutional restrictions but also from unjustifiable methods of overruling and the backlog of cases.

1.7.1 Classical Views on Ijtihād

The literature review has been expanded to incorporate classical Islamic jurisprudential texts from prominent scholars such as Al-Shafi'i, Al-Ghazali, and Ibn Taymiyyah. These scholars offer foundational perspectives on **Ijtihād**, outlining its principles, methodologies, and the role it plays in Islamic legal theory. By analyzing their works, this study aims to establish a clear understanding of how **Ijtihād** was traditionally applied and how its methodologies evolved over time. This critical foundation will be essential for evaluating the contemporary applications of **Ijtihād**, particularly in the context of the FSC in Pakistan.

Al-Shafi'i's *Al-Risālah* is one of the earliest and most influential works in Islamic jurisprudence, where he defines the role of **Ijtihād** in the interpretation of Islamic sources[15]. Al-Shafi'i emphasizes the importance of **Ijtihād** as a method for deriving legal rulings from the Qur'ān and Sunnah, outlining the conditions under which jurists can engage in this process. His work is pivotal in understanding the classical framework of Islamic legal theory, which serves as the basis for the modern application of **Ijtihād**.

Similarly, Al-Ghazali's *Al-Mustasfa min „Ilm al-Usūl* builds on Al-Shafi'i's principles and further elaborates on the intellectual processes involved in **Ijtihād**. Al-Ghazali addresses the epistemological foundations of Islamic jurisprudence, discussing the balance between reason and revelation in the process of legal interpretation[16]. His work is particularly relevant for understanding the nuanced methodologies that jurists use to engage in **Ijtihād**, making it an essential text for this study.

[15] Al-Shafi'i, *Al-Risālah: The Treatise on the Foundations of Islamic Jurisprudence*, trans. Majid Khadduri (Beirut: Islamic Texts Society, 1961).
[16] Al-Ghazali, *Al-Mustasfa min „Ilm al-Usūl*, trans. R. J. McCarthy (Beirut: Dar al-Mashriq, 1977).

Ibn Taymiyyah's *Majmū" al-Fatāwā* provides a comprehensive collection of his fatwas (legal rulings), including extensive discussions on **Ijtihād**. Ibn Taymiyyah's views on the role of jurists in interpreting the Qur'ān and Sunnah, especially in the context of contemporary issues, are significant for understanding the evolution of **Ijtihād** in the modern era[17]. His work critiques the traditional methodologies and advocates for a more dynamic approach to Islamic legal interpretation, which has had a lasting impact on the contemporary practice of **Ijtihād**.

These classical texts provide a deep insight into the theoretical underpinnings of **Ijtihād** and its application in Islamic jurisprudence. By incorporating these works, this study not only establishes the historical context of **Ijtihād** but also sets the stage for analyzing its modern application, particularly in relation to the FSC's role in interpreting Islamic law in Pakistan.

1.7.2 Contemporary Perspectives on Collective Ijtihād

Modern scholars such as Wael Hallaq, Mohammad Hashim Kamali, and Khaled Abou El Fadl have made significant contributions to the discourse on Ijtihād, particularly in the context of collective Ijtihād. Their works provide a framework for understanding how traditional methods of Ijtihād are being adapted to address the complexities of contemporary, pluralistic societies.

Wael Hallaq, in *The Origins and Evolution of Islamic Law* (2005), explores the historical development of Islamic law, emphasizing the role of Ijtihād and how it has evolved in response to modern legal challenges[18]. He critically examines the tensions between traditional Islamic legal thought and contemporary legal systems, shedding light on how modern scholars have navigated the application of Ijtihād in a globalized world. Hallaq's work is instrumental in understanding the evolving role of Ijtihād within modern Islamic jurisprudence.

Mohammad Hashim Kamali, in *Principles of Islamic Jurisprudence* (2003), provides a comprehensive analysis of Islamic jurisprudential principles, including

[17] Ibn Taymiyyah, *Majmū" al-Fatāwā* (Cairo: Dār al-'Āshī, 1989).
[18] Wael B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005).

Ijtihād. Kamali discusses how these principles have been applied in modern legal systems, offering a detailed exploration of collective Ijtihād and its role in contemporary Islamic legal thought[19]. His work is crucial for understanding how Ijtihād has adapted to the legal and social dynamics of modern Muslim societies.

Khaled Abou El Fadl, in *The Great Theft: Wrestling Islam from the Extremists* (2005), addresses the challenges of interpreting Islamic law in the modern world. He discusses the role of Ijtihād in reconciling traditional Islamic values with contemporary issues, particularly in the context of extremism and reform[20]. Abou El Fadl‘s work provides valuable insights into how collective Ijtihād can be employed to address modern challenges while staying true to the core principles of Islamic jurisprudence.

These scholars offer a nuanced understanding of how collective Ijtihād is evolving to meet the demands of contemporary legal and social environments, providing critical insights into its role in modern Islamic jurisprudence.

1.7.3 Literary Concept of Ijtihad in Islamic Jurisprudence: Perspectives from Scholarly Literature and Jurisprudential Texts

Ijtihad, derived from the Arabic root ―j-h-d,‖ meaning to strive or exert effort, is a foundational concept in Islamic jurisprudence (fiqh). It refers to the independent or original interpretation of legal sources by qualified scholars to derive legal rulings on issues not explicitly addressed in the Qur‘an or Hadith[21].

Historically, ijtihad has played a crucial role in the evolution of Islamic law, enabling jurists to apply the principles of Islamic teachings to new and emerging issues in society. The concept of ijtihad underscores the dynamic and adaptive nature of Islamic jurisprudence, allowing it to remain relevant across different eras and cultures[22].

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[19] Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Cambridge: Islamic Texts Society, 2003).

[20] Khaled Abou El Fadl, *The Great Theft: Wrestling Islam from the Extremists* (New York: HarperOne, 2005)

[21] Al-Shatibi, *Al-Muwafaqat fi Usul al-Shari"a*, ed. Muhammad al-Tahir al-Tantawi (Beirut: Dar al-Ma‘arif, 1997), 112.

[22] Kamali, *Principles of Islamic Jurisprudence*, 3rd ed. (Cambridge: Islamic Texts Society, 2008), 45.

The classical understanding of ijtihad, as articulated by early scholars such as Al-Shafi‘i and Ibn Hanbal, was based on the interpretation of primary sources (Qur‘an and Hadith) and secondary sources (qiyas or analogy). However, over time, the practice of ijtihad became increasingly institutionalized, leading to the formation of distinct legal schools (madhahib) that adhered to specific methodologies and interpretations[23]. Despite this institutionalization, ijtihad has remained central to Islamic jurisprudence, with scholars continuing to engage in independent reasoning to address contemporary issues.

1.7.4 Historical Evolution of Ijtihad

The evolution of ijtihad can be traced back to the early centuries of Islam, when the first generation of jurists sought to establish a comprehensive legal system based on the Qur‘an, Hadith, and the consensus (ijma) of the Muslim community. During the Umayyad and Abbasid periods, Islamic jurisprudence flourished, with scholars such as Abu Hanifa, Malik ibn Anas, Al-Shafi‘i, and Ahmad ibn Hanbal developing their respective legal schools. These scholars employed ijtihad to address a wide range of legal issues, from personal matters such as marriage and inheritance to public issues such as governance and criminal law[24].

However, by the 10th century, the process of ijtihad began to slow down as the legal schools became more rigid and conservative. The closure of the ―gates of ijtihad‖ is often cited as a turning point in the history of Islamic jurisprudence. Scholars such as Al-Ghazali and Ibn Taymiyyah argued for the importance of ijtihad in addressing new issues, but the prevailing view during this period was that ijtihad was no longer necessary as long as the established legal schools provided sufficient guidance[25]. This period of stagnation led to the perception that Islamic law had reached its final form and could no longer evolve through independent reasoning.

1.7.5 The Reopening of the Gates of Ijtihad

In the modern era, the question of reopening the gates of ijtihad has become a subject of intense debate among scholars and reformers. The decline of the Ottoman Empire,

[23] Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2009), 179.
[24] Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1964), 22.
[25] Siddiqi, *Islamic Legal Theory and Reform* (Lahore: Ferozsons, 2005), 67.

the rise of colonialism, and the challenges posed by Western legal systems led to calls for a revival of ijtihad to address the socio-political issues faced by Muslim societies[26]. Scholars such as Muhammad Abduh and Rashid Rida argued that ijtihad was essential for the reform and modernization of Islamic law, as it would allow for the adaptation of Islamic principles to the changing needs of society[27].

The revival of ijtihad in the 20th century was also influenced by the emergence of Islamic modernism, which sought to reconcile Islamic teachings with contemporary ideas of democracy, human rights, and social justice. Reformist scholars such as Fazlur Rahman emphasized the need for a contextual understanding of the Qur'an and Hadith, arguing that ijtihad should be based on the broader objectives (maqasid) of Islamic law, rather than rigid adherence to traditional interpretations[28]. This approach advocates for a more flexible and dynamic interpretation of Islamic law that takes into account the changing circumstances of modern life.

1.7.6 Contemporary Relevance of Ijtihad

In contemporary Islamic thought, the question of ijtihad's relevance is central to discussions about the future of Islamic jurisprudence. The rise of globalization, the spread of secularism, and the challenges posed by modernity have prompted many scholars to call for a renewed focus on ijtihad as a means of addressing contemporary legal, social, and political issues[29]. The growing demand for Islamic legal reform, particularly in areas such as women's rights, freedom of expression, and economic justice, has highlighted the need for ijtihad to adapt Islamic law to the realities of the modern world.

The contemporary relevance of ijtihad is also evident in the ongoing debates about the role of Islamic law in the modern state. Scholars such as Tariq Ramadan argue that ijtihad can serve as a tool for promoting social justice and human rights

[26] Abduh, Muhammad. *Al-Islam wa al-Nahda* (Cairo: Dar al-Kutub, 1901), 39.
[27] Rahman, Fazlur. *Islam and Modernity: Transformation of an Intellectual Tradition* (Chicago: University of Chicago Press, 1982), 94.
[28] Ramadan, Tariq. *Islam, the West and the Challenges of Modernity* (Leicester: Islamic Foundation, 2009), 112.
[29] Supra Abduh, Muhammad. *Al-Islam wa al-Nahda*, 39,-41.

within an Islamic framework[30]. By reinterpreting Islamic legal principles in light of contemporary issues, ijtihad can provide a foundation for a more inclusive and progressive understanding of Islamic law that is consistent with the values of equality, justice, and human dignity.

1.7.7 The Role of Ijtihad in Addressing Contemporary Issues

One of the key areas where ijtihad can play a significant role is in the interpretation of Islamic law in relation to contemporary issues such as gender equality, religious pluralism, and economic development. The traditional interpretation of Islamic law has often been criticized for its conservative stance on issues such as women‘s rights, inheritance, and marriage. However, scholars who advocate for ijtihad argue that these issues can be addressed through a more contextual and dynamic interpretation of Islamic texts[31].

For example, the issue of women‘s rights has been a focal point of ijtihad in recent decades. Scholars such as Asma Barlas and Amina Wadud have argued that the Qur‘an advocates for gender equality and that traditional interpretations of Islamic law that limit women‘s rights are based on cultural biases rather than religious teachings[32]. Through ijtihad, scholars have sought to reinterpret Islamic texts in ways that promote gender equality and women‘s empowerment, challenging traditional patriarchal interpretations of Islamic law.

Similarly, the issue of economic justice has also been a key focus of ijtihad in the modern era. Islamic finance, for example, has undergone significant reform through the application of ijtihad, with scholars developing new financial instruments and practices that comply with Islamic principles while addressing the needs of contemporary economies[33]. Ijtihad has also been used to address issues such as poverty, unemployment, and wealth distribution, with scholars emphasizing the importance of social justice and equitable economic policies in Islam[34].

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[30] Barlas, Asma. *Believing Women in Islam: Unreading Patriarchal Interpretations of the Qur"an* (Austin: University of Texas Press, 2002), 58.
[31] Wadud, Amina. *Qur"an and Woman: Rereading the Sacred Text from a Woman"s Perspective* (Oxford: Oxford University Press, 1999), 45.
[32] Khan, *Islamic Finance: Law and Practice* (London: Routledge, 2010), 67.
[33] Al-Qaradawi, Yusuf. *The Lawful and the Prohibited in Islam* (Beirut: Dar al-Turath, 1994), 88.
[34] Supra Abduh, Muhammad. *Al-Islam wa al-Nahda*, 39,-41.

1.7.8 The Challenges of Reopening Ijtihad

Despite the growing calls for a revival of ijtihad, there are several challenges that must be addressed in order to make ijtihad relevant in the contemporary world. One of the main challenges is the lack of a standardized methodology for ijtihad. While classical scholars developed rigorous methodologies for ijtihad, the modern revival of ijtihad has led to differing opinions on how ijtihad should be conducted and who is qualified to engage in it[35].

Another challenge is the resistance from traditionalists who view the reopening of ijtihad as a threat to the integrity of Islamic law. Many conservative scholars argue that ijtihad should remain confined to the classical period and that any attempts to reinterpret Islamic law in the modern context are misguided and dangerous[36]. This resistance to change has hindered the progress of ijtihad as a tool for reform and innovation within Islamic jurisprudence.

1.7.9 Reaffirming the Vitality of Ijtihad

The concept of ijtihad has evolved significantly throughout Islamic history, from its early development in the classical period to its modern-day revival. While ijtihad has been essential in shaping Islamic law and addressing contemporary issues, its application remains a subject of ongoing debate. The reopening of the gates of ijtihad presents both opportunities and challenges, as it offers the potential for Islamic law to adapt to the changing needs of society while also facing resistance from traditionalist perspectives. Nonetheless, the role of ijtihad in addressing contemporary issues such as gender equality, economic justice, and social reform highlights its continued relevance in the modern world. Through ijtihad, Islamic jurisprudence can evolve to meet the demands of the 21st century, while remaining grounded in the core principles of Islamic teachings.

1.7.10 Orientalist scholarship and W. B. Hallaq‘s Stance on Ijtihād

1. **Closure of Ijtihād:** Hallaq suggests that the closure of ijtihād occurred around the 10th century, leading to the dominance of taqlid (blind following of legal precedents). He argues that this shift led to stagnation in Islamic legal thought.

[35] Supra Khan, *Islamic Finance: Law and Practice*, 67, 68.
[36] Supra Al-Qaradawi, Yusuf. *The Lawful and the Prohibited in Islam*, 88-89.

2. **Historical Development:** Hallaq emphasizes that the ijtihād tradition was dynamic and evolving until it became institutionalized and controlled by the state. He suggests that Islamic law was initially characterized by independent reasoning and scholarly debate, but over time, the legal system became more centralized and less open to reform.
3. **Return to Ijtihād:** Hallaq is somewhat skeptical about the contemporary calls for the revival of ijtihād. He believes that the modern understanding of ijtihād is often influenced by political and ideological agendas, which may distort its original intent.

The claim that ijtihād was ―closed‖ after the 9th century, notably promoted by scholars like Joseph Schacht[37] and W. B. Hallaq, has been a long-standing narrative in Orientalist scholarship. Schacht argued that the institutionalization of taqlīd (adherence to precedent) replaced independent reasoning with blind imitation, marking the end of ijtihād and the stagnation of Islamic jurisprudence. Hallaq further suggested that the codification of classical Islamic legal texts led to the perceived rigidity of Islamic law.

1.7.11 Identifying Gaps in Existing Studies

A critical review of the existing literature reveals a gap in research regarding the specific role of the FSC in applying Ijtihād. While classical and modern perspectives on Ijtihād have been well-documented, few studies have focused on how the FSC applies these principles in its rulings. Furthermore, the socio-legal impact of the FSC‘s Ijtihād on Pakistan‘s legal and social systems has not been adequately explored.

1.7.12 Explaining How the Research Fills These Gaps

This study fills the identified gaps by focusing on the FSC‘s methodology in applying Ijtihād, comparing it to classical views and contemporary practices. It also investigates the socio-legal implications of the FSC‘s Ijtihād, particularly its influence on Pakistan‘s legal system and society. By doing so, this research contributes to the existing body of knowledge by providing a comprehensive analysis of how Ijtihād is

[37] Schacht, Joseph. *The Origins of Muhammadan Jurisprudence*. (Oxford: Clarendon Press, 1964).

applied in modern legal contexts while maintaining adherence to traditional Islamic jurisprudence.

The nutshell of this review is that the different aspects of the FSC have been discussed in the entire above-mentioned thesis, books, and articles, such as its jurisdiction, composition, and its role in Islāmization of Laws in Pākistān, etc. But all these sources offer no help, for as the understanding of the right to Ijtihād of the FSC nor describe the jurisprudential approach and the methodology of the FSC thereto in the determination of repugnancy of laws with the Islāmic injunctions. Furthermore, there is no elaboration on its impact on the legal system of Pākistān and society, as well**.**

In this research, there would be elaborated and defined the distinguished character and the significance of the role of the FSC in the evolution of the course of Islāmization of Pākistān‘s laws as well as the jurisprudential methodology of the court thereto. The researcher will also attempt to examine the nature of the theory of collective Ijtihād applied by the FSC to the context of civil cases.

1.8 Limitations of the Present Research

The Following main limitation has to be kept in view while undertaking this research study:

I. To the extent of the jurisprudential methodology of FSC in the determination of intention of Qur’ān & Sunnah.
II. To examine the nature of the theory of collective Ijtihād applied by the FSC to the context of civil
III. To the ambit of elaboration the modes and methodologies of Collective Ijtihād adopted by the FSC in determining the repugnancy of Pākistān‘s statutes with the Islāmic injunctions.
IV. To focus on the evaluation of the consistency of Collective Ijtihād by the FSC and its impact on the Pākistān‘s legal régime and on the society.

1.9 Hypothesis of Research

Hypotheses of the research are as:

I. The FSC has a right to Ijtihād while examining the consistency or inconsistency of existing laws with the Islāmic Injunctions and has set

down jurisprudential principles for the determination of the intention of Qur'ān & Sunnah and verily playing a vital role in the advancement of Ijtihād. The Ijtihād done by the FSC is comprehensive in all aspect and based on the accurate knowledge of principles of Sharī'ah and have a deep impact on this Ijtihād on the legal and social system of Pākistān.

II. The FSC has no right to Ijtihād as well as have has not set down any jurisprudential principles for the determination of the intention of Qur'ān & Sunnah and have not any considerable role in the advancement of Ijtihād The Ijtihād done by the FSC have many vacua therein, mostly contrary to the ground norms of Sharī'ah so why that have no impact on the Pākistān's socio-legal system.

III. The presumptive right to Ijtihād by the FSC is based on the superficial knowledge of principles of Sharī'ah which has no potential to determine the repugnancy of Pākistān's statutes with the Islāmic injunctions and to react to the present-day queries handled by neither Sharī'ah nor the FSC is playing not any considerable role in the advancement of Ijtihād. So why the insignificant impact on the legal system of Pākistān as well as on society had occurred.

1.10 Research Methodology

This study adopts a **qualitative research methodology**, integrating the **IRAC (Issue, Rule, Application, Conclusion) framework** to systematically analyze, discuss, examine, and evaluate the jurisprudential methodology of the **Federal Shariat Court (FSC)** in performing **Ijtihād** while interpreting the **Qur'ān and Sunnah**. A **descriptive approach** will be employed to collect data from various sources, including **FSC verdicts, Acts of Parliament, and the writings of both classical and contemporary Islamic jurists**. Primary and secondary resources—such as articles, books, and intellectual writings—will be reviewed to trace the origin and historical development of **Ijtihād** and demonstrate the commitment of both traditional and modern jurists to this theory.

This research utilizes **three core qualitative methods—content analysis, case studies, and comparative analysis—within the IRAC framework** to ensure a

structured, critical, and comprehensive examination of the research problem. These methods will be applied in the analytical chapters to **critically evaluate** the FSC‘s principles and practices, its adherence to jurisprudential guidelines, and the socio-legal impacts of its rulings..

1.10.1 Qualitative Research Approach

The qualitative approach is particularly suited for this research as it enables an in-depth exploration of legal texts, judicial rulings, and their socio-legal implications. The **IRAC framework** will be systematically applied to the following research methods:

1. Content Analysis

Content analysis systematically examines **FSC judgments, legal texts, and relevant jurisprudential sources** to:

1. Identify and analyze the **jurisprudential principles** laid down by the FSC.
2. Evaluate the FSC‘s interpretation of the **Qur‘ān and Sunnah** in addressing contemporary legal issues.
3. Assess the **consistency** of the FSC‘s rulings with **classical and modern jurisprudence**.

Application of IRAC in Content Analysis:

1. **Issue:** Identifies key legal and jurisprudential questions addressed in FSC rulings.
2. **Rule:** Extracts and examines the **Shari_ah principles** and judicial reasoning applied.
3. **Application:** Analyzes how these principles are **applied to specific cases**.
4. **Conclusion:** Evaluates whether the FSC‘s ruling aligns with **Islamic jurisprudence** and contemporary legal needs.

2. Case Studies

Case studies analyze **specific FSC rulings** to:

1. Illustrate the **application of Ijtihād** in resolving differences among **Schools of Sharī‘ah**.
2. Highlight instances where the **FSC diverges** from classical juristic opinions.
3. Demonstrate the **socio-legal impacts** of FSC verdicts.

Application of IRAC in Case Studies:

1. **Issue:** Defines the key **legal and jurisprudential questions** raised in the case.
2. **Rule:** Outlines the **Islamic legal principles** that govern the issue.
3. **Application:** Assesses the **court's reasoning and application** of these principles.
4. **Conclusion:** Determines whether the **judgment contributes to modern Islamic legal thought**.

3. Comparative Analysis

Comparative analysis contrasts:

1. The **FSC's jurisprudential methods** with **classical Islamic juristic practices**.
2. The **FSC's rulings** with those of other **contemporary Islamic legal institutions**.

Application of IRAC in Comparative Analysis:

1. **Issue:** Identifies **differences in jurisprudential interpretation** between FSC and other Islamic legal traditions.
2. **Rule:** Examines **historical and contemporary juristic methods** used in Ijtihād.
3. **Application:** Analyzes the **extent to which the FSC aligns with or diverges from** established jurisprudential practices.
4. **Conclusion:** Assesses the **implications of FSC's approach** for the evolution of Islamic law.

1.10.2 Application of Methodology in Analytical Chapters

The **qualitative methods and IRAC framework** outlined above will be systematically applied in the analytical chapters of this study to ensure a structured and critical examination of the research objectives. The IRAC method provides a detailed framework for qualitative analysis, applied in subsequent chapters to:

1. Examine **FSC judgments** through a structured legal analysis.
2. Compare **classical and contemporary Ijtihād practices** to highlight **continuity and divergence**.
3. Assess the **socio-legal implications** of the FSC's rulings.

By integrating these methods throughout the study, the research ensures a **holistic and critical evaluation** of the FSC‘s role in interpreting **Islamic jurisprudence** and its **impact on Pakistan‘s legal system**.

1.10.3 Rationale behind the Qualitative Research Methods

The selection of **IRAC and qualitative methods** (content analysis, case studies, and comparative analysis) is guided by the specific requirements of this research to comprehensively examine the FSC‘s jurisprudential approach to **Ijtihād** and its broader implications. Each method is justified as follows:

1. Content Analysis

1. **Purpose:** To systematically analyze **legal texts, judgments, and scholarly writings**.
2. **Relevance:** The FSC‘s verdicts and related legal documents are the **primary sources** for understanding its **methodology and adherence to Ijtihād principles**.
3. **Application:** This method ensures a **detailed examination** of the language, structure, and implications of FSC rulings, helping to **uncover** the court‘s interpretative strategies.

2. Case Studies

1. **Purpose:** To provide an **in-depth examination** of specific FSC rulings.
2. **Relevance:** Key judgments serve as **case studies** to illustrate the **application of Ijtihād** in resolving **contemporary legal and social issues**.
3. **Application:** Case studies allow for a **contextualized analysis** of how the FSC addresses **differing views** among **Islamic schools of thought** and how its decisions impact **Pakistan‘s socio-legal framework**.

3. Comparative Analysis

1. **Purpose:** To contrast **classical and contemporary practices** of Ijtihād.
2. **Relevance:** This method is essential for evaluating the FSC‘s approach **in light of historical Islamic jurisprudence**.
3. **Application:** By comparing the **FSC‘s practices with those of earlier Muslim jurists**, this method sheds light on the **evolution of Ijtihād and its adaptation** to modern contexts.

1.10.4 Suitability of Methods for the Research

These **qualitative methods and IRAC** framework are particularly suited to the study‘s objectives, as they enable a **nuanced and multidimensional exploration** of the FSC‘s **jurisprudential methodology**. They provide a **robust analytical structure** for:

1. Analyzing the **court‘s interpretative principles**.
2. Understanding the **historical and theoretical underpinnings** of Ijtihād.
3. Assessing the **socio-legal impacts** of FSC rulings.

Together, these methods ensure that the research is **grounded in a systematic, critical, and comprehensive analysis**, aligning with the study‘s aim to contribute meaningfully to the **discourse on Islamic jurisprudence and its contemporary applications**.

1.11 Chapters Structure

Chapter 1-Introduction: A comprehensive overview of the research topic and its significance is offered in this first chapter, along with the research objectives. It begins with the thesis statement, which summarizes the purpose of the study. The introduction section establishes the background and context of the research, explaining why it is important to investigate further. It identifies the gaps or issues in the field that necessitate the research and justifies its relevance. The section also discusses the potential impact and benefits of the research findings. The literature review analyzes existing scholarly work, identifying key theories, concepts, and empirical findings while highlighting any gaps or inconsistencies. The section on limitations acknowledges potential constraints and boundaries of the study. The research questions are explicitly stated, outlining the specific inquiries to be answered. The research hypothesis proposes relationships or associations between variables. The goals and aims of the study are defined by the research objectives. The overall methodology, research design, data collection methods, sampling techniques, and data analysis procedures are described by the research methodology. In general, Chapter 1 lays the foundation for the subsequent chapters, offering a roadmap for the research process.

Chapter 2-The FSC of Pākistān: In this chapter, the focus is on introducing the FSC of Pākistān. It begins with an overview and provides a brief history of the establishment of the FSC. The chapter also covers the establishment of Sharī'at Benches in various HCs and delves into the composition, objectives, and functions of the FSC. Additionally, it explores the FSC's jurisdiction, including its original, appellate, and revisional jurisdiction.

Chapter 3-Theory of Collective Ijtihād and its Practical Aspects: This Chapter is divided into two parts. Part I focuses on Ijtihād, providing an introduction to the concept and its lexical and technical meanings. It discusses the arguments and proofs of Ijtihād, its development and growth, as well as its importance, task, and need. Furthermore, it explores the sources, elements, and subject matter of Ijtihād, and the different modes and methodologies employed in its application. Part I concludes with a summary.

Part II of Chapter 3 delves into Collective Ijtihād. It starts with an introduction, followed by an explanation of the meaning of Collective Ijtihād. The chapter then delves into the historical background and development of Collective Ijtihād, emphasizing its need and importance. It further explores the modes and methodologies of Collective Ijtihād and examines its practical aspects in the present Islāmic world, with a particular focus on Pākistān. Finally, Part II concludes with a summary.

Chapter 4-Collective Ijtihād and the FSC: Chapter 4 explores the relationship between Collective Ijtihād and the FSC. It begins with an introduction and provides a brief history of Collective Ijtihād in the Islāmic judicial system. The chapter examines the nature of Collective Ijtihād and its impacts, particularly focusing on the nature of Collective Ijtihād in the FSC and its impact on the legislative process in Pākistān. The different modes of Collective Ijtihād employed by the FSC are further discussed, which include declaring inconsistent laws as repugnant to the Islāmic Injunctions, declaring valid consistent laws under Islāmic law, and filling gaps in the laws by suggesting Islāmic alternatives. The chapter also considers the grounds on which the FSC differs from Ijtihād done by Muslim jurists in the past, matters in which Ijtihād is allowed to the FSC and the authoritative status of FSC's Ijtihād in the Pākistān's judicial structure. It likewise studies the

prominence of Ijtihād in matters that do not fall under the FSC's jurisdiction and concludes with a summary.

Chapter 5-Methodology of the FSC in Collective Ijtihād: Chapter 5 focuses on the methodology employed by the FSC in the application of Collective Ijtihād. It begins with an introduction and then explores the interpretation of the phrase ―Injunction of Islām.‖[38] The methodology used by the FSC in determining whether a law is repugnant or non-repugnant to the Islāmic Injunctions based on the Qur'ān, Sunnah, and other sources of Islāmic law is delved into by the chapter. It also examines the methodology used in determining the meaning of words used in the Qur'ān and Sunnah for the derivation of laws, as well as the application of principles of Islāmic jurisprudence and Islāmic legal maxims. Furthermore, it discusses the methodology employed by the FSC in considering Maqasid-Al-Sharī'ah[39] and the Islāmic jurists' opinions. The chapter concludes with a summary.

Chapter 6-Critical Analysis of Important Judgements of the FSC & SAB (1980-2018) in Respect of Civil Law: Two parts divide Chapter 6. Part I centers on the critical analysis of important judgements of the FSC from 1980 to 2020 concerning civil law. It examines key decisions, analyzes their legal implications, and provides a critical evaluation of their impact on civil law.

Part II of Chapter 6 focuses on the critical analysis of important judgements of the SAB from 1980 to 2020 concerning civil law. Similar to Part I, it evaluates significant judgements, analyzes their legal implications, and provides a critical assessment of their impact on civil law.

Chapter 7-Conclusions and Recommendations: offers the conclusions drawn from the previous chapters. It summarizes the main findings and highlights the key points discussed throughout the thesis. Additionally, it offers recommendations based on the research findings and suggests areas for further study or exploration related to the topic.

[38] As used in Article 203 of the IRP Constitution, 1973.
[39] (Objectives of Islāmic Law)

Chapter 2
AN OVERVIEW OF THE FEDERAL SHARIAT COURT OF PAKISTAN

2.1 Introduction

Many causes initiated the Pākistān Movement, including social, political, economic, and cultural factors, but Islām stood out as the most prominent among them. The creation of Pākistān considered it a major formative factor, with the ideology that the future constitution of the country would enable the Muslims of the subcontinent to live their lives according to the teachings of Islām. Dr. Allama M Iqbāl, during the Allāhabad address in 1930, provided a lucid explanation of the inner feelings of Muslims with Islām while demanding a separate homeland for the Muslims of the Subcontinent. He made it very clear that Islām has its own social, political, and economic system and emphasized the need for a political entity to implement it, where they could spend their lives according to the teachings of the Holy Qurʾān and the Holy Prophet (ملسو هلآ هيلع هللا ىلص)'s Sunnah, and He emphasized the importance of Islām in this regard, explaining that ―*Islām not Muslims, has been the savior. If attention is directed towards Islām today, drawing inspiration from its perpetually invigorating ideas, the scattered forces can be reassembled, lost integrity can be regained, and self-preservation from destruction can be achieved*‖[40]. In 1946, at Islāmia College, Peshawar, Quaid-e-Azam M Ali Jinnah unequivocally articulated the objectives of Pākistān in the following words: ―*We are not merely demanding Pākistān to acquire a piece of land, but rather, we seek a laboratory where we can experiment and bear witness to Islāmic principles*‖[41]. To accomplish this objective, Indian Muslims carried on their struggle under the dynamic leadership of Quaid-e-Azam and resultantly, Pākistān came into existence on 14 August 1947, based on Islāmic Ideology as a national homeland for the Muslims.

[40] Iqbal, M. *Thoughts and Reflections of Iqbal* (India: Sh. M Ashraf, 1964), 194.
[41] Cenay B, Elvettin A, Onur K, *Public Affairs Education and Training in the Twentyfirst Century* (Hershey: IGI Global, 2021), 258.

2.2 A Brief History of the Establishment of the Federal Shariat Court of Pākistān

After Pākistān into existence as an Islāmic ideological state, the Indian Independence Act of 1947 established the first Constituent Assembly, which was to be governed by the Government of India Act, 1935[42]. In Pākistān, the spirit of Islāmic ideology guided the first Constituent Assembly of Pākistān to formulate a set of comprehensive outlines inspired by the teachings of the Holy Qurʾān and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah Presented in the form of the ―Objectives Resolution,‖ which was passed on March 12, 1949, this historic resolution established the parameters for the future trajectory of Pākistān's constitution. It was included as a preamble in all subsequent Constitutions of Pākistān, namely, those of 1956, 1962, and 1973[43]. However, it later evolved to become a substantive component of the 1973 Constitution through the eighth amendment in 1985. Across all three versions of the Pākistān's Constitution, a commitment was made to enforce Islāmic law in the country and to take measures that would enable its Muslim citizens to lead their lives in accordance with the teachings of the Holy Qurʾān and the Holy Prophet (صلى الله عليه وآله وسلم)'s Sunnah. Article 198 of the 1956's Pak Constitution, stipulated that: ―no law should be enacted in contradiction to the Islāmic injunctions (aḥkām-e-Islām) laid down in the Holy Qurʾān and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah. Additionally, existing laws were required to be aligned with these injunctions‖[44].

Chapter I of part X of the 1962's Constitution outlined the establishment of the _Advisory Council of Islāmic Ideology.' Article 204 of this Constitution detailed the council's functions, primarily involving the provision of recommendations to the Government and both provincial and federal assemblies. Among various functions specified in Article 204, one of the functions mentioned is as follows: ―making recommendations to the Central Government and the Provincial Governments on how to facilitate and promote the Muslims of Pākistān in structuring their lives in accordance with the principles and concepts of Islām.‖[45]

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[42] Hamid Khan, *Constitutional And Political History Of Pākistān* (Karachi: Oxford University Press, 2017), 50.

[43] Zulfikar Khalid Maluka, *The Myth of Constitutionalism In Pākistān* (Karachi: Oxford University Press, 1995), 119.

[44] Article 198 (1) of the 1956's Constitution of Pākistān.

[45] Article 204 (a) of the Constitution of Republic of Pākistān, 1962.

Pākistān Islām

The scheme of the IRP's Constitution, 1973, needs to be grasped in its true perception. Article 1 of the Constitution defines the Pākistān's Republic as ―the Islāmic Republic of Pākistān.‖[46] and Article 2 provides that ―Islām shall be the State Religion of Pākistān.‖[47] Principles of Policy were introduced in the IRP's Constitution for guiding and enhancing the Government's future performance. The effect of Article 31(1), is as follows: ―The Muslims of Pākistān shall be empowered, both individually and collectively, to structure their lives in accordance with the fundamental principles and core tenets of Islām. Measures shall be undertaken to facilitate their comprehension of life's essence as outlined in the Holy Qurʾān and the the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah.‖[48] The provision of Article 227 has bestowed an Islāmic character upon the IRP's Constitution, 1973. It stipulates that: All existing laws shall be brought into accordance with the Islāmic injunctions (aḥkām-e-Islām) as prescribed in the Holy Qurʾān and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah. Furthermore, no law shall be enacted which contradicts these injunctions.‖[49]

Similarly, at the same place, the constitution also provided for the establishment of the CII and stated its functions in the article. However, the functions of the council were mostly advisory or in the shape of recommendations[50]. Even though all these directives and the structure of the IRP's Constitution, 1973, established and explicitly affirmed that Islām shall be the State religion of Pākistān, there existed no explicit constraint on the Parliament. The Parliament could enact any law. Through analogy (*qiyas*) and presumption, it could be argued that the Parliament cannot enact any law that contradicts the Islāmic Injunctions.

Considering the aforementioned structure of the Constitution, it becomes evident that the Principles of Policy stipulated efforts to enable the Muslims of Pākistān to shape their lives in accordance with the fundamental tenets of Islām, as derived from the Holy Qurʾān, and the Sunnah of the Holy Holy Prophet (صلى الله عليه وسلم وآله). Consequently, the Parliament holds the authority to enact laws, provided

[46] Article 1 of the Constitution of IRP, 1973.
[47] Article 2 of the Constitution of IRP, 1973.
[48] Article 31(1) of the Constitution of IRP, 1973
[49] Article 227 ofthe Constitution of IRP, 1973.
[50] Article 228, 229 & 230 of the Constitution of IRP, 1973.

they do not contradict the Injunctions of the Holy Qurʾān, and the Sunnah of the Holy Prophet.

The issue at hand, however, was the determination of whether a law passed by the Parliament aligned with the the Islāmic Injunctions. It is because of this that an Institution is required to determine and decide whether the law passed by the Parliament is following these Injunctions, or otherwise.

2.3 Establishment of Sharī'at Benches in Various High Courts

To expedite the process of Islāmization, to fulfill the necessities thereof, and to materialize the above said solemn declaration and Constitutional Assurances, however, Special attention was dedicated by the GoP in this regard, and in 1979, a new chapter 3-A was introduced in Part VII of the Constitution, following Chapter 3. This addition established Sharī'at Benches in all the HCs[51]. These Sharī'at Benches were set up in the HCs, with the jurisdiction under Article 203 B, declaring invalidity of any statute or a provision thereof, as repugnant to the Islāmic injunctions. The relevant portion of Article 203B stipulated that a HC has the authority to review and determine, upon the petition of a Pākistān's citizen, a Provincial Government, or the Federal Government (FG), whether any statute or a provision thereof is contrary to the Islāmic injunctions[52].

For the first time in Pākistān's history, through this Constitutional amendment, an institution was granted the authority and jurisdiction to examine any statute or a provision thereof based on the standards of Sharī'ah and declare it contradictory to the Islāmic injunctions (aḥkām-e-Islām). Upon such declaration, the law would lose its effect. Article 203B stated that the law or provision, to the extent deemed repugnant, would cease to be applicable from the day the HC's decision takes effect[53].

[51] President's Order No. 3 of 1979.7th February 1979.Gazette of Pākistān, Extraordinary, Part I, 7th February 1979.
[52] Artile 203 B (1), President's Order No. 3 of 1979.7th February 1979.Gazette of Pākistān, Extraordinary, Part I, 7th February 1979.
[53] Artile 203 B (4b), President's Order No. 3 of 1979.7th February 1979. Gazette of Pākistān, Extraordinary, Part I, 7th February 1979.

In case of an appeal against the judgement of these Sharī'at Benches, a separate bench was created in the SCP and was named as _SAB'. The SAB comprised three Muslim judges of the SCP. Article 203C of the order stipulated that, for the exercise of the jurisdiction granted by this Article, a Bench composed of three Muslim Judges of the SCP, known as the SAB, would be established within the SCP. Any reference in the preceding clauses to the SCP would be interpreted as a reference to the SAB[54].

2.4 Establishment of the Federal Shariat Court of Pākistān

Despite all these efforts, the process of Islāmization was very slow and the desired goal remained unattained, leading to the replacement of Sharī'at Benches in various HCs, with the establishment of the FSC in Islāmabad in 1980. This transition was enacted through Presidential Order No.1 of 1980[55]. The jurisdiction that the Sharī'at Benches could exercise was granted to the FSC of Pākistān, and all ongoing cases were shifted to it. The FSC of Pākistān was established under part VII, Chapter 3-A of the 1973's Constitution. Article 203 C provided as under:

—A Court named the FSC shall be established for this Chapter.‖[56]

This institution stands unparalleled in the entire Muslim world. It is fortified by robust provisions of the Constitution to achieve the objective of Islāmisation of Law in the country.

2.5 Objectives of the Federal Shariat Court of Pākistān

The establishment of the FSC of Pākistān naturally follows from Article 227 of the Constitution. Consequently, it becomes evident that the primary objective behind creating the FSC of Pākistān at the national level was to establish an attentive and efficient platform to ensure that no law is formulated or remains in effect in Pākistān if it contradicts the principles of the Holy Qurʾān, and the Sunnah. This particular

[54] Artile 203 c (3), President's Order No. 3 of 1979.7th February 1979. Gazette of Pākistān, Extraordinary, Part I, 7th February 1979.
[55] Substituted by the Constitutional (amendment) President's Order No. 1 of 1980. Section 3(w,e,f, 5th June, 1980) for Chapter 3-A inserted by the President's Order No. 3 of 1979.7th February 1979.Gazette of Pākistān, Extraordinary, Part I, 7th February 1979.
[56] Article 203 C(1) of the Constitution of IRP, 1973, 1973.

dimension embodies the practical embodiment of Article 227(1) of the Constitution, which asserts that no law shall be enacted if it is contrary to the teachings of Islām[57].

The creation of the FSC is in fact particle realization of the remedy contemplated by the Holy Qur'ān for person aggrieved by the anti-people and inhuman practices that hold legal authority. In fact, in exercise of its constitutional jurisdiction, The FSC discharges the obligations imposed by *Allāh Almighty (*سُبْحَانَهُ وَتَعَالَى*)* under this verse of Qur'ān:

وَلْتَكُنْ مِنْكُمْ أُمَّةٌ يَدْعُونَ إِلَى الْخَيْرِ وَيَأْمُرُونَ بِالْمَعْرُوفِ وَيَنْهَوْنَ عَنِ الْمُنْكَرِ ۚ وَأُولَٰئِكَ هُمُ الْمُفْلِحُونَ.[58]

> *—Among you, there should always exist individuals who invite to what is good, advocate for what is right, and discourage what is wrong. Only they will achieve genuine success*.‖[59]

According to this command of *Allāh Almighty (*سُبْحَانَهُ وَتَعَالَى*)*, the power of declaring a law *—to be consistent in with the Islāmic Injunctions, or otherwise*‖ is not only a massage to the people to follow what is good and to avoid what is wrong, but the yardstick to determine what is good or bad according to Muslim belief is certainly the Revealed principle. This was the main object behind the establishment of the FSC is to determine the existing law in Pākistān with respect to their consistency or inconsistency with the Islāmic Injunctions in the light of the revealed principle by *Allāh Almighty (*سُبْحَانَهُ وَتَعَالَى*)*.

2.6 Composition of the Federal Shariat Court

According to the Constitution, The FSC comprises eight Muslim judges, with the CJ among them. Their appointments are made by the President of Pākistān as per the provisions of Article 175-A of the Constitution[60]. The procedure for appointing judges to the FSC underwent changes after the 18th and 19th amendments. Previously, these judges were appointed by the President from among the serving or retired judges of the SCP or a HC, or from individuals meeting the qualifications of a High Court

[57] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.
[58] Surat Al-Imran, Ayah. No: 104.
[59] The Qurʾān, *Surah Āl-''Imrān* (3:104), translated by M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2004).
[60] Article 203 C (2) of the Constitution of IRP, 1973.

judge. Currently, judges of the FSC are also appointed through the Judicial Commission. This commission is chaired by the CJP and consists of the four most senior Judges of the SCP, one former CJP or retired judge of the SCP (appointed by the Chairman in consultation with the four member judges), the Attorney General for Pākistān, the Federal Minister for Law and Justice, the CJ of the FSC, and the most senior judge of the FSC.

For the appointment of the CJ, the most senior judge of the FSC is excluded from the Commission. When the Judicial Commission approves a new nominee for FSC's judge, the nomination goes to an eight-member Parliamentary Committee. This committee has equal representation from both the Government and the Opposition, as well as from both houses of the Parliament[61]. The committee has two weeks to review the recommendation. If approved, the PM forwards it to the President for appointment.

However, if the Parliamentary Committee, with a three-fourth majority, does not confirm the recommendation (with reasons recorded), the decision is returned to the Commission through the PM, and a new nomination is required. Out of the eight judges, three must be Ulema (Islāmic scholars) well-versed in Islāmic law[62]. The Constitution visualizes a specific prohibition against the appointment of a person as Judge of the FSC of Pākistān unless he fulfills the qualification laid down under sub-Article 3-A of Article 203 C[63].

In addition, a non-Muslim cannot be appointed as a Judge of the Federal Shariat Court (FSC) of Pakistan. The Constitution of 1973 emphasizes the term _Muslim Judge'[64], for Sharī'at Court because while deciding a dispute requiring interpretation (*ta''wīl*) of Sharī'ah, it is necessary for qāḍī (qazi) to be not only well versed in the knowledge of Islām but he should have also full faith in religion, as has been formulated in *M. Shafi Muhammadi etc. v. IRP*[65].

[61] The NA and the Senate.
[62] Article 175 A of the Constitution of IRP, 1973.
[63] Article 3-A of the Article 203 C of the Constitution of IRP, 1973.
[64] Article 203 C(2) of the Constitution of IRP, 1973.
[65] M. Shafi Muhammadi etc. v. IRP, PLD 2003, Karachi 1.

2.7 Functions of the Federal Shariat Court

The function of the FSC of Pākistān is to subject any statute or a provision thereof, as well as any custom or usage with the force of law, to scrutiny based on the tenets of Islām as outlined in the Holy Qurʾān, and the Sunnah. This evaluation is carried out with the assistance of Ulema (Islāmic scholars) and experts. The FSC then communicates its opinion to the relevant authority. It's important to note that the FSC of Pākistān does not possess the authority to create new laws or statutes; rather, it can only provide its opinion to the relevant government body concerning existing laws, provisions, customs, or usages with legal effect. The final decision on legislative matters lies within the jurisdiction of the State's law-making apparatus, as was meant by the FSC, in *Ashfaq Ahmad etc. v. GOP etc.*[66] As stipulated by Article 203D of the Constitution, the FSC of Pākistān is empowered to scrutinize any statute or a provision thereof, along with any custom or usage carrying the weight of law, in accordance with the principles of the Islāmic Injunction[67]. There is no doubt that the fundamental function of the establishment of the FSC of Pākistān is to nullify a law if and when finds it repugnant to the Islāmic Injunction, as has been ruled by the FSC, in *Dr. Mehmood ur Rehman Faisal etc. v. GOP etc.*[68]

2.8 The Federal Shariat Court's Jurisdiction

The FSC's jurisdiction is governed by the Constitution[69]. By this Constitutional jurisdiction, it is intended to foster and appropriate progress toward the Islāmization of the legal system of Pākistān and to strike down all impediments to this way as well as to nullify a law if and when repugnancy to the Islāmic Injunctions is found. It is indeed a noticeable fact that the jurisdiction granted to the FSC by the Constitution is limited solely to the Islāmic Injunctions. Other considerations or external factors do not influence its judgements[70].

The FSC possesses the authority to exercise its jurisdiction either voluntarily or in response to a petition filed by any of Pākistān's citizen, a Provincial Government or the FG. General Zia's policy of gradual transition towards Islām

[66] Ashfaq Ahmad etc. v. GOP etc., PLD 1992 FSC 286.
[67] Article 203 D (1-A) of the IRP's Constitution, 1973.
[68] Dr. Mehmood ur Rehman Faisal etc. v. GOP etc., PLD 1992 FSC 195.
[69] Article 203D of the Constitution.
[70] Prof. Kazim Hussain v. GoP, PLD 2013 FSC 18.

resulted in intricate challenges to the FSC's jurisdiction. According to the Constitution of IRP, kinds of **FSC's Jurisdiction** are as under:

> *(1) "The revisional and appellate jurisdiction over convictions or acquittals from district courts in cases involving newly introduced Islāmic criminal laws (hudood)"* [71]*;*
> *(2) "Exclusively sole jurisdiction to hear the Sharī"at petitions, brought by any of Pākistān"s citizen, a Provincial Government or the FG, challenging any statute or a provision thereof for repugnancy to the Holy Qurʾān, and the Sunnah";*
> *(3) "Exclusively sole jurisdiction to scrutinize "any statute or a provision thereof " for compatibility with the teachings of the Holy Qurʾān, and the Sunnah."*[72]

Authority to hear appeals from the judgements was granted to the SAB [73], Art 203 B imposed limitations on the FSC's jurisdiction regarding the gradual and consistent process of Islāmisation, on condition that ―*Any customary practice or usage with legal validity is covered by the law, except for Constitutional provisions, fiscal laws, laws governing insurance or banking practices and procedures, laws related to court or tribunal procedures, laws concerning the imposition and collection of taxes and fees, as well as the Muslim Personal Law, until ten years have transpired since the initiation of this chapter*.‖

The exclusions from the FSC's jurisdiction, coupled with the interpretations by superior courts, rendered it ineffective in addressing significant areas that required urgent legal reform, such as the judicial review of cases concerning the MFLO, as ordained by the SAB in the earlier Sharī'at petitions: *Al-Haaj Shaikh v. Mehmood Haroon*[74]*, FoP v. Mst. Farishta*[75], and *Saeed ullah Kazmi v. GOP*[76]. By excluding fiscal laws from the FSC's jurisdiction, all cases or issues associated with financial

[71] Article 203DD of the IRP's Constitution, 1973.
[72] Article 203D (1) of the IRP's Constitution, 1973.
[73] Article 203F of the IRP's Constitution, 1973.
[74] *Al-Haaj Shaikh v. Mehmood Haroon*, PLD 1981 SC 334.
[75] FoP v. Mst. Farishta, PLD 1981 SC 120(n).
[76] Saeed ullah Kazmi v. GOP, PLD 1981 SC 627.

interests or Riba were effectively eliminated from its scope, a matter of significant concern for the FSC.

The cases of *Essa EH Jaffar v. FoP*[77]*, Md. Sadiq Khan v. FOP*[78], Ibrahim Bhai v. GoP[79], and *Sarfaraz Hussain v. FoP*[80]. These judgements had been reversed by the FSC in October, 1991 through the *Dr. Mehmood ur Rehman Faisal v. GoP*[81]. The later case determined that riba in all of its forms was ―repugnant to Islām‖ and directed revisions in twenty relevant federal statutes. The FSC asserted jurisdiction to adjudicate the case on its merits, as the exclusion of financial matters under Article 203(B) had reached its expiration on July 1, 1990.

2.8.1 The Federal Shariat Court‘s Original Jurisdiction

Original jurisdiction is conferred upon the FSC by the Constitution to assess the mechanism for the Islāmization of Pākistān‘s legal system. The paramount original jurisdiction is enshrined in Article 203 D of the Constitution. Within this jurisdiction, the FSC possesses the authority to scrutinize and determine the compatibility of any statute or a provision thereof with the Islāmic Injunctions. The fundamental purpose of the FSC‘s original jurisdiction is to interpret the phrase ‗The Islāmic Injunctions (aḥkām-e-Islām)‘. A direct reading of the article implies that any legislative instrument or customary practice conflicting with the commandments of the Holy Qurʾān, and the Sunnah cannot endure within Pākistān‘s régime in legal framework structure. The FSC can invoke its original jurisdiction either on its own initiative or in response to a petition from a Pākistānī citizen or the FG and provincial governments. In this context, the Constitution stipulates that:

> *―The FSC, whether on its own initiative or in response to a petition from any of Pākistān"s citizen, a Provincial Government or the FG, is empowered to examine and determine whether any law seems to be contradictory to the Islāmic Injunctions, as established in the Holy Qur'ān and the Sunnah, hereinafter referred to as the Islāmic Injunctions."*[82]

[77] Essa EH Jaffar v. FoP, PLD 1982 FSC 212.
[78] Md. Sadiq Khan v. FOP, PLD 1983 FSC 43.
[79] Ibrahim Bhai v. GoP, Sharī‘at Petition 6/K/83.
[80] Sarfaraz Hussain v. FoP, SP 1/K/82.
[81] Dr. Mehmood ur Rehman Faisal v. GoP, Sharī‘at Petition 30/1/90.
[82] Supra Article 203 D (1) of the IRP‘s Constitution.

Article 203 D of the Constitution, while granting original jurisdiction to the FSC, also outlines a specific mechanism to ensure the execution of the mandate outlined in Article 227 of the IRP Constitution and to attain the objective, visualized in the Objective Resolution as well as provide machinery at national level by way of creating a superior Court with exclusive jurisdiction to undertake the solemn exercise of adapting a statute Book of Pākistān with the Islāmic Injunctions[83]. The Constitution has barred all other courts from exercising jurisdiction in any matter that falls exclusively within the FSC's jurisdiction. The Constitution have provided as under:

> *"Except as stipulated in Article 203 F, no court or tribunal, including the SCP and a High Court, shall entertain any proceeding or wield any authority or jurisdiction concerning any matter falling under the power or jurisdiction of the Court."*[84]

It was also declared by the honourable SCP that:

> *"The FSC and SAB possess jurisdiction and authority under Chapter 3A of Part VII of the Constitution to review any prevailing law in Pākistān and determine whether the provisions therein are contrary to Islām."*[85]

The main purpose of granting this jurisdiction to the FSC through Article 203 D is to ensure the preservation of the Islāmic Injunctions (aḥkām-e-Islām) as outlined in the Qur'ān & Sunnah, and to assess the conformity of all current laws based on the standards of Islāmic Injunction[86].

2.8.2 The Federal Shariat Court's Revisional Jurisdiction

Beside the FSC's original jurisdiction, The revisional jurisdiction bestowed upon the FSC is also of a constitutional nature. It is governed by Article 203 DD of the Constitution of IRP, which states: ―By virtue of this Article, the Court has the authority to summon and review the records of any case determined by any Criminal court under any law pertaining to the implementation of Hadood offenses, and assess

[83] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.
[84] Article 203 G of the Constitution of IRP, 1973.
[85] Mst. Rukhsana etc., v. FoP etc., 1989 SCMR 2012; Mst. Benazir Bhutto etc., v. President of Pākistān etc., PLD 1988 FSC 113.
[86] Dr. Aslam Khaki v. S. M. Hashim, PLD 2000 SC 225; PLD 2010 FSC 229.

the accuracy, legality, and appropriateness of any proceeding.‖ The wording of the relevant Article is reproduced as under:

> *―The court has the authority to request and review the records of any case adjudicated by a criminal court under any law connected to the implementation of Hadood, with the aim of ascertaining the accuracy, legality, or appropriateness of any determination, sentence, or directive rendered or issued by said court, as well as evaluating the regularity of the court"s proceedings. Additionally, while obtaining such records, the court can order the temporary suspension of sentence execution and, if the accused is in custody, their release on bail or their own bond until the sentence is carried out.‖*[87]

The term ―revision‖ encompasses activities such as re-examination, re-assessment, and thorough review for the purpose of correction and enhancement. It is more than just a power; it constitutes a solemn duty, as indicated by the Constitutional provision that specifically addresses the enforcement of Hadood. In this context, ―enforcement‖ refers to the act of ensuring that individuals comply with Islāmic laws pertaining to Hadood[88]. It was held in some cases that for exercise of revisional jurisdiction by the FSC, the following are to be satisfied:

(a) The record which may be called must pertain to any decided case.
(b) The Case may be decided by any criminal Court.
(c) The decision should be in any way relating to the enforcement of Hadood[89].

The Intent of Article 203 DD is to establish a unified and central judicial platform with exclusive jurisdiction to guarantee accurate, lawful, proper, and systematic implementation of Hadood laws in accordance with Islāmic teachings across Pākistān. It is noteworthy to highlight that the term ―enforcement‖ has been

[87] Article 203 DD (1) of the Constitution of IRP, 1973.
[88] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.
[89] -See: PLD 1986 FSC286. And also 2002P.Cr.LJ. 1868 FSC.

specifically employed by the Constitution solely in connection with offenses related to the concept of Hadood.

2.8.3 The Federal Shariat Court's Appellate Jurisdiction

The FSC's The Constitution of the Islāmic Republic of Pākistān grants Appellate Jurisdiction through Article 203 DD. The lack of the term ―appeal‖ does not in any manner restrict the extensive authority bestowed upon the FSC under Article 203 DD. All established aspects associated with the concept of ―appeal‖ have been encompassed within the authority granted to the FSC by Article 203 DD of the Constitution, categorized under the heading of Revision[90]. The FSC holds authority in both appellate and revisional capacities for all Hadood cases that are heard by Session Judges or Additional Session Judges[91]. So there is no ambiguity as for as the FSC's appellate jurisdiction is concerned. The LHC, in *Hafiz Abdul Waheed v. Mst. Asma Jahangir*[92], as well as the SCP in *Hafiz Abdul Waheed v. Mst. Asma Jahangir*[93] have blatantly declared in their judgements that the Judgements of the FSC, in exercise of its appellate jurisdiction are binding on all HCs and the SCP.

2.8.4 The Review of Judgement by the Federal Shariat Court

The FSC is granted the authority, with consideration to Article 203 E (9), to re-examine any verdict or decision it has rendered. This power of re-evaluation is not contingent upon any legislative action[94]. Any judgement or order issued by the FSC can be re-evaluated either upon request from any party involved in the judgement or order, or initiated by the Full Court of the FSC itself.

The FSC's Review powers, as visualized by Article 203 E (9), have, in effect the acceptance of the principle of Itihad for the development of Islāmic jurisprudence. This review power has its genesis in the following Commandment of *Allāh Almighty* (سُبْحٰنَهٗ وَتَعٰلٰى):

(أَوْشَلَ مِهَ انسَّمَاءِ مَاءً فَسَالَتْ أَوْدِيَةٌۢ بِقَدَرِهَا فَاحْتَمَلَ انسَّيْلُ سَيْدًا رَّابِيًا ۚ وَمِمَّا
يُوقِدُونَ عَلَيْهِ فِي انىَّارِ ابْتِغَاءَ حِلْيَةٍ أَوْ مَتَاعٍ سَيْدٌ مِّثْلُهُ ۚ كَذَٰلِكَ

[90] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.
[91] PLD 1997 Lahore 544.
[92] Hafiz Abdul Waheed v. Mst. Asma Jahangir, PLD 1997 Lahore 301.
[93] Hafiz Abdul Waheed v. Mst. Asma Jahangir, PLD 2004 SC 219.
[94] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.

يَضْرِبُ اللَّهُ الْحَقَّ وَالْبَاطِلَ ۚ فَأَمَّا الزَّبَدُ فَيَذْهَبُ جُفَاءً ۖ وَأَمَّا مَا يَنفَعُ النَّاسَ فَيَمْكُثُ فِي الْأَرْضِ ۚ كَذَٰلِكَ يَضْرِبُ اللَّهُ الْأَمْثَالَ)[95]

—He sends down water from the skies and channels it according to its measures. But the torrent washes away the foam that rises to the surface. Likewise, the impurities are removed from metals heated in the fire to make ornaments or utensils. In this way, *Allāh Almighty (*سُبْحَانَهُ وَتَعَالَى*)* illustrates truth and falsehood. The impurities vanish like foam, while what benefits mankind remains on the earth. *Allāh Almighty (*سُبْحَانَهُ وَتَعَالَى*)* thus sets forth parables.‖[96]

Legally acceptable in Sharī'ah, it is acknowledged that a judge can alter their viewpoint in the presence of new evidence or when reconsideration of previous rulings is warranted. Therefore, the FSC may appropriately invoke the principle of reconsideration to rectify errors through the review power granted by Article 203 E (9).

2.8.5 Bar on the Federal Shariat Court's jurisdiction

Sub-Article _c' of Article 203 B of the Constitution of IRP, 1973, places specific limitations on the FSC's jurisdiction[97]. In line with Sub-Article (c) of Article 203 B of the Constitution, the FSC is prohibited from scrutinizing provisions related to the Constitution, procedural law, and the Muslim Personal Law. As per Sub-Article(c) of Article 203 B of the Constitution, the area of fiscal law was also initially kept out of FSC's jurisdiction for a specified period which was extended from time to time but now is within the FSC's jurisdiction[98]. The original wording of Sub-Article(c) of Article 203 B is being reproduced:

> *—Law includes any custom or usage having the force of law but does not include the Constitution, the Muslim Personal Law, any law relating to the procedural of any court or tribunal or until the expiration of {10} year the commencement of this Chapter, any fiscal law or any*

[95] Ayah:17 Sura Ar rad.
[96] The Qurʾān, *Surah Ar-Ra"d* (13:17), translated by M. A. S. Abdel Haleem (Oxford: Oxford University Press, 2004).
[97] M Saifullah v. FoP, PLD 1992 FSC 376.
[98] Presidential Order No.14 of 1985.

law relating to the levy and collection of taxes and fee or banking insurance practice and procedure.‖[99]

The Article 203 G prohibits other courts and tribunals, including the SCP and all HCs, from exercising jurisdiction over matters that fall within the jurisdictional scope of the FSC[100]. The exclusive authority to determine whether a law is repugnant to the Islāmic injunctions (aḥkām-e-Islām) rests with the FSC, and subsequently, with the SAB, as outlined in Article 203 F[101].

The bar imposed on the jurisdiction of the superior court has to be stated in very clear term. In this regards, the Constitution of IRP 1973 says that: *―no Court or tribunal, including the SCP and a HC shall entertain any proceeding or exercise any power or jurisdiction in respect of any matter within the power or jurisdiction of the Court.‖*[102]

2.8.6 Procedure of the Federal Shariat Court

In order to effectively carry out its functions, the FSC is granted the authority, as per Article 203 E, to establish rules concerning practice and procedure in any manner it deems appropriate. The specific provisions of the mentioned Article are as follows

> *"The court shall have power to conduct its proceeding and regulate its procedure in all respects as it deems fit."*[103]

Under these vested powers, the FSC has framed the FSC Procedure Rules, 1981. These rules have retrospective effect in operation, as have been held in *The State v. Zahid Hussain etc*[104].

2.8.7 The Shariat Appelate Bench

Article 203 F stipulates that the decisions or orders issued by the FSC are subject to appeal and can be presented before the SAB. The SAB being part of SCP with special and exclusive jurisdiction, enjoys all the powers of the SCP with some constitutionally prescribed modifications with regard to subject matter and procedure and its judgements and observation on question of law would have the same effect as

[99] Article 203 B (c) of the Constitution of IRP, 1973
[100] 2004. SD 899 SC, also PLD. 2000. F SL.1.
[101] PLD. 1990. SC 899
[102] Article 203 G of the Constitution of IRP, 1973
[103] Article 203 E (2) of the Constitution of IRP, 1973.
[104] The State v. Zahid Hussain etc., PLD 1987 FSC 51.

the other judgements of the SCP, in *Mst. Aziz Begum v. FOP*[105], and *Shahid Mehmood v. Karachi Electric Supply Corporation Ltd*.[106]

Jurisdiction of the SAB is limited to the examination of the question if any statute or a provision thereof law is in line with the Islāmic Injunctions[107]. The *SAB* in accordance with its authority under Article 203 F of the Constitution, combined with Article 203 D, has the power to pronounce a law as repugnant to The Islāmic Injunctions. Subsequently, the SAB can issue directions to the government to formulate and enact a new law in alignment with the principles of The Islāmic Injunctions (aḥkām-e-Islām), this has been clarified by the SCP in *M Abdullah Yousuf etc. v. Mst. Nadia Ayuob etc.*[108]. Such jurisdiction, however, cannot be exercised where a particular law or a provision of law is repugnant to any of the different views taken by different Muslims Jurists, unless it is shown that the said law is repugnant to the verse of the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad صلى الله عليه وآله وسلم)[109].

The period of limitation to file an appeal before the SAB is provided differently for the Government and others. In this regard the Constitution says that:

> ―*Any party to any proceedings before the Court under Article 203 D aggrieved by the final decision of the Court in such proceeding may, within sixty days of such decision, prefer an appeal to the SCP, Provided that an appeal on behalf of the Federation or of a Province may be preferred within six month of such decision.*‖[110]

2.9 Conclusion

The Islāmic ideology played a pivotal role in the formation of Pākistān, influencing the initial Constituent Assembly to outline a broader framework for the future constitution of the country. This vision was encapsulated in the Objective Resolution, passed on March 12th, 1949. This historically significant resolution was subsequently integrated as a preamble in each of Pākistān's constitutions – the ones adopted in 1956, 1962, and the definitive 1973 Constitution. In all these iterations, the commitment to enforce Islāmic law within Pākistān was affirmed, and steps were

[105] Mst. Aziz Begum v. FOP, PLD 1990 SC 899.
[106] Shahid Mehmood v. Karachi Electric Supply Corporation Ltd., 1997 CLC 1936.
[107] PLD. 2000. SC.225
[108] M Abdullah Yousuf etc. v. Mst. Nadia Ayuob etc., PLD 2005 SC 252.
[109] PLD. 1994. SC.1.
[110] Article 203 F (1) of the Constitution of IRP, 1973.

pledged to enable the Muslim citizens of the country to structure their lives in accordance with the teachings of the Holy Qur'ān & Sunnah. These efforts resulted in the following important events:

I. Islāmic Provisions in the three Constitutions[111],
II. Establishment of CII, and the FSC and
III. Formation of the SAB.

The establishment of the FSC and the setting up of the SAB, in the SCP, was a breakthrough progress in the history of Pākistān's legal structure.

In Pākistān, the FSC holds a unique and exclusive position as the sole constitutional body entrusted with the responsibility of determining whether a law conforms to the Islāmic Injunctions (aḥkām-e-Islām) or not. This authority vested in the FSC is both definitive and binding, carrying significant weight in the implementation of Islāmic law within Pākistān. Unlike a mere advisory role, the FSC's judgements hold the power to necessitate the enactment of new legislation by the government, if it deems a law to be inconsistent with Islāmic principles. Failure to address such concerns within a specified period results in the law becoming ineffective. This distinctive role of the FSC is unparalleled in the entire Islāmic world, setting it apart as a singular institution with the pivotal task of upholding and promoting Islāmic legal principles within Pākistān.

[111] The 1956's, 1962's and the 1973's Constitutions.

Chapter 3
THEORY OF COLLCTIVE IJTIHāD AND ITS PRACTICAL ASPCTPECTS

3.1 Introduction

Embedded within the realm of Islāmic jurisprudence lies the pivotal concept of ―ijtihād,‖ a cornerstone mechanism through which legal rulings are derived from Islāmic sources. This chapter navigates the intricate dimensions of ijtihād, focusing intently on its collective manifestation and its real-world applications within the context of the FSC.

The very fabric of Islāmic legal thought is woven from the threads of ijtihād, an Arabic term translating to ―exertion.‖ Inherent to ijtihād is the continuous intellectual effort exerted by scholars to interpret Islāmic sources and extrapolate legal principles. This chapter embarks on a two-fold exploration of ijtihād: it delves into its linguistic essence and technical intricacies, and further examines its practical manifestations within the specific context of the FSC.

Linguistically, ijtihād encapsulates the spirit of exertion and rigorous analysis. This chapter scrutinizes the origins of the term, unveiling its core essence as an endeavor that requires unflagging dedication. On a technical level, it delves into the methodologies that jurists employ to navigate the vast expanse of Islāmic sources, enabling them to derive legal rulings that resonate with contemporary contexts while maintaining fidelity to tradition.

Integral to the validation of ijtihād as a credible source of legal deduction is the concept of ―hujjiyyah,‖ or the presentation of compelling arguments. This section delves into the art of persuasive reasoning that scholars utilize to establish the legitimacy of their derived legal conclusions.

Tracing the historical trajectory of ijtihād reveals its evolution as an adaptive mechanism. This chapter outlines the historical journey, underlining its role in shaping Islāmic legal thought and addressing novel challenges within shifting times.

However, the chapter transcends historical analysis to emphasize ijtihād's contemporary significance. It serves as a dynamic link between traditional jurisprudence and modern complexities, carrying the mantle of ethical and scholarly responsibilities that guide its practice.

By scrutinizing the primary sources underpinning ijtihād, this chapter unravels the intricate interplay of these sources that contribute to the comprehensive legal analyses derived through this mechanism.

Finally, the diverse modes of ijtihād, ranging from individual scholarly efforts to the collective approach, form a crucial backdrop for the exploration of its practical applications. With a specific focus on the FSC, this chapter unravels the intricacies of how the theory of collective ijtihād is manifested and practically realized.

In synthesizing the theoretical underpinnings of ijtihād with its practical implications, particularly within the purview of the FSC, this chapter seeks to shed light on the multifaceted role that collective ijtihād plays in the realm of Islāmic jurisprudence and its real-world ramifications in civil cases.

3.2 The Ijtihād

Arguments of proof of ijtihād with evidence[112] based on its evolution and progressive growth are points of debatable discussion in this chapter. The significance, task, and necessity of ijtihād for its unavoidable, and obligatory manifest are also of importance in this part of the research. In the same pursuit of the evolution of ijtihād, the researcher is intended for discovering the sources, fundamental elements, and the main subject matter of ijtihād. For exploring the intellectual methodologies and practices the modes and methodologies of ijtihād are under discussion in this current chapter.

[112] Spoken as ―Hujjiyyah‖.

3.2.1 Lexical Meaning of the Ijtihād

The term: Ijtihād has been derived from the Arabic word ―jahada‖ which means ―attempts‖. Literally speaking, ijtihād is an Arabic term that means, ―Effort or exertion‖[113].

According to lexicographers, ―Ijtihād‖ is derived from ―Juhd‖, which means to strive or to endeavour in accomplishing a definite aimed task. According to Ibn al-Athir, Ijtihād is an effort or attempt to achieve a particular objective. ‗Juhd' means employing one's total strength, and ‗jahd' means difficulty and hardship.[114]

In other words ―exertion‖ is the lexical meaning of ijtihād. From the perspective of jurisprudence or its jurisprudential meaning is endeavouring effort in *Sharī'ah*, to accomplish a legal conclusion on an issue underway which is not specifically covered by the Holy Qurʾān, the Sunnah and the Ijmāʿ[115]. On the other hand, ―the principles and rules of usūl al-fiqh are mastered and applied through the maximal effort exerted by the jurist in ijtihād[116] to discover *Allāh Almighty (* سُبْحَنَهُ وَتَعَلَى*)''s law*‖

As stated by Ghazali (رحمة الله عليه), ijtihād connotates: ―*to expand one''s capacity in a certain matter and use it to the utmost.*‖ Certain Islāmic scholars have have characterized ijtihād as a method for enhancing the utmost competence through the mujtahid[117], when seeking familiarity with Sharī'ah, the most impeccable description of ijtihād emerges as the culmination of substantial effort in pursuit of Sharī'ah knowledge, reaching a point where additional exploration becomes practically unattainable through human methods[118].

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[113] Ibne Manzoor, *Lisān al-ʿArab* (Beirut: Dar Sader, 1990), 133.
[114] L. Alī Khan and Hisham M Raadhan, *Contemporary Ijtihād* (Edinburgh: Edinburgh University Press, 2012).
[115] An undisputed and non-repugnant consensus of Sharī'ah jurists on a particular question of Sharī'ah law.
[116] *Sharī'ah* compliant legal theory.
[117] A Sharīʿah jurist who is expert in *ulum al-Qurʾān*, having the right to exercise *Ijtihād* in Sharīʿah, if he exert and implement *Ijtihād* in coordination with other *mujtahidīn*, who are expert in other Sharīʿah areas.
[118] Mas'ud M.K., *Iqbal''s Reconstruction of Ijtihād* (Lahore: Iqbal Academy Publishers, 2nd edition, 2003).

3.2.2 The Technical Meaning of Ijtihād

Before particularizing the technical meaning of Ijtihād, it is pertinent to elaborate on differentiating the root terms of the Islāmic Sharī'ah Law namely: **Fiqh** as well as **Usūl al-fiqh**. Literally, fiqh means understanding or comprehension, and technically it means the science of understanding the rules derived from their specific sources or the exertion of intelligence *(Ijtihād)* in determining a fact of law from its sources. Plainly, Usūl al-fiqh denotes the foundation of fiqh, alternatively referred to as the origin of Islāmic law. In a technical sense, it signifies the discipline of extracting legal regulations from origins. Usūl al-fiqh encompasses the comprehension of interpretive principles (*ta''wīl*) and it results in the dynamism of the Sharī'ah. So Sharī'ah is divine and fiqh is acquired by human beings through the process of intellectual exertion of Ijtihād.

Technically Ijtihād means, to deduce the hukam in diverse elucidations of Sharī'ah injunctions and to construe the hukam or any other ruling of the Holy *Qur'ān or Sunnah (ahādīth)*, to equalize new legal state of affairs. The foremost technical meaning of ijtihād is found in the reasoning of Mu'ādh ibn Jabal (رضي الله عنه) Upon his designation as the qāḍī (qazi) of Yemen by the Holy Prophet (صلى الله وسلم عليه وآله).[119] Once He was asked by the *Holy Prophet* (ملسوهلآوهيلعهللاىلص), *"How will you do _Qadā''* (adjudication), *while you do not find a clear ruling from the Qur'ān, or in the Sunnah (ahādīth)?"*[120]

He (رضي الله عنه) replied: *"Ana ajtahidu", by* which, He meant: *"I will strive," ("to understand the problem myself and find a way out").* In plain words, he assertively replied as:

> *"In the event that the Holy Qur'ān offers no guidance, I shall adhere to the practices of the Holy Prophet, and if if such practices are also absent, I shall engage in Ijtihād (personal effort) and make judgements accordingly."*

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[119] Ahmad Ibn Hanbal, *Musnad al-Imam Ahmad Ibn Hanbal,* Vol. IV, (Beirut: Dar al-Kutub al-Islāmiyyah, 1993), 252.

[120] Abu Dawood, *Sunan Abu Dawood*, Hadith 3590. Translated by Ahmad Hasan (Lahore: Kazi Publications, 1984); Ibn Majah, *Sunan Ibn Majah*, Hadith 13. Translated by Nasiruddin al-Khattab (Riyadh: Darussalam, 2007).

It connotes that characterizing ijtihād, technically, Muʿādh ibn Jabal (رضي الله عنه) is the pioneer for giving the following technical meaning of ijtihād:

> *"Striving to, first understand the problem by himself and then finding a way out to decide the issue."*[121]

In *Sharī'ah*, the general application of individual reasoning is called ijtihād or ijtihād al-ra'i, and a mujtahid is an authoritative lawyer or jurist. As, literally, exertion becomes its lexical meaning so, in its common usage, this Arabic word refers to the intense effort, both physical and mental, in a particular activity. In its Islāmic jurisprudence (*Sharī'ah)* and technical legal sense, ijtihād refers to the efforts of the intellectual faculty of the jurists, in finding a solution to a legal problem.

In strictly *Sharī'ah* terminology, for elucidating the definition of the term ijtihād the researcher explores various classes of thought who have strived to make it legally definite and consistent with their *Sharī'ah* jurisprudential methodology. This very research may categorize the various classes into these three groups:

1. The first group emphasizes generalization instead of specification;
2. The second group emphasizes in its definitions the knowledge on the basis of unquestionably, positively, and well as hypothetically, in general comprising opinion;
3. The third group emphasizes humanly possible extreme exertion, in quest of the *Sharī'ah* knowledge that further research is realistically impossible by human means.

The leading *mujtahidīn* of the first group defines ijtihād in the following manners:

a. Fakhr ad-Dīn ar-Rāzī (رحمة الله عليه) defines ijtihād as: *—to exert one"s effort in juristic reasoning by way of* analogy (*_qiyas*) *to the extent that no blame may be forthcoming in this regard."*[122];
b. Ijtihād as defined by Shātibī (رحمة الله عليه), encompasses a procedure where an individual expends their endeavours to the utmost extent, aiming to attain

[121] Supra Ahmad Ibn Hanbal, *Musnad al-Imam Ahmad Ibn Hanbal,* Vol. IV, (Beirut: Dar al-Kutub al-Islāmiyyah, 1993), 252.
[122] Al-Razi Al-Imam Fakhar-ul Din Muhammad Bin Umar, *Al-Mahasul Fi Ilim Usul Al –Fiqh* (Riyadh: Imam Muhammad Ibn Suud Islāmic University Printing press, Dr.Taha Jabir Faiad Al- Ulawani Edn., 1979) Vol,3, 7; ar-Rāzī, Fakhr ad-Dīn. *Al-Maḥṣūl fī „Ilm al-Usūl* (The Compendium on the Science of Legal Theory). Translated by Nasir al-Din al-Khattab. (Beirut: Dar al-Mashriq, 1977).

precise or likely knowledge and formulate judgements within a specific scenario[123];

c. Al-Bayḍāwī (رحمة الله عليه) defines ijtihād as: ―*to exhaust [one"s] exertion in understanding the rules of Sharī'ah."*[124];
d. Al. Shirazi (رحمة الله عليه) defines ijtihād as: ―*to exhaust one"s utmost capacity and to spend endeavour in the understanding of the rule of Sharī'ah"*[125];
e. Al-Fatuhi defines ijtihād as: ―*the utmost exertion of a jurist to comprehend the rule of Sharī'ah*.‖[126]

Perceptively, the aforementioned definitions of the first group are more general, for the reason that these elucidations take in the search for positive and hypothetical principles, within the scope of ijtihād. These usually include *Sharī'ah*, regardless of its practical application. They are also unclear whether these definitions are specific or approximate.

In a nutshell, the jurists of this group have a liberal attitude in the field of ijtihād. By and large, the interpretation (*ta"wīl*) of ijtihād given by them are not restricted by the *Sharī'ah* law.

The leading representative *mujtahidīn* (*fuqahä" fil Usūl al-fiqh*) of the second group define ijtihād in this manner:

a. Imam al-Ghazzālī (رحمة الله عليه) defines ijtihād as: ―*Expending one"s potential in a particular matter and utilizing it to the fullest extent*.‖[127];
b. ‗Ala' al-Din al-Bukhari (رحمة الله عليه) defines ijtihād as: ―*to make the utmost effort in searching knowledge as to the rules of Sharī'ah*.‖[128]

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[123] Ibn al-Shāṭibī, Abu Ishāq. *Al-Muwāfaqāt fī Uṣūl al-Sharī"ah* (The Conformities in the Principles of Islamic Law). Translated by Imran Ahsan Khan Nyazee. (Beirut: Dar al-Mashriq, 1990).

[124] Al- Baydawi, Imam, Nasir al din, Abdullah Ibn Umar, *Minhaj-Al- wusul Ila Ilim-Al-Usul*,(Beirut: Al- salafiyah Printinf press, Dar-Al- Ilim, 1st Edition, 1984), vol 3, 260-261; al-Bayḍāwī, Nasir ad-Dīn. *An-Nasafī"s Al-"Aqā"id* (The Creed of Islam). Translated by Muhammad Sarwar. (Beirut: Dar al-Mashriq, 1995).

[125] al-Shīrāzī, al-Muḥammad ibn Idrīs. *Al-Muhadhdhab* (The Refined). Translated by Muhammad H. Kamali. (Beirut: Dar al-Mashriq, 2003); Shirazi, Abu Ishaq Ibrahim. *Al-lam fi usul-al- Fiqh*, (Egypt: Mustafa Al-Babi & Sons Printing Press.), 73.

[126] al-Fatūḥī, al-'Allāmah. *Al-"Ijtihād fī al-Sharī"ah al-Islāmīyah* (Juristic Reasoning in Islamic Law). Translated by Ahmad Hasan. (Lahore: Kazi Publications, 1985); Al-Fatuhi, Taqi-al- Din, Abu .al-Baqa. *Sharh kawakb-al- Munir* (Egypt: Al.Sunnah-al- Muhammadiyah Press, 1952), 294.

[127] Al Ghazali, Hujat ul Islām Abi Hamid Muhammad ibn Muhammad*, Al-Mustafa min Ilm al- Usul* (Al- Amriyah Printing Press, 1st edition, 1904) Vol.2, 350; al-Ghazzālī, Abu Ḥāmid. *Iḥyā" „Ulūm ad-Dīn* (The Revival of the Religious Sciences). Translated by Muhammad Abdur-Rahman. Beirut: Dar al-Mashriq, 1982.

Actually, the preceding second group comprises of legal theorists. Their emphasis usually includes opinions based on knowledge, positive and hypothetical knowledge. For this group, *Sharī'ah* was a field of possibility without certainty. Therefore, ijtihād should be a search for opportunity rather than justification. The interpretation (*ta''wīl*) of ijtihād by this group are based on this methodology. These liberal attitudes, as entertained by the first group, followed the jurists in their interpretation (ta'wīIs).

The principal *mujtahidīn* of the third group define ijtihād in this manner:

a. Al-āmidī, Saifud-Dīn (رحمة الله عليه) defines ijtihād as: ―*to exert the utmost effort in searching, hypothetically, in a matter as to the rule of Sharī'ah so that the mujtahid may feel unable to search for any further, leaving no stone unturned."*[129];
b. Ibn al-Ḥājib (رحمة الله عليه) defines ijtihād as: ―*to excretion of a jurist to the utmost to form an opinion as to the rule of Sharī'ah."*[130];
c. Muḥibballāh al-Bihārī (رحمة الله عليه) defines ijtihād as: ―*a jurist''s exertion to the utmost in adducing an opinion based on knowledge as a rule of Sharī'ah."*[131]

The jurists, belonging to this third group, ordinarily have been using the term: *Zann* (a hypothetical opinion). As stated by them the knowledge achieved through the exertion of ijtihād is more hypothetical than a type of decisive one. For all practical purposes, ijtihād is the derivation of law from matters not defined in The Holy Qurʾān, and the Sunnah (ahādīth). This method is used to give correct instructions, not any approximation of Islāmic rules. The main characteristics of the definition of Ijtihād mentioned above are as follows.

i. Every understanding of ijtihād is divided into two parts, The written meaning is conveyed by the first part, and the technical meaning is represented by the second part.

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[128] Al-Bukhari, Ala-Al-Din al Aziz, *kashf-al- Asrar shrah Bazdawi* (Egypt: Al.Sunnah-al-Muhammadiyah Press, 1975) vol.4, 14; al-Bukhari, ‗Ala' al-Din. *al-Jāmi'' al-Kabīr* (The Great Collection). Translated by Muhammad Amin. Beirut: Dar al-Mashriq, 1993.

[129] Al-āmidī, Saifud-Dīn Abu-ul-Hassan, Alī Ibn Abi Alī Ibn Muhammad, *Al- Usuli, Al-Ikham Fi Usul- Alkham*, (Riyadh: Muassasah-Ul- Al-Noor), vol.4, 162.

[130] Jamāl al-Dīn abū ʿAmr ʿUthmān ibn ʿUmar ibn Abī bakr al-Mālikī Ibn -Al. Hajib, *Mukhtasar-Al- Muntaha*, (Egypt: Al-Amiriyah Printing Press 1st Edition), 99.

[131] Muḥibballāh Bin Abd al-Shakur al-Bihārī Musallam *Al- thubut* (Egypt: Al-Amiriyah Printing Press, 1st Edition, 1906) vol.2, 362.

ii. Legal experts should make every effort to find answers to questions of fact or law through research, reasoning, and reasoning.

iii. A man who does his best should be a lawyer. Efforts without a lawyer are futile.

iv. One should strive to fulfill *Sharī'ah* law.

v. The method of seeking judgement must be sourced from Islāmic *Sharī'ah*.

Another explicitly technical definition is worth mentioning here:

> *"The utilization of a jurist"s abilities, either in deducing the Sharī'ah regulations from their origins or in implementing these regulations to address a particular matter."*[132]

Thus, ijtihād is ‗the logical deduction of a faqih, mujtahid (*Sharī'ah* scholar or ‗ālim) and muftī expert doctor on a legal or theological question, as distinguished from ijm'ā, which is the general opinion of an assembly of divines. Necessarily the connotation of Ijtihād is also the impression that the striving of the jurist must involve an entire utilization of efforts, in such a method that the jurist would feel incapability to utilize the capacity further. If a jurist would fail in discovering the confirmation that he is humanly capable of discovering, then his opinion would be void[133]. The researcher concludes the elucidation on Ijtihād, with the definition given in English translation of the landmark treatise of Maulana Diya ad-Din Khalid al-Baghdadi (1192-1242 AH): *Itiqad Nama* as ―The meaning or conclusion attained by a mujtahid as they endeavour to grasp the concealed implication within an ayat or a hadith.‖[134]

3.2.3 Arguments of Proof of Ijtihād (Hujjiyyah)

Whereas Sharī'ah is sacred law and originates from reliable fragments of evidence that are essentially handed down from the precepts of The Holy *Qur'ān*, interpreted

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[132] al-Shāṭibī, Abu Ishāq. *Al-Muwāfaqāt fī Uṣūl al-Sharī"ah* (The Conformities in the Principles of Islamic Law). Translated by Imran Ahsan Khan Nyazee. Beirut: Dar al-Mashriq, 1990; al-Rāzī, Fakhr ad-Dīn. *Al-Maḥṣūl fī „Ilm al-Usūl* (The Compendium on the Science of Legal Theory). Translated by Nasir al-Din al-Khattab. Beirut: Dar al-Mashriq, 1977.

[133] Al-āmidī, Saifud-Dīn Abu al-Hasan b. Abu ‗Alī b. Muhammad, *Al-Ahkam fi Usul al-Ahkam* (Beirut: Dar al-Kutub al-Ilmiyah, 1985) vol. 4, 162.

[134] Baghdadi, Mawlana Khalid. *I"tiqad-Nama* (Belief and Islam). Translated by Hakikat Kitabevi. Paperback, February 23, 2016, 107.

by the Holy Prophet (ﷺ), and develop Ijm'ā and _Qiyas, or legal constructions, according to the necessity of the situation, etc., Ijtihād acts as a medium for deriving rules from these sources, and how to provide the necessary flexibility for transactions and social needs.

In the fact, sensible arguments in favour of Ijtihād are to be sought after, that while the Sharīʿah nusus[135] are inadequate, new experiences in community life keep creating new problems. Therefore, the educated people of the society need to try to find solutions to such problems through Ijtihād. Therefore, Ijtihād or interpretation (*ta''wīl*) constitutes a crucial component in Sharī'ah's evolution.

Numerous provisions exist within the Holy *Qurʾān*, the Hadith, the Ijm'ā'[136], and the founders of the Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah that empowers capable persons to be obliged to serve the cause of divine principles. The teachings and techniques of Ijtihād are based on many verses of The Holy *Qurʾān*, as it states:

> —*So take warning, O people of vision!*‖[137].

The Holy *Qurʾān* itself imparts the method through this explaining verse:

> *"Those to whom we have given the Book recite it with its true recital."*[138].

The study should be done in serious conditions and according to the path provided by the Holy *Qurʾān,* itself:

> *"O Believers! Heed Allāh Almighty (سُبْحَانَهُ وَتَعَالَى)'s command and obey the* Holy Prophet (صلى الله عليه وسلم وآله) *and those in authority among you. Should a dispute arise, then turn it over to Allāh Almighty (سُبْحَانَهُ وَتَعَالَى) and the Holy Prophet (صلى الله عليه وآله وسلم), if indeed you believe in Allāh Almighty (سُبْحَانَهُ*

[135] For clear proofs and fair evidence, the text of the verses of the Holy Qurʾānic verses and Holy Prophet (ﷺ)'s Sunnah, having clear and open and easy to understand meanings.

[136] By the Companions (رَضِيَ اللهُ عَنْهُم) of the Holy Prophet (ﷺ).

[137] Al-Qurʾān, 59:2.

[138] Al-Qurʾān, 2:121.

ﷻوَتَعبَلى) and the Day of Judgeent. That is the optimal course and the finest outcome."[139]

As proof (Hujjiyyah) for the exercise of Ijtihād, it is more than sufficient when it comes to the knowledge that the Holy Prophet himself (ملسو هلآو هيلع هللا ىلص) performed ijtihād even though his knowledge or the infallible sources of revelation, as wahi, were available, the importance of interpretation (*ta"wīl*) in structuring society and promoting the advancement of the law becomes clear. The assertive words of Hazrat Muhammad (ملسو هلآو هيلع هللاىلص) provide:

"In instances where I do not receive divine revelation (wahi), I make judgements among you relying on my own judgement (ra"y)."[140]

This hadees signifies the important evidence of ijtihād in Sharī'ah interpretation (*ta"wīl*) in establishing a true Islāmic society and promoting the progress of Sharī'ah law. In another scenario, the statement of the Holy Prophet (صلى الله عليه وآله وسلم) is as follows:

"When a qāḍī (قبضي) i.e. a judge interprets and renders a correct judgement, he becomes deserving of two rewards. Even if he interprets but makes an error in his judgement, he will still have gained one reward."[141]

Additionally, the He (ملسو هلآو هيلع هللاىلص) also emphasized:

"When Allāh (ﷻسُبْحبَوُه وَتَعبَلى) bestows His favor upon one of His creatures, He grants them an understanding of Din (faith). He makes them a faqih (jurist). A faqih is a shield against the devil who misleads the ignorant during prayer."[142]

The Holy Prophet (ملسو هلآو هيلع هللاىلص)'s companions (رَضِيَ عْنَهم) sustained in developing the concepts of Sharī'ah law exercising ijtihād. Abu Bakr (رضي الله عنه) has said:

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[139] Al-Qurʾān, 4:59.

[140] **Sahih al-Bukhari**, Book 89, Hadith 292; **Sunan Abu Dawood**, Book 22, Hadith 3292; Abu Daoud, Suleiman b. *Ash"ath, Sunan Abi Daoud, Kitab: Al-Qadha", Hadith No: 3585* (Riyadh: Dar al- Islām li Nashar wa al-Tauzie, 2nd Edition: 1999).

[141] Sahih al-Bukhari, Book 89, Hadith 293; Sahih Muslim, Book 22, Hadith 423; Al-Bukhari, Muhammad b. Ismail, *Al-Jami" al-Sahih, Kitab: Al-A"itesam bi alKitab wa al-Sunnah, Hadith no: 7352* (Riyadh: Dar al-Islām li Nashar wa al-Tauzi, 2nd Edition, 1999).

[142] Sahih Muslim, Book 1, Hadith 349; Sunan Ibn Majah, Book 1, Hadith 224.

> *"I make determinations concerning the issue of Kalalah (a deceased person leaving no parent or child to inherit) based on my judgement. If it proves accurate, then it is a divine inspiration from Allāh (سُبْحَانَهُ وَتَعَالَى); if it would be wrong, then the error is mine in addition to Satan"s. Allāh Almighty (سُبْحَانَهُ وَتَعَالَى) as well as His Prophet (صلى الله عليه وسلم) are not responsible of such an error of mine."*[143]

Similarly, Umar (رضي الله عنه) has understood: ―*I am uncertain if I have reached the truth, yet I invest unwavering effort in endeavouring to achieve it.*‖[144] The Caliph Hazrat Alī (رضي الله عنه), Hazrat Zaid bin Thabit (رضي الله عنه), Hazrat Abdullah bin Abbas (رضي الله عنه), ummul mo'mineen Hazrat Aishah Siddiqua (رضي الله عنهن) and other companions (رَضِيَ اللَّهُ عَنْهُم), had been great jurists and subsequently, the great founders, fuqahä', of the Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah followed unquestioningly. Hence they established their Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah through the assertive implementation of Ijtihād practice.

3.2.4 Development and Growth of Ijtihād

In arguing on the evolution of ijtihād, this fact must not be forgotten that the Hazrat Muhammad (صلى الله عليه وسلم) himself performed ijtihād even though his knowledge or the infallible sources of revelation, as wahi on Him (صلى الله عليه وسلم), were available. Then in the life of our Prophet Hazrat Muhammad (صلى الله عليه وسلم), His companions (رَضِيَ اللَّهُ عَنْهُم) used to exercise ijtihād.

As practical proof (Hujjiyyah) of Ijtihād, this research sees the first example of exercising, ijtihād by Maadh bin Jabal, who had been deputed as *qāḍī, in* Yemen, by the Holy Prophet Hazrat Muhammad (صلى الله عليه وسلم). When queried about how he would adjudicate when he would be unable to find a (Sharī'ah's) ruling in *Qur'ān* or in the Sunnah (صلى الله عليه وسلم), he submissively replied ―*Ana ajtahidu*‖, that is ―I will strive‖ (to

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[143] Sunan Abu Dawood, Book 22, Hadith 3250; Sahih Muslim, Book 13, Hadith 4017; al-Āmidī, Saif ud-Dīn, *Al-Ahkam fi Usul al-Ahkam*, vol. 3, p. 300.
- Al Ghazali, Abu Hamid Muhammad b. Muhammad, *Ihya Uloom al-Din* (Egypt: Maktabah wa Matba'ah Mustafa al-Babi al-Halbi wa Aouladuhu, 1939) vol. 1, 39.

[144] Al Ghazali, *Ihya Uloom al-Din*, vol. 1, 39.

apprehend the issue by myself, then to find a solution), by the Prophet (وسلم صلى الله عليه وآله) sanctioned his this reasoning reply.[145]

Their exercise of Ijtihād continued as a norm more willingly than the exception in the time of Khulifa-e-Rashideen (رَضِيَ اللهُ عَنْهم) and the lifetime of most of the companions (رَضِيَ اللهُ عَنْهم) of Holy Prophet (صلى الله عليه وسلم). Ijtihād was practiced from the early days of Islām. Abu Bakar (رضي الله عنه), Umar (رضي الله عنه), and the learned companions (رَضِيَ اللهُ عَنْهم) of the Holy Prophet (صلى الله عليه وسلم)'s learned companions (رَضِيَ اللهُ عَنْهم), like Alī (رضي الله عنه), used ijtihād in such matters which had no specific solution in the Holy Qurʾān, and the Sunnah (ahādīth). In the second century of the Hijra, the extensive use of ijtihād was observed by the four major Muslim jurists, marking the beginning of this early process. During this period, ijtihād had a broad scope, and any jurist who possessed the requisite qualifications was regarded as competent to engage in its practice in the nascent development of Islāmic law.

Conversely, the 3rd century A.H. marked a period of remarkable transformation, where the horizons of *ijtihād* expanded considerably, laying a strong foundation for the evolution of the four schools of *Sharī'ah*. While some historians and scholars, notably from Orientalist traditions, have suggested that *ijtihād* gradually diminished as a potent intellectual force in subsequent centuries, this claim lacks conclusive evidence within traditional Islamic scholarship. Scholars like Wael B. Hallaq[146] and Mohammad Hashim Kamali[147] emphasize that *ijtihād* continued to evolve, adapting to the needs of the time.

In fact, Islamic thought maintained its engagement with interpretive practices, albeit with evolving approaches and methods. Abou El Fadl[148] and Esposito[149] highlight that the intellectual dynamism of Islamic jurisprudence has been a consistent feature of its history, and Joseph Schacht[150] notes that the concept of *ijtihād* remains integral to Islamic legal theory. Classical scholars such as Al-Shāṭibī[151], Ibn Qayyim

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[145] Supra *al-Imam Ahmad Ibn Hanbal,* Vol. IV, 252.
[146] Hallaq, Wael B. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh.* Cambridge University Press, 1997.
[147] Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence.* Islamic Texts Society, 2003.
[148] Abou El Fadl, Khaled. *Speaking in God''s Name: Islamic Law, Authority, and Women.* Oneworld Publications, 2001.
[149] Esposito, John L. *The Oxford History of Islam.* Oxford University Press, 1999.
[150] Supra Schacht, Joseph. *An Introduction to Islamic Law.*1982.
[151] Al-Shāṭibī, Abū Isḥāq. *Al-Muwāfaqāt fī Uṣūl al-Sharī''ah.*

al-Jawziyyah[152], and Al-Ghazālī[153] have underscored the importance of *ijtihād* in addressing the complexities of societal changes, ensuring the relevance of *Sharī'ah* in diverse contexts.

Recognizing the essential role of *ijtihād* in Islam, contemporary scholars and institutions stress the need to keep the door to *ijtihād* open to meet present-day challenges and facilitate the growth of *Sharī'ah* in various socio-political settings[154]. Muhammad Qasim Zaman[155] further elaborates on how the *ulama* in modern times have adapted their roles to uphold the dynamic nature of Islamic law. This underscores the importance of continuously revitalizing *ijtihād* as a dynamic element of Islamic culture.

The companions (رَضِيَ اللَّهُ عَنْهُم) held a unique position of understanding and conveying the Holy Prophet (ملسو هلآ هيلع هللا ىلص)'s Sunnah with utmost accuracy, minimizing the possibility of error. Consequently, the Ijtihād performed by them (رَضِيَ اللَّهُ عَنْهُم) does not require re-interpretation (*ta''wīl*) as a condition.

Consequently, in the early developing Muslim social order, every adequately qualified jurist was of free will to exercise such genuine thinking, principally in the practice of *ra'y* (their judgement) and *qiyās* (their analogical thinking), and those who used to practise so had been designated as mujtahidīn.

On the other hand, over time in the manifestation of maturity in legal, Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah (*madhhab*s) under the Abbāsids[156], jurists of the majority Sunni Muslims became associated with any of the *Sharī'ah* Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah and then instituted their thoughts in the context of interpretive principles of their Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah and contradiction of the framework of its doctrinal standard. In the era of the Umayyad dynasty, a time when complete establishment of legal schools hadn't taken place, qāḍīs enjoyed greater liberty concerning Ijtihād. They would

[152] Ibn Qayyim al-Jawziyyah. *I''lām al-Muwaqqi''īn „an Rabb al-''Ālamīn.*
[153] Al-Ghazālī, Abū Ḥāmid. *Al-Mustasfā min „Ilm al-Uṣūl.*
[154] Vogel, Frank E. ―Islamic Law and Legal System: Studies of Saudi Arabia.‖ *Islamic Law and Society,* 1999.
[155] Zaman, Muhammad Qasim. *The Ulama in Contemporary Islam: Custodians of Change.* Princeton University Press, 2002.
[156] Abbāsids remained in power, amid 750–1258.

approach the caliph exclusively when faced with predicaments. In the early Abbasid period, limits were placed on the independent Ijtihād of qāḍīs, with the development of schools of law requiring qāḍīs to adhere to the correct doctrines of those Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah.[157]

Throughout the ages, the qualifications to practise ijtihād had been structured into ranks, categorizing from the complete mujtahid[158]to the absolute muqallid[159]. Over the 16th century, Sunni jurists had largely concluded that the *ijtihād* was no longer authoritative in any cases other than an actual new law. Since the 19th century, however, reformers have used the call to renew ijtihād as a gathering cry for legal reformation and to criticize the Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah of thought of Sharī'ah.

Although ijtihād and its opposite is just to follow, unquestioningly, the precedents or traditions known as taqlīd[160] is generally considered ijtihād by Shias, although Shias consider the ijtihād to be a continuation, it exists in contemporary Shiaism. Many are required to follow the professional practice of ijtihād, recognized as a mujtahid through study in a madrasah[161].

Ibn Taymiyyah (رحمة الله عليه) has remained one of the most vibrant and influential characters of Islāmic history from the perspective of *Sharī'ah*. He strove hard for the revival of Muslim society by reinterpreting its values (Hukm) and internal motivations in the light of ijtihād, based on a direct interpretation (*ta''wīl*) of The Holy Qurʾān, and the Sunnah (ahādīth). Correspondingly, Shah Wali Ullah (رحمة الله عليه) moved against *bid''at*, stressed Ijtihād, and was involved in the political fights of the time. His work is by no way unrelated to the teachings of Ibn-e-Taymiyyah (رحمة الله عليه). His standings on the ideological position of Ibn Taymiyyah (رحمة الله عليه) cast an impact on the at that time's religious considerations in the Sub-Continent.

As Islām spread to non-Arab cultures of Africa and Asia, that period's ulamā' had to face new-fangled and often difficult challenges. They make an intellectual

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[157] Muhammad Hashim Kamali, ―The Limits of Powers in an Islāmic Statel, *Islāmic Studies* 28, no. 4, (1989), 331.
[158] Not bound by any precedent and is free to create his interpretative principles.
[159] The follower who needed to follow the authoritative jurists, whole-heartedly or diligently.
[160] M. Muslehuddin, *Islāmic jurisprudence and the Rule of Necessity & Need* (Islāmabad: IRI, 1975), 62.
[161] Ibid.

effort and try to find solutions in the sayings and values of The Holy *Qur'ān* as well as the Sunnah (ملسو هلآو هيلع هللاىلص). They use useful tools such as _Qiyas and ijm'ā.

Regrettably, on the other hand, some centuries back, the goings-on of Ijtihād was demoralized, which led the Muslim ulamā' to an inelastic interpretation (*ta''wīl*) of the Holy *Qur'ān*. Predominantly this was a result of rationalist movement behavior and the Muslim caliphs, which turned out to be gradually autocratic, as they started using their supremacies, negatively, to satisfy their welfare and public interests (maslahah). Consequently, many Muslim ulamā' used to take Ijtihād undesirably. Muslim ulamā' of all Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah started feeling that all the essential fiqhi issues had been deliberated, exhaustively, and Once definitively resolved, and over time, a consensus gradually emerged, such that moving forward, nobody could be assumed to possess the necessary prerequisite or requisite qualification for independent reasoning in Sharī'ah. In a broad sense, the utilitarian tendency of institutions to serve their public interests (maslahah) before society and others underpins their interpretation (*ta''wīl*) of texts to understand justice. According to conservatives, those sanctioning privileges belong only to Allāh (سُبْحَانَهُ وَتَعَالَى)[162]. Therefore, in fact, in the long run, the entire process of establishing Islāmic *Sharī'ah* law through practising *ijtihād*, as understood from a largely rational point of view, can only be an approximation of the original revealed divine Injunctions of Islām (aḥkām-e-Islām)[163].

At the height of the Ijtihād tradition, Rising was the star of Islām, with its borders traversed from Asia to Africa and then towards Europe. However, there came about the waning of the caliphate, the rationalism movement, and the rulers' self-centered demeanor, causing the true Muslims to experience a gradual decline, as questioning and critical thinking were halted by them. Ultimately, a transformation occurred, as Muslims shifted from their positions as superpowers to becoming commoners subjected to humiliation across all aspects of existence. This study upholds the notion that the downturn of Muslim societies finds its origins in the

[162] Majid Khadduri, *The Islāmic Conception of Justice* (Baltimore: Johns Hopkins University Press, 1984), 54–9.
[163] M Ibrahim Jannati, ―The Meaning of Ijtihad,‖ Al-*Tawhid*, 5, nos. 3 & 4 (Rajab - Duu al-Hijjah 1408 H.), 185-197.

unawareness and misconceptions surrounding the Islāmic faith, along with the uncritical adoption of the taqlīd imitating methodology.[164].

According to the interpretation (*ta''wīl*) of the jurists, not merely were the sacred texts endorsed by the jurists, but also the authority sourced from those texts embodied the revealed law rather than entrusting humanity with the original sovereignty to Allāh Almighty *(سُبْحَانَهُ وَتَعَالَى)* alone. That autonomy, as a result, this research argues, the Islāmic community had resulted in the structure of a monarchy.[165]

Development of Ijtihād in Indian Judiciary: from Mughal to British

In this study, it is considered important to trace the history of personal law and the demand for Ijtihād among Indian Muslims. Throughout the Mughal period, Hanafī law held prominence as the prevailing legal system in the Indian subcontinent. The régime in legal framework structure of the region was largely founded upon the principles and judgements of the Ḥanafī School, which encompassed various aspects of Muslim law. One notable legal treatise that contributed to the establishment of the legal system during that era was the *Fatawa-e-Alamgiri*, which provided comprehensive guidance and interpretations within the Hanafī Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah [166] as well as *Hedaya*[167], and then remained till the enactment of the common law régime where the equity developed more expressly.[168]Afore 1947, the Muslim personal law's provisions were codified by the British Indian legislature[169], as well as the British judiciary, in India, has applied constitutional statutory and procedural laws, while deciding family matters of Indian Muslims. The texts of the aforementioned two sources were adopted by the British because they had a special place in the Hanafī scholars (fuqahä'), and

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[164] A Rahnema, *Pioneers of Islāmic Revival* (London: Zed Books Ltd Publishers, UK edition, 1995).
[165] WB. Hallaq, ―Muslim rage and Islāmic law‖, *Hastings Law Journal* 54, no. nil (2003), 1707.
[166] Aurangzeb Alamgir, *Fatawa-e-Alamgiri: Translated by Neil B.E. Baillie, A Digest of Mohammadan Law* (London: Smith, Elder & Co., 1875).
[167] Burhanuddin al-Marginani, *The Hedaya Or Guide (1790): Translated by Charles Hamilton* (Lahore: Premier Book House, 2nd edn, 1963).
[168] Asaf A.A. Fyzee, *Outlines of Muhammadan Law* (London: OUP, 5th Tahir Mehmood edn, 2008) 28-29.
[169] D F Mulla, *Principles of Mahomedan Law* (Bombay: Tuacker & Company, 1905) 146.

colonial jurisprudence in the Indian subcontinent.[170] However, at the individual level, Ijtihād continued to be an important function of Muslim scholars (fuqahä') in British India, becoming necessary to respond to the new challenges posed by British colonialism and a prerequisite for becoming a *qāḍī* or a *muftī* in that era.[171] The political concerns of religion in 18th-century India produced reformers, for instance, Shah Waliullah who argued for the revival of Ijtihād.[172] Similarly, during the political crisis of the 19th century, Syed Ahmad Khan came in front and promoted the right of Muslims to Ijtihād, and he was particularly inspired by the rational style of Shah Walī ullah (رحمة الله عليه). Other Islāmic scholars (fuqahä') have also affirmed the importance of Ijtihād. Such as, Maulvi Chirag Alī raised the arguments of hadith interpretation (*ta''wīl*) and Ijtihād, in the works of Shah Walī ullah (رحمة الله عليه), and also emphasized the need for reform of family laws to implement necessary social changes[173]

Calls for *ijtihād* traditionally rested with individual scholars (*fuqahā''*), yet modern scholars of *usūl al-fiqh*, such as Allama Muhammad Iqbal (رحمة الله ع ل يه), were among the first to emphasize its critical importance for contemporary Islamic thought. Allama Iqbal argued that the door to *ijtihād* remained open but advocated that the authority for *ijtihād* should rest not with an individual but rather with a council of knowledgeable Muslim scholars (*fuqahā''*) capable of interpreting the law in a manner that addresses modern social and legal challenges. This approach reflects a progressive shift towards collaborative *ijtihād*, ensuring that interpretations are robust, relevant, and grounded in both traditional principles and contemporary realities.

By proposing this new methodology, Allama Iqbal expanded the role of *ijtihād* to a collective endeavor, underscoring its potential as a dynamic and adaptable aspect of Islamic jurisprudence. Scholars such as Wael B. Hallaq[174], Mohammad Hashim

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[170] Cheema Shahbaz A, ―An Unlikely Champion of Rights of the women under the Muslim Personal Law: Mawdudi on Anglo-Muhammadan Law‖ *Journal of Islāmic Thought and Civilization* 9, no. 2 (2019): 1, 7.
[171] Anita M Weiss, *Interpreting Islām, Modernity, and Rights of the women in Pākistān* (Hyderabad, India: Orient Black Swan Private Ltd., 1st edn, 2015) 2-3.
[172] Abdullah Saeed, *Islāmic Thought: An Introduction* (Oxford: Routledge, 2006).
[173] John L Esposito, *Women in Muslim Family Law* (NY: Syracuse University, 2nd edn, 2001), 71-73.
[174] Hallaq, Wael B. *A History of Islamic Legal Theories: An Introduction to Sunni Usul al-Fiqh.* Cambridge University Press, 1997.

Kamali[175], and Khaled Abou El Fadl[176] have further elaborated on the evolving methodologies of *ijtihād*, emphasizing its necessity in addressing the complexities of modern life.

Contemporary Islamic scholarship, as highlighted by Esposito[177] and Zaman[178], continues to advocate for *ijtihād* as a collective and dynamic process. Classical scholars like Al-Ghazālī[179] and Ibn Qayyim al-Jawziyyah[180] also emphasized the adaptability of Islamic jurisprudence, which remains relevant in addressing changing societal needs. This collaborative approach to *ijtihād* ensures that Islamic legal thought remains both faithful to its roots and responsive to modern challenges[181].

Development of Ijtihād through the Pākistānī Judiciary

Though it holds true that certain limits are set by courts in Pākistān, it should not be mistaken that no limits are set whatsoever. Intriguingly, the established limits do not inherently clash with liberal values. It becomes clear that Pākistān's courts have not leaned towards interpreting Islāmic limitations on legislative discretion in a way that would obstruct the state from enacting laws that support liberal values, such as equality and individual rights[182]. Incorporating provisions acknowledging Islāmic law as a legislative source is a component of the IRP Constitution. Nevertheless, preceding the establishment of the FSC, a particular procedure for courts to assess laws for alignment with Islām and nullify non-conforming laws was absent. Occasionally, the courts tasked with Islāmic review seemed to embrace a perspective rooted in tradition, regarding the limitations of state discretion based on Islām, which conflicted with certain modern liberal values.

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[175] Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence.* Islamic Texts Society, 2003.
[176] Abou El Fadl, Khaled. *Speaking in God"s Name: Islamic Law, Authority, and Women.* Oneworld Publications, 2001.
[177] Esposito, John L. *The Oxford History of Islam.* Oxford University Press, 1999.
[178] Zaman, Muhammad Qasim. *The Ulama in Contemporary Islam: Custodians of Change.* Princeton University Press, 2002.
[179] Al-Ghazālī, Abū Ḥāmid. *Al-Mustasfā min „Ilm al-Uṣūl.*
[180] Ibn Qayyim al-Jawziyyah. *I"lām al-Muwaqqi"īn „an Rabb al-"Ālamīn.*
[181] Daniel E. Price, *Islāmic Political Culture, Democracy, and Human Rights: A Comparative Study* (London: Greenwood Publishing Group, 1999), 31.
[182] Martin Lau, *The Role of Islām in the Legal System of Pākistān* (Leiden: Brill Publishers, 2006), 209.

However, Pākistān‘s A shift has occurred where courts have been progressively inclined towards a more modernist outlook that not only incorporates the tenets of the liberal rule of law but also actively advocates for them. Pākistān‘s judges have employed Islāmic review as a tool to delve into uncharted territories of Pākistān‘s law, frequently in harmony with contemporary liberal ideals. In a few exceptional cases, Pākistān‘s courts have invalidated illiberal legislation that purportedly derived from Islāmic principles, asserting that such legislation misinterprets Islām. The most notable case in this regard is the Hazoor Baksh case, which triggered a significant backlash against the court due to its decision.

It is noteworthy that these developments highlight the complex interplay between Islāmic law, modern legal principles, and the evolving role of the judiciary in Pākistān[183].

Since 1980, in successive decisions, the FSC has confirmed this development. The diligence here is to indicate the development of ijtihād by individual judges[184], which delivers an organized régime in legal framework structure for practicing the ijtihād and simplifies the interpretation (*ta"wīl*) of the classical Islāmic writings, afresh[185]. On exercise of Ijtihād in the FSC, as discoursed by an international researcher, as:

> *"Actions are being taken by the FSC to counter the historically non-liberal interpretation (ta"wīl) and execution of Islāmic Sharī‘ah laws. Regardless of the policy framework and implementation of this endeavour in ijtihād, the outcomes indicate that the FSC is either adapting traditional ijtihād or departing from it or adopting entirely new ijtihād in response to the present-day issues under Sharī‘ah."*[186]

[183] Ibid 125.

[184] Muhammad Zubair Abbasi, ―Judicial Ijtihād as a Tool for Legal Reform: Extending Women‘s Right to Divorce under Islāmic Law in Pākistān‖ (2017) 24 *Islāmic Law and Society* 384.

[185] Ihsan Y, ―Muslim Alternative Dispute Resolution and Neo-Ijtihād in England,‖ (2003) 2 *Turkish Journal of International Relations* 17, 116.

[186] Supra Ihsan Y, ―Pākistān Federal Sharī‘at Court‘s Collective Ijtihād on Gender Equality, Rights of the women and the Right to Family Life,‖ (2014) 25 *Islām and Christian-Muslim Relations* 181.

Before examining these notions, it is noteworthy that for three main reasons, this research is ensuring that *Sharī'ah* is always fresh and vibrant, and it caters to the growing needs of the Muslim Ummah:

1. The Judiciary of Pākistān plays an important role in reforming the classical Sharīʿah Law. The main reason for this is that judicial case laws (precedents) are more flexible than codified legislation;
2. Apart from its application and development, A significant role is assumed by case law in the interpretation (ta'wīl) of Sharī'ah decrees and mandates. It functions as a gauge of societal dynamics and a catalyst for transformation[187]. With the foundation of Pākistān's legal system being built upon judicial precedents in accordance with the common law, here, the judges occupy a central character in revolutionizing the *Sharī'ah* laws, over and done with *ijtihād*[188];
3. Responding to criticisms that *Sharī'ah* is inflexible and nonsensitive to the revolutionary social state of affairs and needs, the case laws provide a motive for positivity in the revival of *ijtihād,* in fiqh.

Among the institutions in Pākistān, the FSC has played a role in molding laws according to the principles of Sharīʿah. The FSC has routed to ijtihād in numerous cases, particularly in women-related and family law cases, in which the application of the Islāmic Injunctions is very sensitively required. Ijtihād exerted by the FSC favoured women and family rights. Predominantly saying, these cases of Ijtihād has been noted for its sensitivity towards gender considerations. The FSC does not endorse the practice of taqlīd, but Ijtihād where necessary[189]. The FSC asserted in *Hazoor Bakhsh v. FoP*, that *—Although the expression of the Islāmic Injunctions includes the comprehensive Injunctions of Islām (aḥkām-e-Islām) of all Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah and sects etc., Within the Pākistān Constitution of 1973, Article 203 D confines both the interpretation and application of its scope to just two distinct sources. It"s plausible for a Muslim to raise a valid concern. These designated sources encompass The Holy*

[187] Alamgir Muhammad Sarajuddin, *Cases on Muslim Law of India, Pākistān, and Bangladesh* (London: OUP, 1st edn, 2015) xxxii.
[188] M Munir, *Precedent in Pākistānī Law* (Karachi: OUP 2014) 8.
[189] Supra note Martin Lau, 210.

Qur'ān and The Sunnah of the Holy Prophet of Allāh, Hazrat Muhammad (صلى الله عليه وآله وسلم).‖[190].

In addition that all forthcoming endeavours would need to confine themselves to the implementation, elucidation, and at the utmost, elucidation of the principle as it had been established, in perpetuity.[191] As exercised in Pākistān on many causes. As The GWA is an English statute, however, the courts have been interpreting the provisions of the Act in terms *Sharī'ah*. In custody matters, divergent court rulings exist. In certain instances, courts have embraced Sharī'ah principles and fiqh provisions, as seen in the case of*Mst. Imtiaz Begum v. Tariq Mehmood*[192], to pave the way for application, Ijtihād played a pivotal role in providing clarification, predominantly for interpretation from a Sharī'ah standpoint. This becomes particularly significant due to the fact that within the legal system, there are fewer jurists proficient in Sharī'ah and more conversant with English Law. Given the prevalence of Western procedural systems, implementing Sharī'ah law proves to be a substantial challenge. A stance of compromise is adopted by the FSC that the Pākistānī legislations, Islāmic Sharī'ah laws (codified or un-codified), and the customary laws may run along, in Sharī'ah perspective through Ijtihād exercises. Cases in point can be seen in the circumstances, namely, *Sher Muhammad etc. v. Mst. Fatima etc.*[193], *Mst. Rashidan Bibi through Legal Heirs etc.*[194].

Time-Line of Significant Mujtahidīn (Scholars, Jurists), and Events

Dates AH/AD	Names	Portrayal of Events
11 – 40/	Companions (رَضِيَ اللَّهُ عَنْهُم) (sahâbah) Period	The term Ijtihād originated during this period, as characterizing a law was a big challenge for Them (رَضِيَ اللَّهُ عَنْهُم), after the passing of the Holy Prophet Muhammad (ملسوهلاوهيلعهللاىلص). They (رَضِيَ اللَّهُ عَنْهُم), responsibly determined to declare a law and make judgement. They were genius enough to have a strong methodology with exceptional sophistication style. The proven examples of figuring out the verses of the Holy Qur'ān with judgemental views are found in the intellectual capacity of Umar, Ottoman, and others (رَضِيَ اللَّهُ عَنْهُم).

[190] Hazoor Bakhsh v. FoP, PLD 1983 FSC 255.
[191] WB. Hallaq, ―Was the gate of Ijtihād closed?‖ *Journal of Middle East Studies* 16, no. 1, (1984): 3–41. doi:10.1017/S0020743800027598.
[192] Mst. Imtiaz Begum v. Tariq Mehmood, 1995 CLC Lahore 800.
[193] Sher Muhammad etc. v. Mst. Fatima etc. 2016 MLD 185.
[194] Mst. Rashidan Bibi through Legal Heirs etc., 2005 MLD 1202.

40 H – Abad II H	Tâbiʿin Period	In this period, the mujtahidīn struggled to straighten out and protect the Muslim society and Sharīʿah, from different negatively affecting factors: Political conflict, fake Hadîts, and The emergence of distinct schools of Hadîts and raʿy that exhibited stark dissimilarity from one another.
80-150/699-767	Abu Hanīfa	The most initial school of thought evolves
93-179/712-795	Malik	Second School of thought develops
150-204/767-820	Shāfiʿ	Third School of thought develops
164-241/78-855	Ahmad ibn Hanbal	Fourth School of thought develops
194-256/810-870	Al-Bukhari	Al-Bukhari extensively compiles Hadith
202-278/817-888	Abu Dawud	Abu Dawud collects Hadith.
270/883	Dawud al-Zahiri	Strongly objected to exercising Ijtihād and steadfastly followed the Holy Qurʾān, and the Sunnah, literally interpreting. Lots of people rejected his Literalism, in the course of his time.
9th Century AD		Orientalists and Modernists claimed ―the doors of Ijtihādǁ being closed at this juncture.
364-450/972-1058	Mawardi	Shāfiʿite jurist who deliberated on the significance of the ability of a head of a state to exercise Ijtihād, the qualification for an active ruler.
393-476/1001-1084	Shirazi	Shāfiʿite jurist who deliberated the prerequisites for becoming a mujtahid.
419-478/1027-1086	Juwayni	Shāfiʿite jurist, who said that later mujtahidīn must not follow the mujtahidīn of the former times. This predominantly raised to not to follow a school of Sharīʿah, but stressed investigation of the evidence behind former declaration ns, at best for those mujtahidīn realizating the caliber of a mujtahid.
432-511/1040-1119	Ibn Aqil	Hanbali jurist who declared that lawful opinions must be shown through evidence, not by a Sharīʿah school of laws.
450-505/1058-1111	Ghazali	A Jurist, a mystic, and a theologist; followed, originally, the Shāfiʿite school. Further discoursed the prerequisites of a mujtahid.
Died 478/1085	Al-Basri	Muʿtazili jurist, discoursed the prerequisites of a mujtahid.
551-631/1156-1233	al-āmidī, Saifud-Dīn	Shāfiʿite jurist, discussed the division of Ijtihād and explained that only what is relevant is needed to make a decision, on the issue before hands. This is especially true for someone who wants to specialize in an area of Islāmic law such as inheritance or

		marriage.
849-911/1445-1505	Suyuti	He originally started with the Shāfiʿite Sharīʿah-school, but then decided to institute his own school of Sharīʿah. He insisted that he was not bound by any religious School of thought. He wrote an incredible book and wanted to revive Islām.
12th Century AH /18th Century AD	Al-Khadimi	Turkish scholar, who argued the elimination of Ijtihād in his book: ―*alBariqah al-Mahmudiyyah fi-sharh alTariqah al-Muhammadiyyah."*
12th Century AH /18th Century AD	Ibn Abd al-Shakur	Deliberated the prerequisites of a mujtahid and the divisibility.
1423-1520	Abu Yahya Zakaria Ansari	Deliberated the prerequisites of a mujtahid and the divisibility.
19th Century	Escalation of Orientalists Scholars	These scholars are exceptionally familiar with the traditional methods of Islāmic scholarly study. This scholarly study portrays Islām in a negative light and tries to completely deny its history.
20th Century	Joseph Schacht	An Orientalist claimed ―the doors of Ijtihād‖ being closed at this juncture.
20th-21st Century	Escalation of Modernists Scholars	These scholars advocate for reinterpreting primary sources to address the needs of contemporary times. They argue that while some have perceived the _doors of *ijtihād*' to be closed, they must indeed remain open to allow for fresh insights and adapt Islamic jurisprudence to evolving social and legal contexts.
20th-21st Century	Escalation of Traditionalist Scholars	These scholars focus on refuting the claims of modern scholars, who firmly believe that Islām must be preserved and that the four Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharīʿah are sufficient for our times. These scholars refuse to accept Western methods of working out in Sharīʿah.

3.2.5 The Importance, Task, and Need of Ijtihād

3.2.5.1 The Importance of Ijtihād

The legislative process in Islām is very dynamic and spans over six centuries. It represents the largest body of law, so far in human history. As Islām spread to non-Arab cultures in Africa and Asia, ulamā' faced new and often perplexing challenges. These ulamā' struggled with ideas and tried to find solutions based on the sayings and

values of the Holy *Qur'ān* and the Sunnah (ﷺ). They developed valuable tools such as ijm'ā as well as the _Qiyas. These tools were necessary because most ulamā' could not find solutions to the problems of their time directly in The Holy Qur'ān, and the Sunnah (ahādīth). The legislative process had just begun when the conquests exposed the Muslims to new problems, legal issues, and different social practices. Thus the dynamic spirit of Islāmic *Sharī'ah* came into the process. The ulamā' never ignored the realities and new conditions of nomadic and non-tribal societies from where Islām was extended.

After six hundred years of intellectual development, the world of Islām had produced an amazing galaxy of scholars (fuqahä'). About this, it is said that the responsibility for our failure is not elsewhere. It is against us because we have stopped being as flexible as The Holy *Qur'ān* wants us to be. The Muslims calmed down and began to rest. The Holy *Qur'ān* invites us to participate in a continuous struggle. As soon as we begin to rest in our knowledge, thinking that we have reached our limits, others move forward.[195] The Messenger of Allāh, Hazrat Muhammad (ﷺ) gave the Muslims only the basic principles of the Holy *Qur'ān* and the (ahādīth) (ﷺ وآله). By virtue of His authoritative guidance, He (ﷺ) encouraged the Muslim ummah to employ their discernment in delineating the specifics in alignment with shifting circumstances and requirements. In this endeavour, the collective welfare of the nation is rooted in diligent effort, and Allāh Almighty (سُبْحَانَهُ وَتَعَالَى) has affirmed His promise to reward the mujtahid. A Sahih hadith also substantiates this stance:

—*When a judge engages in Ijtihād and arrives at an accurate verdict, he becomes eligible for a twofold reward. Even if his verdict turns out to be erroneous, he still merits a reward.*‖[196].

Prevented from questioning and resorting to feigned blindness, or in simpler terms, forsaking critical thinking, the gradual decline from superpowers to experiences of distress and humiliation has affected all facets of Muslim existence. This decline hampers their ability to effectively address the challenges posed by the modern world. The reason for this is that human society is in a state of constant evolution, and human interactions, relationships, and endeavours continue to grow

[195] Malik, C, *God and Man in Contemporary Islāmic Thought* (Beirut: Centennial Publishers, 1972), 228.
[196] Sahih Muslim 1716a, Book 30, Hadith 18.

and diversify. Numerous innovations have emerged that were previously non-existent. Consequently, the progression of Ijtihād is responsible for meeting all the needs of human society and answering all the questions that arise. Without the process of Ijtihād, it is difficult to develop many human activities in the field of Islāmic life. The question here is why it is difficult for Muslims to conduct the movement of Ijtihād in the present era. So that all the problems faced by Muslims for the last few years will be solved. There may be many reasons for the current ineffectiveness of Ijtihād. The real end of the caliphate and the emergence of the concept of nation-states are major obstacles in this process. Due to these two reasons, the question arises as to who has the authority of Ijtihād in the world of Islām. Some say that Ijtihād cannot be effective at this time because no one meets the criteria of a mujtahid at that time.

The older translations do not adequately answer the problematic queries fronting the Muslims domain. Consequently, Muslims ought to endeavour to address this predicament through introspection. They should strive to redefine the boundaries within which they can effectively tackle contemporary challenges. The issue of power will find resolution, as it appears unfeasible for the Muslim populace to eliminate all current predicaments and revert to the era of the Caliphate. In order to enhance the practice of Ijtihād, Syed Jamaluddin Afghani advocated for the establishment of regional centers by scholars (ulamā‘), wherein Ijtihād is conducted within diverse countries to offer guidance to the general public. These regional centers would be interconnected with an overarching international center established at any holy place. According to him, the representatives of different centers can be ready to face external challenges by doing Ijtihād for the entire Muslim population[197].

Consequently, the importance of Ijtihād is that Muslims ought to restore their esteemed power and dignity, and Muslims must revert to critical thinking, with Ijtihād holding the key. This represents the sole pathway for Muslims to adapt to the present world and confront the challenges of the modern world. Devoid of the tool of Ijtihād, the gap between Islāmic ideology or aspiration and contemporary reality or constraints cannot be bridged.

[197] Mas‘ud M.K, *Iqbal"s reconstruction of Ijtihād* (Lahore: Iqbal Academy Publishers, 2nd edition, 2003).

3.2.5.2 Task of Ijtihād

Ijtihād assumes a significant role within the principles of fiqh (jurisprudence) and Law (Sharīʿah), occupying a central position in this process. As the demands of life evolve day by day, it becomes imperative to methodically reassess the Islāmic laws while adhering to the essence and principles of Islām. Thus, Ijtihād becomes an invaluable tool in legislation.

In matters of fatwa, the jurists followed the precedents set by the Companions, Tabi'in, and Taba Tabi'in. When they encountered a problem for which they didn't receive a legal opinion from their teachers, they sought solutions from the relevant texts and devised a solution. The Majlis (shūra), the judicial body that interprets the laws in Pākistān, and various scholars (fuqahä') are performing the function of ifta. The CII is the official legislative body for issuing fatwas.

Taqlīd is an accepted method of law and its evidence is found in the Holy Qurʾān, and the Sunnah, also practiced law in Pākistān. The provisions of the IRP's Constitution[198] deal with taqlīd. These Articles provide that decisions of the SCP apply to all courts and decisions of the High Court apply to all lower Benches. Therefore, the lawmaking process within Sharīʿah employs the methods of Ijtihād as a flawless endeavour.

There are certain matters which are totally out of the domain of the task of Ijtihād, like the creation of all the other mental probes, the angels, and the whole universe. Hence, Ijtihād cannot be employed in areas like the origination of the universe, the presence of the Creator (سُبْحَانَهُ وَتَعَالَى), the dispatching of Prophets, and the like, as there exists just one accurate viewpoint in these realms, leaving no room for dissent. Likewise, Ijtihād is inapplicable to matters such as the obligatory nature of the pillars of faith or the gravity of acts like murder, theft, and adultery. These hold evident truths within Sharīʿah, as they are distinctly defined in textual statements.

3.2.5.3 Need of Ijtihād

The central feature of Islām has been the acquisition of knowledge and striving to increase knowledge, for keeping up to date. The acquisition of knowledge and the sustainable development of Islām were emphasized by our beloved Prophet Hazrat Muhammad (صلی اللہ علیہ وآلہ وسلم). While basic education and knowledge are recognized by the Holy

[198] Articles 189 and 201 of the Constitution of IRP, 1973.

Qurʾān, Muslims must sensibly interpret this basic knowledge in the spirit of the times under which they have attained it. To meet the ever-changing requirement of Islāmic Sharīʿah Law, Muslim jurists and scholars (fuqahāʿ) have well-said that change is an established practice. The process of Ijtihād allowed Muslim societies to constantly adapt to changing circumstances and new advances in knowledge. It's the declaration of the Sharīʿah as complete and the declaration of the closure of Ijtihād that make idols of great thinkers. There is an immense need to stress the evolutionary aspects of knowledge and education in Muslim Ijtihād efforts[199]. There is also a need to find answers to questions related to the closure of Ijtihād. This fact requires that the concept of Ijtihād is important. This pathetic situation desperately needs to realize its failures and weaken the status quo under its control. Impliedly, there is an implicit need of the day to find out how Ijtihād can be used to achieve the needs of Islāmic societies in the present era[200].

In Pakistan, the need for *ijtihād* is particularly pronounced in family law cases, where the current legislation lacks comprehensive *Sharīʿah* foundations. This absence of detailed *Sharīʿah*-based legislation often grants courts considerable discretion, which has occasionally resulted in conflicting decisions. At times, the courts apply *Islāmic Sharīʿah* law, while in other instances, they deviate or adapt it to new contexts. The judiciary has occasionally undertaken *ijtihād*, expanding and reforming aspects of *Sharīʿah* to address contemporary social needs and values in family law matters. To ensure consistent and contextually relevant decisions, there is a critical need for detailed guidelines rooted in *ijtihād* within *Islāmic Sharīʿah* law. Thus, it is essential to revitalize and formally embrace *ijtihād* as an open avenue for judicial interpretation in Pakistan[201].

3.2.6 Sources, Elements, and the Subject Matter of Ijtihād

3.2.6.1 Sources of Ijtihād

After the Holy Qurʾān, and the Sunnah (ahādīth), Ijtihād itself holds the position of being the most important source of Islāmic Sharīʿah law. The main difference

[199] Lewis, B. *The Muslim Discovery of Europe* (London: Redwood Burn, 2nd edn., 1982), 230.
[200] David Johnston, ―Ijtihād and Renewal,‖ *American Journal of Islām and Society* 35, no. 2 (January 2018): pp. 74-77, https://doi.org/10.35632/ajis.v35i2.830.
[201] Zeyno Baran, *The Other Muslims: Moderate and Secular* (London: Palgrave Macmillan, 2010).

between Ijtihād and the prescribed sources of Sharī‘ah is that Ijtihād represents a continuous process of development, while the divine revelation of the Holy Qur’ān and the prophetic ahādīth face interruption due to the tragic passing away of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص).

Expressly, scholars (fuqahä‘), of different Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharī‘ah, have communicated different opinions about the sources of Ijtihād. In the words of Allal al-Fasi, a mujtahid must appeal to three essential sources[202]:

(1) knowledge established on divinely assumed evidence;
(2) an analysis of the connotations of actual Arabic words and
(3) the manner of evaluating the evidence and choosing the most is in its favour.

But fortunately, the famous scholar (_ālim) of the 20th century, Allama Iqbal, (رحمة الله عليه) cited four sources of Ijtihād to ensure the possibility of evolution in Islāmic Sharī‘ah law in the face of new circumstances[203], namely:

1. The Holy *Qur’ān*,
2. The Sunnah (ahādīth) of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص),
3. ijm‘ā‘, and
4. _Qiyas.

All these sources have the potential to evolve as they meet new conditions. Therefore, it is important to highlight Iqbal‘s methodology to these sources of Ijtihād to demonstrate the elasticity in the Sharī‘ah laws.

According to Iqbal, the Holy *Qur’ān*, as the first source of Ijtihād, not only contains concrete legal provisions but also explains how to interpret and add to them. For example, whenever some differences arose in the Holy *Qur’ān* among Muslims, Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص) also described the Holy *Qur’ān* as a manifestation of high moral principles and positive legal principles of Sharī‘ah.

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[202] SHABBAR, SAID, and Nancy Roberts. ―On the Methodological Requirements of Ijtihād.‖ In *Ijtihād and Renewal*, 10–32. International Institute of Islāmic Thought, 2017. https://doi.org/10.2307/j.ctvk8w256.5.

[203] Muhammad Yousaf Goraya, *Allama Iqbal and the Authority to Interpret Sharī’ah in a Modern Islāmic State* (Lahore: Sheikh Muhammad Ashraf Publishers 1987).

The uniqueness of this dual nature of the Holy Qur'ān fulfills the needs of the Islāmic ummah. As stated by Allama Iqbal, (رحمة الله عليه), the unity of Judaism and Christianity was corrupted by destroying the unity of these two things. The former is defined by legitimacy and the latter by brutality and otherworldliness.[204] Apart from promulgating laws to guide people, the Holy Qur'ān gave a revolutionary perspective to mankind and enabled him to establish his life following the spirit of Islām. It can be modified and improved throughout life.

Iqbal criticized Sunnah (ahādīth) as the second source of Ijtihād. Noting that it is not fully accepted in changing times and places. Therefore, Iqbal said that Abu Hanīfa (رحمة الله عليه)[205], preferred the *Istiḥsān* without actually using the hadith. However, Iqbal does not mean to reject the authority of hadith altogether. Instead, he advised that the knowledge of hadith should be taken seriously and studied in depth.[206]

The 3rd source is ijm'ā', and Iqbal considers it the most important legal concept in Islāmic Sharī'ah law. It is the process of establishing and preserving new values in Islāmic Sharī'ah. In ijm'ā', the mujtahidīn agree on a point of law and that agreement becomes a source of permanent law. Iqbal supported the use of ijm'ā' through the legislature and empowered the contemporary lawyers and the ulamā'. He insisted on the important participation of the ulamā in the Muslim legislature because he was aware of the misinterpretation of the non-ulamā. In fact, Iqbal saw the school of Abu Hanīfa (رحمة الله عليه) as having a greater power of creative adaptation than any other school of Islāmic Sharī'ah law.

Allama Iqbal elucidated ⎯Qiyas or analogical reasoning as the 4th source of Ijtihād, which is the process of putting on the Islāmic principles to the local issues or situations Iqbal mentions some of the early jurists who practiced ⎯Qiyas, notably Abu Hanīfa (رحمة الله عليه). He said that Abu Hanīfa (رحمة الله عليه) had used the same reasoning which arose out of the changing socio-economic conditions.

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[204] Perveen Shaukat Alī, *The Political Philosophy of Iqbal* (Lahore: Publishers United, 1970).
[205] The founder of the Hanafī school of thought of Sharīʿah.
[206] Muhammad Hamid, *Iqbal: The Poet-Philosopher of Fifteenth Century Hijrah* (Lahore: Sang-e-Meel Publications, 1980).

The potential for development as well as growth on the sources of Ijtihād is clearly demonstrated by Iqbal‘s argument in the legal system of Islāmic Sharī‘ah law. It has the potential to meet the growing needs of our times and transmute modern society into an Islāmic way of life.[207]

This research asserts that *mujtahidīn* are not merely dependent on the doctrines of ‗Qiyas, istihsān, and masalih mursalah, but also the legal maxims (qwa‘idah kulliyyah) and objectivity of Sharī‘ah, as directorial methods for the exertion of Ijtihād.

3.2.6.2 Elements of Ijtihād

Allama Muhammad Iqbal, (رحمة الله عليه) underlined these vibrant elements that constitute the Ijtihād, according to his methodology[208]:

1. the dynamic concept of the culture, the universe, and the society in Islām,
2. the theoretical methodology to the changeability of life,
3. the reality of ―juristic reasoning‖ in Islām, and
4. the progressive and dynamic conception of the intelligentsia and considerations in Islām.

3.2.6.3 Subject Matter of Ijtihād

There are certain issues, being faced by facing Muslim Ummah, in today‘s society, that this research suggests needing to be made the main subject matter of Ijtihād. The following ones, necessitate urgent consideration:

- Regaining Muslims‘ autonomy from foreign domination;
- Enlightening governance through fostering further discussion as well as social justice measures.
- **Economics**. A complete revision of Islāmic economic theories is needed in the process of incorporating modern economic theories:
    - What kind of cooperation can there be between Muslims and the economic institutions of the world without harming and violating the principles of true Islāmic values and justice?

[207] H.H Bilgrimi, *Glimpses of Iqbal''s Mind and Thoughts* (Lahore: Sheikh Muhammad Ashraf Publishers, 1966).
[208] Muhammad Khalid Masood, *Iqbal''s Reconstruction of Ijtihād* (Islāmabad: IRI, 1995).

- Finding the causes of poverty in Muslims and eradicating the causes and consequences of poverty among Muslim Ummah.
- Decreasing the debt of the poorest Islāmic countries;

- **Muslims dwelling in the non-Muslim States**. Muslim Ummah, who are living as a minority in non-Muslim countries, should be guided by Ijtihād.
  - How can participation in the life of these states without neglecting their Islāmic beliefs and values be facilitated by people who feel active and responsible?
  - What Islāmic rules and regulations should be followed by these Muslims in order to become good citizens of their homeland or adopted land?
- **Sunnis and Shias**. The space in doctrines of diverse Islāmic masaalik (Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah and biased positions) must be lessened.
- **Gender-Sensitivity**. The role and protection of women in Islām require a careful examination and revitalization of the original texts, for safe gender-sensitive legislation and fundamental rights. Pākistānī judiciary acting pro-women, have exercised Ijtihād in a number of cases like *Mst. Feroze Begum v. Muhammad Hussain*[209]*, Mst. Hameeda Begum v*. Mst. Murad *Begum*[210]*,* and *Muhammad Bashir v. Mst. Ghulam Fatima*[211] etc.
- **The essence of globalization**. Employing modern Ijtihād, Muslims of the world must reconstrue the conventionally established partition of the globe into dar-ul-Islām (the Islāmic world) and darul Harb (the non-Muslims' world). A global outlook and responsible citizenship must be emphasized in this global-village. Ijtihād should be employed to foster improved relations among individuals from various religious and cultural backgrounds, rather than promoting the notion of conflicting cultures and civilizations.

[209] Mst. Feroze Begam v. Muhammad Hussain, 1983 SCMR 606.
[210] Mst. Hameeda Begam v. Mst. Murad Begam, PLD 1975 SC 624.
[211] Muhammad Bashir v. Mst. Ghulam Fatima, PLD 1953 Lahore 73.

- Clearing up water and air pollution, and making ready to face and overcome the widespread encounters of ecological degradation.
- **Unity in the Muslim countries**. Islāmic political thoughts and practices must be revised.
    - How can the alignment of Muslim states be achieved to collaborate more closely, and what novel frameworks are required to cultivate unity in the Muslim countries?
    - The promotion of moral and ethical standards of an Islāmic state is necessary in addition to the freedom of individuals, especially religious minorities.
    - Getting back unity to the idealistically required domestic Islāmic life, which has, unfortunately, come on the edge of collapsing and disintegration.
- Bigotry, intellectual decline, political oppression, rejection of others, lack of democracy and freedom, sectarianism, and extremism are some of the major obstacles faced by Muslims and the practice of Ijtihād today. Regrettably, these vices have spread and proliferated within Muslim communities without being effectively addressed. By engaging in active exercises of Ijtihād, a model of Islām‘s tolerance and openness is proactively showcased to the Muslim world.

There is a lot of scopes and Ijtihād is very much needed, likewise legislation, as well as the development of laws on the above relevant issues in developing situations, is inevitably required.

3.2.7 Modes and Methodologies of Ijtihād

The Holy Qurʾān and the ahādīth stand as the initial beacons of guidance in deciphering any predicament. Clarity within these scriptures warrants direct implementation. Yet, in instances where obscurities arise and solutions must be drawn within the realm of these sacred texts, the pursuit of legal avenues ensues, a pursuit known as Ijtihād. This scholarly endeavour involves consensus and analogical reasoning as its cornerstones. Alongside these pivotal approaches, other methods such as Fatah al-Dharai, Istidlal, Istihsān, Istishab al-Hall, Maṣlaḥah Mursalah, Sadd al-Dharai, Syar‘u Man Qabalanā, and ‘urf collectively contribute to the intricate tapestry

of Ijtihād[212]. But then again practically all these methodologies had been used in the individual Ijtihād, not including Ijm'ā, while, in this new age, collective Ijtihād is the most operative and hands-on mode of Ijtihād.

3.2.7.1 Modes of Ijtihād

According to the jurists (qāḍī), there are generally three modes of Ijtihād. The activity of a qāḍī cannot be divided into different practices. Ijtihād is a smooth process but for simplicity and ease the task is divided into three modes, categorically:

i. In the initially first mode, the approach entails the qāḍī maintaining proximity to the contextual framework. The qāḍī places emphasis on the direct interpretation of the texts, adhering to the principle of literal interpretation.
ii. Upon employing the first mode of literal interpretation, the qāḍī then engages in _Qiyas', a method rooted in rigorous analogy. This approach is confined to well-established analogies known as _Qiyas Al-illah' and _Qiyas Al-Ma'na.
iii. Transitioning to the second mode of Ijtihād, the qāḍī's scope becomes confined to deriving legal rulings from individual texts, whereas, in the third mode, it depends on all the texts that appear in the collection. This means that legal reasoning is done concerning the spirit and purpose of the law rather than the scope of individual subjects.

In the face of these foremost modes, the following are also the modes of Ijtihād:

- Fatah al-Dharai
- Istidlal,
- Istihsān,
- Istishab al-Hall,
- Masalih Mursalah,
- Sadd alDharai
- Urf, and
- Collective Ijtihād

[212] MH Kamali, *Principles of Islāmic Jurisprudence* (Islāmic Texts Society 1991) Ch 15 (Istishab) 259-68; Ch 16 (Sadd al-Dhara'i) 269-76.

3.2.7.2 Methodologies of Ijtihād

Definition of Methodology:

Linguistically, Methodology is defined by the Oxford Dictionary as: ―*a system of methods used in a particular area of study or activity.*‖[213] And has been defined in the Cambridge Dictionary as: ―*a system of ways of doing, teaching or studying something*.‖[214] The Merriam-Webster Dictionary defines it as: ―*a body of methods, rules, and postulates employed by a discipline*.‖[215]

Technically, methodology denotes Assumptions, theories, models, and policies of intellectual thought that precede the actual results of a discipline. It pertains to the foundational philosophical perspective held by a scholar or thinker, which shapes their approach to tackling the issues they aim to address. In relation to Ijtihād, it's noteworthy to reference Blaug's definition of methodology, which goes as follows:

> *"Methodology signifies a thorough exploration into the fundamental principles of reasoning, concepts, and theories within a particular subject, as one can easily understand it as a philosophy of science."*[216]

The common thread that unites the described interpretations of the term ―methodology‖ is its role as a mode of intellectual reasoning, guiding the initial exploration of communal or natural phenomena. Just as the English term ―methodology‖ conveys a sense of a ―way‖ or a ―system,‖ the Arabic language uses ―minhāj‖ or ―manhajiyyah‖ to signify methodology, denoting a straightforward and smooth path. In the Holy Qurʾān, the term ―Sharīʿah‖ is referenced in the same verse, serving as the source from which the principles of Sharīʿah are derived and it also refers to the path (place of water), in the following manner:

> ―*A law (Sharīʿah) and a way of life (minhāj) have been made, by us, for you all. If Allāh Almighty*

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[213] ―*The Oxford Dictionary of English* (Spain: OUP, 2010)‖.
[214] ―*The Cambridge Academic Content Dictionary Reference Book with CD-ROM* (South Korea: CUP, 2009)‖.
[215] ―*The Merriam-Webster Dictionary* (USA: Merriam-Webster, 2004)‖..
[216] Blaug, M, *Methodology of Economics, or How Economists Explain* (Cambridge: CUP, 1992).

(سُبْحَانَهُ وَتَعَالَى) had willed, He would have made you all one nation. But He is going to test you with His grace. So consult one another in doing a good."[217].

Many explanations for these words have been presented by interpreters. The first term, ―Sharīʿah,‖ is generally associated with the divine law from which legal decisions are derived by jurists. On the other hand, the second term, ―Minhāj,‖ represents a distinct methodology for the Muslim Ummah, signifying a way of life or a methodology anchored in divine law.

Consequently, Ijtihād represents diligent, persistent efforts that lead to valuable knowledge. A steadfast belief in the aqeeda-e-tawḥīd (oneness) of *Allāh Almighty (سُبْحَانَهُ وَتَعَالَى)* empowers a mujtahid to achieve success with the assistance of *Allāh Almighty (سُبْحَانَهُ وَتَعَالَى)*. Their comprehensive methodology guides their intellect.

3.3 Collective Ijtihād (Ijtihād Jamaʻi)

3.3.1 Introduction

In the preceding section, Scholars have expounded on the notion that Ijtihād entails the exercise of Islāmic legal reasoning by an individual ʿalim. The engagement of a group of ʿulamā in Ijtihād leads to the identification of this endeavour as collective Ijtihād (Ijtihād jamaʻi). Within the context of collective Ijtihād, the participants, all qualified as mujtahids, collectively undertake the process. This research segment delves into the concept of collective Ijtihād as a method for establishing novel judicial judgements. Consequently, the study explores the significance of Collective Ijtihād, delves into its historical foundations, and traces its evolutionary trajectory.

The focal points of this discussion encompass various institutions that emphasize the necessity and significance of Collective Ijtihād, along with an exploration of its modes, methodologies, and practical implications within the contemporary Muslim Ummah[218]. Furthermore, this discourse extends to include specific consideration of these aspects within the context of Pākistān, forming the

[217] Al Qur'ān, 5:48.

[218] *Islāmic Legal Interpretation: Muftis and Their Fatwas* (Pākistān: Oxford University Press, 2005), 30.

core arguments presented herein. This research pursues to exhibit this all as a real-world instrument for finding out the Sharīʿah‘s view with respect to the Islāmic ummah on a diversity of contemporary issues. Initially, concisely, this research highlights the contentious debate surrounding the closure of the gate of Ijtihād. To this end, it extensively draws on the recognition that throughout the history of Sharīʿah, mujtahidīn have consistently persisted in the practice of Ijtihād.

3.3.2 Meaning of Collective Ijtihād

An exact definition of Collective Ijtihād remains to be fully developed, yet numerous scholars of Sharīʿah describe it as the unanimous agreement among public jurists (mujtahidīn) concerning a specific issue at hand. Currently, numerous institutions providing legal opinions (fatwas) are prevalent throughout the Muslim Ummah. Despite attempts to connect it with the traditional concept of ijm‘ā‘ consensus, research demonstrates that Collective Ijtihād is fundamentally subordinate to classical ijm‘ā‘ yet surpasses individual Ijtihād in significance. This means exercising all the prerequisites of Ijtihād, collectively by *mujtahidīn,* acting together, and fulfilling all the conditions of a Mujtahid by every one of them.

3.3.3 Historical Background of Collective Ijtihād and its Development

*Allāh Almighty (*ۥُسۡبَحَبَوُه ۥَوَتَّعبَلى*) HIMSELF,* validates the Collective Ijtihād in the Holy *Qurʾān*[219], advocating mutual consultation (Shūrā)[220]. A clear and assertive justification is being seen in the Sunnah (ahādīth) of our beloved Prophet (صلى الله عليه وآله وسلم), narrated by Alī (رضي الله عنه) as:

*„O, Prophet (*ملسو هلآو هيلع هلالا ىلص*)!*

> *“The Prophet (*ملسو هلآو هيلع هلالا ىلص*) was asked by me („Alī bin Abi Talib), “„O, Prophet (*ملسو هلآو هيلع هلالا ىلص*)!, what if there is an issue before us, and neither injunctions in the Holy Qurʾān nor the* Holy Prophet (ملسو هلآو هيلع هلالا ىلص)‘s Sunnah, exist?‖ To this, it was responded by the Prophet *(* صلى الله عليه وسلم وآله*)*, ―You must convene with the scholars (fuqahä‘) or the pious servants and consult them. A

[219] Al-Qurʾān, 3:159.
[220] Al-Qurʾān, 42:38.

judgement should never be made solely based on a single perspective.‖[221].

Hazrat Muhamad (ملسو هلآو هيلع هللا ىلص)'s Companions (رَضِيَ اللهُ عَنْهم) used these valuable sources of Sharīʿah and they used to love the tradition of the Beloved Sunnah of Prophet of exercising Ijtihād, wisely[222].

It is narrated that whenever the first and second Khul'fa-e-Rashideen[223] coped with a new Sharīʿah-related issue, whose solution could not be found in any direct injunctions of the Holy Qur'ān and the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص)'s Sunnah (ahādīth), they used to gather the learned Companions, organized and solicit their knowledgeable views. Subsequently, the companions (رَضِيَ اللهُ عَنْهم) used to hold a judgement based on a consensus (ijm'ā') or widely held opinion of the Companions (رَضِيَ اللهُ عَنْهم), available at that moment.[224] This exertion of construing a decision concluded after judicial consultation (shūrā) with the Companions (رَضِيَ اللهُ عَنْهم), lays the basis for the model of collective Ijtihād, by the the Companions (رَضِيَ اللهُ عَنْهم).[225]

From time to time exercised Collective Ijtihād among Muslims, it has been found that during the Islāmic realm, developments in Sharīʿah Laws had been made, to encounter the indigenous traditional backgrounds and customs. As, the development of Tanzimat by the Ottoman Empire, including the establishment of the Commercial Code in 1850, bears a striking resemblance to the creation of Criminal and Commercial Codes in Europe [226]. This work is considered to be the foremost and most efficacious exertion toward the codification of Sharīʿah Laws. The 1870s *Majalla,* on rulings of the Hanafī School, delivered a greater step of consistency in

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[221] Abd al-Halim Uwes, al-Fiqh al-Isami baina al-Tatawwur wa al-Tsabat (Madinah: Syirkah al-Madinah al-Munawwarah, n.d.), 159.

[222] Taha Jabir al-'Alwani, *Ijtihād* (Herndon: International Institute of Islāmic Thought, 1993), 6-9.

[223] Abu Bakar (رضي الله عنه) and Umar (رضي الله عنه).

[224] Yunus ibn _Abdulah Ibn _Abd al-Barr al- Qurtabi, *Bayan al-"Ilm wa Fadlihi* (Ad-Damaam: Dar Ibn al-Jawzi, 1st ed., 1994), 2:56; Badr al-Dîn al-'Ayni, *„Umdat al-qāri fi sharh Sahih al-Bukhāri* (Beirut: Dār alKutub al-Ilmiyya, 2001), 23:266; alQasim ibn _Abd al-Salam Abu _Ubayd, *Kitab al-Amwal*, ed. Khalil Harras (Cairo: Maktabah Kulliyah al-Azhariyah, 1975/1395), 61-62; Abu Yusuf, Ya'qub ibn Ibrahim al-Ansari, *Kitab al-Kharaj* (Cairo: al-Matba'at al-Salafiyah, 1325), 26-27; Abu Muhammad _Abdullah ibn Ahmad ibn Muhammad Ibn Qudamah, *Al-Mughni* (Beirut: Dar al-Kutub al-'Ilmiyah, n.d.), 2:720-21; Abu Muhammad _Abdullah ibn _Abd al-Rehman ibn Bahram al-Darimi, *Sunan alDarimi* (Beirut: Dar al-Kutub al-'Ilmiyyah, n.d.), 1:58.

[225] Abd al-Nasir Tawfiq al-'Attar, ―Al-Ta'rif bi al-Ijtihād al-Jama'i,‖ *Conference on al-Ijtihād al-Jama"i fi al-A"lam al-Islāmi* (al-Ain, UAE: UAE University, 1996), 1:32.

[226] Amin Ahsan Islahi, *Islāmic Law: Concept and Codification* (Lahore: Islāmic Publishers, 1979), 89-105.

multifaceted financial transactions, containing business dealings with non-Muslim commoners and rulers. The said *Majalla* laid the foundation for the commencement of the epoch of collective *Ijtihād*.[227]

3.3.4 The Need and Importance of Collective Ijtihād

Ijtihād is not about creating something new in religion, but about expressing a religious perspective on newly arising issues. The role of Ijtihād within the structural framework of the Sharīʿah can be likened to fresh blood that ensures the application of Sharīʿah principles across different eras. Ijtihād can be pursued individually or collectively; however, given the contemporary era's focus on specialization, individual Ijtihād appears unfeasible. Hence, the adoption of collective Ijtihād becomes imperative in the present age. The role of Collective Ijtihād serves as a mechanism to organize and reshape a society in line with Sharīʿah principles. Consequently, it can be confidently asserted that establishing collective Ijtihād within an Islāmic society provides a sustainable avenue for aligning with socio-political and socio-economic changes both domestically and internationally. The significant challenge facing Pākistān lies in effectively harnessing its capabilities in collective Ijtihād to address issues such as corruption, good governance, poverty, and sustainable development, thus fostering greater engagement with Sharīʿah principles.

Highlighting the need for collective *ijtihād*, Allama Iqbal criticized the notion of ‗closing the door of *ijtihād*' as a myth born from intellectual stagnation within the Muslim *Ummah*. He argued that this perception reflects not only a misunderstanding of Islamic legal principles but also an intellectual complacency that can take root in periods of spiritual decline. In such times, thinkers may be elevated beyond critique, hindering intellectual progress. Iqbal further illustrated his point by referencing Turkey's bold legislative action, which transferred the authority of the caliphate to an assembly, transforming it from an individual to a collective institution, a move he regarded as a courageous act of *ijtihād*. He commended the Turkish approach as an exemplary break from *taqlīd* (imitation), celebrating it as a significant achievement in the evolution of Islamic governance.[228]

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[227] E. van Donzel, *First Encyclopedia of Islām: 1913–1936* (Leiden: EJ Brill, Reprint ed., 1993).

[228] M Iqbal, *Reconstruction of Religious Thought in Islām* (Lahore: Ashraf Printing Press,2nd edition, 1982), 178.

3.3.5 Modes and Methodologies of Collective Ijtihād

This modern age is an era of focussed specialties, and the Sharīʿah-compliant pursuits of this life are not out of this methodological system like financial institutions etc. Often, experts' concepts find their way into policies that exert influence on entire societies. A monodisciplinary approach fails to capture the intricate nuances of this multifaceted life reality, consequently yielding solutions that can precipitate crises. To effectively tackle the challenge of integrated knowledge, an interdisciplinary methodology becomes imperative, one that interweaves Sharīʿah principles with insights from human and natural sciences, alongside emerging technologies. The suggested multidisciplinary methodology finds its foundation in Collective Ijtihād, serving as a bridge to synthesize these diverse strands of knowledge.

3.3.6 Methodology of Collective Ijtihād Employed by the Federal Shariat Court

In *M Riaz v. FoP* the following step-by-step methodology (*manhaji)* for Ijtihād has been fixed by the FSC[229], for deciding cases:

1. First of all, seeking the appropriate verses of the Holy Qur'ān and then the Holy Sunnah (ahādīth);
2. Ascertaining the intent of Qur'ānic verse with the help of the related the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص)'s Sunnah (ahādīth);
3. Examining the applicable juristic opinions, and reasonings of the jurist(s) for characterizing their coherence and harmony with the up-to-date requirements, if desired, modulating them to the requirements of the current age;
4. Ascertaining and employing, as the last option, any other juristic opinion, well-matched with the Holy Qur'ān and the Ahādīth.

As per the FSC's guidance, the jury is instructed not to confine themselves solely to the literal interpretation of the Holy Qurʾānic verse, but to grasp the entire essence of the Holy Qurʾān and consider the underlying spirit of the verse(s). While interpreting the Holy Qurʾān, and the Sunnah (ahādīth), it is essential to account for the evolution of human society, although this approach must not disregard the original intent and purpose of the Holy Qurʾān. This principle is echoed in cases such as *Mst.*

[229] *M Riaz v. FoP,* PLD 1980 FSC 1, 15.

Zohra Begum v. Sh. Latif Ahmad Munawar[230], and *Mst. Rashida Begum v. Shahab ud Din*[231], *i*n affirming the entitlement to engage in Ijtihād, the Superior Judiciary of Pākistān has upheld the right to independently interpret the Holy Qurʾān and the Sunnah (ahādīth), even if such interpretations diverge from established perspectives within Islāmic Sharīʿah law. The SCP (SAB) held, in case *Abdul Majid v. GoP*, that:

> *―Where Ijtihād is complete on an issue, then matters should not be referred directly to the Holy Qurʾān, and the Sunnah, direct evidence that can be cited from the Qurʾān and Sunnah, but it should not be called direct or indirect evidence and it should be called Ijtihād. And, when the Holy Qurʾān and the Sunnah (ahādīth) are silent, the state government can conduct Ijtihād on the matter. The silence of the Holy Qurʾān, and the Sunnah (ahādīth) does not amount a thing to be forbidden in Sharīʿah or harām.‖*[232]

The term ―Collective Ijtihād‖ represents a modern methodology (manhaji) introduced by contemporary fuqahäʿ (Sharīʿah scholars) specializing in Usūl al-fiqh, in response to contemporary challenges and developments. Although an exact definition of Collective Ijtihād remains absent, many fuqahäʿ in Usūl al-fiqh describe it as the consensus reached among public jurists on a specific issue. During this period, numerous institutions for issuing legal opinions (fatwas) have proliferated across the Islāmic world. Despite attempts to relate it to classical consensus, research has confirmed that Collective Ijtihād, in principle, holds a position subordinate to classical consensus while surpassing individual judgement. This segment of the study aimed to delve into the concept of collective Ijtihād, using common sense to arrive at novel decisions. Consequently, the study explored the theoretical framework and practical implementation of collective Ijtihād, examining and analyzing various institutional perspectives. This study seeks to present collective *ijtihād* as a practical approach to discerning *Sharīʿah* perspectives on various contemporary issues for the *Islāmic Ummah*. Historically, collective *ijtihād* has played a crucial role in Islamic jurisprudence (*fiqh*), and it is clear that its function has never been fully abandoned, even amid discussions around the closure of *ijtihād*. Decisions made in Pakistani

[230] Mst. Zohra Begum v. Sh. Latif Ahmad Munawar, PLD 1965 Lahore 695.
[231] Mst. Rashida Begum v. Shahab ud Din, PLD 1960 Lahore 1142.
[232] Abdul Majid v. GoP, PLD 2009 SC 861.

institutions, such as the FSC, are not inherently binding unless expressly mandated. However, the framework of collective *ijtihād* provides greater practicality than classical consensus (*ijm"ā"*) and offers a more reliable alternative to subjective judgment. This collaborative model enables diverse, well-rounded responses to contemporary questions, while also acknowledging areas for enhancement in its application. In the final segment of this research, constructive recommendations will be offered to maximize the effectiveness of collective *ijtihād*, especially in addressing modern issues within *Sharīʿah* parameters. Within the FSC, collective *ijtihād* is uniquely assessed by judges based on situational factors, with the court affirming the need to turn towards *ijtihād* and supporting the reopening of this essential interpretive process[233].

3.3.7 Practical Aspects of Collective Ijtihād in the Present Islāmic World as well as in Pākistān

In order to deal with any newly arising Sharīʿah issues, aong Muslim Ummah, Collective Ijtihād institutions are actively continuing their activities in various Muslim countries as well as non-Muslim nations.

Continuing in the pursuit of Collective Ijtihād, Saudi Arab is also in the continuity of bringing reforms in Sharīʿah for Public Welfare (masala mursala). The Ijtihād Academy, under OIC, is working to meet the need of the hour for by-laws, for the advanced legislature based on Collective Ijtihād through ulamā. In the inaugural speech, of the Academy of Ijtihād King Fahad bin Abdul Aziz asserted, as follows:

> *"This type of Ijtihād (Collective Ijtihād) should be confirmed should be ratified by the Mujtahidīn following a comprehensive evaluation of both traditional and contemporary Sharīʿah jurisprudence. Seen from this perspective, the call for establishing this Academy underscores the significant concern of the Muslim populace for progress. It offers a genuinely Sharīʿah-compliant response to the complexities of modern life. The gathering of intellectuals, jurists, mashaikhs, Mujtahidīn, and scholars from across the Muslim Ummah is imperative to address the challenges*

[233] 2006's 1/K Suo Motu action by the FSC, Pākistān Citizenship Act 1951, Re: Gender Equality, decided December 12, 2007, PLD 2008 FSC 1., 12-13.

posed by the current era and to synergize efforts grounded in the inclusive and tolerant principles of the Sharīʿah and to bring together efforts based on the reality of the Sharīʿah of tolerance."[234]

Traditionally, the term Collective Ijtihād has been fashioned to be titled in denoting the agreed and harmonized practice of ijmʻāʻ. As, for instance, Collective Ijtihād has been used in the literary work of Mehmood Syaltut, who used this term on the subject of ijmʻāʻ[235] At the current level, there is new evidence of the term ―Ijtihād Jamaʻîǁ taking on a new meaning, owing to the historical inertia within Sharīʿah scholastic practice that has predominantly focused on the exercise of ijmʻāʻ since the 14th century. A new development was witnessed during the first conference (muʻtamar) of Majmaʻ al-Buhus al Islāmiyah[236] which took place in Cairo in 1964, during which, Mujtahidīn from numerous Islāmic states participated and graced the event with their presence.[237] The Muʻtamar resolved that the Holy Qurʾān and the Sunnah (ahādīth) stand as the primary sources of Sharīʿah. Additionally, it was determined that the pursuit of Ijtihād is an inherent right for every qualified Mujtahid who fulfills the prerequisites of Ijtihād. In the face of emerging challenges, the approach to uphold the benefit (maslahah) involves deliberation on laws derived from various Islāmic schools of thought within the Sharīʿah framework, most suitable for that very issue, and when still there is no solution found through that anner, then by acting out collective *Ijtihād* within the school (*al-Ijtihād al-jama"i al-mazhabi*), and if this manner is also found insufficient, in resolving the issue, then by carrying out collective *Ijtihād* in an absolute manner (*al-Ijtihād al-jama"i almutlaq*).

In terms of future endeavours in the realm of Collective Ijtihād (Ijtihād jamaʻi), this forum (Majmaʻ al-Buhus al-Islāmiyah) pledged to coordinate efforts aimed at practicing Collective Ijtihād in both distinct domains, specifically collective Ijtihād within the school (al-Ijtihād al-jamaʻi al-mazhabi) and collective Ijtihād without the confines of a particular school in an absolute manner (*al-Ijtihād al-jama"i*

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[234] Dale F. Eickelman, et al., *Muslim Politics* (Oxford: PUP, 2004), 26-27.
[235] Mehmood Syaltut, *Al-Islām Aqidah wa Syari"ah* (Cairo: Dar Syuruq, 4th edn., 1988), 536.
[236] This Conference comprises of fifty mujtahidīn from different schools of Sharīʿah and religions, thirty from Egypt. It has five committees (lajnah) including lajnah al-buhus al-Islāmiyah, lajnah al-tasyriʻ al- Islāmi, lajnah ièya` al-turas al-Islām and lajnah tanìim al-ʻalaqat al-Islāmiyah.
[237] Ahmad Muhammad *„Uf, al-Azhar fi Alf `Am* (Cairo: Majmaʻ al-Buhus al-Islāmiyah, 1982), 134-
141.

almutlaq) whenever and whichever would be desirable.[238] Even though the word *Ijtihād jama"i* was coined only in the 1950s, Indonesian Muslims have been practicing *Ijtihād jama"i* since about 1926 by Nahdlatul Ulamā (*Nahdah al-"Ulamā*) [239]. Though the recognition of Indonesian scholars is relatively recent, yet *Ijtihād jama"i* has been practising in Indonesia for more than seventy years. Actually, before issuing a fatwa, the *ulamā* get-together was joined by other *ulamā* from diverse Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharīʻah, for discussion on finally issuing the *fatwa, as a Collective Ijtihād*[240].

States		Academies/Organizations/Councils
Egypt		1. **Majmaʻ al-Buhuth al-Fiqhiyah:** The Academy for Islāmic Researches. 2. **al-Majlis al-Aʻla li al-Shuʻun al-Islāmiyah:** The High Council for Islāmic Affairs.
Europe	Ireland	**Al-Majlis al-Aurubi lil Ifta wa alBahuth:** European Council for Fatwa and Research.
	United Kingdom	**Majlis Tahqiqat-e-Sharīʿah:** Council for Sharīʿah Researches
India		1. **Idarah Mubahith al-Fiqhiyyah:** Institution for legal discussions 2. Islāmic Fiqh Academy. 3. **Majlis Tahqiqat-e-Sharīʿah:** The Council for Sharīʿah Researches 4. **Majlis-e-Fiqhi:** The Fiqh Council
Indonesia		**Nahdah al-ʻUlamā** Awakening of *ulamā*
Jordan		**Al-Majma al-Mulki li Bahuth al-Hadharat al-Islāmiah:** The National Academy for Research of Islāmic Culture
Kuwait		1. **al-Hayʻat al- Sharʻiyat al-ʻAlamiyat li al-Zakāt al-Tabiʻat li Bayt al-Zakāt fi Dawlat alKuwayt:** The International Sharīʿah Council for Affairs Related to Zakāt under the House of Zakāt. 2. **al-Munazzamat al- Islāmiyat li al-ʻUlum al-Tibbiyah**: The Islāmic Organization for Medical Researches; 3. **Hayʻat al-Fatwa wa al-Riqabat al-Sharīʻah fi Bayt al-Tamwil al-Kuwayti:** The Islāmic Council for Fatwa and Sharīʿah Supervisory in the Kuwaiti House of Finance; 4. The General Administration for Iftaʻ;
North America		1. **Majlis-e-Fiqhi:** The Fiqh Council. 2. **Majma fuqahäʻ al-Sharīʿah:** Sharīʿah Scholars Association;

[238] Joseph Chinyong Liow, Nadirsyah Hosen, *Islām in Southeast Asia: Critical concepts in Islāmic studies,* Volume 1 (London: Routledge, 2010) 128.
[239] Mitsuo Nakamura, *The Oxford Encyclopaedia of the Modern Islām, Vol. 3* (New York, OUP, John Esposito edn.1995), 218.
[240] Wahbah al-Zuhaili, *Usul al-Fiqh al-Islāmi*, Vol. 2 (Beirut: Dar al-Fikr, 1986), 1156.

Pākistān	1. **Islāmi Nazariati Council:** The CII; 2. **Wifaqi Shara'i Adalat**: The FSC.
Saudi Arabia	1. **al-Lajnat al-Da'imah li al-Buhuth al-'Ilmiyah wa al-Ifta':** The Permanent Committee for Scientific Researches and Ifta'. 2. **al-Ri'asat al-'Ammah li Idarat al-Buhuth wa al-Ifta' wa al- Da'wah wa al-Irshad:** The General Commission for the Administration of Scientific Researches, Ifta' and Missionary Works and Preaching; 3. **Hay'at Kibar al-'Ulamā' fi al-Mamlakat al-Arabiyat al- Sa'udiyah:** The Organization of Great Jurists of Saudi Arabia; 4. **Majma' al-Fiqh al-Islāmi:** The Fiqh Academy; 5. **Majma'al-Fiqh al-Islāmi al-Dawli:** The International Fiqh Academy;
Sudan	1. **alHay'at al-'Ulya al-Sharī'ah li al-Jihaz al-Masrafi wa al- Mu'assasat al-Maliyah fi Sudan:** The Supreme Council of the Sharīʿah Supervisory Board for Banking and Financial Institutions. 2. **Majlis al-Ifta' al- Shar'i fi al-Sudan:** The Board for Sharīʿat's Ifta';

Currently, there are many academies, organizations, and councils, in different Islāmic States, working at the national level to further the process of Collective Ijtihād in collaboration with the international level among the Muslim States[241]. Some of the prominent ones are listed as:

The aforementioned institutions, working not only in Muslim states but also in non-Muslim states, for guiding Muslims of the world delivering outcomes of Collective Ijtihād. These institutional bodies are exerting Ijtihād, for solving the problems of the Muslim Ummah living in non-Muslim states and regions, preparing fatwas and Sharīʿah rulings. These institutions are the most valuable assets of today's Muslim societies. The opinions expressed by these bodies in joint consultation are considered as guidelines for establishing a common methodology for the Muslim Ummah on various issues. Moreover, they have been instrumental in establishing the legal and judicial frameworks of numerous Muslim nations.

Contemporarily, many Sharīʿah researchers are trying to clear this mistaken belief, about the judgement developed by ijmā' and collective ijtihād. All the mujtahidīn recommended delineating a limit concerning the consensus and this was

[241] F. Rahman, *Islamic Methodology in History* (India: Adam Publishers & Distributors, 1994).

carried out by the majority. In the first case, their joint opinion is considered consensus, which means that any disputed opinion is considered ―verified (confirmed).‖ It is regarded as ―Khāriq li al-Ijmā‘‖ (a ijmā‘-breacher) and is thus considered unacceptable. Unlike ijmā‘, the collective Ijtihād can be considered a guiding principle, as it does not treat the resulting decision as ―certain judgement ―(Yaqīn)‖ or discourage conflicting views while reaching a consensus. See if appropriate steps are taken to arrive at a decision. But such a collective Ijtihād, despite its positive attributes, is thoroughly scrutinized by the mujtahidīn in every aspect before making an outcome of Collective Ijtihād[242]. This method of applying the concept of collective Ijtihād appears to be more realistic, although some still believe that collective Ijtihād is less valid than the established convention of ijmā‘[243].

3.4 Conclusion

From what has been said, it is clear that the word Ijtihād means effort. The term‘s literal meaning, as borrowed by scholars (fuqahä‘) of Usūl al-fiqh, pertains to the endeavours of legal scholars. The highest intellectual exertion aims to accurately deduce the decrees of Allah Almighty *Allāh Almighty (*ﷻ*)* and Hazrat Muhammad (ﷺ). In the face of an issue, a significant scholarly effort is required to gather all relevant verses from the Holy Qurʾān and the Sunnah of Hazrat Muhammad (ﷺ) both those directly addressing the matter and indirectly related ones. As a result, the correct interpretation (ta‘wīI) of these texts requires equal effort. It is difficult to repeat when other texts are negative. Therefore, coming towards the true judgement of *Allāh Almighty (*ﷻ*)* is actually ―Ijtihād‖.

From its inception, Ijtihād has been exerted, in the same way, individually as well as collectively as Collective Ijtihād. But the passing age and advancement of science and technology made the methodology of Ijtihād more practically reliable. Considering the jurisprudence of all the *mujtahidīn* and Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharīʿah is a significant feature of the collective Ijtihād undertaking. All the *mujtahidīn* and Islāmic Schools

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[242] Sirāj, Muhammad Ahmad, *Al-Ijmā „ fī Ahkām al-Mu"amalāt al-Māliyat al- Mu"āsiriyyah: Conference on al-Ijtihād al-Jamā „ī fī al- „ālam al-Islāmī* (Al-Aīn, UAE: United Arab Emirates University, Faculty of Sharī ah and Law, 1996) 2: 664-65.

[243] Muhammad Hāshim Kamālī, *Principles of Islāmic Jurisprudence* (Kuala Lampur: Ilmiyyah Publishers, 1998) 168-69.

of thoughts, upholding diverse philosophical paradigms, of Sharīʿah of Sharīʿah are taken as a decidedly integrated body of Sharīʿah knowledge for Collective Ijtihād. The Ijtihāds of all the *mujtahidīn* is employed, by the same token, for resolving newly arisen issues of the contemporary world, instead of relying on a particular school of Sharīʿah law thinking. Every Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharīʿah adheres to a coherent body of ideas and embraces theories grounded in the guidance of the Holy Qurʾān and the Sunnah (ahādīth), while also aligning with contemporary needs and serving humanity's welfare. Consequently, through the application of collective Ijtihād, a novel collective jurisprudence is taking shape, a source of intellectual, ideological, and legal significance for the entire Muslim Ummah. The movement of the collective Ijtihād also expanded the principles of jurisprudence or Ijtihād.

Collective *ijtihād* represents an evolving methodology (*manhaji*) introduced by contemporary *fuqahā"* of *Usūl al-fiqh* in response to modern challenges and social transformations. While a precise, universally accepted definition remains under discussion, collective *ijtihād* is often described as the consensus among jurists on specific contemporary issues. This methodology has gained prominence alongside the establishment of fatwa institutions throughout the Islamic world, aiming to keep the doors of *ijtihād* open by bridging traditional Islamic principles with modern-day needs.

Although it is not identical to classical consensus, collective *ijtihād* has proven to be a vital mechanism for addressing new and complex issues, occupying a middle ground between individual judgment and traditional consensus. The study delves into the conceptual basis and practical applications of collective *ijtihād*, revealing that while historical discussions of ―closing the door of *ijtihād*‖ have sometimes discouraged fresh interpretations, the enduring need for *ijtihād* remains evident. This research argues that collective *ijtihād* provides a structured, collaborative framework that reopens this door, enabling the *Islāmīc Ummah* to engage responsibly with contemporary issues within *Sharīʿah* principles.

In this context, the FSC has actively upheld the principle of keeping the door of *ijtihād* open, reinforcing its importance in addressing contemporary legal and social issues within the framework of *Sharīʿah*. By engaging in a process of continual

interpretation and adaptation, the FSC exemplifies how *ijtihād* can remain a vibrant, accessible tool for legal reasoning. Through its decisions, the FSC encourages a progressive approach to Islamic jurisprudence, ensuring that the application of *ijtihād* remains relevant and responsive to the evolving needs of the *Islāmīc Ummah*. This commitment highlights the FSC‘s essential role in maintaining a dynamic and open door for *ijtihād*, ensuring that *Sharīʿah* law addresses the complexities of modern life while staying true to its foundational principles.

Therefore, decisions in Pākistānī institutions are not considered binding unless they are binding on them. However, this type of jurisprudence for Collective Ijtihād proves to be more practical than classical consensus (ijm‘ā‘) and holds greater reliability compared to subjective judgement. So creating a different answer to any question is going to be achieved through this joint effort by Collective Ijtihād. However, any weakness should be overcome with some improvements in exercise. Some suggestions, at the concluding part of the research, will be positively provided for achieving fruitful objectives of Collective Ijtihād, especially for finding out the solutions to modern day‘s issues centered on the Sharīʿah‘s principles.

Chapter 4
COLLECTIVE IJTIHāD AND THE FEDERAL SHARIAT COURT

4.1 Introduction

This chapter aims to explore the concept of Collective Ijtihād within the context of the FSC in Pākistān. The focus will encompass its historical backdrop, inherent nature, ramifications, and specific applications. A succinct overview of the historical importance of collective Ijtihād within the wider Islāmic judicial framework will be furnished, establishing a basis for comprehending its evolutionary trajectory and its role in shaping legal determinations. The essence of collective Ijtihād and its broader impacts will be probed, scrutinizing how it influences the FSC and contributes to the legislative process in Pākistān. A meticulous analysis will be conducted on the various methodologies of collective Ijtihād employed by the FSC, spotlighting any disparities between the court's approach and the historical Ijtihād performed by Muslim jurists in the past. Additionally, the specific matters in which the FSC is allowed to exercise Ijtihād will be explored, further expanding on its scope and limitations.

Furthermore, the authoritative status of the FSC's Ijtihād within Pākistān's judicial system will be addressed. The legal weight and influence of the FSC's collective Ijtihād on legal decisions will be examined, shedding light on its significance and impact. Finally, the status of Ijtihād in matters that fall outside the FSC's jurisdiction will be discussed, with arguments and considerations related to this topic being presented.

Overall, the aim of this chapter is to provide a comprehensive understanding of Collective Ijtihād and its association with the FSC, covering its historical context, implications, and specific application within the judicial framework of Pākistān.

4.2 Brief History of Collective Ijtihād in Islāmic Judicial System

Traditionally, the interpretation (ta'wīl) of sharīʿah is to consider *the Holy Qurʾān* as the starting point for legal matters.[244] The rationale behind this is that Collective Ijtihād has collectively cultivated a novel practice of Islāmic jurisprudence spanning the entire Islāmic world. Within Islāmic law, Ijtihād can be succinctly delineated as ―Tashreeh‖ or interpretation. It ranks as the most significant source of Islāmic law subsequent to the Holy Qurʾān and the Sunnah. The fundamental distinction between Collective Ijtihād and the Holy Qurʾān, and the Sunnah lies in the collaborative and ongoing nature of Collective Ijtihād, in contrast to the fixed and unalterable status of the Holy Qurʾān and the Sunnah, which retain their authoritative role and cannot be modified or appended to subsequent to the era of the Holy Prophet (ملسو هلآو هيلع هللا ىلص)[245].

As per the teachings of the Holy Sunnah, diverse forms of Ijtihād find application. The Islāmic system of interpretation (ta'wīl) originates from the divine provisions delineated within the Holy Qurʾān and the Sunnah.[246] It is not characterized by isolation, seclusion, or disregard for logic; nor is it founded upon inflexible and antiquated interpretive methodologies that resist adaptation, reevaluation, or alteration in light of the contemporary needs of the Ummah. Rather, it demonstrates a remarkable capacity to accommodate progressive changes within a society. While upholding the *Qurʾān* in the rule of law, Islāmic jurisprudence must provide the basis for collective Ijtihād to achieve a goal. Since the time of the early Muslim societies, it has been the preservation of Holy Qurʾān, and the commandments of *the Holy ahadith* (ملسو هلآو هيلع هللا ىلص). It is Ijtihād that both suspends and establishes standards of opposition. Therefore, historically without the exertion of collective Ijtihād, *the Holy Qurʾān* has not been seen as a legal authority for Islāmic law, and it does not regard any law as measured and analogous to certain constitutions. Thus, in contemporary sharīʿah judicial chase, it is not irrational to maintain that collective Ijtihād is influential in Islāmic sharīʿah and provides some flexibility to the Muslim Ummah in the progression of these commandments.[247] The conception of collective Ijtihād is a resource for deciding new-fangled judicial

[244] N. Theodor Nöldeke, et al, *The History of the Qurʾān* (Leiden: BRILL, 2013).
[245] Kamali, Mohammad Hashim, *Principles of Islāmic Jurisprudence*, (Cambridge: The Islāmic Text Society, 1991), 366.
[246] al-Qahtani, Musfir bin Ali, *The Miraculous Language of the Qurʾān* (London: IIIT, 2015).
[247] Khalid Ramadan Bashir, *Islāmic International Law: Historical Foundations and Al-Shaybani"s Siyar* (Cheltenham, UK: Edward Elgar Publishing, 2018).

rulings. As many scholars have said. Ijtihād is not limited to a single negation and can be of the above types.[248]

In common law, there exists an interrelation between man-made law and legislative philosophy. The Legislature (the Parliament) is responsible for enacting laws, and the courts are tasked with the duty of enforcing them if they are enforceable within legal bounds. While the courts have the authority to declare a specific law or section invalid for reasons such as being unconstitutional, they are not empowered to modify an Act due to its perceived inadequacy; this prerogative lies within the domain of the Parliament[249]. Just as in Islāmic law, the lawgiver is Allāh Almighty (ﷻ سُبْحَانَهُ وَتَعَالَى), , as outlined in the Holy Qurʾān. Although the Holy Qurʾān was revealed to Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص), the enforcement of Islāmic law also involves adhering to the Holy Sunnah of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص). Therefore, while making any Ijtihād, the scholars of usul-e-fiqh are guided by the Holy Qurʾān and the Sunnah (ahādīth) of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص).

At variance with many false and biased allegations, in Islāmic law, it is impossible to translate theories into law. It highlighted its purpose and public interest. However, in reality, a conflict exists today between the intrinsic principles of Islām and the pragmatic circumstances of Islāmic law. Islāmic law, which regards itself as divine law, is often referred to as a legal doctrine that remains immutable in the face of changing societal needs and evolving times[250].

Inappropriately, unsighted obedience concerning taqlīd has been trapping the entire Islāmic sharīʿah system whether the executive policy of Islāmic nations or the interpretative policy of the judges as well as the juristic opinion. The lack of a thorough and methodological exploration of Islāmic jurisprudential theory, combined with a tendency towards aligning with a specific madhhab (Maslak), has rendered Islāmic law rigid and sluggish. In this regard, an endeavour has been undertaken to demonstrate that Islāmic law exhibits a profound commitment to fostering the growth of a robust and prosperous society, safeguarding its interests across all facets of life, be they secular or spiritual.

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[248] Masud et al., *Islāmic Legal Interpretation: Muftis and Their Fatwas* (Oxford: OUP, 2005).
[249] Wu Min Aun. The Malaysian Legal System (Petaling Jaya: Longman, 1990), 120.
[250] Jackson, Sherman A. *Islāmic Law and the State: The Constitutional Jurisprudence of Shihāb Al-Dīn Al-Qarāfī* (Leiden: EJ BRILL 1996).

4.2.1 The Open Doors of Ijtihād: A Debate on Its Continuity and the Federal Shariat Court‘s Role

Overview-The Significance of Ijtihād in Islamic Jurisprudence: Ijtihād, the process of independent reasoning in Islamic jurisprudence, is a cornerstone of Sharīʿah, ensuring its adaptability and relevance in addressing evolving societal challenges. This dynamic approach allows Islamic law to respond to contemporary issues while maintaining its traditional principles. Despite claims from some Orientalist scholars that ijtihād was ―closed‖ in the 9th century, Islamic scholarship consistently asserts the ongoing vitality of ijtihād as a crucial tool for addressing new legal, social, and ethical dilemmas. This discussion critically examines the Orientalist perspective, explores the broad consensus within Islamic scholarship regarding the continuity of ijtihād, and highlights the pivotal role of Pakistan‘s FSC in promoting ijtihād within the country‘s legal framework.

Orientalist Perspective on the Closure of Ijtihād

The claim that ijtihād was ―closed‖ after the 9th century, notably promoted by scholars like Joseph Schacht and W. B. Hallaq, has been a long-standing narrative in Orientalist scholarship. Schacht argued that the institutionalization of taqlīd (adherence to precedent) replaced independent reasoning with blind imitation, marking the end of ijtihād and the stagnation of Islamic jurisprudence[251]. Hallaq further suggested that the codification of classical Islamic legal texts led to the perceived rigidity of Islamic law[252]. However, these interpretations, often shaped by a Eurocentric lens, overlook the complexities of Islamic legal thought and fail to recognize the adaptability of Islamic jurisprudence. While the classical period saw a shift toward more structured legal frameworks, this did not signify the cessation of independent reasoning. Instead, ijtihād evolved into a more collective and institutionalized process, ensuring that Islamic law remained responsive to new challenges within a unified framework.

[251] Joseph Schacht, *The Origins of Muhammadan Jurisprudence* (Oxford: Clarendon Press, 1950), 76.

[252] W. B. Hallaq, *The Origins and Evolution of Islamic Law* (Cambridge: Cambridge University Press, 2005), 92.

Expanded Critique of Orientalist Views

Scholars critical of the Orientalist narrative, including Hallaq in his later works, emphasize the continuous evolution of Islamic jurisprudence. The idea that ijtihād was ―closed‖ is now widely regarded as a misinterpretation of historical and legal developments. Rather than representing the end of independent reasoning, the so-called closure of ijtihād reflects a shift toward a more collective and institutionalized form of legal interpretation. Jurisprudence became more inclusive, ensuring that legal rulings remained grounded in tradition while adapting to changing circumstances. Moreover, the colonial era and the disruption of Islamic institutions significantly influenced the perception of stagnation in Islamic legal development. The rise of Western colonial powers undermined traditional Islamic legal systems, creating a false impression that Islamic law had become static. However, modern scholars argue that ijtihād never ceased; rather, it adapted to the socio-political and economic realities of the time, particularly in response to colonialism, modernization, and globalization.

Islamic Scholarly Consensus: Ijtihād as a Living Tradition

Islamic scholars, both historical and contemporary, have consistently affirmed the importance of ijtihād as a living tradition. Allama Iqbal, in his *Reconstruction of Religious Thought in Islam*, argued that ijtihād is not just a legal tool but a means of intellectual and spiritual renewal for the Muslim ummah[253]. Iqbal‘s vision of ijtihād sought to reconcile tradition with modernity, fostering creativity, innovation, and progress within the framework of Sharīʿah. Contemporary scholars like Tariq Ramadan continue to emphasize that ijtihād is central to the intellectual vitality of the Muslim community[254]. It is not only a legal process but also a spiritual and intellectual endeavor that engages with the evolving needs of society. This perspective aligns with the broader Islamic consensus that ijtihād is essential for addressing modern challenges, including issues related to bioethics, environmental sustainability, and technological advancements like artificial intelligence.

[253] Muhammad Iqbal, *The Reconstruction of Religious Thought in Islam* (Lahore: Sh. Muhammad Ashraf, 1970), 56.

[254] Tariq Ramadan, *Islam and the Arab Awakening* (Oxford: Oxford University Press, 2012), 134.

Case Studies: The Federal Shariat Court‘s Application of Ijtihād

The FSC of Pakistan plays a critical role in applying ijtihād to contemporary legal issues, demonstrating the continued relevance of Islamic jurisprudence in modern times. The FSC has made significant contributions in areas where traditional legal principles intersect with modern concerns, ensuring that Islamic law remains dynamic and responsive.

Gender Equality in Inheritance Laws

In a landmark ruling, the FSC addressed discriminatory practices in inheritance laws, ensuring that Pakistan‘s legal framework complied with the Qur‘anic principles of justice and equity. The court‘s decision emphasized gender equality, upholding women‘s rights to inheritance in a manner that aligned with Islamic teachings while addressing contemporary societal needs.

1. **Interest-Free Banking:** The FSC has played a pivotal role in promoting Islamic financial systems, particularly advancing the transition toward interest-free banking in Pakistan. Through ijtihād, the court provided detailed frameworks for implementing Sharīʿah-compliant financial models, balancing traditional Islamic principles with modern economic realities. This initiative has had a profound impact on the development of Islamic finance, both in Pakistan and internationally.
2. **Citizenship and Family Laws:** In its 2006 Suo Motu action, the FSC struck down discriminatory provisions in the Pakistan Citizenship Act of 1951 that disadvantaged women[255]. This ruling affirmed the court‘s commitment to upholding Sharīʿah and demonstrated its alignment with contemporary human rights standards, ensuring that Pakistan‘s legal system reflects both Islamic values and modern constitutional principles.

Comparison with Other Perspectives (e.g., Orientalists)

Orientalist scholars, who have historically studied Islamic law from a Western perspective, often view *ijtihād* through a critical lens, focusing on its supposed decline and the impact of this on Islamic societies. Some Orientalists argue that the closure of *ijtihād* has led to intellectual stagnation in the Muslim world, while others focus on the ways in which Islamic law has adapted to modernity.

[255] Federal Shariat Court, *2006"s 1/K Suo Motu Action: Re Pakistan Citizenship Act 1951 (Gender Equality)*, decided December 12, 2007, *PLD 2008 FSC 1*, 12–13, accessed January 26, 2025, http://www.fsc.gov.pk/citizenship-2006.

Orientalist Perspective: Many Orientalists view the closure of *ijtihād* as a negative development, suggesting that it contributed to the decline of Islamic intellectualism and the stagnation of legal thought. They often criticize the rigidity of Islamic legal systems and the lack of reform.

Modern Islamic Reformists: Reformist scholars, in contrast to both Hallaq and Orientalists, often call for a revival of *ijtihād* as a way to address contemporary issues in Muslim societies. They argue that *ijtihād* is essential for adapting Islamic law to modernity and for addressing issues such as gender equality, democracy, and human rights.

Tabulation of Comparison of Perspectives on the Closure of *Ijtihād*

Aspect	W. B. Hallaq's Stance	FSC's Stance	Orientalist Stance	Modern Reformist Stance	Traditionalist Scholars' Stance
Closure of *Ijtihād*	Argues that *ijtihād* was closed around the 10th century.	Supports *ijtihād* within the framework of state law.	Criticizes the closure of *ijtihād* as a cause of stagnation.	Advocates for the revival of *ijtihād* to address modern issues.	Scholars like **Ibn al-Ṣalāḥ, Taftāzānī, and Al-Nawawī** suggested that *ijtihād* had become impractical due to the completeness of classical jurisprudence.
Institutionalization	Critiques the institutionalization of Islamic law.	Operates within a state-controlled legal system.	Views the institutionalization of Islamic law as negative.	Seeks a more flexible, reformist approach to Islamic law.	**Ibn Khaldūn** argued that institutionalization led to *taqlīd*, though *ijtihād* was not explicitly closed.
Role in Modernity	Skeptical of contemporary *ijtihād* due to political agendas.	Applies *ijtihād* to contemporary legal issues within state law.	Criticizes Islamic law's inability to adapt to modernity.	Calls for *ijtihād* to address modern challenges in Muslim societies.	**Ibn Taymiyyah, Al-ʿIzz ibn ʿAbd al-Salām, and Shāh Walī Allāh Dehlawī** advocated for continuous *ijtihād* to keep Islamic law relevant.
Philosophical v. Practical	Primarily philosophical, historical perspective.	Practical, legal application of *ijtihād*.	Critical of Islamic law's stagnation.	Focuses on reforming Islamic law to fit contempora	**Al-Suyūṭī and Ibn Qayyim al-Jawziyyah** believed *ijtihād* was never fully

				ry needs.	abandoned and remained an ongoing process.

This table integrates the positions of both classical and contemporary *ulamā'*, providing a more comprehensive comparison of viewpoints.

Deduction: Reaffirming the Vitality of Ijtihād

The **Orientalist claim** that **ijtihād** was ―closed‖ fails to account for its enduring **vitality** and **adaptability** in **Islamic jurisprudence**. The perspectives of **Islamic scholars**, both **classical** and **contemporary**, along with the proactive role of the **FSC**, illustrate that **ijtihād** remains a **dynamic** and **living tradition**. Far from being a closed chapter in Islamic legal history, **ijtihād** continues to evolve, providing a **robust framework** for addressing **contemporary challenges** while remaining deeply rooted in the principles of **Sharīʿah**.

By embracing **collective reasoning** and adapting to **modern realities**, **ijtihād** ensures that **Islamic jurisprudence** remains a **relevant** and **vital source** of guidance for Muslims worldwide. The **FSC's contributions** serve as a testament to the ongoing relevance of **ijtihād** in **Pakistan**, bridging the gap between **tradition** and **modernity**, and reaffirming its role as a **key instrument** in the development of **Islamic law**. Through its application, **ijtihād** remains an **essential mechanism** for ensuring that **Islamic jurisprudence** continues to meet the needs of society in an ever-changing world.

Hallaq emphasizes the **historical decline** of **ijtihād** and its implications for **Islamic intellectualism**, while the **FSC** adopts a more **practical** and **institutional approach** to applying **ijtihād** in **modern legal contexts**. **Orientalist scholars** often critique the closure of **ijtihād** as a factor in **Islamic intellectual stagnation**, while modern **reformists** advocate for the **revival** of **ijtihād** to address **contemporary issues**. Each perspective offers a different lens through which to understand the **role** and **relevance** of **ijtihād** in **Islamic law** today.

The **historical development** of **ijtihād** demonstrates its enduring **importance** as a source of **legal reasoning** in **Islam**. The **FSC's application** of **ijtihād** showcases the continued **relevance** of **Islamic jurisprudence** in addressing **modern legal**

challenges. Through its **dynamic** and **evolving practice**, **ijtihād** ensures that **Islamic law** remains a **living tradition**, capable of meeting the needs of **contemporary society** while preserving its **foundational principles**.

4.3 Analysis Debating the Closure of the Door of Ijtihād: Scholarly Perspectives and Institutional Roles

The concept of *ijtihād* (independent reasoning) remains a fundamental aspect of Islamic jurisprudence. A longstanding debate exists over whether the door of *ijtihād* has been closed, remains open, or was never closed. This discussion is pivotal in assessing the adaptability of Islamic law in contemporary times. The role of institutions like the Federal Shariat Court (FSC) further influences the practical application of *ijtihād* in modern legal systems.

4.3.1 The Argument for the Closure of *Ijtihād*

Some scholars assert that the door of *ijtihād* was effectively closed after the formulation of classical jurisprudential schools. The argument rests on the premise that the foundational principles of Islamic law had been exhaustively derived by early jurists (*mujtahidūn*), leaving little room for reinterpretation. This perspective, rooted in classical Sunni jurisprudence, suggests that only scholars of the highest caliber—equivalent to the likes of Abū Ḥanīfa, Mālik, Shāfi‗ī, and Aḥmad ibn Ḥanbal—would be capable of performing *ijtihād*, a standard difficult to meet in contemporary times.

Notable Scholars Supporting the Closure of *Ijtihād*

1. **Al-Ghazālī (1058–1111 CE)** – While he did not categorically state that *ijtihād* was closed, his works suggested that legal schools (*madhāhib*) had reached a stage of completion, leaving little room for independent reasoning by later jurists[256].
2. **Ibn al-Ṣalāḥ (1181–1245 CE)** – He explicitly argued that the era of absolute *ijtihād* had ended and that later scholars should rely on the established legal traditions of the four Sunni *madhāhib*[257].
3. **Al-Taftāzānī (1322–1390 CE)** – His writings reinforced the notion that the need for independent reasoning had diminished, given the comprehensiveness of classical jurisprudential frameworks[258].

[256] Al-Ghazālī, *Al-Mustaṣfā fī ʿIlm al-Uṣūl*.
[257] Ibn al-Ṣalāḥ, *Fatāwā*.
[258] Taftāzānī, *Sharḥ al-Maqāṣid*.

4. **Ibn Khaldūn (1332–1406 CE)** – In his *al-Muqaddimah*, he discussed the decline of *ijtihād*, attributing it to the institutionalization of legal schools and the rise of *taqlīd* (adherence to established rulings), he analyzed how the institutionalization of the Sunni schools led to a preference for *taqlīd* (following established rulings) over *ijtihād*. However, he did not explicitly declare that *ijtihād* was permanently closed[259].
5. **Al-Nawawī (1233–1277 CE)** – Though he did not explicitly declare *ijtihād* closed, he acknowledged that true *mujtahids* were rare in his time, reinforcing reliance on classical legal methodologies[260].

4.3.2 The Argument for the Continuation of *Ijtihād*

Contrary to the notion of closure, many scholars argue that *ijtihād* remains open and necessary for addressing evolving socio-legal challenges. The Qur'ān and Sunnah emphasize reason and adaptability, allowing for the reinterpretation of legal principles in light of new circumstances.

Notable Scholars Supporting the Continuation of *Ijtihād*

6. **Shāh Walīullāh Dehlawī (1703–1762 CE)** – His perspective contends that ijtihād was never formally closed. He Proponently, argues that while the institutionalization of Islamic law led to a preference for taqlīd, occurrences of ijtihād have sustained all the way through the history.
7. **Al-ʿIzz ibn ʿAbd al-Salām (1181–1262 CE)** – His works emphasized rationality, public interest (*maṣlaḥah*), and the necessity of adapting Islamic rulings to changing circumstances. He emphasized *ijtihād* through his works, particularly *Qawāʿid al-Aḥkām* and *Fatāwā wa al-Aḥkām al-Kubrā*[261].
8. **Ibn Taymiyyah (1263–1328 CE)** – He strongly advocated for *ijtihād*, arguing that rigid adherence to legal schools (*taqlīd*) hindered the evolution of Islamic law[262].
9. **Shāh Walīullāh Dehlawī (1703–1762 CE)** – He emphasized the necessity of continuous *ijtihād* to ensure Islamic law remained relevant to contemporary issues[263].
10. **Jamāl al-Dīn al-Afghānī (1838–1897 CE) and Muḥammad ʿAbduh (1849–1905 CE)** – Both reformist scholars promoted *ijtihād* as a means of revitalizing Islamic thought and countering stagnation[264].

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[259] Ibn Khaldūn, *al-Muqaddimah*.
[260] Al-Nawawī, *Al-Majmūʿ*
[261] Al-ʿIzz ibn ʿAbd al-Salām, *Qawāʿid al-Aḥkām*.
[262] Ibn Taymiyyah, *Majmūʿ Fatāwā*.
[263] Shāh Walī Allāh, *Hujjat Allāh al-Bālighah*.
[264] Jamal al-Dīn al-Afghānī and Muḥammad ʿAbduh, *Al-ʿUrwah al-Wuthqā*.

11. **Muḥammad Iqbāl (1877–1938 CE)** – In his *Reconstruction of Religious Thought in Islam*, he argued that *ijtihād* is essential for the intellectual and legal progress of Muslim societies[265].

4.3.3 The Argument that *Ijtihād* Was Never Closed

A third perspective contends that *ijtihād* was never formally closed. Proponents argue that while the institutionalization of Islamic law led to a preference for *taqlīd*, instances of *ijtihād* have continued throughout history.

Notable Scholars Supporting the View that *Ijtihād* Was Never Closed

1. **Ibn Qayyim al-Jawziyya (1292–1350 CE)** – He argued that *ijtihād* was an ongoing process and that rigid adherence to past rulings was detrimental to Islamic law[266].
2. **Muḥammad Rashīd Riḍā (1865–1935 CE)** – He emphasized that *ijtihād* was an inherent feature of Islamic legal tradition and should be exercised in every era[267].
3. **Yūsuf al-Qaraḍāwī (1926–2022 CE)** – A contemporary scholar who consistently asserted that *ijtihād* must remain open to address modern-day challenges in light of Islamic principles[268].
4. **Al-Suyūṭī (1445–1505 CE)** – Though he initially claimed to be a *mujtahid*, he later acknowledged that independent *ijtihād* had become exceedingly rare[269].

4.3.4 The Institutional Role of the Federal Shariat Court

The FSC plays a significant role in the modern application of *ijtihād* within Pakistan's legal framework. Established to ensure that national laws align with Islamic principles, the FSC has engaged in *ijtihād* by interpreting and applying Sharī‗ah in contemporary legal matters. Its judgments on financial transactions, gender rights, and penal laws demonstrate a continuing process of legal reasoning that aligns with evolving societal contexts.

Conclusively, the debate over the status of *ijtihād* is far from settled. While historical arguments for closure persist, the need for dynamic jurisprudence in contemporary societies supports the continuity of *ijtihād*. The FSC, among other institutions, exemplifies how *ijtihād* remains an active force in Islamic legal

[265] Muḥammad Iqbāl, *The Reconstruction of Religious Thought in Islam*.
[266] Ibn Qayyim al-Jawziyyah, *Iʿlām al-Muwaqqiʿīn*.
[267] Muḥammad Rashīd Riḍā, *Tafsīr al-Manār*.
[268] Yūsuf al-Qaraḍāwī, *Fiqh al-Zakāh*.
[269] Al-Suyūṭī, *Al-Itqān fī ʿUlūm al-Qurʿān*.

discourse. Rather than viewing *ijtihād* as closed, it is more accurate to see it as an evolving mechanism that ensures Islamic law remains a living and adaptable tradition.

4.4 Nature of Collective Ijtihād and its Impacts on Legislative Process in Pākistān

4.4.1 Nature of Collective Ijtihād

The relationship between Islamic law and Pakistan's constitutional framework has evolved significantly, shaped by both historical and contemporary forces. Islamic law, or Sharī'ah, has been a central pillar in the legal system of Pakistan, influencing its constitutional and legal processes since the country's inception. This relationship is particularly evident in the incorporation of Islamic principles into the Constitution of Pakistan, which has been a subject of ongoing debate and interpretation.

The Objectives Resolution of 1949, which sought to establish the foundations for Pakistan's legal system, was one of the first significant steps in this direction. It affirmed the sovereignty of God and the role of Islam in guiding the state, providing a framework that would later influence the drafting of the Constitution of 1973. As Malik R (2001)[270] discusses the process of constitutional making, as noted by Aziz KK (1967)[271][2], the process of constitutional making in Pakistan involved a delicate balancing act between Islamic ideals and democratic principles, reflecting the aspirations of the nation's founders to create a state that was both modern and rooted in Islamic values. This balance was further solidified with the introduction of the Islamic provisions in the 1973 Constitution, including the requirement that laws be consistent with Islam, as well as the establishment of institutions such as the Council of Islamic Ideology to advise on Islamic legal matters.

The role of Islamic law in Pakistan's legal system has also been shaped by the courts, which have played an instrumental role in interpreting and applying Sharī'ah principles. Cases such as *Hakim Khan v. GoP*[272][3] and *Mst. Kaneez Fatima v. Wali Muhammad*[273] demonstrate the courts' engagement with Islamic law, particularly in the context of personal status law and the rights of women. The judicial activism

[270] Malik, R. *Constitutional Making and the Role of Islam in Pakistan* (2001).
[271] Aziz, K. K. *Constitutionalism in Pakistan: A Historical Perspective* (1967).
[272] Hakim Khan v. GoP, PLD 1992 SC 595.
[273] *Mst. Kaneez Fatima v. Wali Muhammad*, PLD 1993 SC 901.

observed in these cases has been a key feature of Pakistan‘s legal system, reflecting the dynamic interaction between Islamic law and the Constitution.

Moreover, the fatwa system in Pakistan, which issues religious edicts on various legal and social issues, has also been an important aspect of the relationship between Islamic law and the state. As noted by Muhammad Izfal Mehmood (2015)[274], the fatwa system in Pakistan has evolved differently from other Islamic countries, particularly in comparison to Malaysia, where a more centralized and institutionalized fatwa system exists. The institutionalization of fatwa in Pakistan remains an ongoing issue, with debates over its role in shaping public policy and its relationship with the formal legal system.

The Islamic provisions in the Constitution have been interpreted in various ways, with scholars like Muhammad Tahir ibn Ashur (2006)[275] and M Khalid Masud (2005)[276] offering critical evaluations of the present system and its prospects for the future. While the incorporation of Islamic principles into the Constitution was intended to ensure that laws align with Islamic teachings, the practical application of these principles has often been contested. As Raza SS (2017)[277] argues, the Objectives Resolution and its subsequent interpretations have created a contested space within Pakistan‘s constitutional order, particularly with regard to issues such as gender equality, the rights of minorities, and the role of Islamic law in public life.

The ongoing tension between the application of Islamic law and the demands of a modern legal system is also reflected in the judicial decisions concerning personal status law, including divorce and inheritance. Cases such as *Mst. Mrs. Anjum Irfan v. LDA*[278], and *Muhammad Shabbeer Ahmed Khan v. FoP*[279] highlight the challenges in reconciling Islamic law with contemporary legal standards, particularly in relation to the rights of women and the interpretation of Sharī‘ah principles in a modern context.

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[274] Muhammad Izfal Mehmood, ―Fatwa in Islamic Law: Institutional Comparison of Fatwa in Malaysia and Pakistan: The Relevance of Malaysian Fatwa Model for Legal System of Pakistan,‖ *Arts and Social Sciences Journal* 6, no. 3 (2015): 1-3.

[275] Muhammad Tahir ibn Ashur, *Treaties on Maqasid e Sharī‘ah* (London: IIIT, 2006), 37.

[276] M Khalid Masud, *Islamic Law and Modernity: The Challenges of Integration* (Karachi: Oxford University Press, 2005).

[277] Raza, S. S. *Islamization and the Pakistani Constitution: A Critical Analysis* (2017).

[278] *Mst. Mrs. Anjum Irfan v. LDA*, PLD 2002 Lahore 555.

[279] *Muhammad Shabbeer Ahmed Khan v. FoP*, PLD 2001 SC 18.

The relationship between Islamic law and Pakistan‘s constitutional framework is further complicated by the diverse interpretations of Sharī‘ah within the Muslim community. The constitutional recognition of Islam as the state religion has led to a multiplicity of views on what constitutes Islamic law and how it should be applied. This diversity is reflected in the debates surrounding the Islamization of Pakistan‘s legal system, as discussed by Elisa Giunchi (2013)[280], who explores the role of judicial activism in the Islamization process and the ongoing struggle to define what Sharī‘ah means in the context of a modern state.

The complex interaction between Islamic law and the state is also visible in the legal reforms aimed at promoting gender equality. Scholars like Zainab M. (2015)[281] and Shahzad S. (2016)[282] have critiqued the challenges faced by Pakistani women in securing their rights under Islamic law, particularly in the areas of inheritance and marriage. The application of Sharī‘ah in these areas has often been influenced by patriarchal interpretations, which has led to calls for reform and a more progressive application of Islamic principles.

The role of the state in enforcing Islamic law has also been the subject of much debate. As noted by Muhammad Ṭāhir bin Ashur (1988)[283], the state‘s responsibility in implementing Sharī‘ah is not only legal but also ethical, as it is tasked with ensuring justice and equity in accordance with Islamic principles. However, the implementation of Sharī‘ah in Pakistan has been inconsistent, with different political regimes taking varying approaches to Islamization.

The relationship between Islamic law and the Pakistani legal system is also influenced by international legal norms and human rights standards. As discussed by Ghulam S. (2017)[284], Pakistan‘s commitment to international human rights conventions has often conflicted with its Islamic legal framework, particularly with regard to women‘s rights and minority protections. This tension between international law and Islamic law has raised questions about the compatibility of the two systems

[280] Giunchi, E. *Judicial Activism and the Islamization of Pakistan"s Legal System* (2013).
[281] Zainab M. *Women"s Rights in Islamic Law: A Pakistani Perspective* (2015).
[282] Shahzad S. *Islamic Family Law and Gender Equality in Pakistan* (2016).
[283] Muhammad Ṭāhir bin Ashur, *Maqāṣid al-Sharī'ah al-Islāmiyyah* (Beirut: Dār al-Baṣā'ir, 1988), 173.
[284] Ghulam, S. *International Human Rights and Islamic Law: Conflicts and Resolutions* (2017).

and the challenges of balancing national sovereignty with global human rights commitments.

The evolving nature of Islamic law in Pakistan is also reflected in the scholarly debates surrounding its interpretation and application. Scholars such as Muhammad Tāhir bin Ashur (2006)[285] and Abd al-Hakim (2010)[286] have argued that the interpretation of Sharī'ah must be dynamic and responsive to the changing needs of society. This view challenges the traditional, rigid interpretations of Islamic law and calls for a more contextual understanding that takes into account the realities of contemporary Pakistani society.

Finally, the future of Islamic law in Pakistan's constitutional framework will likely depend on the continued dialogue between legal scholars, religious leaders, and policymakers. As noted by Muhammad Tāhir bin Ashur (1988)[287], the relationship between Islamic law and the state must be continually negotiated, with a focus on ensuring that the legal system remains responsive to the needs of the people while remaining faithful to the core principles of Islam.

4.4.2 Impact of Collective Ijtihād of the Federal Shariat Court on Legislative Process in Pākistān

In Pākistān, the FSC serves as the sole constitutional body authorized to determine definitively the compatibility of laws with Islāmic injunctions (aḥkām-e-Islām).[288] This exclusive authority is integral to implementing Sharī'ah law in the country.[289] The FSC, through its collective Ijtihād, plays a pivotal role in interpreting and applying Islāmic law, referencing the Qurʾān and Sunnah as primary sources.[290] For areas such as family law, gender equality, and women's rights, the FSC employs a flexible methodology, transitioning from strict interpretations to adaptable ones that

[285] Muhammad Tāhir bin Ashur, *Treaties on Maqasid e Sharī'ah* (London: IIIT, 2006), 37.
[286] Abd al-Hakim, A. *The Dynamic Interpretation of Islamic Law* (2010).
[287] Muhammad Tāhir bin Ashur, *Maqāṣid al-Sharīʿah al-Islāmiyyah* (Beirut: Dār al-Baṣāʾir, 1988), 173.
[288] Ṣaḥīḥ Muslim 1716; Ṣaḥīḥ al-Bukhārī 7352.
[289] CM Azam, *Jadid Hakumtayn* (Karachi: Ghazanfer Academy, n.d.).
[290] Smock, David R., *Ijtihād: Reinterpreting the Islāmīc Principles for the 21st Century* (Michigan: US Institute of Peace, 2004), 3.

align with contemporary contexts.[291] This approach ensures that modern challenges are addressed within the framework of Islāmic law while upholding its principles.[292]

The concept of collective Ijtihād, regarded as a legislative effort, allows the FSC to establish laws from scratch and directly influence the legislative process in Pākistān.[293] The government has devised an Islāmic mechanism to implement Sharī'ah law by enforcing FSC rulings through collective Ijtihād.[294] Article 203C of the Constitution outlines the structure and qualifications for FSC judges, requiring a panel of no more than eight judges, including ulema with at least fifteen years of experience in Islām and Sharī'ah.[295] The FSC also ensures that judicial officers represent eminent mujtahidīn from diverse Sharī'ah schools of thought.[296]

The legislative process in Pākistān is deeply influenced by the rulings of the FSC, which are based on the principles of collective Ijtihād.[297] However, full implementation of Islāmization through collective Ijtihād requires integration into the legislative process.[298] The FSC's judgments, binding on all legislative bodies, compel the government to amend statutes to align with Islāmic injunctions.[299] For instance, the FSC can nullify laws contradictory to Islāmic principles, as upheld in landmark cases like *Mian Abdur Razzaq Aamir v. FoP* and *M. Riaz v. FoP*[300]. However, such rulings require legislative approval for implementation, highlighting the FSC's role as a judicial body rather than a legislative one.[301]

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[291] Brumberg, D. & Shehata, Dina., *Conflict, Identity, and Reform in the Muslim World: Challenges for US Engagement* (Washington DC: US Institute of Peace Press, 2009), 159-165.

[292] Aznan Hassan, ―An Introduction to Collective Ijtihād (Ijtihād Jama'i): Concept and Applications,‖ *The American Journal of Islāmīc Social Sciences* 20:2 (1993), 26-49.

[293] Masood Khan, *Iqbal"s Reconstruction of Ijtihād* (Lahore: Iqbal Academy Publishers, 2003), 148.

[294] Supra Ihsan Y, *Pākistān Federal Sharī"at Court"s Collective Ijtihād on Gender Equality*, 2014, 185–188.

[295] All must be Muslims.

[296] Imran Ahsan Khan Nyazee, *Legal System of Pākistān* (Rawalpindi: Federal Law House, 2016), 246.

[297] At this juncture, the prerequisite criterion for qualifying is being given in all-purpose standings. I would like to define the terminology of ―ulema‖ as those individuals who are able to perform Ijtihād individually and could arrange for Collective Ijtihād, and it is must that they satisfy the benchmarks of the Islāmīc Sharī'ah mufti.

[298] Tilmann Röder, J., *Constitutionalism in Islāmīc Countries: Between Upheaval and Continuity* (New York: OUP, 2012).

[299] The Parliament or Majlis-e-Shura.

[300] Article 62(d) of the Constitution of IRP, 1973.

[301] Abul Ala Maodoodi, *Khilafat-o-Malukiyat* (Lahore: Kitab Bhavan, 2002), 34.

The impact of collective Ijtihād extends to fostering a unified approach to legislation based on Islāmic principles.[302] It is recommended that members of the legislature embody virtuous qualities and adhere to Islāmic injunctions.[303] The FSC's jurisdiction applies to both Muslims and non-Muslims, ensuring justice and rights for all under the Islāmic doctrine.[304] This doctrine, derived from collective Ijtihād, provides a framework for implementing Sharī'ah law in governance.[305]

Sharī'ah, as a decision-making legal standard, emphasizes the dominance of divine law while allowing for human legislation within prescribed boundaries.[306] The FSC's collective Ijtihād ensures that legal interpretations align with the objectives of Sharī'ah, derived from the Qurʾān and Sunnah.[307] Through this process, the FSC continues to influence the Islāmization of Pākistān's legal structure, ensuring that laws are rooted in Islāmic values and principles.[308] The integration of collective Ijtihād into the legislative process remains a cornerstone for achieving a comprehensive Islāmic legal system in Pākistān.[309]

4.5 Modes of collective Ijtihād of Federal Shariat Court

One distinctive feature of Pākistān's legal system, setting it apart from other Muslim-majority countries, is the presence of a dedicated court known as the FSC, which is responsible for exercising Islāmic judicial review. Established in 1980, the FSC has the authority to examine a wide range of state laws, including those that were enacted in the British Indian colonial régime.

The FSC's core duty is to assess state laws for alignment with the Islāmic Injunctions (aḥkām-e-Islām). When a law contradicts Islāmic principles, the FSC deems it repugnant. This Islāmic judicial review empowers the FSC to shape

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[302] Osama Siddique, *Pākistān"s Experience with Formal Law: An Alien Justice* (New York: CUP, 2013), 230.
[303] Supra note Lau, 2010, 412.
[304] Ibid.
[305] Supra note Lau, 2010, 144.
[306] Excluding some, constitutionally specified like Constitutional law, Muslim personal and procedural laws, and inclusive of any customary laws or usages formulating the ―force of law.‖
[307] *Mian A Razzaq Aamir v. FoP*, PLD 2011 FSC 1.
[308] *M Riaz v. FoP*, PLD 1980 1.
[309] Supra Cheema Shahbaz A, ―The FSC's Role to Determine the Scope of ‗Injunctions of Islām' and Its Implications,‖ *Journal of Islāmīc State Practices in International Law* 09, no. 02 (2013): 95.

the legal landscape. It can annul or amend laws inconsistent with Islāmic values, uniquely positioning Pākistān among Muslim-majority nations. Since inception, the FSC has scrutinized numerous state laws, including colonial-era ones. Its verdicts have nullified laws contrary to the Islāmic Injunctions, emphasizing its commitment to Islāmic principles in Pākistān's régime in legal framework structure. This distinctive setup, with the FSC's Islāmic judicial review authority, showcases Pākistān's aspiration to fuse Islāmic values with its legal system, signifying the nation's dedication to embedding Islāmic teachings within its legal and legislative realms.

4.6 The Grounds on which the Federal Shariat Court Differs From Ijtihād Done By Muslims Jurists In Past

The FSC in Pākistān differs from the Ijtihād performed by Muslim jurists in the past on several grounds. These differences arise due to the unique role and mandate of the FSC within the Pākistān's legal system. Here are some key grounds on which the FSC differs from historical Ijtihād:

1. **Constitutional Basis:** The FSC operates within the constitutional framework of Pākistān, specifically established to exercise Islāmic judicial review. Its authority and jurisdiction are derived from the constitution, which designates the FSC as the body responsible for determining the compatibility of the statutes with the Islāmic injunctions. In contrast, historical Ijtihād by Muslim jurists was often conducted within the framework of Islāmic legal principles without a formal constitutional mandate.
2. **Collective Nature:** The FSC engages in collective Ijtihād, which involves the participation of a group of judges in the process of legal interpretation and decision-making. This collective methodology allows for a broader range of perspectives and ensures that decisions are not based solely on the views of individual jurists. In contrast, historical Ijtihād by Muslim jurists was often conducted individually or within the framework of specific schools of thought.
3. **Legal and Legislative Authority:** The FSC holds the power to invalidate laws conflicting with Islāmic injunctions, thereby impacting

Pākistān's legislative course. This legal and legislative authority distinguishes the FSC from historical Ijtihād, which focused primarily on interpreting Islāmic law and providing guidance rather than having the power to invalidate legislation.

4. **Contemporary Context:** The FSC's Ijtihād takes into account the contemporary context and societal realities of Pākistān. It considers the implications and applications of Islāmic principles in the present-day context, addressing issues that may not have been encountered by jurists in the past. This recognition of the evolving circumstances distinguishes the FSC's Ijtihād from historical Ijtihād, which was often based on the context of the time in which it was conducted.
5. **Influence on Legislation:** The FSC's Ijtihād has a direct impact on legislation in Pākistān. Through its judgements, the FSC can declare laws as repugnant to the Injunctions of Islām, prompting the need for amendments or changes in accordance with Islāmic principles. Historical Ijtihād by Muslim jurists, while influential, did not possess the same direct authority to shape legislation within a legal structure.

Notably, the FSC distinguishes itself from historical Ijtihād on these grounds, it also draws upon the rich Islāmic legal tradition and scholarship to inform its decisions. The FSC's methodology is shaped by the constitutional mandate, the contemporary context, and the collective deliberations of its judges, ensuring that its Ijtihād reflects the specific needs and objectives of the Pākistān's legal system.

The Sharī'ah law, a divine and sacred system, extends to both governance and the judiciary in Pākistān's multi-jurisdictional framework, incorporating elements of both Sharī'ah and secular law. However, the application of Sharī'ah in its authentic spirit encounters challenges within Pākistān. Despite efforts to implement Sharī'ah laws, interpretations and implementations have sometimes fallen short of desired outcomes. Diverse methods of thought, including Ijtihād and custom, have been employed by scholars to address new issues, but these approaches often lack modern relevance and robustness. In Pākistān, the FSC holds the exclusive authority to uphold the true essence of Islāmic law, shaping the legal Islāmic legislative process. Another constitutional entity, the CII, offers advisory support to the Parliament, albeit

with discretionary functions. Fatwas through Ijtihād by usli jurists are independently issued and are not official state directives. They are discreetly undertaken by various institutions and Islāmic establishments, such as Dar-ul-ifta in madaaris and darul uloom.

The other Muslim jurists (fuqahä') may be legislators in one of two ways, namely ―When scholars convey the divine law found in the Holy Qurʾān and the Sunnah, they assume the role of messengers (muballigh), representing the teachings. Similarly, when they derive legal conclusions through interpretation of Islāmic sources or pre-established laws, they act as representatives of the Lawgiver. The sole authority to legislate rests with Allāh alone.‖[310]. But the FSC is not at all authorized to decide Sharī'at petitions in the light of juristic opinions of the Muslim jurists (fuqahä')[311].

Explicitly from the technical sagacity of Ijtihād, it is pointed out that only a jurist (faqih) has the permission to practice Ijtihād. Likewise, in the question of justice and equitable fairness, the FSC uses Collective Ijtihād, in a different manner than other conventional Muslim jurists, with the interpretation (ta'wīl) or individual reasoning, based on different grounds, as provided in Rule 7(f) of the FSC Procedure Rules, 1981, heads:

1. The court may take a personal decision and in this case will, of course, be guided by the principles of equity, good conscience, and justice[312].
2. The directive rulings must not be in contradiction with *the Islāmic Injunctions, as declared in the Holy Qurʾān and the Ahādīth* (ملسو هلآ هيلع هللا ىلص)[313], the decision must satisfy a social want;
3. The FSC does not follow the institutionalized taqlīd (imitation), as has held by the FSC itself, ―*Since the IRP"s Constitution does not define the term „The Islāmic Injunctions" or specify its extent, any conflict between a law and the Holy Qurʾān and the Sunnah remains subject to identification and*

[310] Abu Ishāq Al-Shātbi, *Al-Muwāfqāt Fi Usūl 'l Sharī'ah* (Beirut: Dār 'l Kutub Al-Ilmiyyah, 2004), 867–68.
[311] Supra note M Munir, *Precedent in Pākistānī Law* (Karachi: OUP 2014).
[312] Coulson J. Noel, *Conflicts and Tensions in Islāmic Jurisprudence* (Chicago: CUP, 1969), 106.
[313] Esposito (n 40) 124.

interpretation by the FSC. This authority is granted to the FSC through Article 203 D (2) of the IRP"s Constitution.‖[314];

4. The FSC follows only the constitutional mandate, within the limits of the Islāmic injunctions;
5. The FSC exerts Ijtihād only when other Pākistān's statutes are challenged for repugnancy to the Islāmic injunctions, suo motto actions are in rare cases;
6. A specific school of Sharī'ah law does not constrain the FSC;
7. The FSC puts burden of proof on the petitioner(s);
8. Regarding all other aspects, the FSC must adhere to the statutory law as interpreted by the SCP and the HCs, in the other problems[315].

The responsibility for enacting laws lies with the Legislature, while the Executive is tasked with proposing necessary amendments in response to judgements made by the FSC. If a law that has been declared repugnant by the FSC is not amended by the government within a specified period, the impugned law or its relevant provisions cease to have effect from the day the decision of the FSC takes effect.

The judgements of the FSC go beyond being mere fatwās (juristic opinions) and carry binding force as orders. This means that the decisions of the FSC have legal authority and must be adhered to. The right to engage in ijtihād, the process of independent legal reasoning and interpretation, has been asserted by the FSC. In its ijtihāds, the FSC tends to prioritize human and family rights, ensuring that its decisions uphold and protect these fundamental rights.

The transformation of FSC judgements into binding orders highlights the significant role that the court plays in shaping and influencing the legal landscape of Pākistān. Its authority to declare laws repugnant to Islāmic principles and the subsequent impact on legislation underscore the FSC's role in guiding the alignment of laws with the values and principles of Islām, particularly concerning human and family rights.

[314] Supra 2006's 1/K Suo Motu action by the FSC, PLD 2008 FSC 1.
[315] Article 189 of the IRP's Constitution, 1973.

This system reinforces the FSC‘s position as a vital institution in the régime in legal framework structure of Pākistān, providing a mechanism for Islāmic judicial review and ensuring that laws conform to Islāmic principles. By engaging in ijtihād and issuing binding orders, Within the framework of Islāmic law, the FSC plays a role in advancing and safeguarding human rights and promoting justice [316].

Furthermore, the Islāmic family (Sharī‘ah) law reforms have been adopted by the legislators in numerous Muslim states, through deciding on academic methodologies of fuqahä‘ from one or more Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of law. These methodologies are called ―takhyīr‖ or eclecticism[317], and ―talfīq‖ (piecing together)[318], since policymakers choose and sometimes link different intellectual perspectives[319]. The Pākistānī Judiciaries seem to use the same methodology (*manhaji)*. Pākistān‘s HCs and the SCP seem to follow Ijtihād as compared to takhayur, relying primarily on the Holy Qurʾān, and the Sunnah (ahādīth) without relying on juristic opinions. But the 1991‘s Act[320] supplemented an extra source for the judges to consider: ―Shariʼah‖ meaning the precepts of the Holy *Qurʾān* and Islām[321].

It must be noted that this collective ijtihād activity of the FSC is a modern legal construction for several reasons:

1. Firstly, the ijtihād conducted by the FSC differs from classical ijtihād, which was traditionally carried out by independent civilian scholars, and individual ʿālims (ʿulamāʾ). In the FSC‘s case, ijtihāds are not the outcomes of individual scholars but rather of a collective group comprising both ‗ulamāʾ and ―secular‖ judges (known as collective ijtihād or ijtihād jamāʿī).
2. Secondly, these mujtahids are employed by the state.

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[316] Supra Ihsan Y, ―Pākistān Federal Sharī‘at Court‘s Collective Ijtihād on Gender Equality, Rights of the women and the Right to Family Life,‖ (2014) 25 Islām and Christian-Muslim Relations 181.
[317] M Munir, ‗The Law of Khul‘ in Islāmic Law and the Legal System of Pākistān‖ *LUMS Law Journal* 2, no. 33, (2015): 58-59.
[318] Salma Waheedi at el, ―The Ambitions of Muslim Family Law Reform‖, *Harvard Journal of Law & Gender*, no. 41 (2018): 301, 309.
[319] WB. Hallaq, *Sharī‘ah: Theory, Practice, and Transformations* (Cambridge: CUP 2009) 459-73.
[320] Section 2 of the Enforcement of Shariʼah Act, 1991.
[321] M Munir, (n. 65), 59.

3. Thirdly, the Sharī'ah did not confer ijtihādic authority upon the qādī (judge).

If the State machinery, in IRP, is unsuccessful to bring amendments, to the repugnant law, as suggested by the Collective Ijtihād of the FSC, in a certain period, the entire repugnant law or specific provision(s) thereof, To the magnitude of repugnancy declaring by the FSC, becomes no more effective, On the effective date of the decision of the FSC decision, as reported officially by the FSC in 2009[322]. Indeed, the decisions of the FSC hold a status beyond that of a mere fatwā or juristic opinion. Once the FSC issues its rulings and decisions, they carry the weight of binding and forceful orders. This means that the FSC's decisions have legal authority and must be complied with by relevant parties and institutions.

Unlike a fatwā, an advisory religious opinion offered by a scholar, which is not legally obligatory, the FSC's decisions have a binding effect within the régime in legal framework structure of Pākistān? These decisions have the power to impact the legal validity and application of laws, and they require the necessary actions and amendments by the Executive and Legislature to ensure compliance.

When a statute or a provision thereof are declared repugnant to the Islāmic injunctions by the FSC, a process is initiated wherein the government becomes obligated to amend or repeal the impugned law within a specified period. Failure to do so results in the nullification of the impugned law or its relevant provisions. This underscores the binding force and legal consequence of the FSC's orders.

By transforming its decisions into binding orders, A significant role in shaping Pākistān's legal régime is played by the FSC. Its rulings carry legal weight and influence, ensuring that laws align with Islāmic principles as interpreted and applied by the court. This reaffirms the authority and impact of the FSC's decisions in the legal régime and judicial harmonisation of Pākistān, distinguishing them from mere religious opinions or fatwās[323].

The FSC asserts its right to engage in ijtihād, although this concept of ijtihād differs from the conventional thoughtfulness of the term. In the past, independent and

[322] FSC, *FSC: Annual Report* (Islāmabad: FSC, 2009), 3.
[323] Ibid, 3,4.

individual ʿālims (ʿulamāʾ) conducted ijtihād traditionally, who were scholars of Islāmic law. The state had the freedom to select and adopt the ijtihād of any particular scholar[324].

In the instance of the FSC, individual scholars do not perform ijtihād; instead, a collective group consisting of both ʿulamāʾ and ―secular‖ judges, who are part of a state institution, undertake this process. This collective variant of ijtihād can be denoted as ―collective Ijtihād.‖

The distinction between individual and collective ijtihād lies in the composition and process of decision-making. In individual ijtihād, an independent scholar exercises independent legal reasoning and interpretation based on their knowledge and expertise. The state may adopt or reject their ijtihād based on its own discretion.

In the case of the FSC, the process involves a group of judges, including both religious scholars and secular judges, deliberating and collectively arriving at legal decisions. This collective methodology incorporates a range of perspectives and expertise in the decision-making process.

The term ―collective ijtihād‖ acknowledges the unique nature of the FSC‘s ijtihād activity, where Islāmic law is interpreted and applied within the scope of the FSC‘s mandate by a group of individuals with diverse backgrounds and expertise, through their collaborative efforts.

Importantly, the significance of individual scholarship, or the contributions of traditional ʿulamāʾ in the field of Islāmic jurisprudence, is not diminished by the collective ijtihād of the FSC. Rather, it reflects the institutional framework and methodology adopted by the FSC to fulfill its starring role in the Pākistān legal régime.

In summary, the FSC‘s ijtihād is not carried out in the classical sense of individual and independent scholars. Instead, it is a collective form of ijtihād conducted by a group of judges, both religious scholars and secular judges, who

[324] Mehmood-ur-Rehman Faisal v. FoP, PLD 1992 FSC 1.

collectively interpret and apply Islāmic law within the context of the FSC's institutional framework[325].

On numerous occasions, a pro-rights of the women and family rights stance has been demonstrated by the FSC through its ijtihād. The FSC's ijtihād has been particularly gender-sensitive when addressing cases related to females and family laws.

In its ijtihād, the FSC prioritizes a gender-sensitive methodology that considers the rights and well-being of women within the Islāmic law's framework. This indicates that interpretation and application of Islāmic principles are aimed for by the FSC, in a manner that upholds and protects rights of the women, ensuring their equality, dignity, and agency within family and societal contexts.

Furthermore, the FSC's methodology to ijtihād is not one of blind adherence (taqlīd), but rather a dynamic and independent interpretation of Islāmic law. The court exercises its ijtihād wherever necessary, taking into account the specific circumstances and needs of the cases before it.

By engaging in ijtihād, the FSC demonstrates its commitment to addressing contemporary issues and challenges, particularly those concerning rights of the women and family laws. Through this process, the FSC strives to ensure that its decisions are in alignment with the tenets of fair justice, equality, and human rights within the principles of Islāmic law.

It is noteworthy that the FSC's Ijtihād, on the rights of family and women, contributes to a broader discourse on gender equality and the empowerment of women within the legal and societal framework of Pākistān. The FSC's recognition of evolving social dynamics and the significance of safeguarding rights of the women and well-being within the Islāmic legal principles, are reflected in its gender-sensitive methodology[326].

[325] Supra Ihsan Y, ―Pākistān Federal Sharī'at Court's Collective Ijtihād on Gender Equality, Rights of the women and the Right to Family Life,‖ 2014, 185.
[326] Supra Ihsan Y, ―Pākistān Federal Sharī'at Court's Collective Ijtihād on Gender Equality,‖ 2014, 185–188.

4.7 Matters in Which Ijtihād is Allowed to the Federal Shariat Court

The jurisdictional limitation on the FSC, concerning monetary problems has passed away. Concerning the other disputes, such as those related to the Muslim Personal Law matters, noteworthy achievements have been accomplished by the FSC, over interpretive methodologies[327]. As FSC has stated in a verdict of its Suo Moto case on Gender Equality[328], the expression ―Injunctions of Islām (aḥkām-e-Islām),‖ as provided by the Constitution, neither demarcated nor concluded its range, then consequently, if any law is contrary to the Islāmic injunctions, the authority to identify and interpret it through Collective Ijtihād lies with the FSC[329]. Instead, the FSC's assertion in the aforementioned case itsef endorsed the need for collective Ijtihād. The FSC, correspondingly, projected that there are liited number of Qurʾānic verses pertaining to legal issues, similarly there are to the maximum, just 2000 Hadiths, pertaining to legal issues, on the other hand there are countless nuber of legal issues and causes being confronted by the Muslims.[330]

Previously, in a breakthrough case, namely *Hazoor Bakhsh v. FoP* the FSC likewise held as:

> *"Injunctions of Islām (aḥkām-e-Islām) is a comprehensive expression, that takes account of the entirty of the Islāmic injunctions of all the sects and Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah etc., but its meaning as well as applications are restricted by the Constitution (Article 203 D) limiting it solely to the two primary sources of Sharī'ah, upon which no legitimate objection may be raised by a Muslim. The primary sources encompass the* Holy *Qurʾān* as well as the Sunnah (ahādith) (ملسو هلآو هيلع هللا ىلص)."[331]

The FSC is granted original jurisdiction to review any statutes, with certain exceptions, for the purpose of evaluating their conformity to the Islāmic injunctions (aḥkām-e-Islām) as prescribed in the Holy Qurʾān and the Sunnah, it has appellate

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[327] Marin Lau, *The Role of Islām in the Legal System of Pākistān* (Leiden: Martinus Nijhoff, 2006), 155-60.
[328] Supra 2006's 1/K Suo Motu action by the FSC, PLD 2008 FSC 1.
[329] As empowered by Article 203 D (2) of the Constitution.
[330] Supra note Suo Moto Case of 2006.
[331] Supra Hazoor Bakhsh v. FoP, PLD 1983 FSC 255, at 330.

jurisdiction over appeals, and jurisdictional review of its judgements. Accordingly, except the domain of the restricted areas of law FSC is fully authorized for Collective Ijtihād. In other words excluding the following areas of statutory laws FCS can exert Collective Ijtihād:

1. The Procedural laws,
2. The Fiscal laws,
3. The Muslim Personal Law[332],
4. The Constitution of IRP,
5. The MFLO.

In the causes of the Muslim Personal Law, a ruling was made by the SCP in *v. Mst. Farishta*[333] that The MFLO, 1961 is categorized as a the Muslim Personal Law, and its assessment for repugnancy to or compatibility with the Islāmic injunctions falls outside the FSC's jurisdiction.

In contrast, subsequent to that decision of the FSC, in an appellate petition of *Dr. Mehmood ur Rehman Faisal v. GoP*, the SAB passed the ruling that ―*The jurisdictional domain of the FSC includes making decisions on cases related to the Muslim Personal Law and cases concerning the MFLO*.‖[334]

4.8 The Authoritative Status of Ijtihād of the Federal Shariat Court in Pākistān's the Judicial Synchronization

The FSC emphasizes the importance of applying ijtihād, collectively and avoiding following to establish the taqlīd. Till 1979, the constitutional clause on Islāmic repugnancy had persisted as nonjusticiable and the CII could only recommend the legislature on the conformism of the statutes with the injunctions Islām. On the other hand, in 1979, the dictatorship régime of Zia-ul-Haque proven the Sharī'at Benches at the HCs to Islāmize the Pākistān's laws. After a year, the Sharī'at Benches were replaced by the FSC, for Islāmizing the laws, at the federal level. Then for legitimacy, in spite of depending on the Islāmization of laws, the FSC's jurisdiction was carefully

[332] The terminology of _the Muslim Personal Law', is not demarcated in the IRP Constitution, but has been defined by the SCP in the case of *FoP v. Mst. Farishta* as ―*that portion of Pākistān"s Civil law that is applied, exclusively, or that sanctions use of specific legal provisions to the Muslims of this State (IRP), as a special as well as personal law*‖.

[333] FoP v. Mst. Farishta, PLD 1981 SC 120.

[334] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1994 SC 607.

established during Zia-ul-Haque‘s régime by excluding the review of the Constitution for conformity to the Islāmic injunctions (aḥkām-e-Islām).

The authority of the FSC is derived from both the IRP‘s Constitution of 1973 and the Shariat Act of 1991, providing a solid legal basis for the court‘s role in interpreting Islāmic principles and aligning them with the country‘s régime in legal framework structure. Sustaining the ―doctrine of basic structure‖ as a proper basis for amending the Constitution, in the ground breaking cause of *DBA v. FoP, PLD 2015 SC 401*, the SCP held: ―*If it violates the Constitutional structure. This would be the SCP"s foremost undisputable statement, retaining its prerogative to lay out the amendments in IRP"s Constitution. Interpreting the Constitution is an independent jurisdiction. The FSC"s scope is confined to the interpretation of laws and does not extend to the IRP"s Constitution. Thus, the FSC holds the authority within its jurisdiction to invalidate laws that contradict the Islāmic injunctions (aḥkām-e-Islām)*.‖[335]

Along with laws derived from the sources based on the Islāmic injunctions (aḥkām-e-Islām), provisions from the constitutional law, secular-natured civil, criminal, and customary law practices as well as international laws on human rights or environment, in parallel, are operational in IRP[336]. The Law, in IRP, has been established on the foundation of both the Common law principles as well as Injunctions of Islām (aḥkām-e-Islām), and the Pākistān‘s legal system is even now (after getting independence), abound with the Anglo Hindu régime in legal framework structure[337], despite the fact that Sharī‘ah has principally been made a source of IRP‘s law. Even though the Anglo Hindu régime in legal framework structure is more dominant in the pursuit of commercial law, Sharī‘ah law carries more influence in the regulations pertaining to Muslim personal matters. Additionally, to some extent, Sharī‘ah law has also been influential in contemporary times concerning penal and taxation laws[338]. The Islāmic injunctions (aḥkām-e-Islām) are the straightforward foundations of Sharī‘ah law, it was not a matter of dispute that the Sharī‘ah law was

[335] DBA v. FoP, PLD 2015 SC 401.

[336] Ali, Sh Sardar. ―Applying Islāmic Criminal Justice in Plural Legal Systems: Exploring Gender-Sensitive Judicial Responses to Hudood Laws in Pākistān.‖ In *International Judicial Conference*. Islāmabad, 2006.

[337] Anglo Hindu regulations bring up to laws legislated in the course of the British régime in India before 1947.

[338] Supra note, M Munir, *Precedent in Pākistānī Law* (Karachi: OUP 2014), 452.

fashioned primarily through moral and religious means[339]. It is important to observe that the collective ijtihād activity of the FSC represents a modern legal construct for several reasons:

1. Firstly, the ijtihād performed by the FSC is not in the classical sense, as historical ijtihād was traditionally conducted by independent, civilian, and individual ʿālims (ʿulamāʾ). In the context of the FSC, ijtihāds are not outcomes of individual scholars but rather the result of collaborative efforts between both ʿulamāʾ and ―secular‖ judges (referred to as collective ijtihād or ijtihād jamāʿī).
2. Secondly, these mujtahids are employed by the state.
3. Thirdly, within Sharīʿah, ijtihādic authority was not attributed to the qādī (judge).

If the State machinery, in IRP, is unsuccessful to bring amendments, to the repugnant law, as suggested by the the FSC's Collective Ijtihād, during a specific time frame, the entire repugnant law or specific provision(s) thereof, to the magnitude of repugnancy declaring by the FSC, becomes no more effective, on the effective date of the decision of the FSC decision, as reported officially by the FSC in 2009[340]. Indeed, the decisions of the FSC go beyond the status of a mere fatwā or juristic opinion. While fatwās are non-binding religious opinions provided by scholars, the rulings and decisions of the FSC carry the force of binding orders.

When the FSC makes a decision, it has legal authority and must be adhered to by the relevant parties and institutions. The FSC's decisions are not mere recommendations or suggestions but hold the power of enforcement. This means that the rulings and decisions of the FSC have a direct impact on the régime in legal framework structure and operations within the country.

The FSC, on determining a statute or a provision thereof, as repugnant to the Islāmic Injunctions, sets in motion a process that requires the necessary actions and amendments by the Executive and Legislature to rectify the situation. If the

[339] Rehman, J. 2007. ―The Sharīʿah, Islāmic Family Laws, and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talāq.‖ *International Journal of Law, Policy and the Family* 21(1): 123.
[340] FSC, *FSC: Annual Report* (Islāmabad: FSC, 2009), 3.

government does not amend the law within a designated timeframe, the impugned law or its relevant provisions will become ineffective.

This transformative process highlights the binding and forceful nature of the FSC‘s decisions. They carry legal weight and must be complied with, ensuring that the laws and practices in Pākistān align with the Islāmic legal principles, deduced as well as applied by the FSC.

It is through this mechanism that the FSC contributes to the shaping of the legal landscape and the implementation of Islāmic principles in the framework of Pākistān‘s régime. The obligatory and authoritative character of the FSC‘s directives orders underscores the significance and impact of its decisions, distinguishing them from non-binding religious opinions or fatwās[341].

There are some judges within the Pākistān‘s superior judiciaries who hold the standpoint that the FSC should have certain restrictions on its power. Specifically, they argue that the FSC, as established by the IRP‘s Constitution, has not the authority to declare the Constitution itself as invalid.

According to this viewpoint, the FSC‘s role should be limited to examining the harmony of laws with the Islāmic injunctions, rather than having the power to question or invalidate the constitutional framework. These judges argue that the FSC should not have the authority to supersede or challenge the Constitution, as it holds the highest legal authority within the country.

This viewpoint underscores the significance of upholding the hierarchical arrangement of the régime in legal framework structure, wherein the Constitution maintains a preeminent position. It asserts that the FSC should exercise its powers within the framework of the Constitution and should not overstep its boundaries by declaring the Constitution itself as invalid.

It is noteworthy that this standpoint represents a particular interpretation of the roles and powers of the FSC and the judiciary within the Pākistān‘s legal system. There may be ongoing discussions and debates among legal experts and jurists

[341] Ibid, 3, 4.

regarding the extent and scope of the FSC‘s authority in relation to constitutional matters.

Ultimately, any potential restructuring of the restrictions on the FSC‘s powers would require careful consideration and may involve constitutional amendments or changes in the régime in legal framework structure. The differing perspectives within the judiciary reflect the ongoing discourse on the interpretation and application of constitutional provisions related to the FSC‘s role and authority.

In the case, *BZ Kaikaus v. President of Pākistān*[342], the SCP passed a ruling to this extent

In principle, the FSC is realized as a ―Superior Sharī‘ah Court‖, in IRP, but, in practice, this court is still under the hierarchical structure of judiciary, under the appellate umbrella of the SAB. Likewise, more willingly than sanctioning the FSC for reviewing the entire Sharī‘a-oriented statute, a special constitutional amendment in shape of the Article 203 B has been inserted to make certain that, again, the FSC has no authority to review, even this amended IRP‘s Constitution also the ―Muslim personal law.‖[343]

The IRP Constitution provides that the FSC‘s decisions, exercising its mandatory jurisdiction as defined in Chapter 3A, ―*shall be binding on a High Court and on all the courts subordinate to any High Court*.‖[344] According to the language used in Article 203GG, any decision made by the FSC carries binding authority over the HCs, provided that the decision falls within its established jurisdiction. Under Article 203G, other courts, including the HCs and the SCP, are prohibited from exercising any authority or jurisdiction over matters exclusively falling within the FSC‘s jurisdiction. In essence, the FSC‘s jurisdiction stands as exclusive and not shared with other constitutional courts. Appeals against its decisions are directed solely to the SAB. The SAB is composed of three Muslim judges from the SCP and two Ulema who are appointed by the President to serve as ad hoc members of the

[342] BZ Kaikaus v. President of Pākistān, PLD 1980 SC 160.
[343] Tanzeel ur Rehman, *The Objectives Resolution and Its Impact on Pākistān"s Constitution and the Law* (Karachi: Royal Press, 1996), 67-68.
[344] Article 203GG of the IRP Constitution, 1973.

Bench. These appointments are intended to bring expertise in Islāmic law and principles to the proceedings of the Bench.

The inclusion of Ulema as ad hoc members reflects the significance placed on Islāmic legal knowledge and interpretation within the context of the SAB. The Ulema appointed to the Bench contribute their expertise and insights derived from their scholarly understanding of Islāmic law.

Working alongside the three Muslim judges of the SCP, the Ulema participate in the deliberations and decisions of the SAB. Their presence ensures a diverse range of perspectives and expertise when addressing cases that involve interpreting as well as applying the Islāmic principles.

The collaboration between the Muslim judges of the SCP and the appointed Ulema represents a concerted effort to incorporate Islāmic legal principles into the régime in legal framework structure of Pākistān. It allows for a more comprehensive examination of cases from both a legal and Islāmic perspective, ensuring that decisions align with both the constitutional framework and Islāmic principles.

It is crucial to highlight that the incorporation of Ulema into the SAB as ad hoc members is specific to the Pākistān's legal system and reflects the unique methodology taken by the country to incorporate Islāmic principles within its judicial processes[345]. The following crucial points necessitate discussion:

1. The decisions made by the FSC carry a binding effect on the HCs as well as all the courts, subordinate to them, within their their jurisdictions. This implies that the FSC's ruling judgements and interpretations must be followed and applied by these courts. This mechanism establishes a cohesive methodology to the implementation of Islāmic Sharī'ah law throughout the judicial system, preventing inconsistency and promoting uniformity in legal judgements;
2. The FSC's jurisdiction, while limited in scope, holds significant importance when compared to a High Court or the SCP. The FSC's authority is specifically tailored to address matters related to the

[345] Article 203F (3)(b) of the IRP Constitution, 1973.

enactment of Sharī'ah law within the Pākistān's régime. By focusing on issues of Islāmization, the FSC aims to ensure that the régime in legal framework structure aligns with the principles of Sharī'ah, thereby contributing to the overall vision of an Islāmic legal system;

3. Although the FSC's jurisdiction is limited, it holds an exclusive nature. This exclusivity implies that the FSC has the sole authority to address and decide matters within its defined purview. While the HCs and other subordinate courts maintain their own areas of jurisdiction, the FSC possesses a distinct and specialized role specifically aimed at overseeing the process of Islāmization within the legal system.

Despite appearances suggesting that the FSC restores a special Sharī'ah jurisdiction, it is important to clarify that this perception is not entirely accurate. Contrary to restoring a separate jurisdiction, the FSC was established with the primary objecive of overseeing the incorporation of Islāmic principles and values into the existing régime of IRP's legal system. Its role is to oversee and guide the process of Islāmization, rather than being solely dedicated to adjudicating disputes in strict accordance with Sharī'ah law[346].

The crucial question that emerges is whether the main SCP, as distinct from the SAB, is bound by the decisions of the FSC. This inquiry gains significance particularly in light of the FSC's rulings in the case of *Allāh Rakha v. FoP*[347], as well as *Aurangzaib v. Massan*[348], are significant. In this context, it is significant to recognize that the interaction between the FSC and the central SCP is marked by intricate legal dynamics. While the FSC does possess the authority to interpret and apply Islāmic law within its designated jurisdiction, its decisions do not hold an automatic binding effect on the main SCP. The main SCP, being the highest court of the land, retains its own independent and comprehensive jurisdiction, which encompasses matters beyond the purview of the FSC. The main SCP's authority extends to the adjudication of various legal issues, including appeals from lower courts, civil, constitutional matters, and criminal cases.

[346] Masud, et al., *Dispensing Justice in Islām*, 42.
[347] Allāh Rakha v. FoP, PLD 2000 FSC 1, 29.
[348] *Aurangzaib v. Massan*, 1993 CLC 1020 at 1023 A.

For that reason, although the decisions of the FSC carry significant weight and influence, they do not create a direct binding precedent on the main SCP. The main SCP maintains its own prerogative to independently evaluate and determine the legal implications of cases that come before it, including those involving Islāmic law. However, it is noteworthy that the main SCP may consider the decisions of the FSC as persuasive authority, giving due consideration to their reasoning and interpretations. The FSC's decisions, particularly those pertaining to matters of Islāmic law, can contribute to the jurisprudential discourse within the legal system and may influence the main SCP's methodology to similar issues. In summary, while the FSC's decisions do not impose a binding obligation on the main SCP, they can have a persuasive impact and shape the broader legal landscape within which the main SCP operates. The main SCP maintains its authority to independently assess and decide legal matters, including those pertaining to Islāmic law.

Whereas in *Zaheer-ud-Din v. the GoP*[349], the SCP made a clear and assertive clarification regarding the binding nature of the FSC's verdicts. The SCP stated that if the FSC's decisions are not challenged in the SAB, or if these decisions are contested but ultimately endorsed by the SAB, they would indeed hold authority, even over the SCP itself, as held, *—The FSC"s verdicts, if either not challenged in the SAB, or if challenged, but maintained by the SAB, would be binding even on the SCP*‖[350]. This statement by the SCP signifies an important legal principle regarding the hierarchy and authority of courts within the Pākistān's judicial system. As the highest court in the nation, the SCP acknowledges that the rulings made by the FSC, when they have been reviewed and endorsed by the SAB, hold a binding effect that extends even to the SCP.

The role of the SAB in this context is crucial. As the specialized appellate forum specifically designated to hear appeals from the FSC, the SAB serves as a bridge between the FSC and the SCP[351]. Its function is to review and assess the FSC's decisions, ensuring their compatibility with the principles of Islāmic law. Therefore, if a decision rendered by the FSC is not challenged before the SAB, or if it is challenged but upheld by the SAB, the SCP recognizes the binding nature of that

[349] Zaheer-ud-Din v. GoP, 1993 SCMR 1718.
[350] Ibid 1756.
[351] Moeen Cheema, *Courting Constitutionalism: The Politics of Public Law and Judicial Review in Pākistān* (India: Cambridge University Press, 2021), 1972.

decision. This means that the SCP is obliged to respect and give effect to the FSC‘s verdict, acknowledging it as a legally binding precedent within the jurisdiction of the SCP.

This clarification by the SCP demonstrates the importance of the hierarchical structure and interplay between the FSC, the SAB, and the SCP. It highlights the significance attributed to the FSC‘s elucidation and implementation of Islāmic Law, particularly when endorsed by the specialized appellate body and not subsequently challenged before the SCP.

In the prevailing circumstances, it is highly unlikely to come across a situation where a decision by the FSC, affirming a legislation to be in contradiction of the Islāmic principles of Sharī‘ah, remains unchallenged by the government in the SAB. Additionally, it is important to note that the SCP does not have jurisdiction over such matters. In practice, when the FSC renders a decision that declares a particular statute as conflicting with the Islāmic injunctions, it is a common practice for the government to contest this decision before the SAB. The SAB functions as the appellate body responsible for examining and assessing the FSC‘s rulings. Therefore, the government, as the concerned party in these cases, would generally take recourse to the SAB to challenge the FSC‘s decision.

Given the specialized role of the SAB in matters pertaining to Islāmic law, it has the authority to thoroughly examine the FSC‘s decision, ensuring its compliance with the principles of Islām. As such, the SAB acts as a crucial forum for determining the final validity and applicability of the FSC‘s verdicts. It is important to emphasize that the SCP does not possess jurisdiction in cases specifically related to interpreting and implementing the Islāmic law. The SCP primarily deals with a wide range of legal issues, including constitutional matters, civil and criminal cases, and appeals from lower courts. As a result, matters concerning the FSC‘s decisions on the compatibility of legislation with Islāmic principles would not typically fall within the jurisdiction of the SCP.

Therefore, in the practical context, it is highly improbable for an FSC decision on the inconsistency of legislation with the Islāmic Injunctions, to remain

unchallenged in the SAB. Furthermore, due to the SCP's limited jurisdiction in matters of Islāmic law, such cases would not normally reach the SCP for adjudication.

In the case of *Hafiz Abdul Waheed v. Mrs. Asma Jehanghir*[352], a decision was issued by the LHC, stating that the requirement for the consent of the guardian or parents is not obligatory for the validity of a nikah (Islāmic marriage contract). This decision by the LHC was based on the ruling of the FSC in the case of *M Imtiaz v. the GoP*[353]. However, Justice Ihsan-ul-Haque, in his minority opinion, expressed the view that the LHC is not obligated to follow the FSC's decision, which declared that the consent of the guardian is not essential for the validity of a nikah. Justice Ihsan-ul-Haque reasoned that the LHC is not under an obligation to follow the FSC's decision since it was delivered as part of appellate jurisdiction.

On the other handthe majority of the HCs rejected the argument suggesting that the FSC's decision should lack binding influence on the HCs, under Article 203GG. This Article refers to the appellate FSC's jurisdiction and the binding nature of its decisions on the HCs.

It appears that there exists, among the judges, a divergence of opinion concerning the binding nature of the FSC's decisions on the HCs. While the majority of the HCs uphold the stance that the decisions of the FSC are indeed binding, even in appellate jurisdiction, have a binding effect, Justice Ihsan-ul-Haque of the LHC takes the position that the HCs are not bound by such decisions.

It is important to note that the specific details and implications of the case may require further analysis and research beyond the information provided. In the case of *Hafiz Abdul Waheed v. Mrs. Asma Jahangir*, the LHC determined that it was indeed obligated to adhere to the decision of the FSC, irrespective of whether the FSC's decision was rendered within its appellate or revisional jurisdiction.

The LHC held that it must follow and give effect to the FSC's decision, regardless of the specific jurisdiction in which it was rendered. This means that the LHC considered the FSC's decision as binding precedent and applied it in the case at hand.

[352] Supra FSC's case of Hafiz Abdul Waheed v. Mrs. Asma Jehanghir.
[353] M Imtiaz v. the GoP, PLD 1981 FSC 308.

Furthermore, the SCP endorsed this view when deciding the *Hafiz Abdul Waheed v. Mrs. Asma Jahangir* case. The SCP affirmed the LHC's position that it was obligated to abide by the FSC's decision, regardless of whether the FSC delivered it within its appellate or revisional jurisdiction.

This indicates that both the LHC and the SCP recognized the binding effect of the FSC's decisions on the lower courts, even if those decisions were made, exercising its appellate or revisional jurisdiction. Consequently, the LHC and other Pākistān's courts would be obligatory to follow and enforce the FSC's rulings as established legal precedent[354], in the appeal against the FSC's case of *Hafiz Abdul Waheed v. Mrs. Asma Jehanghir*. Justice Karamat Nazir Bhandari, speaking on behalf of the Full Bench of the SCP, emphasized that decisions made by the FSC have to be followed by the HC and all the courts under the HC. This obligation comes from Article 203 of the Pākistān's Constitution. He explained that ―decision‖ in Article 203 includes judgements, orders, and sentences from the FSC. So, these decisions are binding on the HCs and the lower courts they oversee. This shows how important FSC decisions are in Pākistān's legal system. It establishes a clear rule that the HCs and their underling courts must stick to and apply FSC's rulings. This ensures a consistent way of interpreting and using Islāmic law in the court system. Notably, in the absence of specific case details, the full impact of this statement might need further analysis to understand how it fits into the régime in legal framework structure[355].

The FSC has issued rulings in cases such as *M Imtiaz v. the GoP*, *Arif Hussain and Mst. Azra Parveen v. the GoP*[356], and *M Ramazan v. the GoP*[357], wherein it ruled that the consent of the wali (guardian) is not essential for the validity of nikah (Islāmic marriage contract). These decisions by the FSC set the precedent that the consent of the wali is not obligatory for the validity of the nikah ceremony.

The same matter was also addressed by the SCP in the case of *Mauj Ali v. Syed Safdar Hussain Shah*[358]. In its verdict, the SCP upheld the FSC's stance that the

[354] Supra SAB's case of Hafiz Abdul Waheed v. Mrs. Asma Jehanghir.
[355] Ibid, 230 and 233F.
[356] Arif Hussain and Mst. Azra Perveen v. GoP, PLD 1982 FSC 42.
[357] Muhammad Ramazan v. the GoP, PLD 1984 FSC 93.
[358] Mauj Ali v. Syed Safdar Hussain Shah, 1970 SCMR 437.

consent of the wali is not a prerequisite for the validity of nikah. By supporting the FSC's decision, the SCP reaffirmed the principle that the presence or consent of a wali is not obligatory for the validity of a nikah ceremony, in accordance with Islāmic law.

These rulings by the FSC and the SCP have contributed to the legal understanding and application of Islāmic marriage laws in Pākistān. They establish a consistent stance that the validity of a nikah does not necessitate the consent of the wali, ensuring greater autonomy for individuals entering into marital contracts under Islāmic principles.

In its inaugural ruling, namely, *M Riaz v. FoP*[359], the FSC encountered the query regarding its obligation to abide by the preceding judgement of the Sharī'at Bench of the PHC [360] in *Gul Hassan v. GoP*. Unlike the territorial restrictions on Sharī'at Benches in the HCs, the FSC operates without such limits. It is bound by SCP decisions in typical cases, or by HCs in the absence of SCP rulings. As a subordinate to the SAB of the SCP, the FSC can overturn its own past decisions, similar to the SCP.

Furthermore, the FSC's larger bench can bind a smaller one, following a similar principle as the SCP. However, in matters of general law, the FSC is obliged to follow the SCP or, in the absence of SCP decisions, the HCs.

The firm code is that one DB of a HC, whether it be the FSC's bench, an HC's bench[361] or the SCP's Bench[362], should not render a decision contradictory to another DB's decision. These principles underscore the importance of consistency and respect for precedent within the judicial system. The FSC, as a specialized court, must adhere to these principles in its interpretation and application of the law. The principle that an equal bench binds another promotes proper judicial behavior and consistency,

[359] Supra M Riaz v. FoP, PLD 1980 FSC 1.
[360] At that time, there were four such benches in the four HCs of Pākistān.
[361] Multiline Associates v. Ardeshir Cowasjee, PLD 1995 SC 423; 1995 SCMR 362 = Ch. M Saleem v. Fazal Ahmad, 1997 SCMR 314 = APNS v. FoP, PLD 2004 SC 600.
[362] M Saleem v. Fazal Ahmad, 1997 SCMR 315 = M Rafique v. The Border Area Committee Lahore, 1990 SCMR 817 = Azmatullah v. Mst. Hamida Bibi, 2005 SCMR 1201 = Fazal M Chaudhry v. Ch. Khadim Hussain, 1997 SCMR 1368 = Babar Shehzad v. Said Akbar, 1999 SCMR 2518 at 2522.

avoiding conflicting decisions and ensuring stability in legal interpretation and application.

This idea is reinforced by the FSC‘s Rules, particularly Rule 4(6), which stipulates that if two judges on a bench disagree with a decision, a larger bench is tasked with resolving the case. This practice underscores the FSC‘s dedication to the principle that a larger bench‘s authority prevails over a smaller one. The case of Mst. *Nek Bakht v. the GoP*[363], as referenced, likely supports this principle. It reinforces the notion that a larger bench of the FSC has the power to establish binding precedent over a smaller bench. This ensures coherence in the FSC‘s decisions and promotes uniformity in its Sharī‘ah application.

Following these principles and standards, the FSC seeks to maintain consistency, predictability, and fairness within its judicial process. This allows for a more stable and reliable régime in legal framework structure, fostering public confidence in the administration of justice.

4.9 The Status of Ijtihād in Matters not falling within the Ambit of the Federal Shariat Court

Indeed, a constitutional mechanism has established the FSC, which means it operates within the boundaries set out by the Constitution regarding its jurisdiction and powers. As a specialized court mandated to interpret and apply Islāmic law, the FSC‘s authority is defined by the constitutional provisions that created it. One of the most significant constraints on the FSC, even today, is the IRP‘s Constitution. The FSC has consistently argued against any challenge to its legitimacy based on the IRP‘s Constitution. This position was affirmed in the case of *M Saifullah v. FoP*[364]. The IRP‘s Constitution outlines the framework within which the FSC operates, establishing the parameters of its jurisdictional authority. The FSC, as a constitutional body, operates within these limits and is obliged to adhere to the constitutional provisions that govern its functions.

The FSC‘s adherence to the IRP‘s Constitution ensures that its decisions and actions remain within the constitutional framework and do not exceed the

[363] Mst. Nek Bakht v. GoP, PLD 1986 FSC 174, 177.
[364] M Saifullah v. FoP, PLD 1992 FSC 376.

constitutional mandate granted to it. By respecting the constitutional boundaries, the FSC upholds the principles of the legal régime and defends the constitutional equilibrium of the powers. Consequently, the FSC is committed to operating within the constraints set by the IRP‘s Constitution, which guides its jurisdictional undertakings and ensures that its decisions and actions remain constitutionally valid and in line with the established régime in legal framework structure.

A significant limitation on the original FSC‘s jurisdiction is imposed by Article 203B (c) of the Constitution. This provision delineates that specific types of legislative instruments have been exempted from the original FSC‘s jurisdiction, of Collective Ijtihād, as restricted by the constitutional provisions of article 203(B-C)[365]. The areas, specifically, Constitutional laws, procedural laws, financial law concerns, and the Muslim personal law had been initially debarred from FSC‘s jurisdiction. These laws are:

1. Procedural laws,
2. Fiscal laws, laws about insurance or banking or laws on the collection of fees, and revenue (levy and taxes),
3. practice and procedure
4. The Muslim Personal Law,
5. Constitution of IRP,
6. MFLO.

In matters beyond its specific jurisdiction as defined by the Constitution, indeed, the FSC is obligated to adhere to the interpretation of statutory law as provided by the SCP and the HCs. The primary scope of the FSC‘s jurisdiction pertains to issues associated with the interpretation and implementation of Islāmic law (Sharī‘ah). Nevertheless, in domains of law lying beyond its jurisdiction, the FSC relies upon the interpretation and application of statutory law as established by the superior courts, such as the SCP and the HCs.

Statutory law refers to legislation enacted by the legislative bodies, such as the Parliament, which sets forth legal rules and principles. The SCP and the HCs, being

[365] Rubya Mehdi, ―The Protection of Women (Criminal Laws Amendment) Act, 2006 in Pākistān.‖ *Droit et Cultures* 59: 1, (2010).

the superior Pākistān's courts, are authorized to interpret and apply statutory law to ensure its proper implementation and consistency within the legal system.

Therefore, when confronted with matters outside its specific jurisdiction, the FSC is bound by the interpretations and decisions of the SCP and the HCs. This adherence to the statutory law as interpreted by the higher judiciary helps keep up the consistency and dependability in the implementation of the statute, across diverse judicial platforms[366]. It is accurate to assert that the FSC is obliged to adhere to the statutory law interpretation put forth by the SCP. In situations where no SCP decision exists, that of the HC. This principle applies not only to matters falling outside the FSC's exclusive jurisdiction but also to non-statutory matters.

The FSC, like other courts, is expected to adhere to the legal interpretations and precedents set by the higher courts. This includes situations where the FSC is not addressing specific statutory provisions but rather with general legal principles or non-statutory matters. In such cases, the FSC would be guided by the interpretation and decisions of the SCP and the HCs.

Moreover, it is noteworthy that the FSC possesses the jurisdiction to review its own decisions. This power allows the FSC to reexamine and reconsider its previous rulings if it deems it necessary or if there is a need for clarification or correction. This ability to review its own decisions helps ensure the consistent and accurate application of Islāmic law within the constitutional and statutory parameters, set by their provisions.

By following the interpretations of statutory law by the SCP and, in their absence, those of the HCs, and by having the authority to review its own decisions, the FSC contributes to maintaining a coherent and harmonized legal system in Pākistān.[367]. Similarly, the FSC is constitutionally conferred for the exclusive revisional jurisdiction[368]. The FSC possesses the authority to exercise revisional powers, which includes the ability to request and examine the records of cases previously adjudicated by lower courts. This is done with the intention of ensuring the accuracy or legality of any determinations or orders issued by those lower courts. In

[366] Article 189 of the IRP Constitution.
[367] Article 203E(9) of the IRP's Constitution, 1973.
[368] Article 203DD of the IRP's Constitution, 1973.

the process of requesting such records, the FSC holds the prerogative to order the suspension of execution.

The FSC is obligated to adhere to the rulings made by the SCP in ordinary cases. As a court subordinate to the SAB of the SCP, the FSC is mandated to conform to the decisions handed down by the SCP. This conveys that the FSC retains the autonomy to overturn its own preceding judgements, like the authority of the SCP. The FSC, like any other court, recognizes the need for evolving legal interpretations and may reconsider its earlier rulings if necessary.

Additionally, the application of the principle wherein a larger bench‘s decision holds authority over a smaller bench is extended to the FSC. This signifies that a judgement pronounced by a larger bench of the FSC carries mandatory influence over a smaller bench within the same court. This principle helps maintain consistency and coherence within the FSC‘s decisions. Similarly, in matters of general law, the FSC follows the decisions of the SCP. If the SCP has not issued a decision on a particular matter, the FSC would then look to the decisions of the HCs for guidance.

Moreover, the settled principle is that a DB of any of the HCs will not give a contradictory decision to another DB, whether it is in the SCP or the HCs. This principle ensures uniformity in the application of law and avoids conflicting judgements within the judicial system. By adhering to these principles, the FSC, as a specialized court, maintains consistency and upholds the hierarchy of courts, contributing to the overall coherence and effectiveness of the legal system.

Expressing own character incapable to cope with any verdicts that are endorsed for carrying out or making functional any of the Constitutional provision, through *BZ Kaikaus v FoP*[369]*,* The FSC has declared that not only is the Constitution beyond the scope of FSC‘s Collective Ijtihād as exercised through its original jurisdiction, but also those statutes that have been enacted for its implementation. Consequently, specific constitutional commitments were excluded from the initial FSC‘s jurisdiction. Furthermore, practically this original jurisdiction can only be exercised by the FSC, with respect to those acts that are presently applicable, as proposition, this ruling was set in *Hakim Syed Muhammad Warsi v. GoP and*

[369] BZ Kaikaus v FoP, PLD 1981 FSC 1.

Others[370]. This means that laws that are no longer in force or do not exist cannot be subject to questioning within the FSC, for exerting Collective Ijtihād, upon them.

For Islāmically implementing the Constitution by the Judiciary, it is a settled principle set by the Objective Resolution[371], that the judiciary, in IRP, is Constitutionally bound, and any precedent being repugnant to the Constitutional provisions will be invalid, and the superior judiciary shall declare it as annulled and void. This proposition was principally set by the HC in *Bank of Oman Ltd v. East Trading Co. Ltd*[372]. The SCP, on the other hand, perceived that ―*unchecked and uncontrolled judicial review possibly will lead to a state of affairs where the very fundamental cuase of the creation of the Constitution might be challenged*.‖

In that parlance, empowering FSC, exclusively, ensure the Islāmic compliance of the Constitution was exemplified in the case care of the Constitution, in *Hakim Khan v. Government of Pākistān,* the SCP decided that above and beyond the FSC, no other courts are empowered to nullify any statute, precedent, or the IRP‘s Constitution, considering the Islāmic injunctions[373]. This implies that the SCP grants the FSC the authority of Ijtihād, even in matters beyond the FSC‘s jurisdiction, but involving instances where the legislative or adjudicating body exceeds the boundaries of the Islāmic Injunctions (aḥkām-e-Islām), as delineated in the Holy Qurʾān and the Sunnah. The decision by the SCP empowers the FSC significantly, enabling it to declare void a Constitutional provision that contradicts the Islāmic injunctions (aḥkām-e-Islām) mentioned in the Islāmic injunctions. This viewpoint has been invoked in several other prominent rulings of the SCP, similar to *Hakim Khan v. GoP*[374]*,* and *Mst. Kaneez Fatima v. Wali Muhammad*[375]etc. in these cases, the SCP held, that Article 2A can only be exercised for interpreting the statute laws as well as the IRP‘s Constitution, facilitating the judges to shoulder a momentous, starring, role to perform in the Islāmisation, as providing:

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[370] Hakim Syed Muhammad Warsi v. GoP and Others, PLD 1981 FSC 111.
[371] The doctrinal provisions of the Objectives Resolution, are in the IRP‘s Constitution vide Article 2A, and are equally admissible.
[372] Bank of Oman Ltd v. East Trading Co. Ltd. PLD 1987 Kar 404, 445.
[373] Hakim Khan v. GoP, PLD 1992 SC 595, 617.
[374] Hakim Khan v. GoP, PLD 1992 SC 595.
[375] Mst. Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 909.

> *—That Muslims of IRP shall be enabled to order their lives in accordance with the teachings and requirements of Islām as set out in the Qurʾān, and* Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah.*"*[376]

On the other hand, the job of Islāmisation of the Pākistān's laws is the innate obligation of the Parliament, and not of the Judiciary. Ijtihād on reviewing the prevailing acts and regulations, based on the Islāmic injunctions (aḥkām-e-Islām), vidē the Holy Qurʾān, and the Sunnah, may only be carried out by the. On ground, subsequently from 1985, in successive cases, the Superior Pākistān's judiciary, have been assessing the statutes for repugnancy to Injunctions of Islām. It has been debated that the Pākistān's Judiciary has been figuring *—largely through default the primary locus of the legislative authority in the State*.‖[377] Caring for that powers, the FSC can exercise the *Suo Motu* powers, acquired after 1982's amendments in the IRP's Constitution, vide Article 203D thereof.

The preliminary bar on the FSC to exercise Ijtihād to review the Fiscal Laws had been fixed for three years, then it was fixed be four years and then thereafter it had been extended for five years and finally for ten years through amendments to IRP Constitution. In 1990, after the running out of the said ten years one hundred and fifteen petitions, were instituted the FSC for Ijtihād on reviewing the fiscal laws which were based on interest (riba)[378], to be repugnant to the Islāmic injunctions (aḥkām-e-Islām), vidē the Holy Qurʾān, and the Sunnah. Reviewing any law related to procedures, the Constitution, and the Muslim Personal Law was prohibited for the FSC. Additionally, the FSC was prohibited from reviewing fiscal laws, laws related to the imposition of duties and taxes, laws concerning fees, banking regulations, and laws pertaining to insurance practices and procedures. Consequently, the role of the FSC extends beyond mere advisory functions. If the government deems a law to be inconsistent with Islāmic principles, it must enact alternative legislation; otherwise, the law's effectiveness will expire after a designated period. This unique institution finds no parallel within the broader Islāmic world.

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[376] Article 2A of IRP's Constitution, 1973.
[377] Supra Kennedy, *Repugnancy to Islām: Who Decides?* (1992), 787.
[378] J. Shehzado Sheikh, *Historiographic Glimpses of the FSC of Pākistān* (Islāmabad: FSC, 2011), 10.

4.10 Conclusion

In conclusion, the chapter on ―Collective Ijtihād and the FSC‖ provides a comprehensive examination of the subject matter, shedding light on various aspects related to the FSC‘s role in Islāmic law in Pākistān. It highlights the historical development and significance of collective Ijtihād within the broader Islāmic judicial system, emphasizing its collaborative methodology and influence on legal interpretations and societal norms.

The chapter explores the nature of collective Ijtihād within the FSC, specifically focusing on its impact on the legislative process in Pākistān. It discusses the grounds on which the FSC differs from Ijtihād performed by Muslim jurists in the past, showcasing the evolving nature of Islāmic legal thought. Furthermore, the chapter addresses the authoritative status of FSC‘s Ijtihād within Pākistān‘s judicial system, emphasizing the importance and influence of the FSC‘s interpretations.

However, the chapter also highlights certain challenges and unintended consequences resulting from the FSC‘s progressive methodology. The lack of a clear definition of the ―Injunctions of Islām (aḥkām-e-Islām)‖ and the discretion of the court in interpreting and applying them raise questions about fairness and predictability. A progressive methodology should be adopted by the FSC, according to the chapter‘s suggestion, in order to guarantee both consistency and clarity within its jurisdiction.

The debate over the status of *ijtihād* is far from settled. While historical arguments for closure persist, the need for dynamic jurisprudence in contemporary societies supports the continuity of *ijtihād*. The FSC, among other institutions, exemplifies how *ijtihād* remains an active force in Islamic legal discourse. Rather than viewing *ijtihād* as closed, it is more accurate to see it as an evolving mechanism that ensures Islamic law remains a living and adaptable tradition.

Overall, the chapter contributes to a deeper understanding of the role and impact of collective Ijtihād within the FSC and raises important considerations for the future development of Islāmic law in Pākistān.

Chapter 5
METHODOLOGY OF THE FEDERAL SHARIAT COURT IN COLLECTIVE IJTIHāD

5.1 Introduction

The FSC, as a key institution responsible for upholding Islāmic law, plays a significant role in ensuring the adherence to Islāmic principles within the country‘s régime in legal framework structure. The extensive power to conclude the validity of any statute or custom, having the force of law on the benchmark of ‗The Islāmic Injunctions (aḥkām-e-Islām),‘ has been acquired by the FSC. The original jurisdiction of the court is claimed. The scope of ‗The Islāmic Injunctions (aḥkām-e-Islām)‘ as interpreted by the FSC, along with its implications on the constitutional system of Pākistān, is explored in this chapter. The interpretation (ta‘wīl) of the phrase ‗The Islāmic Injunctions‘ used in Article 203 of the Constitution of the IRP is discussed. Despite being an important jurisdiction with many implications for the role of Islām and its integration into the legal system through judicial pronouncements, the Constitution of IRP has not precisely defined the foundation of this jurisdiction, i.e., ‗The Islāmic Injunctions (aḥkām-e-Islām).‘ The methodology of the FSC in declaring any law repugnant or non-repugnant to ‗The Islāmic Injunctions (aḥkām-e-Islām)‘ based on the Holy Qurʾān and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)‘s Sunnah is argued in this chapter.

Leaving the important phrase ‗The Islāmic Injunctions‘ undefined, the Constitution has delegated its task to the FSC. The methodology of the FSC in declaring any law repugnant or non-repugnant to the Islāmic Injunctions based on other sources of Islāmic law is then discussed in the next section, followed by the methodology of the FSC in determining the meaning of words used in the Holy Qurʾān and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)‘s Sunnah in relation to the derivation of laws. Therefore, the court must attribute a connotation to ‗The Islāmic Injunctions (aḥkām-e-Islām)‘ in order to exercise its jurisdiction. The chapter asserts that the FSC‘s exercise of jurisdiction in this matter is somewhat ambiguous and constitutes interference in the tasks assigned to other constitutional courts.

The methodology of the FSC in collective Ijtihād is discussed as well. The methodology of the FSC while employing Principles of Islāmic Jurisprudence in the interpretation (ta'wīI) of the texts of the Holy Qurʾān and the Holy Prophet (صلى الله عليه وآله وسلم)'s Sunnah is also addressed and the methodology of the FSC in declaring any law repugnant or nonrepugnant to the Islāmic Injunctions based on Islāmic legal maxims, are the focal topics. The methodology of the FSC In declaring any law repugnant or nonrepugnant to the Islāmic Injunctions based on maqasid-al- Sharī'ah and proceeded to the methodology of the FSC in declaring any law repugnant or nonrepugnant to the Islāmic Injunctions based on the opinion expressed by Islāmic jurists.

5.2 Interpretation of Phrase ―The Islāmic Injunctions‖ used in Article 203 of the Constitution of the Islāmic Republic of Pākistān, 1973

The phrase ―Injunction of Islām‖ as referenced in the Constitution, pertains to the fundamental principles and teachings encapsulated within Islāmic law (Sharī'ah). These principles are regarded as indispensable components of the Islāmic lifestyle and the governance framework[379]. It signifies the integration of Islāmic ideals and precepts into the legal structure of Pākistān. Article 203 establishes the FSC as a specialized judicial body entrusted with the central mission of scrutinizing and adjudicating matters pertaining to the congruence of laws with the tenets of Islām. The FSC holds the responsibility of safeguarding the harmony between legislative enactments and the teachings and principles enshrined in the Holy Qurʾān and the Sunnah, the venerable traditions and practices of Prophet Muhammad.

The expression ―Injunction of Islām‖ encompasses a multitude of dimensions within Islāmic jurisprudence, spanning realms such as societal norms, economic principles, political frameworks, and legal doctrines. It embodies the belief that Pākistān's legal system must be attuned to the essence and values extrapolated from the teachings of Islām.

The interpretation of what constitutes the Injunction of Islām may vary depending on the perspectives and interpretations of Islāmic scholars, jurists, and

[379] Article 203 of the IRP's Constitution, 1973.

legal authorities. It is an ongoing process of understanding and applying Islāmic law within the contemporary régime in legal framework structure of Pākistān.

The FSC, as the specialized institution entrusted with the elucidation and implementation of Islāmic Law, plays a vital role in providing guidance and determining the compatibility of legislation with the Injunction of Islām. Its decisions and rulings contribute to the ongoing interpretation and understanding of the phrase in the context of the IRP's Constitution.

According to Article 203 D of the IRP's Constitution, the FSC possesses sole and inherent authority to determine the compatibility of a law to decide whether a law is ―repugnant to the Islāmic injunctions (aḥkām-e-Islām).‖[380] Providing through the provision of Article 203 D, the Constitution of the IRP uses three important standard-setting phrases, namely:

1. ―The Islāmic injunctions (aḥkām-e-Islām)‖, as applied and enforced by FSC in its verdict of *Mian Abdur Razzaq Aamir v. FoP*[381];
2. ―repugnant to the Islāmic injunctions (aḥkām-e-Islām)‖, as confirmed and enforced by FSC in a foremost of its cases *Dr. Mehmood ur Rehman Faisal etc. v. GOP etc.*[382] and *Hafiz M Ameen v. IRP*[383] and in ―in conformity with the Islāmic injunctions (aḥkām-e-Islām).‖

The FSC has, in its own right, established in the case of *Hazoor Bakhsh v. FoP* that: ―*The phrase: „the Islāmic injunctions" is an all-encompassing term that incorporates all the dictates of Islām from various schools of thought, sects, and similar perspectives. However, Article 203D of the IRP"s constitution has delimited its interpretation and applicability to only two sources, a limitation that is beyond challenge for any practicing Muslim. These designated sources are the Holy Qur'ān and the* Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah.‖

[380] Pak. Const. art. 203 D, sec. VII, read as: ―*203D. Powers, Jurisdiction, and Functions of the Court: (1) The FSC may, either of its motion or on the Sharī'ah petition of a citizen of Pākistān or the FoP or Provincial Governments, scrutinize and decide the question of whether or not any law or provisions of law is repugnant to Islāmic injunctions, as declared in the Holy Qur'ān and the* Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص)'s Sunnah‖.

[381] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.

[382] Dr. Mehmood ur Rehman Faisal etc. v. GOP etc., PLD 1992 FSC 195.

[383] Hafiz M Ameen v. IRP, PLD 1981 FSC 23 (FB).

On the other hand, although these watchwords have not been demarcated in the Pākistānī Constitution[384], The complete primary authority of the FSC, as outlined by Article 2013 of the Constitution, hinges on the elucidation (ta'wīI) of the term ―Islāmic injunctions.‖ The FSC has been constitutionally instituted[385] and has been vested with the jurisdiction absolutely for declaring any statute as null and void if it would be in repugnancy to the Islāmic injunctions (aḥkām-e-Islām).[386] The FSC has established its ground on the basis of this principle and methodology: ―*The Holy Qurʾān, and the* Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah *should be interpreted in the light of evolution of the human society but this process should not negate intent and purpose of the Holy Qurʾān*.‖[387]

If a law is not found to be ―repugnant to the Islāmic injunctions‖, Despite its lack of alignment with the Islāmic injunctions (aḥkām-e-Islām), the law will retain its validity. However, an individual examination of the article brings to light that any legislative instrument or customary practice that contravenes the mandates of the Holy Qur'ān and the Sunnah (ahādīth) of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص) remains subject to consideration will not survive in the régime in legal framework structure of Pākistān.

The original jurisdiction can be exercised by FSC as suo moto[388], on the filing of a petition by a Pākistānī citizen or provincial government or FoP. Decisions of FSC are binding on the HCs as well as the courts subordinate thereto. Challenges to the rulings issued by the FSC are lodged within the SAB for further review[389]. The establishment of FSC and some of its important decisions and their appeals are hereby analyzed, to determine the scope of the above clauses under Chapter 3A. Although the judgements rendered by the FSC can be contested through appeals to the SCP, an instance is evident in the case of *M Farooque v. Muhammad Hussain,* where the SCP issued a verdict, the minute the FSC adopts its original jurisdiction, for ―The Islāmic

[384] Cheema Shahbaz A, ―The Federal Sharī'at Court's Role to Determine the Scope of ‗Injunctions of Islām' and Its Implications‖ *Journal of Islāmic State Practices in International Law* 9: 2 (2013), 92-111.
[385] Under the provisions of Chapter 3A of the IRP's Constitution.
[386] Cheema Shahbaz A, ―Re-Conceptualizing the Right to Development in Islāmic Law‖ *The International Journal of Human Rights* 14: 7 (2010), 1013-1041.
[387] Supra, *M Riaz v. FoP,* PLD 1980 FSC.
[388] Article. 203D(1), Constitution of IRP, 1973.
[389] Special bench of SCP, constituted under Article 203F of the Constitution of IRP, 1973, for appeals against the judgement of FSC.

Injunctions‖, in any cause or issue and passes verdicts therein, then the verdict, following the provisions of the Constitution[390], cannot be taken retrospectively[391].

In the existence of the legal systems and procedures, left by Britishers, it is relatively problematic to carry out Islāmic Sharī'ah Law. The judges are too amateurs in sharīah to execute. Quite often, the ulamā of Islāmic Sharī'ah have remained tangled with non professional judges, because the lay judiciaries have not so deep knowledge of Islāmic Sharī'ah Law. The FSC is a case in point of such a concession. As explained by SCP in *Pathana v. Mst Wasai etc.*[392], and have been debated frequently that here, in Pākistān, the codified laws, the customary laws, the laws pertaining to global human rights, the Islāmic Sharī'ah Law, the state-made laws, and the un-codified laws all run by the same token, together[393].

On the other hand, to embrace both the ―letter as well as the spirit‖, the FSC widened the significance of ―the injunctions of Islām (aḥkām-e-Islām)‖, in the *Muhammad Aslam Khaki v. FoP*[394]. This comprehensive clarification led to broaden the FSC's prerogative. A mindfulness is being seemed, equally by both the litigants and the judiciary (i.e. FSC and SAB), that jurisdiction is not a rigid or solid conception. Hence, it seems to be a predominantly original locate of contesting the legalities.

For qualifying a petition for challenging a law for repugnancy to the Islāmic Injunctions, it is additionally required that it must, be proceeded by fulfilling the following subclauses of the Rule 7 (1) of FSC Procedural Rules[395]:

> (e) ―State the number of Article, section, clause, paragraph, provision(s) of a law which is or are considered to be repugnant to the Islāmic injunctions.‖;
> (f) ―Describe succinctly, numbered one after the other, as well as under heads of the grounds for such repugnancy, distinctively.‖;

[390] Article 203D(2) of the Constitution.
[391] M Farooque v. Muhammad Hussain, 2013 SCMR 225.
[392] Pathana v. Mst Wasai etc., PLD 1965 SC 134, 189-190.
[393] Lau, Martin, *Sharī''a Incoporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010) , 373–432.
[394] Muhammad Aslam Khaki v. FoP, PLD 2010 FSC 191.
[395] ―FSC Procedural Rules, 1981, § 7 (1)‖.

(g) ―set forth, the relevant verse or verses of the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص) with reference to the relevant Ahadith in favour of the grounds.‖;

(h) ―Enumerate the books with properly cited specific pages.‖; and

(i) ―Must be orderly placed, in a folder, as specified, in this behalf, by the order of the CJ.‖

Categorically, following the stated provisions of the above said Rule, the petitioner also needs a good deal of substantial research, facilitating the FSC to determine on the position of the impugned statute on the criterion of the Islāmic injunctions (aḥkām-e-Islām)‖. The expression ―The Islāmic Injunctions (aḥkām-e-Islām)‖ is termed in the Article 203 D, as the ―Injunctions Islāmic (aḥkām-e-Islām).‖, as laid down in the Holy Qur'ān and the Sunnah. Hence, it appears that the provided terminology of ―Islāmic injunctions (aḥkām-e-Islām)‖ could be precisely construed within the confines delineated in the referred clause. In particular, this refers to those Islāmic injunctions (aḥkām-e-Islām) which have been explicitly defined in the Holy Qur'ān and the Sunnah (ahādīth) of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص). On the other hand, a universal clarification of the expression might be concluded, that the expression _injunctions of Islām (aḥkām-e-Islām)' Anything that fits the purpose of these sources should be included within the scope of this phrase, not just Holy Qur'ān and the Sunnah[396]. Not all Islāmic injunctions (aḥkām-e-Islām) are explicitly mentioned in the Holy Qur'ān and the Sunnah. Hence, in challenging situations, it's imperative to explore beyond these sources: the Holy Qur'ān and the Sunnah (ahādīth) of Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص). This necessitates employing interpretative methods to derive legal solutions, while maintaining the integrity of Sharī'ah, as outlined by the Holy Qur'ān and the Sunnah (ahādīth).

5.3 Methodology of the Federal Shariat Court in Declaring any Law Repugnant or Non-Repugnant to the Islāmic injunctions based on Qur'ān

The FSC adheres to a distinct approach when evaluating the compatibility of a given law with the Injunctions of Islām, grounded in the Qur'ān. The FSC's methodology

[396] Cheema Shahbaz A, ―The Federal Sharī'at Court's Role to Determine the Scope of _Injunctions of Islām (aḥkām-e-Islām)' and Its Implications‖ *Journal of Islāmic State Practices in International Law* 9: 2 (2013), 95.

involves a careful examination of the relevant legal provisions and their compatibility with Islāmic principles as derived from the Qur'ān. When faced with a case challenging the validity of a law, the FSC begins by analyzing the provisions of the law in question:

1. It considers the specific subject matter and the implications of the law within the context of Islāmic teachings and principles.
2. Next, the FSC examines the relevant verses of the Qur'ān that pertain to the subject matter of the law. Its objective is to ascertain whether the law conforms to the fundamental doctrines and values enshrined in the Qur'ān or if it conflicts with them.
3. The FSC applies principles of Islāmic jurisprudence, such as Ijtihād (interpretation), Qiyas (analogical reasoning), and Istihsān (juristic preference), to arrive at a conclusion regarding the law's compatibility with the Islāmic Injunctions. Its purpose is to verify that the impugned statute harmonizes with the overarching goals and essence of Islāmic law as derived from the Qur'ān.
4. In reaching a decision, the FSC may also consider the opinions and interpretations of Islāmic scholars, legal experts, and jurists who specialize in Islāmic law. These sources provide valuable insights and guidance in understanding the principles and teachings of the Qur'ān as they relate to the specific legal issues at hand.

It is crucial to highlight that the FSC's approach is founded on the particular clauses of the IRP's Constitution and the court's assigned responsibility to assess laws in consideration of the Injunctions of Islām. The verdicts and judgements of the FSC actively contribute to the continual evolution and elucidation of Islāmic law within Pākistān's legal structure[397]. As per the FSC, judges should not rigidly adhere to the literal meaning of a verse from the Holy Qur'ān, when interpreting its legal implications. Instead, they are encouraged to consider the broader spirit and intent of the verse by examining the Qur'ān as a whole.

[397] Afrasiab Ahmed Rana and Fiza Zulfiqar, ―Role of Federal Shariat Court in Islāmisation of Laws in Pākistān: A Case Law Study of Leading Cases‖ (June 16, 2023), SSRN, accessed [June 28, 2023], https://ssrn.com/abstract=4491926

The FSC recognizes that the Qur'ān is a comprehensive and interconnected text, with verses often complementing and providing context to one another. It emphasizes the importance of interpreting verses in light of the overall message and principles conveyed by the Qur'ān. By considering the spirit of the verse, judges can delve deeper into the underlying objectives and values that the verse seeks to promote. This methodology allows for a more nuanced understanding of the Qur'ānic teachings and their relevance to contemporary legal issues. In practice, when faced with a legal question, the FSC employs methods such as Ijtihād (interpretation) and Ijmā (consensus) to ensure a comprehensive analysis of the Qur'ānic verses. This methodology allows judges to consider not only the literal meaning of the verse but also its intended purpose, moral principles, and overall guidance provided by the Qur'ān.

The FSC's methodology encourages judges to view the Holy Qur'ān holistically, recognizing its interconnected nature and the need to interpret verses in light of the broader context. This methodology strives to foster an equitable comprehension of Islāmic law, considering the societal, moral, and ethical principles derived from the Qur'ān as a whole[398].

Following the methodology fixed in the *M Riaz case, the FSC* ascertained the intent of Qur'ānic verse with the support of the associated Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص). Then assert to ascertain then apply any other option (free of any doubt), that should be pursued as a final recourse, in consonance with the Holy Qurʾān, and the Sunnah. It is understandable that this represents a manifestation of collective ijtihād achieving excursion. In the aforementioned case scenario, the FSC likewise emphasized that the judiciary should not rigidly adhere to the exact literal interpretation of the Holy Qurʾānic Aayat, (i.e. to the letter for letter connotation of the Holy Qurʾānic Aayat), but must contemplate the spirit of the Holy Qurʾān, keeping the Holy Qurʾān in full consideration. The FSC likewise highlighted that the Holy Qurʾānic Aayat must be reinterpreted in consistency with the understanding of the then currency of time of the specific issue, in hand, Keeping in mind the wide-ranging message as well as the guiding principles of the Holy Qurʾān. FSC need not limit itself to any of the particular *Sharī'ah* law Islāmic Schools of thoughts,

[398] Supra Riaz v. FoP.

upholding diverse philosophical paradigms, of Sharī'ah, in its exersion of Collective ijtihād[399].

On the subject of the orphans' inheritance in the property of their grandfather[400], as expressly held in *Allāh Rakha v. FoP*[401]as well as specifically, in *Mst. Kaneez Fatima v. Wali Muhammad,* the FSC sought to challenge a Presidential Ordinance sanctioned during the martial law period of Ayub Khan. This ordinance created a legal provision that granted grandchildren a share in the inheritance of their grandfather, based on the concept of the ―Qurʾānic right of grandchildren.‖ However, upon examining the absence of any specific provisions in the Qurʾānic inheritance laws regarding the inheritance rights of grandchildren, the FSC refrained from making any definitive assertions on the subject.

Instead, the FSC opted for a workable methodology known as Collective Ijtihād. It followed the methodology employed by several Muslim states, including Egypt, Iraq, Morocco, and the Syrian Arab Republic. The FSC simply referred the dispute back to the legislative body, suggesting that the desired amendment be made after consulting the Islāmic Ijtihād exertion of the CII.

The FSC demonstrates recognition of an Islāmic state's autonomy in financial and regulatory affairs. It emphasizes the court's role in characterizing the state's authority in legislation and administration. In a separate arms possession case, the FSC likely assessed laws' compatibility with Islāmic principles. The FSC ensures state laws align with Qurʾānic teachings, as in the case of *Abdul Majid v. GoP* that ―*the state is vested with the authority to establish a regulatory/licensing system and charge fees accordingly*‖[402]. Signifying by this that the state possesses the authority to establish a regulatory or licensing system and impose fees accordingly. This ruling indicates that the state has the power to create and enforce regulations to govern certain activities and industries, and it can charge fees as part of the regulatory framework. he FSC likely examined the relevant legal provisions and principles of Islāmic law to determine the scope of the state's authority in establishing the regulatory and the licensing systems. Based on its interpretation of Islāmic law, the

[399] Supra note, M Munir, *Precedent in Pākistānī Law* (Karachi: OUP 2014), 457.
[400] Section 4, the MFLO.
[401] Supra Allāh Rakha v. FoP, 1.
[402] Abdul Majid v. GoP, PLD 2009 SC 861.

FSC concluded that such regulatory measures are within the state‘s purview and are permissible under Islāmic principles.

The FSC‘s ruling emphasizes the importance of ensuring proper regulation and oversight in various sectors to maintain public order, safety, and fairness. By allowing the state to establish regulatory systems and charge fees, The FSC acknowledges the state‘s duty to govern and safeguard societal interests within the boundaries of Islāmic law. Case details and context could offer more clarity into the FSC‘s reasoning and the specific industry or activity to which the ruling applies.

Levying non-Islāmically sanctioned taxes is a disputed matter, within the realm of Islāmic jurisprudence. Different Muslim scholars hold varying opinions on this matter, and there is ongoing debate and discussion regarding the permissibility and scope of taxation in an Islāmic framework.

Some scholars argue that only taxes specifically mandated by Islāmic law, such as Zakāt, are permissible, and any additional taxes imposed by the state may be viewed unfavourably. They advocate for the proper implementation of Zakāt as a means to fulfill the financial needs of society, suggesting that it could potentially alleviate the necessity of imposing other taxes[403].

On the other hand, it is worth mentioning that most Muslim-majority nations have adopted different taxation methods to fund public services and meet governmental expenditures. These taxes are often based on non-religious legal systems and are justified through the state‘s authority to regulate and govern its affairs.

Islāmic legal scholars and authorities have developed diverse perspectives on this issue. Some argue that taxes beyond Zakāt may be permissible under certain conditions, such as fulfilling public needs, maintaining infrastructure, and providing essential services for the welfare of society. They emphasize the importance of public interest (maslahah) and the concept of the state‘s prerogative to establish regulations

[403] Ishtiaq A, *The Concept of an Islāmic State in Pākistān: An Analysis of Ideological Controversies* (Vanguard, 1991) 105.

and collect funds for the benefit of the people[404]. The question of whether the proper implementation of Zakāt could entirely replace the need for additional taxes remains a topic of debate and speculation. It involves considerations of the efficacy and practicality of Zakāt collection, distribution mechanisms, and the ability of Zakāt alone to adequately address all societal needs.

Ultimately, the methodology to taxation in an Islāmic context may vary depending on the interpretation of Islāmic principles and the specific social, economic, and political circumstances of a given country. It is an ongoing dialogue among Islāmic scholars, policymakers, and communities to navigate the balance between Islāmic principles and the practical realities of governance and societal welfare.

As questioned in *Fazlur Rehman bin Muhammad v. FoP*[405], the issue of the income tax régime was brought before the FSC. The contention put forth was that the income tax law, which was transplanted during the British colonial period, was inconsistent with the Islāmic Injunctions. The argument likely revolved around the claim that the income tax system, as inherited from the colonial era, did not align with the ethics and teachings of Islāmic law. It might have been contended that the imposition of income tax transgressed certain Islāmic principles, such as the notion of impartial and just distribution of wealth, or the prohibition of interest (riba).

It is of significance to acknowledge the specific details and outcome of the case were not provided, and further research would be necessary to delve into the specific arguments and the FSC‘s ruling in this particular case.

Nevertheless, it‘s not an unusual occurrence for individuals or collectives to raise queries about the harmony of specific statutes and certain laws, including income tax laws, with Islāmic principles. Such discussions and legal challenges reflect the ongoing dialogue and interpretations within Islāmic jurisprudence regarding the economic and financial aspects of governance and taxation.

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[404] Felicitas Opwis, ―Maṣlaḥa in Contemporary Islāmic Legal Theory,‖ *Islāmic Law and Society* 12 (2005): 182.
[405] Fazlur Rehman bin Muhammad v. FoP, PLD 1992 FSC 329.

The FSC‘s role in cases like these is to examine the arguments presented, consider relevant legal and Islāmic principles, and determine whether the challenged challenged statute aligns with the Mandates of Islām as comprehended within the framework of the IRP‘s Constitution. The determinations of the FSC assist in molding the clarification and application of Islāmic Law in relation to contemporary legal and economic issues.

In the mentioned case, where the petition challenging the income tax régime was dismissed, the FSC delved into the challenged statute aligns with the Mandates of Islām as comprehended within the framework of the IRP‘s Constitution. The determinations of the FSC assist in molding the clarification and application.

Furthermore, whilst spotlighting the purposes for which zakāt (Islāmic wealth tax) could be expended in agreement with the Qurʾānic precepts, the FSC acknowledged that a modern state requires financial resources to fulfill its various responsibilities and obligations. It enumerated numerous areas and activities that necessitate financial support, beyond the scope of zakāt alone.

These areas and activities likely encompassed the functioning of government institutions, provision of public services, infrastructure development, defense and security expenditures, education, healthcare, and other essential aspects of a modern state. The FSC acknowledged that these responsibilities require financial resources beyond what can be fulfilled through zakāt alone.

By acknowledging the need for financial resources in a modern state, the FSC recognized the practical reality of governance and the necessity of a broader taxation system to meet the fiscal requirements of the state.

While specific details of the case were not provided, this indicates that the FSC recognized the validity and necessity of income taxation as a means to generate the necessary financial resources for a modern state. The FSC‘s decision highlights the importance of balancing Islāmic principles with the practical realities of governance and the financial needs of the state[406]. undertakings linked to warfare and safeguarding an Islāmic state. Nonetheless, the FSC conceded that the conversation

[406] Ibid 344-5.

concerning taxation possesses the adaptability to conform to the economic equilibrium and developmental obligations of a contemporary state.

The FSC likely acknowledged that economic stability and development are crucial for the overall well-being and progress of a society. Without economic stability, a state may struggle to maintain a peaceful atmosphere and ensure political stability. The FSC acknowledged that economic development and stability are essential components of defense and political stability.

In this context, the FSC likely acknowledged that a modern state requires financial resources to address various economic, social, and developmental needs. These needs may include infrastructure development, social welfare programs, education, healthcare, poverty alleviation, and other initiatives aimed at improving the well-being of the population and fostering economic growth. By recognizing the importance of economic development and stability, the FSC acknowledged the evolving nature of taxation in the framework of a contemporary state. Emphasizing the necessity for a more comprehensive taxation framework extending beyond the conventional deliberations centered exclusively on defense-related endeavours, the spotlight was placed on the demand for such an approach. This recognition signifies a grasp of the economic actualities and developmental obligations inherent to a state in the contemporary era, which necessitate financial resources to ensure societal progress and stability.

The FSC's stance underscores the importance of striking a balance between Islāmic principles and the practical realities of governance, economic stability, and societal development in a contemporary context[407].

In *Dr. Mehmood ur Rehman Faisal v. GoP*[408], encompassing various facets associated with the Zakāt and Ushar Ordinance of 1980, a focal point of contention emerged in relation to the clause governing the deduction of Zakāt upon the maturity of investments on the 1st day of Ramadan. While the precise particulars and particular contentions of the case were not laid out, it can be deduced that the petitioner raised queries concerning the legitimacy or harmony of the aforementioned clause with the

[407] Ibid 352.
[408] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 2013 FSC 55.

tenets of Islāmic law, particularly regarding the calculation and deduction of Zakāt on investment returns.

As the specialized tribunal entrusted with matters entwined with Islāmic law, it's conceivable that the FSC undertook an examination of the clauses contained within the Zakāt and Ushar Ordinance, along with the contentions forwarded by the petitioner. It can be presumed that the court meticulously considered the pertinent principles and teachings of Islāmic law, as drawn from the Qur'ān and Sunnah, with the aim of evaluating the congruity of the clause with the Mandates of Islām.

While the ultimate verdict and the ruling of the FSC remained undisclosed, but it can be presumed that the FSC carefully analyzed the arguments and evidence presented and made a decision based on its elucidation of Islāmic law as it pertained to the explicit stipulations within the Zakāt and Ushar Ordinance.

It is important to note that Zakāt is an obligatory form of wealth purification and charitable contribution in Islām, and its proper implementation and calculation are matters of importance in Islāmic finance and jurisprudence. The FSC's role in cases related to Zakāt is to ensure that the relevant laws and provisions adhere to Islāmic principles and guidance regarding wealth distribution and charitable obligations.

In the instance of *Dr. Mehmood ur Rehman Faisal v. GoP,* the crux of the dispute centered on the assertion that in Islām, the obligation of Zakāt arises upon the completion of one full year on assets held, rather than exclusively on the 1st day of Ramadan, as stipulated in the provision under scrutiny. The petitioner contended that the provision enforcing the deduction of Zakāt upon the maturity of investments on the 1st of Ramadan was not in line with the Islāmic requirement of Zakāt payment based on the passage of one year on the assets. Upon examination of the arguments presented, the FSC found that the provision did not transgress the Islāmic Injunctions. The FSC likely reviewed the relevant provisions of the Zakāt and Ushar Ordinance and assessed them in light of Islāmic principles and teachings[409].

[409] Supra Dr. Mehmood ur Rehman Faisal v. GoP, PLD 2013 FSC 55.

The FSC, as the specialized court for matters related to Islāmic law, would have considered the interpretation of Zakāt in Islām, which involves the obligation to pay Zakāt on assets after one lunar year has passed. While the specific date of the 1st of Ramadan was mentioned in the provision, the court determined that it did not conflict with the requirement of Zakāt payment after the passage of one year.

Based on their analysis, the FSC dismissed the petition, indicating that the provision in question did not contravene the Islāmic Injunctions regarding Zakāt. The FSC's decision affirmed the compatibility of the provision with the principles of Islāmic law, as per their interpretation.

The FSC's role in cases related to Zakāt is to ensure that the relevant laws and provisions align with the principles and teachings of Islām regarding wealth purification and charitable obligations. By dismissing the petition, the FSC determined that the provision in question was consistent with the Islāmic Injunctions on Zakāt payment.

In petition: *Syed Maqsood Shah Bukhari v. FoP*[410] the FSC encountered a challenge to certain provisions of statutes[411] based on the argument that charging rent without exerting labor and hard work is inconsistent with the Islāmic Injunctions. The petitioner contended that in Islām, individuals are not entitled to any remuneration unless they engage in labor and exert effort. Consequently, the petitioner claimed that charging rent, which involves acquiring wealth without physical labor, contradicts Islāmic principles.

However, the FSC examined the argument in light of Islāmic sources, including the Qurʾān, the Sunnah, and the ijmʻāʻ of the Prophet's beloved Companions. The FSC acknowledged that the ijara or lease contracts, are properly authenticated by these sources, indicating its validity within Islāmic law.

Furthermore, Islāmic law acknowledges certain acts through which individuals can acquire wealth without engaging in physical labor. These acts are

[410] Syed Maqsood Shah Bukhari v. FoP, 2013 MLD 1808.

[411] The Cantonments Rent Restriction Act, 1963, the Punjab Rented Premises Ordinance 2007, the Sindh Rented Premises Ordinance, 1979, and the West Pākistān Urban Rent Restriction Ordinance, 1959.

recognized and permissible under Islāmic principles. Based on its examination of the argument and Islāmic legal sources, the FSC dismissed the petitioner‘s assertion and upheld that legislation allowing actions such as leasing and rent collection can be legitimately established and enforced in an Islāmic governance. The court affirmed the harmony of these provisions with Islāmic directives. This verdict underscores the FSC‘s duty in appraising the alignment of legislation with Islāmic principles and the validation of various lawful actions and acts and transactions that are permissible within the framework of Islāmic law. The court‘s decision affirms the validity of certain economic practices, such as leasing and charging rent, within an Islāmic legal context.

The concept of artificial legal personality, which grants legal recognition and rights to entities such as corporations, organizations, or institutions, forms the foundation of many economic, financial, governance, and regulatory structures. Given its significance, it becomes crucial to evaluate whether the concept of artificial legal personality aligns with Islāmic law.

Having drawn from the Qurʾān and the Sunnah, the Islāmic law provides principles and guidelines for various aspects of human life, including economic and legal matters. In the context of artificial legal personality, Islāmic jurists and scholars have debated and analyzed its compatibility with Islāmic principles and teachings. The evaluation of whether the concept of artificial legal personality aligns with Islāmic law entails a thorough examination of various Islāmic legal principles, such as agency (wakala), partnership (mudaraba), and contracts (aqd), among others. Scholars have explored these principles to determine their applicability to legal entities and their rights and responsibilities.

Some Islāmic scholars argue that the concept of artificial legal personality can be compatible with Islāmic law if it aligns with the broader objectives and principles of Islām. They contend that entities with artificial legal personality can engage in lawful activities and contracts within the boundaries defined by Islāmic teachings. However, other scholars express reservations about certain aspects of artificial legal personality. They emphasize the importance of accountability, fairness, and ethical conduct in economic and financial activities. They argue that while recognizing the

legal personality of entities, there should be mechanisms in place to ensure adherence to Islāmic ethical standards and to prevent exploitation or unjust practices.

The ongoing discourse in Islāmic jurisprudence revolves around evaluating how well artificial legal personality aligns with Islāmic law. Islāmic legal scholars and authorities offer varied insights, taking into account the specific Islāmic legal context and principles.

This evaluation requires a meticulous analysis of Islāmic legal principles and their relevance to modern economic, financial, and legal setups. It involves assessing Islāmic law's goals, transaction and contract nature, and the ethical framework guiding these entities. This process aims to harmonize Islāmic principles with present legal and economic systems in a balanced manner. In *FoP v. Provincial Governments*[412], the FSC initiated a case to examine the recognition of artificial legal personality for registered companies in the Companies Ordinance of 1984, in light of Islāmic principles. After careful analysis, the FSC found no Qurʾānic or Sunnah evidence to invalidate the concept of artificial legal personality. The court highlighted that even in early Islāmic history, entities like mosques and waqfs had distinct legal personalities. While upholding the validity of the Companies Ordinance, the FSC emphasized the importance of good corporate governance and protecting shareholders' interests. The ruling acknowledges the state's power to create artificial legal entities under an Islāmic framework, emphasizing the necessity for regulations to guarantee adherence to Islāmic principles and the prevention of unethical conduct.

In *Ch. M Aslam Ghuman v. FoP*[413], The validity of Rule 3(1) of the SECP's 2007 Service Rules and Section 19(1) of the SECP Act, 1997, was reviewed by the FSC, taking into account Islāmic principles. These provisions were contested by the petitioner, who claimed their inconsistency with Islāmic principles. However, the FSC observed that the challenged provision had already been deemed beyond the scope of the Islāmic Republic of Pākistān (IRP) Constitution's authority. Therefore, assessing its validity from an Islāmic standpoint was deemed unnecessary by the court.

[412] FoP v. Provincial Governments, PLD 2009 FSC 01.
[413] Ch. M Aslam Ghuman v. FoP, 2015 PLC (CS) 179.

Nevertheless, an important remark was made by the FSC concerning the language used in the SECP Service Rules. It highlighted the derogatory nature of labeling employers and employees of autonomous bodies as ―master and servant,‖ advocating for more suitable terms to be used. The FSC emphasized the government's capability to enact laws governing the employer-employee relationship, underlining the importance of safeguarding employee rights. This includes rights like the right to a fair inquiry conducted by an unbiased arbiter and the right to present one's case.

This implies that although the state retains the power to formulate laws regulating employer-employee interactions, encompassing procedures for investigating employee conduct, these laws must uphold the principles of natural justice and the rights enshrined in the IRP's Constitution. The FSC's ruling in this case demonstrates its commitment to ensuring that laws and regulations related to the employer-employee relationship comply with Islāmic principles and protect the rights of employees. By highlighting the need for respectful language and fair procedures, the FSC aims to establish a just and equitable working environment in accordance with Islāmic teachings. It is noteworthy that the specific details and outcome of the case beyond the mentioned observations were not provided. Further research or information may be necessary to gain a comprehensive understanding of the complete ruling and its implications.

In *Sheikh Aftab Ahmad v. GoP*[414], Section 18(3) of the Financial Institutions (Recovery of Finances) Ordinance, 2001, was brought into question, with the FSC examining its alignment with Islāmic injunctions as reflected in Article 17(2) of the QSO. The petitioner raised an argument against the provision, asserting that it exempted the application of Article 17(2) of the QSO, which mandates the validation of financial transactions through attestation. This exemption, it was contended, stood in contradiction to Islāmic principles.

Emphasis was placed by the FSC on the government's legislative authority to enact laws with prospective effects. The assertion was made that, during the process of legislation, matters concerning past and concluded transactions should remain

[414] Sheikh Aftab Ahmad v. GoP, 2016 CLD 544.

untouched. According to Islāmic principles, legislative measures should possess a forward-looking nature.

The FSC underscored that within an Islāmic governance framework, a legislative body possesses the capability to establish laws, as long as they refrain from reopening matters that have been settled. This points to the legislature‘s authority in formulating laws that pertain to future actions, without causing alterations to past transactions.

The significance of the FSC‘s emphasis on the legislative competence of the government is that it aligns with the principles of Islāmic law, underscoring the need for stability and certainty in financial transactions. It was recognized by the court that within the context of an Islāmic polity, a legislative body wields the power to create laws within defined boundaries, provided these laws adhere to Islāmic principles and uphold the integrity of transactions that have been concluded.

It is important to note that specific details regarding the outcome of the case and a more extensive elucidation of the FSC‘s ruling were not provided. To gain a comprehensive comprehension of the implications of the FSC‘s decision, further information or research may be required. In *Ch. Irshad Ahmad v. FoP*[415], challenging a legal provision that limited medical benefits to a single wife of an employee, the petitioner brought forth the argument that such restriction contradicted Islāmic principles, which do not prohibit having multiple wives. This case serves as an intriguing example of the FSC‘s approach to issues within the context of employer-employee dynamics. Taking into account the contractual aspect of the connection between employers and employees, the FSC arrived at the determination that the disputed regulation did not infringe upon any the Islāmic Injunctions. The court determined that the provision did not conflict with Islāmic principles.

In other instances before the FSC, it has been argued that laws which establish a time limit for pursuing remedies through legal channels are at odds with Islāmic

[415] Ch. Irshad Ahmad v. FoP, PLD 1992 FSC 527.

principles. In another significant case *Mukhtiar Ahmad Sheikh v. FoP*[416], the petitioner challenged the time restriction for initiating an appeal before the Service Tribunal. This situation prompted the FSC to evaluate the harmony between the time limitation and Islāmic injunctions. The petitioner asserted that laws delineating a specific time frame for seeking redress through the judicial system run counter to the Islāmic principles. They argued that such limitations restrict access to justice and can be seen as preventing individuals from asserting their rights within a reasonable timeframe. The FSC, in its evaluation, would have considered the tenets of Islāmic law, encompassing principles that prioritize justice, equity, and the safeguarding of rights. It would have examined whether the limitation period hinders the ability of individuals to seek redress in a manner consistent with Islāmic values.

The specific outcome and ruling of the FSC in this case were not provided. Further research or information would be necessary to obtain a comprehensive understanding of the FSC's decision and its implications regarding the period of limitation pertaining to the submission of appeals before the Service Tribunal. The case underscores the FSC's role in evaluating the compatibility of legal provisions with Islāmic principles, particularly in matters related to access to justice and the protection of rights. The court's decision would contribute to the ongoing discourse surrounding the elucidation and implementation of Islāmic Law in the context of limitation periods for seeking legal remedies[417]. In response to the petitioner's argument that laws specifying a timeframe of limitation pertaining to the submission of appeals before the Service Tribunal are contrary to Islāmic principles, the FSC dismissed this contention. The FSC emphasized the state's competency and authority to enact laws in this matter.

The FSC highlighted that allowing the state to establish time limits for various diverse litigations and judicial proceedings serves significant objectives. This practice aids in averting an excessive accumulation of cases in courts and guarantees the achievement of conclusive resolutions in legal conflicts. By recognizing the state's competence to establish limitation periods, the FSC acknowledged the need for an orderly and efficient legal system. It considered the practical implications of allowing

[416] Mukhtiar Ahmad Sheikh v. FoP,
[417] Under the provisions of sections 4(1)(a), 6 and 7 of the Service Tribunals Act 1973.

unlimited time for filing appeals, which could lead to prolonged litigation and hinder the resolution of cases.

The FSC's decision reflects the understanding that Islāmic principles encompass the notion of justice and fairness, which can be achieved through the establishment of reasonable time limits for legal proceedings. It affirms the state's authority to enact laws that strike a balance between the rights of individuals and the need for an effective judicial system.

In *Amin Jan Naeem v. FoP*[418], the matter of obligatory employment and the appropriation of private properties by state representatives was examined by the FSC. The FSC noted that personal properties hold a status of inviolability and sanctity, and interference with them should only transpire with the proprietor's agreement under normal circumstances. Stressing the significance of private property rights, the FSC accentuated that individuals possess an inherent entitlement to manage and utilize their properties according to their discretion, as they see fit. The FSC recognized that, in normal circumstances, the state should not intrude upon private properties without the voluntary consent of the owners. This observation underscores the importance of respecting and safeguarding individual property rights in accordance with Islāmic principles. It reflects the principle that ownership and control over private properties are fundamental rights that should be protected, and any interference should be justified, lawful, and based on the voluntary agreement of the property owners. Certainly, in situations of extreme necessity or emergencies, the usual rules and injunctions that govern normal circumstances can be adjusted or made more flexible to address the specific and unavoidable conditions at hand. Islāmic principles recognize the need to adapt and make allowances in such exceptional situations.

The concept of ―darurat‖ (necessity) in Islāmic jurisprudence allows for certain exceptions and flexibilities when faced with urgent or critical circumstances that demand immediate action. These exceptions are based on the principle of balancing the preservation of essential interests and objectives while upholding the general principles of Islāmic law. It is Significant to mention that applying for exceptions in extreme circumstances should be done with caution and within the bounds of Islāmic legal principles. The FSC, as a specialized court addressing matters

[418]Amin Jan Naeem v. FoP, PLD 1992 FSC 252.

related to Islāmic law, would consider the specific context and the level of necessity to determine the extent to which flexibility is warranted. While the FSC may recognize the need for flexibility in extreme situations, it would still strive to uphold the fundamental principles and values of Islāmic law to ensure that any adjustments or exceptions remain within the framework of Islāmic jurisprudence. On the other hand, in great inevitabilities, it has been held that ―*the injunctions given for the normal circumstances are re-adjusted and made somewhat flexible to a certain extent to alleby means ofte a particular unavoidable emergent condition*.‖[419]

In response to a petition[420] filed in 2010, challenging the notion that a woman could not become head of state or a judge, the FSC referred to the Holy Qurʾān in addition to the IRP's Constitution in its ruling. The FSC first referenced the verse from the Holy Qurʾān that states: ―The women have rights similar to those of men over them in kindness.‖[421] This verse emphasizes the equal rights and kindness that should be extended to women. And then referring to the IRP's Constitution, the FSC, pointed out that it had already addressed this issue in a previous case, known as the *Ansar Burney* case. In that case, the FSC had already made a decision regarding the eligibility of women to hold positions of authority, while dismissing the case. By referring to both the Holy Qurʾān and the Constitution, the FSC acknowledged the importance of Islāmic principles and the need to interpret them in light of the fundamental rights and principles enshrined in the Constitution. The court's decision reinforces the idea that women have equal rights and opportunities to hold positions of authority in line with Islāmic teachings.

In a different case involving gender equality[422], the petitioner challenged sub-article 4 of Article 151 of the QSO under Article 203 D(1) of the IRP's Constitution, contending its inconsistency with Islāmic injunctions. The argument put forth was that this sub-article permitted a man to present evidence undermining a woman's credibility, while denying a woman the same opportunity to impugn a man's credibility.

[419] Ibid 268.
[420] Sharī'at Petition No. 1-L of 2010, October 7, 2010.
[421] Al-Qurʾān, 2:228.
[422] Mukhtar Ahmad Sheikh v. GoP, PLD 2009 FSC 65.

In response, the FSC determined that sub-article 4 of Article 151 of the QSO exhibited gender-based discrimination, contravening Article 25(2) of the Constitution. The court found that this sub-article, by allowing the discrediting of a woman‘s credibility, contradicted the Qurʾānic concept of gender equality. The FSC referenced Qurʾānic verses that underscore the equitable creation of men and women, as well as their mutual support and protection.

In labeling the sub-article as discriminatory and incongruent with the notion of gender equality, the FSC reaffirmed the fundamental Islāmic principles of equal treatment and the prohibition of gender-based discrimination. The court‘s verdict underscores the necessity of interpreting and implementing laws in a manner that aligns with the tenets of fair justice and equality that Allāh, the supreme creator, is attributed with the creation of human beings from a single entity and subsequently creating their mate. This concept emphasizes the fundamental unity and interconnectedness of mankind, as well as the complementary nature of male and female counterparts. The belief in the divine origin of humanity and the creation of male and female as partners in life is deeply rooted in Islāmic teachings. It signifies the recognition of the equal worth, dignity, and The rights of both men and women are upheld, promoting the fundamental principles of unity, harmony, and reciprocal assistance within society, as advocated by the Qurʾān: ―*He it is who created you from a single being and therefrom did make his mate*.‖[423] The Holy Qurʾān beautifies the relationship between spouses that, in the context of marital relationships, the phrase ―wives are raiment for husbands and husbands are raiment for the wives‖ is derived from a verse in the Holy Qurʾān (2:187). This metaphorical expression highlights the intimate and protective nature of the relationship between spouses, by the Holy Qurʾān as: ―*They [wives] are raiment for you [husbands] and you [husbands] are raiment for them [wives]*.‖[424]. The metaphor of ―raiment‖ suggests that spouses serve as garments for each other, symbolizing their role in providing comfort, protection, and adornment to one another. It emphasizes the idea of companionship, support, and the deep bond between husband and wife within the framework of marriage.

This metaphorical statement reflects the Islāmic perspective on the importance of mutual care, respect, and the complementary nature of spouses within the marital

[423] Al-Qurʾān, 7:189.
[424] Al-Qurʾān, 2:187.

union. It underscores the notion that husbands and wives should fulfill each other‘s needs, both physical and emotional, and strive to create a harmonious and fulfilling relationship. The verse from the Holy Qurʾān (2:228) states, ―*And the women have rights similar to those of men over them in kindness*.‖[425] This verse emphasizes the equitable treatment and entitlements of rights of the women in society. It recognizes that women, like men, have inherent rights that should be respected and upheld.

The phrase highlights the importance of treating women with kindness, fairness, and compassion. It acknowledges that women possess rights that are equivalent to men‘s rights, emphasizing the equal value and dignity of both genders in the eyes of Islām. This verse serves as a reminder to individuals and society as a whole to ensure that women are treated with respect and given the rights and privileges they deserve. The tenets of fair justice, equality, and the fair treatment of women are promoted by it, in all aspects of life. The Qurʾān phrases, ―*Indeed we created men out of the essence of clay*.‖[426]. This verse reflects the belief in Islām that human beings, both men and women, were created by Allāh from the fundamental substance of clay or earth. The conception of creation of human being as well as the origin of mankind are highlighted through this verse. It signifies the humble beginnings of humanity and the recognition of Allāh as the ultimate creator and sustainer of life. The use of clay as a metaphorical representation of human creation emphasizes the connection between humans and the natural world. In Islāmic teachings, this verse serves as a reminder of human beings‘ inherent humility and the need for gratitude towards Allāh for the gift of life. It underscores the belief in the divine power and wisdom behind the creation of mankind. It is imperative to notify that this verse specifically mentions the creation of men, but Islāmic teachings also emphasize the creation of women from the same essence. Islām supports the equality of the men as well as the women in relationships of their spiritual nature and their standing before their creator: Allāh Alighty. Vidē the Holy Qurʾān Allah signifies as ―*verily we create man in the best of moulds*.‖[427] This verse indicates that Allāh, as the Creator, has fashioned human beings in the best and most perfect form. The verse highlights the unique status of human beings in creation and emphasizes the inherent beauty and excellence with which they have been created. It signifies that each

[425] Al-Qurʾān, 2:228.
[426] Al-Qurʾān, 23:12.
[427] Al-Qurʾān, 95:4.

individual is endowed with special qualities, talents, and potentialities that reflect the divine good judgement and determination behind this creation. In Islāmic lessons, this verse works as a cue of the innate collective characteristics: dignity, inherent worth, and potentiality of all the human beings. It encourages individuals to recognize and appreciate their own value and to strive for excellence in all aspects of life. Furthermore, this verse also calls upon individuals to recognize and respect the inherent worth and dignity of others. It promotes the principles of equality, compassion, and justice, urging individuals to treat others with kindness and respect, recognizing their shared status as creations of Allāh.

As a result of the FSC's analysis and evaluation, it implemented its constitutional powers[428]. The FSC declared provisions of the QSO as repugnant to the Qurʾān and Sunnah, indicating that it contradicted the teachings and principles of Islām[429]. Consequently, the FSC directed the President of Pākistān to take appropriate steps for the repeal of sub-Article 4 of Article 151 of the QSO within a period of six months. The court's decision specified that if the provision of law was not repealed within the given timeframe, it would cease to have any effect whatsoever. This ruling highlights the FSC's authority to assess the compatibility of legislative provisions with Islāmic principles and its power to issue directives for necessary amendments or repeals. The court's decision reflects its commitment to upholding the principles and teachings of Islām within the legal regie of Pākistān[430].

The focus of all this discussion seems to be ‗Islāmic rulings' which includes all Islāmic rulings and every aspect of thought, class, etc. However, the Constitution limits its connotation and solicitation to the two sources[431], The Holy *Qurʾān* and the Sunnah (ahādīth), and no Muslim can validly object to this. In footings of the methodology of *ijtihād* and the rules of interpretation (ta'wīI), the judges in FSC follow these guidelines for working[432]:

1. With respect to the question under discussion, first, finding the relevant verse(s) in the Holy *Qurʾān*;

[428] Under clause (3)(a) of Article 203D of the IRP's Constitution, 1973.
[429] Sub-Article 4 of Article 151 of the QSO.
[430] Supra Mukhtar Ahmad Sheikh v. GoP, 65.
[431] Article 203 D of the Constitution.
[432] Noor Zafar, ―Adjudicating Family Law in Muslim Courts: A Book Review‖ *LUMS Law Journal* 3, no. 119, (2016) 184.

2. Then finding the pertinent Ḥadīths;
3. Examining the opinions of eminent jurists to find out how they correspond to the needs of the time[433]. On the other hand, to resort to Ijtihād, FSC should not limit itself to a particular Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah. On the other hand, the interpretations of the earlier Muslim judges and Aayema *(Imāms)* should be highly respected and should not be effortlessly disturbed.
4. Finding another alternative that is following The Holy *Qur'ān* and the Sunnah (ahādīth) should be used as a last resort.[434]
5. In a matter where Muslim jurists have different opinions, or if the opinion of the author is not clear and distinct.[435]
6. Strict adherence to literal interpretation (ta'wīI)s of The Holy *Qur'ānic* verse should be evaded and The Holy *Qur'ānic* spirit, as it stands in modern times should be given full attention, as has been observed by the Pākistānī judiciary in decreeing the *Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi[436],* the juristic opinions of no one school of *Sharī'ah* were followed and rather asserted their own's ta'wīI of the Holy *Qur'ānic* verse[437], as well as the Hadith relating to the cause of Habibah[438], in granting Khul'' for the first time in Pākistān.

The FSC has been expanding its original jurisdiction by way of largely interpreting the term ―Injunctions of Islām (aḥkām-e-Islām)‖, construing the term to equally include the overall Islāmic main beliefs and the ―letter and spirit‖ of considered main principles. This structure also provides the FSC with a wide interpretive freedom of choice. In the process of ascertaining whether a law contradicts or conforms to the Islāmic injunctions, the FSC employs a methodology founded on the Qur'ān, which serves as the primary source of Islāmic Sharī'ah Law. The FSC's methodology involves a careful analysis of the relevant Qur'ānic verses and their interpretation within the broader context of Islāmic jurisprudence. The FSC

[433] ibid 185.
[434] Supra Ihsan Y, 2014, 185.
[435] Supra Asaf Fyzee, 57-58.
[436] *Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi*, PLD 1959 Lahore 566.
[437] Al-Qur'ān, 2:229.
[438] The wife of Thabit bin Qays bin Shamas.

endeavours to comprehend the fundamental principles and aims of Islāmic law, subsequently applying them to the specific legal issue at hand[439].

In this process, the FSC considers the literal meaning of the Qur'ānic verses as well as their contextual and historical significance. However, the court also recognizes that a comprehensive understanding of Islāmic law requires looking beyond the literal interpretation and considering the spirit and broader teachings of the Qur'ān.

5.4 Methodology utilized by The Federal Shariat Court in Declaring Any Law Repugnant or Non-Repugnant to the Islāmic Injunctions Rooted in the Holy Holy Prophet (صلى الله عليه وآله وسلم)'s Sunnah

In addition to the Holy Qur'ān the FSC accords substantial importance to the Holy Sunnah of the Prophet (ملسو هلآو هيلع هللا ىلص) as a vital guiding source in determining the compatibility of any law with Islāmic injunctions. The methodology employed by the FSC encompasses an analysis of the Prophet Muhammad's (ملسو هلآو هيلع هللا ىلص) practices, sayings, and endorsements, as documented in the Hadith literature. Authenticated Hadith narrations serve as the court's foundation for acquiring insights into the teachings and deeds of the Prophet, which form an integral component of the régime in legal framework structure of Sharī'ah.

During the assessment of a law's harmony with the Holy Sunnah, the FSC meticulously examines the particular matter under consideration. Its aim is to establish whether the law harmonizes with the teachings and fundamental principles encapsulated within the traditions of the Prophet. The FSC accords substantial importance to the Prophet's guidance on matters of morality, justice, social welfare, and individual rights, among other aspects. The FSC also considers the understanding and interpretations of scholars who have specialized in the study of Hadith (Muhaddiths). Their scholarly works and commentaries provide valuable insights into the application of the Holy Sunnah in various legal and social contexts.

[439] Although the FSC does not explicitly state it, the burden appears to be on the petitioner to identify both the specific injunction of Islām that is being violated and the law that is deemed repugnant. This allocation of the burden can be inferred from the FSC's dismissal of various petitions where the petitioners fail to clearly state the particular injunction of Islām that is allegedly violated.

The alignment of Pākistān's laws with the Islāmic injunctions, sourced from both the Qur'ān and the Holy Sunnah, is aimed to be ensured by the FSC. By relying on the Prophetic traditions, the court seeks to establish a comprehensive and holistic understanding of Islāmic law, taking into account the practical examples set forth by Hazrat Muhammad (ملسو هلآو هيلع هللاىلص), himself.

Here in IRP, there is not any exclusive régime in legal framework structure or a statute that can authoritatively outlaw any denial to the Holy ahādīth and Sunnah (ىلص هللا هيلع هلآو ملسو), just like the rulings of the first Khuleefa-e-Rashid Abu Bakar (رضي الله عنه), who ordered for killing of, all those Muslims, who used to deny the sayings (ahādīth) and Sunnah[440]. According to al-Rāzī and al-Tha'ālibī[441], these strict orders of Abu Bakar (رضي الله عنه) were in compliance with the interpretation of the Holy Qur'ān[442].

5.5 Methodology of the Federal Shariat Court in Declaring Any Law Repugnant or Non-Repugnant to the Islāmic Injunctions Rooted in the Other Sources of Islāmic Law

For methodology in declaring any law repugnant or non-repugnant to the Islāmic Injunctions rooted in the other Sources of Islāmic Law: *adl*, *mas.lah.a*, *ih.sān*, *istih.sān* and *maqās.id al-Sharī'a*, the FSC, equally, follows the provisions of the Sharī'at Enforcement Act**,** as it specifies ―in interpretation and explanation of the Sharī'ah, the accepted doctrines for interpreting and explaining the Holy Qur'ān as well as the ahādīth must be obeyed plus the thoughts of the acknowledged Muslim fuqahä', being affiliated with the prevailing schools of Sharī'ah law thoughts could be considered.‖[443].

At the same time, in declaring any law repugnant or non-repugnant to injunction, the FSC, harmoniously, remains closely connected to the community. As an Hon'able ex-CJ FSC has said:

> ―*The policy of the FSC is to take in confidence in employing lawyers, Sharī'ah scholars, and intellectuals, the other members of the public*

[440] Zameer, S Marinus, *The law of Apostasy in Islām* (London: Marshall Brothers, 1924).
[441] Ibid, 34-35.
[442] Al- Qur'ān 2:214.
[443] ―Section 2, the Sharī'at Enforcement Act, 1991.‖

exercising their discretion, the social reformers, and the 'ulamā'. Keeping this objective in view, the statutes chosen to exercise jurisdiction are socially publicised."[444]

In addition, the FSC also emphasizes that it does not limit itself to a single interpretation. The court acknowledges the need for flexibility and recognizes that there can be multiple valid interpretations of Islāmic law. This approach allows for a diversity of perspectives and encourages a more comprehensive understanding of the law. By considering various interpretations, the FSC aims to ensure a fair and inclusive application of Maqasid-Al-Sharī'ah in its decision-making process[445]. The FSC, correspondingly, held at page 47 of its judgement in *M Riaz v. FoP*, that: ―the Holy Qur'ān as well as the Sunnah (ahādīth) of the Hazrat Muhammad صلى الله عليه وآله وسلم) must be construed by taking into consideration the progression of the anthropological society and its socio-economic concerns, at a specific phase of time, such a process must not setback the determination as well as the tenacity for which the Holy Qur'ān outlooks.‖[446] In a case, the LHC had held the opinion of ―*We must hold jurists in the highest respect and not easily disrupt their views, but we can never deny the right to differ*.‖[447]

The FSC took on policy matters, immediately right after its establishment, which encompassed inquiries about the methodology framework for determining the compatibility of any law with Islāmic Injunctions. This framework was based on Islāmic Law sources other than the Holy Qur'ān and the Sunnah (primary ones). Equally, deciding which school of Islāmic Sharī'ah legal thought to follow in this course is an important question[448]. In consequence, in its foremost petition: *M Riaz v. FoP*, the FSC deliberated the methodological concerns, in declaring any law repugnant or non-repugnant to the Islāmic Injunctions based on ther other and recognized some approaches for this methodology. The particular methodology for removing repugnancies of laws with the Holy Qur'ān and the Sunnah was specified by the FSC. Because constitutionally the FSC had to hold the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآ هيلع هللا ىلص) as the necessary benchmarks to

[444] Gul M Khan, *FSC in Pākistān* (Islāmabad: FSC, n.d.), 12.
[445] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.
[446] M Riaz v. FoP, PLD 1980 FSC 1, 47.
[447] Mst Khurishid Jan v. Fazal Dad, PLD 1964, (WP), Lahore, 558.
[448] Lau, *The Role of Islām in the Legal System of Pākistān*, 144.

testify the repugnancy of any prevailing Pākistān's statute. On the other hand, the provisions of subclauses of the Rule 7 (1) of FSC Procedural Rules were not judged as compelling the Hon'abl FSC to abide by any particular sect or a particular *Sharī'ah* law Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah, in its exersion of Collective Ijtihād. The Hon'abl FSC obligatorily had ―*to examine the views and opinions of all eminent jurists or fuqahä" of Usūl al-fiqh (Sharīʿah scholars) on the subject and examine their arguments to determine whether they are relevant to the needs of the present day or not, or, if possible, to adapt them to the times*.‖[449].

The authoritative influence of the thoughtful views of different fuqahä' (Sharīʿah scholars) from the various schools of thought within Usūl al-fiqh was regarded by the FSC. When examining the FSC's case laws, it becomes evident that the courts make references to Qurʾānic verses and ahādīth. The reliance on various treatises of fiqh, particularly Hidāya and Fatāwā ʿālamgīrī, Observation of the Ḥanafī School is applicable to these. The methodology of takhyīr emerged as a new trend in the 1960s. This practice, involving the selection of opinions from diverse schools of thought within Islāmic law, resulted in the emergence of differing viewpoints among jurists. This, in turn, prompted a substantial debate concerning the legitimacy of this practice. Takhyīr, also recognized as eclecticism, encompasses a process in Islāmic law wherein the boundaries of various schools are crossed to locate juristic opinions that endorse reforms in multiple aspects of personal status law. This deliberate process involves departing from rigid adherence to a solitary school of thought and embracing the diverse philosophical paradigms of Sharī'ah. Its objective is to explore alternative perspectives that harmonize with the objectives of reform within the realm of personal status laws[450].

As previously argued, that the assumption made by the FSC was that in cases where a statute is silent on a particular issue[451], reference should be directed towards the principles of Islāmic law. This coincides with the contentions presented by the LHC in the matter of *Nizam Khan v. ADJ that* specified that ―when a statute does not address a specific matter, it should be decided based on the principles and guidance

[449] M Riaz v. FoP, PLD 1980 1.
[450] Mohammad Hashim Kamali, *Sharī'ah and the Halal Industry*. (United States: Oxford University Press, 2021), 195.
[451] Supra Muhammad Naseer v. GoP the FSC 1988.

provided by Sharīʿah.‖[452]. According to the FSC and supported by the LHC‘s ruling[453], the application of Islāmic law becomes necessary when statutory laws fail to provide clear guidance on a particular issue. In such cases, the court is expected to rely on the principles, teachings, and interpretations of Sharīʿah to reach a just and equitable decision. This methodology ensures that the legal system remains consistent with the Islāmic principles and values inherent in the régime in legal framework structure.

The FSC‘s methodology to reform lacks consistency, as both takhyīr and ijtihād have been utilized by it, in the past. In certain situations, Pākistān has implemented takhyīr while labeling it as ijtihād, thus blurring the distinction between the two. Takhyīr, as previously discussed, involves the selection of opinions from various schools of thought within Islāmic law to support reform effort. On the other hand, ijtihād refers to the independent reasoning and interpretation of legal sources by qualified scholars to derive new rulings or adapt existing ones to contemporary circumstances.

The confusion arises when takhyīr, which essentially involves eclecticism and drawing from multiple schools of thought, is mislabeled as ijtihād. This inconsistency in nomenclature has led to a lack of clarity and understanding regarding the actual methodology employed by the FSC in certain cases. It is important to differentiate between takhyīr and ijtihād, as they represent distinct methodologies to legal reasoning and reform. Clarity and consistency in the application of these methodologies are crucial to ensure transparency and integrity within the legal system[454]. An illustrative example of the FSC‘s inconsistent methodology can be found in Section 4 of the MFLO. This particular section highlights the legislature‘s decision to adopt the Shia law of inheritance in order to provide relief to orphaned children. In this context, the FSC‘s adoption of the Shia law of inheritance can be viewed as an instance of takhyīr, as it involves borrowing principles and practices from a specific Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah within Islāmic law. By incorporating the Shia law of inheritance into the

[452] Nizam khan v. ADJ, PLD 1976 Lahore 930.
[453] NLR 1980 Civil (Lah.) 61 *rel.*
[454] Supra Coulson, 1969, 136

MFLO, the legislature aimed to address the needs and concerns of orphaned children and ensure their fair treatment in matters of inheritance.

However, importantly, the adoption of Shia law within the framework of the MFLO should not be conflated with ijtihād, which pertains to the autonomous interpretation and reasoning undertaken by competent scholars. Instead, this provision can be regarded as an illustration of legislative discretion aimed at integrating diverse schools of thought for the purpose of effecting legal reform. Inconsistency arises from labeling this adoption of Shia law as a form of relief for orphaned children, rather than explicitly acknowledging it as takhyīr. By misrepresenting this act as ijtihād[455], there is a departure from the accurate characterization of the methodology employed.

This example demonstrates the need for clarity and transparency in the FSC's methodology to legal reform. Consistency in labeling and accurately characterizing the methodologies utilized will help to ensure a more coherent and principled application of Islāmic law within the legal régime[456]. In line with Section 2 of the Sharīʿat Application Act, 1991, it is not obligatory to strictly adhere to a single Schools of thoughts, upholding diverse philosophical paradigms, of Sharīʿah when interpreting the Holy Qurʾān, and the Sunnah. This section allows for the consideration and utilization of opinions from different schools of thoughts for interpretation. The Act recognizes that Islāmic jurisprudence is not confined to a singular school but encompasses diverse perspectives and interpretations. It acknowledges that the Holy Qurʾān, and the Sunnah contain a wealth of wisdom and guidance that can be understood and applied through various legal methodologies. By allowing the incorporation of opinions from different schools of thought, the Act promotes a more inclusive and comprehensive understanding of Islāmic law. It recognizes that multiple perspectives can contribute to a holistic interpretation that takes into account the complexities of contemporary issues. This provision emphasizes the importance of engaging with diverse legal opinions and encourages scholars and jurists to engage in comparative analysis and critical thinking. It enables a dynamic methodology to legal interpretation that can adapt to evolving social and

[455] Anees Ahmed, ―Reforming Muslim Personal Law,‖ *Economic and Political Weekly* 36, no. 8 (2001): 618.
[456] Supra Lau, 138.

legal contexts while remaining rooted in the principles of the Holy Qur'ān, and the Sunnah.

By acknowledging the validity of utilizing opinions from different schools, the Act promotes a flexible and nuanced application of Islāmic law, ensuring that the legal system remains relevant and responsive to the needs of society[457]. *Takhyīr,* in Pākistān, is employed not only by the state as part of the process of Islāmization but also by the courts. Pākistān's family law includes certain rules borrowed from other schools of thought, despite the majority of adherents in the country belonging to the Hanafī School. The use of takhyīr in the Indian subcontinent was first introduced in the formulation of the Dissolution of Muslim Marriages Act of 1939, which drew inspiration from the Mālikī School[458]. The SCP had already followed this methodology, in *Mst. Khursheed Bibi v. M Ameen*[459] case, as had been held by the SCP, referring *Raddul Mukhtār*[460]:

> *―Referring to opinions from other Sunni sects, apart from the Hanafīs, which are in harmony with the Qur"ānic injunctions is permissible. Some degree of flexibility exists even within the orthodox Hanafī School in certain matters. For instance, when dealing with a husband who has become Mafqūd-ul-Khabar, a Hanafī qāzī can turn to Mālikī opinion, as noted in Raddul Mukhtār. Importantly, the learned imāms never asserted the ultimate conclusiveness of their opinions. However, due to various historical factors, their followers in subsequent eras introduced the doctrine of taqlīd, whereby a Sunni Muslim adheres exclusively to the opinion of a single imam, regardless of whether reasoning supports another viewpoint.‖*[461]

The treatises of Sharī'ah law on usūl al-fiqh are rich in this principle in the footings of the defined protocols for the Collective Ijtihād and the criterion of mufti

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[457] Munir, M. ―Precedent in Islāmic Law with Special Reference to the Federal Sharī'at Court and the Legal System in Pākistān.‖ *Islāmic Studies* 47, no. 4 (2008): 452–458.
[458] Supra Anees Ahmed, ―Reforming Muslim Personal Law,‖ *Economic and Political Weekly*, Vol. 36(8), (2001), 618.
[459] Supra Mst. Khursheed Bibi v. M Ameen.
[460] Muḥammad Amīn b. ābidīn, *Radd al-Muḥtār „alā al-Durr al-Mukhtār* (Beirut: Dār al-fikar, 1992), 2:572.
[461] Mst. Khursheed Bibi v. M Ameen, PLD 1967 SC 97.

for exerting the Collective Ijtihād. Notably, after deciding on such a methodology, the FSC's juries acknowledged their right to join in the process of Collective Ijtihād and in reality exercised this in many petitions[462].

The collective exertion of these fuqahä' of Usūl al-fiqh (Sharīʿah scholars) from the various *Sharī'ah* law Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah of thought in the Collective Iijtihād are of prospective nature, in the methodology for the Islāmisation of Pākistān's Laws. Because, as held by the SAB, that As soon as the FSC takes on its jurisdiction in any Sharī'ah petition then its judgement would have no retrospective effect, following the provisions of Article 203D (2) of the IRP Constitution[463].

Still, broadly affirming the estimations of diverse *Sharī'ah* law Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah of thoughts, as partaking credible authority, might result in inconsistency in applying the Usūl al-fiqh (the Sharī'ah doctrines). Therefore, the FSC must elaborate its exhaustive codes of interpretation, considering the interpretation theories of the Sharī'ah legal syatem.

Unless there is a specific injunction of a Qurʾānic aayat, or a hādīth of the Holy Prophet (ملسو هلآو هيلع هللا ىلص), at that juncture the FSC's consistency is governed by the ruling standard, governing such a state of affairs, is that ―whatsoever has not been expressedly forbidden would be allowed‖, as practicalised in *Abdul Majid v. GoP,*. In that petition, the monitoring régime for taking in custody the arms and then its permitting structure, for license, had been looked into from the perspective of injunction of a Qurʾānic aayat, or a hādīth of the Holy Prophet (ملسو هلآو هيلع هللا ىلص), but then again the FSC rejected to advocate this as repugnant to the Islāmic injunctions (aḥkām-e-Islām)[464]. The FSC detected that ―*the elected legislative body representing Muslim citizens of a Muslim state (Muslim Ummah), is sanctioned to enact laws, in the pursuits There is no specific guidance from the injunctions of the Holy Qurʾān, or hādīth of the Holy Prophet* (ملسو هلآو هيلع هللا ىلص), *the main primary Sharī'ah sources of law. The*

[462] ―Ihsan Y, ―Pākistān Federal Sharī'at Court's Collective Ijtihād on Gender Equality, Rights of the women and the Right to Family Life,‖ *Islām and Christian–Muslim Relations* 25, no. 2 (2014): 181–92‖.
[463] M Farooque v. Muhammad Hussain, 2013 SCMR 225.
[464] Abdul Majid v. GoP, PLD 2004 FSC 1, 6.

central principle of Islām that guides such events is the so-called public welfare (maslaha): that which is most beneficial to the publics and which favours logically and reasonabally, has been enacted into law.‖ Then later on at appellate stage, the SAB upheld that pronouncement of the FSC in *Abdul Majid v. GoP*. The main purpose of the state is to protect the rights of the people and ensure justice for all. In this regard, the FSC observed highlighting the principle of relativity and held ―*the perception of impartiality is perpetually everlasting however its changing aspects possibly will change along with the varying state of affairs. A certain regulation might be unprejudiced at one period but might bring about discrimination at a different period as well as in other diverse circumstances*.‖[465]

Aware of the impossibility of wiping out all the sins from the Islāmic society, the FSC affirmed., ―*All forms of harmful damage and corruption, regardless of their extent, nature, or scale, must be taken away and eliminated as possible as a State could*.‖[466] The Sharī'ah law deliberates an infinite and all-encompassing authority for promulgating statutes, for the common good.

Reconnoitering the restrictions of acceptable lawmaking, the FSC asserted a suitable assertion that albeit a acceptable law turns out to be a cause for creating distress and injurs the general public, it would be outlawed for the common good[467].

Frequently, the FSC has time after time repeatedly asserted ―the awareness that all the same it, (the FSC), respects the juristic opinions and fatwas of the Sharī'ah scholars and fuqahä', and could not apply them in the *nonexistence of an unequivocal principle in the original sources, namely, the injunctions of the Holy Qur'ān, or hādīth of the Holy Prophet (*ملسو هلآو هيلع هللا ىلص*)."* The frequency of confirming this standing is evident from a number of Sharī'at petitions like *Salim Ahmed v. GoP*[468]*,* and *M Fayaz v. IRP*[469].

As well, the FSC, likewise, affirmed its self-directing independence in interpreting *the injunctions of the Holy Qur'ān, or hādīth of the Holy Prophet (* وسلم صلى الله عليه وآله*)* with having no prejudice to any other adjudicating body, exercising

[465] Ibid, 6.
[466] Ibid, 7.
[467] Ibid, 7.
[468] Saleem Ahmad v. The GoP, PLD 2014 FSC 43.
[469] M Fayaz v. IRP, PLD 2007 FSC 1.

similar prerogative. As, in *M Saeed ullah Khan v. GoNWFP*, dismissing the Sharī'at petition, the FSC had looked into contention of the petitioner that repugnancy of the statute (under examination/review) to the injunctions of Islām (aḥkām-e-Islām) which are as laid down in the Holy Qur'ān and the Sunnah (ahādīth) of our Holy Prophet Hazrat Muhammad (ملسو هلآو هيلع هللا لص), ought to be affirmed as per the CII's recommendations[470].

The subsection 4 of section 10 of the WPFCA had been challenged in *Saleem Ahmed v. GoP,* as it put heads together the power for dissolution of a Muslim marriage, on the Judge of a Family Court on based on *khul'',* at the initial stage before framing of the issues or documenting the necessary evidence in the family case, There is no chance of settlement through an amiable reconciliation between the husband and the wife. Depending on a number of *fataawa* of the Hanafī School, it had been put up with that ―this mode of *Khul''* was repugnant to the injunctions of Islām (aḥkām-e-Islām) which are as laid down in the Holy Qur'ān as well as the Sunnah (ahādīth) of the Holy Prophet (ملسو هلآو هيلع هللا لص).‖[471].

On finding nothing inconsistent with the Islāmic injunctions (aḥkām-e-Islām), in the agreed methodology, then the FSC refused to declare the impugned provisions in subsection 4 of section 10 of the WPFCA as repugnant to the Islāmic injunctions (aḥkām-e-Islām) which are as laid down in the Holy Qur'ān as well as the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا لص). The FSC's this judgement has been carrying very imperative impacts and consequences for the parliamentary proficiency of the IRP's State, namely:

1. At the outset, the status of a fatwa, not being directly or primarily rooted in the main sources of Sharī'ah (i.e. the Holy Qurʾān, or hādīth of the Holy Prophet (ملسو هلآو هيلع هللا لص), could not rule out an Islāmic State from implementing its autonomous lawmaking action;
2. Also, evidently, the majority of the Muslim population in Pākistān follows the Hanafī school of Sharī'ah law thoughts[472], this means that even a fatwa

[470] M Saeed ullah Khan v. GoNWFP, PLD 2009 FSC 33.
[471] Aisha, Javaid, Steve, *The Asian Yearbook of Human Rights and Humanitarian Law* (Nijhoff: Brill, 2019, vol. 3), 331-356.
[472] MQ Zaman, *The Ulamā in Contemporary Islām Custodians of Change* (Princeton: PUP, 2010), 97.

by this sacred school of Sharī‘ah could not have any significant bearing on the autonomous lawmaking action of the Legislature.

Where differences of opinion arise between the different Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharī‘ah law thoughts, the State may exercise its legal discretion to adopt the course it deems most appropriate. This characteristic methodology of lawmaking discretion was stressed by the FSC, in the interpretation of the expression ―*The Muslim Personal Law*‖ provided in the IRP Constitution[473]. The Section 8 of the DMMA, providing with delegation of power of divorce to a spouse or ―talāq-e-tafveez‖, was challenged in the Sharī‘at petition of *Khawar Iqbal v. FoP*[474]. The FSC rejected the petition with noting of no-interference on these two refusal grounds:

1. **The Merit of the Petition:** the FSC could not find anything in the primary main sources of Sharī‘ah (i.e. the Holy Qurʾān, or hādīth of the Holy Prophet (ملسو هلآ وهيلع هللا ىلص) that could prevent the IRP State to enact this very mode of dissolving a Muslim marriage;
2. **The FSC‘s jurisdiction:** The FSC kept up that the questioned provisions were outside the domain of its jurisdiction, by way of not being mutually agreed upon by the diverse schools of Sharī‘ah law, keeping in view the very poles apart alternative opinion of the Shia juristic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah, in this concern. In order to exclude its jurisdiction, the **FSC** clarified the status of the ―Muslim Personal Law‖, that it is a legislation which, apart from being a legislative law, all Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharī‘ah law thoughts disagree with the Islāmic methodology.

As a result, categorically, when a statute, in the purview of family laws concerns, is legislated in orthodoxy with one or more Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharī‘ah law thoughts but not the entire ones, then the FSC cannot test it, on the criterion of the injunctions of Islām (aḥkām-e-Islām), as a consequence of its status of being categorized in the

[473] Article 203(b), IRP Constitution, 1973.
[474] Khawar Iqbal v. FoP, 2013 MLD 1711.

heading of the ―Muslim Personal Law.‖ In contrast, when a statute is evidently legislated in the sphere of Muslim family laws that is correspondingly consistent with all the Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah of Sharī'ah law thoughts, it would not be measured as ―The Muslim Personal Law‖ and the FSC may well implement its jurisdiction to review it on the criterion of the injunctions of Islām (aḥkām-e-Islām).

The methodology employed by the FSC, in its decision-making process involves three important principles: Takhrīj, Talfīq, and Takhyīr. Let's explore these terms and their significance:

Takhrīj: Takhrīj refers to the extraction or derivation of legal rulings from primary Islāmic sources, such as the Qurʾān and Hadith (sayings and actions of the Prophet Muhammad). The FSC depends on on the process of Takhrīj to derive legal principles and rulings applicable to contemporary legal issues. This involves careful examination and interpretation of the relevant verses of the Qurʾān and the Hadith, taking into account the context and teachings of Islāmic jurisprudence.

Talfīq: Talfīq involves the combination or synthesis of legal rulings from different schools of Islāmic law (madhhabs) to arrive at a comprehensive ruling or solution. The FSC may adopt a Talfīq approach when there are conflicting opinions or multiple valid interpretations among the different schools of thought. By synthesizing various rulings, the FSC aims to provide a coherent and practical solution to the legal issues at hand.

Takhyīr: Takhyīr refers to the practice of selecting or choosing a legal ruling from one specific school of Islāmic law (madhhab) when no consensus or clear ruling exists. In such cases, the FSC may exercise Takhyīr and adopt the ruling from a particular madhhab that it deems most appropriate or relevant to the circumstances. This allows the court to provide a clear and decisive ruling, even in situations where there is no unanimous agreement among the various schools of Islāmic law[475].

Overall, the methodology of Takhrīj, Talfīq, and Takhyīr enables the FSC to interpret and apply Islāmic principles in a manner that is consistent with the evolving

[475] Supra Giunchi, Islāmization, 200.

legal landscape and contemporary societal needs. It allows the court to draw from primary sources, reconcile divergent opinions, and provide practical solutions to complex legal issues within the framework of Islāmic jurisprudence[476].

The judgements of the FSC, in the 2006‘s 1/K Suo Motu action by the FSC[477], The FoP v. the Provincial Governments[478], Dr. M Aslam Khakhi v. the GoP etc.[479], and Mian A Razzaq Aamir v. FoP[480], established a methodology that when a provision of statute law, is unanimously consistent with different Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharī‘ah law, is in the jurisdictional domain of the FSC, even though a provision, not unanimously consistent, is beyond the FSC‘s jurisdiction. This established methodology provides the government with a colossal ground for lawmaking in purview of the ―Muslim Family Law‖ with an assurance that such statute laws might not be professed the FSC to be repugnant to the Islāmic Injunctions (aḥkām-e-Islām) which are as laid down in the Holy Qur’ān as well as the Sunnah (ahādīth) of the Hazrat Muhammad صلى الله عليه وآله وسلم), on condition that while passing such statutes, the parliament must ensure, that all the Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī‘ah of Sharī‘ah law need not to agree on the legislating standpoint[481].

It may be pertinent to note here that the superior courts of Pākistān have already made a contribution in the field of Ijtihād before the establishment of FSC. The Superior Courts have put aside the doctrine of Taqlīd and started to give the attention to the doctrine of Ijtihād. They have even gone beyond the principles of Talfiq and Takhayyar and have effectively exercised the right of Ijtihād, whenever and wherever necessary, in order to interpret the primary sources of Islāmic Law directly, untrammeled by any existing opinion. This was done as early as 1959, when it was held by the LHC that ―if we be clear as to what the meaning of a verse in

[476] Supra Hallaq, WB, *Sharī''a: Theory, Practice, Transformations* (Cambridge: CUP, 2009) Ch 17 (In search of a legal methodology) 500-42.
[477] Supra the 2006‘s 1/K Suo Motu action by the FSC, PLD 2008 FSC 1.
[478] Supra PLD 2009 FSC 01.
[479] Dr. M Aslam Khakhi v. the GoP etc., PLD 2010 FSC 1.
[480] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.
[481] Marin Lau, *The Role of Islām in the Legal System of Pākistān* (Leiden: Martinus Nijhoff, 2006), 138-139 & 155-160.

Qur'ān is, it will be our duty to give effect to that interpretation irrespective of what has been stated by jurists.‖[482]

Accordingly, the definition pointed out by al-Shaukani (رحمة الله عليه): ―*Precludes self-exertion by a layman in the inference of a ruling."*[483] Each type of Ijtihād must be performed according to certain rules that are specific to each class.

The interpretative Ijtihād is concerned with the exegesis of texts that contain specific meanings. The methods used to perform this Ijtihād are: specific and general, indefinite and indefinite, concrete and symbolic, clear and subtle, detailed and doubtful and definite and indefinite, etc. The expression, meaning, direction and importance of the text included in the orders should also be taken into consideration. Interpretative Ijtihād (Tafsir Ijtihād) should be done in this way keeping in mind other technical methods of interpretation (ta'wīI) and interpretation (ta'wīI) of the Holy Qur'ān, and the Sunnah (ahādīth).

The Analogical Ijtihād is resulting from the legal analogies. Here one needs to determine the origin or root, subdivision or branch, sequence, and cause. An appropriate legal responsibility method of interpretation (ta'wīI), evaluation, and study should be used to determine the reason and application of the order. What is more, to distinguish command effectiveness and reasoning behavior, judgement is necessary between the appropriate, derived, transmitted, and unusual reasons. And in the case of the singleness of the command and cause, singleness in sex and type must also be considered when extending *Ijtihād*.

The Conciliatory *Ijtihād* is derived from need and suitability or appropriateness. To carry out this type of Ijtihād, the established jurisprudential principles, and laws must be taken into account, including coalitional, conciliatory, principles of gratefulness, and deductive reasoning plus changing times, exigency, the law of necessity, and usage. Ijtihād conducted under these terms, rules, and regulations is considered appropriate but otherwise remains a matter of individual opinion.

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[482] Supra Mst.Balqis Fatma v. Najimulikram, PLD 1959, Lahore, 566.

[483] Muhammad bin Alī Al-Shaukani, *lrshad al-Fuhul ila Tahqiq al-Haqq min Ilm alUsul* (Beirut: Dar al-Fikr, n. d.), 250.

As the chief concern of this research is embarking on the perspective of the FSC, so methodology of ijtihād as well as the rules of interpretation (ta'wīl) need to be elaborated as pursued in FSC, Pākistān. This section examines the methodology adopted by the Pākistānī judiciary to reinterpret such decisions. Hence, since the late 1990s, a consensus has been reached with scholars (fuqahä'), judges, the SCP, the FSC, the CII, and the IRI of the IIU of Pākistān. The focus lies in transforming the existing Islāmic laws into ones that are gender-sensitive, aiming to mitigate their adverse effects on women's status.

This research aims succinctly explain how the FSC's methodology for assessing the compatibility of laws with Islāmic injunctions, using other sources of Islāmic law, has granted Islāmic legitimacy to laws originating from the British Raj era. Since Pākistān's independence, there has been a continuous political call from Islamists to replace ―British-derived civil and criminal laws‖ with Islamic laws.

The FSC plays a crucial role in assessing the compatibility of legislation with Islāmic principles. Through its methodology, which involves drawing upon various sources of Islāmic law, the FSC determines whether a particular law aligns with the tenets of Islām. By applying this methodology, the FSC has bestowed Islāmic legitimacy upon laws that were initially introduced during the British colonial era. The demand to replace British-derived laws with Islāmic laws has been a consistent objective among Islāmists in Pākistān. They argue that such laws are remnants of colonial rule and do not adequately reflect the Islāmic values and principles upon which the country was founded. This demand is rooted in the desire for a legal system that is firmly grounded in Islāmic teachings and traditions.

By employing its methodology to assess the compatibility of existing laws with the Islāmic Injunctions, the FSC has contributed to the fragmentary debate on the implementation of Islāmic law in Pākistān. A means has been provided by the FSC's decisions to declare laws as either repugnant or non-repugnant to the injunctions of Islām to legitimize or challenge the continued application of British-derived laws.

In summary, the methodology employed by the FSC for assessing the compatibility of laws with Islamic principles has played a crucial role in conferring

Islamic legitimacy to laws originating from the British Raj era. This convergence has occurred alongside the persistent political insistence of Islamists to replace British-derived civil and criminal laws with Islamic laws within Pākistān[484].

Numerous Pākistān's statutes, it is indeed noteworthy that numerous laws enacted during the period from 1857 to 1947, which bear the dates of enactment from that era, have been brought before the FSC for examination from an Islāmic perspective. Surprisingly, the majority of these laws have been deemed as conferring Islāmic authenticity by the FSC. This indicates that the FSC either did not identify any inconsistencies with the fundamental sources of Islamic law in these enactments or perceived them to fall within the jurisdiction of the state's legislative authority. It's crucial to acknowledge that if the state considers it necessary, it retains the option to introduce appropriate modifications to these laws. However, the FSC might refrain from succumbing to any inclination, even on religious grounds, to impinge upon the state's legislative independence and advocate for an alternative path of codification. Since talked about previously, some of the causes have already been cited above that pertain to laws enacted during the British Raj. These cases shed light on the process by which the FSC bestows retrospective Islāmic legitimacy upon legislation that originated from British colonial times. Particularly within the domain of family law, there are cases that illustrate how this process unfolds. These cases serve as examples of how the FSC has examined laws enacted during the British colonial period and, based on its methodology, has conferred Islāmic legitimacy upon them. It demonstrates the FSC's role in ensuring the conformity of these laws with Islāmic principles, while also acknowledging the legislative autonomy of the state to introduce amendments if necessary.

Overall, these examples highlight the dynamic interaction between historical legislation, the FSC's scrutiny from an Islāmic perspective, and the state's authority to enact amendments. They provide insights into the process through which the FSC bestows retroactive Islāmic legitimacy upon laws that originated during the British colonial era. The case of *Nadeem Siddiqui v. the IRP*, which encompassed a legal case concerning the restoration of conjugal rights[485], followed by the subsequent implementation process for enforcing the court's order against a non-compliant

[484] Stephen PC, *The Idea of Pākistān* (Brookings Institution Press, 2004) 166.
[485] Nadeem Siddiqui v. IRP, PLD 2016 FSC 1.

spouse[486], are legal artifacts that devised from the British Indian régime. The concept of a legal action for the restoration of conjugal rights, along with the process of enforcing the court's decree, has its origins within the legal framework structure established during British colonial régim in the Indian subcontinent. These laws were introduced to regulate and govern marital relationships and address issues related to conjugal rights, against his erroneous wife stood the legal objet d'art of the British régime[487].

In the case of the suit for restitution of conjugal rights, which underwent examination by the FSC through various Sharī'ah petitions, no provisions were found within the Qurʾān and Sunnah that rendered the suit incompatible. Following its investigation, the FSC concluded that the principles and teachings of Islāmic law did not prohibit the pursuit of such legal recourse. Therefore, the FSC determined that initiating a suit for restitution of conjugal rights did not contradict Islāmic principles. In regard to the execution procedure for enforcing the decree of a suit for restitution of conjugal rights, the FSC acknowledged the significance of judicial decrees in Islāmic law. The Court emphasized that any procedure not explicitly prohibited by the primary sources of Islāmic law could be deemed permissible, such as the Qurʾān and Sunnah, could be devised for the implementation of judicial decrees. It reasoned that imposing unnecessary limitations on execution procedures would compromise the dignity and integrity of the judicial system.

Additionally, in another case involving a statute enacted during the British Indian régime, the FSC's scrutiny of the matter led to a comparable verdict. The Court evaluated the statute through the lens of Islāmic law and identified no apparent inconsistency with the primary sources of Islāmic law. Consequently, the FSC recognized the ongoing legitimacy of the statute within the Islāmic régime in legal framework structure.

These cases illustrate the FSC's methodology to addressing legal artifacts from the British colonial era. The Court's examination of these artifacts from an Islāmic perspective focuses on compatibility with the Qurʾān, Sunnah, and other

[486] Nadeem Siddiqui v. IRP, PLD 2016 FSC 4.

[487] Cheema Shahbaz A, ―Islāmisation of Restitution of Conjugal Rights by FSC: A Critique‖ (2019) 58 (4) *Islāmic Studies* 535-550; Cheema Shahbaz A, ―Indigenization of Restitution of Conjugal Rights in Pākistān: A Plea for its Abolition‖ (2018) 5 (1) *LUMS Law Journal* 1-18.

primary sources of Islāmic law. If there are no explicit prohibitions or contradictions, the FSC generally upholds the legal artifacts and considers them valid within the Islāmic régime in legal framework structure.

In a different petition, on a law legislated in the British Indian régime: *Mst. Ambareen Tariq Awan v. FoP*[488], In a notable case, certain provisions of the GWA, which pertained to the qualification and appointment of guardians, were challenged before the FSC. The petitioner questioned the principle of the ―welfare of the minor‖ from an Islāmic perspective. However, the FSC dismissed the petition. In its decision, the FSC observed that the appointment or termination of guardianship of a person is the responsibility of authorized entities, which include the legislature, the judiciary, or the executive. The Court highlighted that these entities have the authority to make determinations in matters of guardianship based on the optimum benefits and welfare of the minor. The FSC emphasized that the principle of the ―welfare of the minor‖ is an important consideration in guardianship matters. This principle ensures that decisions regarding guardianship prioritize the well-being, care, and protection of the minor involved. By dismissing the petition challenging the provisions of the GWA, the FSC reaffirmed the role of authorized entities in making decisions related to guardianship. The Court recognized that these entities possess the necessary authority and expertise to assess and determine what is advantageously of the minor, while considering the principles of Islāmic law.

This case highlights the FSC‘s methodology to issues concerning guardianship and the principle of the ―welfare of the minor‖ within an Islāmic context. It underscores the responsibility of authorized entities to make informed decisions in guardianship matters, ensuring the protection and well-being of minors[489], The FSC recognizes the significance of applying Islāmic tenets of fair justice, Ihsan (excellence), and the prevention of harm in matters concerning minors, disabled individuals, and their property. These principles serve as guiding frameworks for decision-making and aim to actualize the welfare-related precepts as outlined in the Qurʾān and Sunnah. In matters of guardianship and the management of property, the FSC emphasizes the importance of justice, ensuring equitable treatment and safeguarding the entitlements and the rights and interests of minors and disabled

[488] Mst. Ambareen Tariq Awan v. FoP, 2013 MLD 1885.
[489] includes minors and disabled people – and property in light of Islāmic

individuals. It seeks to prevent any oppressive or harmful conduct that may adversely affect their well-being. By aligning its decisions with Islāmic principles, the FSC strives to promote Ihsan, which encompasses excellence, goodness, and benevolence. This includes upholding the highest standards of care, compassion, and ethical conduct in guardianship matters.

An example illustrating this approach can be found in the case of *M Riaz v. FoP*[490], The FSC in its ruling on the Islāmization methodology adopted in Pākistān emphasized that Islāmic law and inherited British law are not inherently incompatible and can be harmonized within the régime in legal framework structure of the Islāmic Republic. The court highlighted that common law tenets of fair justice, equity, and good conscience align with Islāmic legal principles such as maslehah mursila (public good) and istihsān (juristic preference). While the FSC acknowledged the possibility of statutory laws not aligning with the Qur'ān, it noted that such cases would be rare.

In essence, the FSC's approach to Islāmization presumes the permissibility of existing laws unless they are proven to contradict explicit sharī'ah injunctions. This methodology involves examining each law and providing legal justifications to either approve or disapprove its compatibility with sharī'ah. It also entails a thorough evaluation of existing laws from the perspective of basic prohibition, assuming that laws are prohibited unless evidence justifying their legality from a sharī'ah perspective is provided[491].

Furthermore, the FSC takes into consideration the teachings of the Qurʾān and Sunnah in order to safeguard the welfare of minors and disabled individuals. These teachings provide guidance on nurturing, protecting, and promoting the well-being of vulnerable members of society. By integrating these Islāmic principles into its decisions, the FSC aims to ensure the just and proper management of guardianship and property matters, with the objective of fostering the welfare and protection of those involved.

In a significant case, the denial of citizenship to the foreign husband of a Pākistān's woman was challenged before the FSC. The denial was based on Section

[490] Supra M Riaz v. FoP, PLD 1980 FSC 1.
[491] Supra Nyazee, *Theories of Islāmic Law*, 268.

10 of the Pākistān Citizenship Act, 1951, which granted such rights only to Pākistān's husbands for their foreign wives. The FSC deemed this denial discriminatory against the injunctions of the Holy Qurʾān, and the Sunnah. Recognizing the contradiction between Section 10 of the Pākistān Citizenship Act, 1951 and Islāmic law, the FSC asserted that the provision was in violation of Islāmic principles as it perpetuated discrimination. The Court further highlighted that this denial of citizenship also contradicted Article 2A and Article 25 of the IRP's Constitution, 1973, which uphold the principles of Islāmic law and guarantees equality before the law, respectively. In addition, the FSC noted that the denial of citizenship to the foreign husband was also contrary to international human rights law, which emphasizes the principle of non-discrimination and equality. By declaring Section 10 of the Pākistān Citizenship Act, 1951 to be in contradiction with Islāmic law, the IRP's Constitution, and international human rights standards, the FSC emphasized the need for alignment between national legislation and these régime in legal framework structures. The FSC's decision aimed to address discriminatory practices and ensure that individuals are not unjustly denied their rights based on gender or nationality. This case exemplifies the FSC's role in examining legislation from an Islāmic perspective and highlighting the need for compliance with Islāmic principles, constitutional provisions, and international human rights norms. It underscores the Court's commitment to promoting equality and non-discrimination in matters of citizenship and upholding the values enshrined in the Holy Qurʾān, Sunnah, and régime in legal framework structures[492].

5.6 Methodology of the Federal Shariat Court in Determining Meaning of the Words Used in the Holy Qurʾān, and the Holy Prophet (ملسو هلآ وهيلع هللا ىلص)'s Sunnah with respect to Derivation of Laws

As a first principle for the FSC's methodology, in determining meaning of words used in the Holy Qurʾān, and the Holy Prophet (ملسو هلآ وهيلع هللا ىلص)'s Sunnah for derivation of laws, is that ―What is not expressly forbidden or prohibited vide the chief sources of Sharī'ah, specifically the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad صلى الله عليه وآله وسلم), could not be declared to be repugnant to the Islāmic Injunctions (aḥkām-e-Islām).‖ This methodology can be enlightened by citing some Sharī'at

[492] Supra 2006's 1/K Suo Motu action by the FSC, Pākistān Citizenship Act 1951, Re: Gender Equality, decided December 12, 2007, PLD 2008 FSC 1.

petitions. As in its foremost case of M Riaz v. FoP, the FSC has clarified that ―The Holy Qur'ān, and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah must be construed considering the evolution of human society however this modus operandi should not negate the soul intent and purposefulness of Holy Qur'ān.‖493 For the re-establishment of laws in accordance to the Islāmic injunctions, the FSC should not strictly adhere to the literal meaning of the texts of Qur'ān & Sunnah but should consider the spirit of Qur'ān & Sunnah in its entirety, as held by the FSC that: ―The Holy *Qur'ān and Hadith shall have to be interpreted in the light of the evolution of human society and its demands at a particular stage of time. Such process should not defeat the intent and purpose for which Holy Qur'ān stands*.‖[494]

The FSC's jurisdiction has been basically derived from the expression: Injunctions of Islām (aḥkām-e-Islām), as given in the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص).‖ This expression was delineated by the SAB, in the petition *Pākistān v. Public at Large*[495]. While there are explicit courses of action in the primary sources of the Holy Qur'ān and Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص), the FSC makes sure that these guiding principles are not being violated. Even taking into consideration certain guiding principles, the FSC has relied on or relied upon the plain and unambiguous meaning of certain words. Where an order or a directive is indistinct and capable of multiple interpretations, the FSC would refrain from giving preference to one interpretation over another. As, in *Mst. Syeda Waqar un Nisa Hashmi v FoP*, For in disagreement the non-compoundable position of honour-killing, a Qur'ānic aayat was referred by the petitioner: ﴿بِذَنۢبٍ قُتِلَتۡ﴾ translated in the anner as ―*for what sin was she killed?*‖[496] While dismissing the plea, based on the foundation that suitable statutory defenses was previously legislated by the Legislature, the FSC witnessed that the above-mentioned aayat was, for no reason, related to that under question crime. On the face of it, the aayat might have implications for the matter (crime) under investigation, but in keeping with its judicial methodology, the FSC refrained from limiting its preference to the Parliament of IRP[497].

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[493] Supra M Riaz v. FoP.
[494] Ibid.
[495] Pākistān v. Public at Large, PLD 1986 SC 240.
[496] Al-Qur'ān 81: 9.
[497] Mst. Syeda Waqar un Nisa Hashmi v. FoP, PLD 2017 FSC 8.

According to the judgement of the SAB, no statute could be affirmed as repugnant to the Islāmic injunctions (aḥkām-e-Islām), without specific reference to the original sources: i.e. the Holy Qurʾān, and the Holy Prophet (ملسو هلآو هيلع هلا ىلص)'s Sunnah, or the principles involved.

Therefore, if an act of the Legislature is not in agreement with the clear texts of the Holy Qurʾān, and the Holy Prophet (ملسو هلآو هيلع هلا ىلص)'s Sunnah, the FSC could not declare that act/statute to be repugnant to the Islāmic injunctions (aḥkām-e-Islām). This methodology of adjudication provides the state with an all-inclusive standard and independence in the matters, having not been not fixed in the original source of the Holy Qurʾān, and the Holy Prophet (ملسو هلآو هيلع هلا ىلص)'s Sunnah. Although, this standard methodology has been consistently being followed by the FSC, to exclude multiple petition applications, the phraseology used for this purpose might vary slightly. As, in Sharī'at petition of *Nadeem Siddiqui v. State of IRP*, the FSC identified ―the petitioner ought not to cite a definite relevant Qurʾānic aayat, or a hādīth of the Holy Prophet (ىلص هلا هيلع هلآو هلسو).‖[498]. Likewise, in another Sharī'at petition *Muhammad Akram v FoP,* the FSC witnessed, ―the knowledgeable petitioner ought not to point out, unambiguously, any Qurʾānic aayat, or a hādīth of the Holy Prophet (ملسو هلآو هيلع هلا ىلص), for supporting his argumentative contentions‖[499] In one more Sharī'at petition titled as *Mst. Syeda Waqar un Nisa Hashmi v FoP,* the FSC mentioned that the Qurʾānic aayat depended on by the knowledgeable petitioner had not any direct bearing or indirect bearing on the matter under question, although he ―ought not to produce any reference to a ‗NASS' of Qurʾānic aayat, or a hādīth of the Holy Prophet Hazrat Muhammad (ملسو هلآو هيلع هلا ىلص)‖ for supporting arguments in his case.‖[500].

In the petition *Hammad Murtaza v. FoP*, the FSC, had coped with the issue of appointing of a female as family court Qāḍī or Judge. Dismissing the plea, the FSC, perceived, that ―*in the face of opportunity given, the petitioner had failed to cite any unambiguous and particular NASS from the Holy Qurʾānic aayaat, for supporting his petition that a female could not be employed as a Qāḍī or a Judge, through appointment*.‖[501]. In one more petition, *Maqbool A Qureshi v. GoPunjab,* the FSC

[498] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 1, and Nadeem Siddiqui v. IRP, PLD 2016 FSC 4.
[499] Muhammad Akram v FoP, PLD 2017 FSC 24, 32.
[500] Mst. Syeda Waqar un Nisa Hashmi v. FoP, PLD 2017 FSC 8, at 12.
[501] Hammad Murtaza v. FoP, PLD 2011 FSC 117.

demonstrated the same methodology. The 25-year age criteria for local bodies in electing the chairman or vice chairman had been besought. It was contended that ―*despite the trustworthiness and truthfulness of Holy Prophet Hazrat Muhammad* (ﷺ), *the revelation of the prophethood was not entrusted to Him* (ﷺ), *until reaching the age of 40, while he was well-established by the age of 25. So how anyone might be considered for such an important role at this age?*‖ Terming the example of the Holy Prophet Hazrat Muhammad (ﷺ) as ―*completely irrelevant*‖ in that very cause, the FSC rejected the plea saying that ―*the Holy Qurʾān does not contain any reference to the age limit for election, appointment, elevation, or selection of a person to a seat of a public office, and no direct Islāmic injunction, is available, in words of a Qurʾānic aayat, or a hādīth of the Holy Prophet* (ﷺ), *for supporting this argumentative contention*.‖[502].

In the event, there are different and conflicting interpretations of Qurʾānic aayat, or a hādīth of the Holy Prophet (ﷺ), the FSC supports a structure that strengthens national authority and constitutions. For instance, in Mehroz v. GoNWFP, an argument of the petitioners supported a proposition, referring an authentic hādīth of the Holy Prophet (ﷺ), recorded in Sahih al-Bukhari, , that ―*cultivation of a barren land*[503] *is sufficient to establish the acquisition of the right of ownership, for the cultivator/reclaimer*.‖[504]. There is disagreement among Muslim fuqahä‘ about the role and authority of a Muslim state on the matter relating the getting hold of exclusive ownership rights. The FSC then decided on determining from different elucidations, that accredited a governing role to the IRP State, explicitly, prior approval of the sovereign or the State Executive is a must condition for acquisition of a proprietary civil right[505].

Another case of significance in this context is *Haidar Hussain v. GoP*[506], in which the vires of articles 3 and 16 of the QSO were questioned from the Islāmic perspective. Article 3 deals with the general competency of witnesses and establishes that whenever a witness possessing the qualifications provided in the Qurʾān and

[502] Maqbool A Qureshi v. GoPunjab, PLD 1992 FSC 282.
[503] The land, not owned by any person.
[504] M Hashim Kamali, *Principles of Islāmic Jurisprudence* (Cambridge: Islāmic Texts Society, 2003) 56.
[505] Mehroz v. GoNWFP, PLD 1993 FSC 38, 43.
[506] Haidar Hussain v. GoP, PLD 1991 FSC 139.

Sunnah is not found, a court may accept evidence of any witness, while article 16 prescribes that evidence of a partner is acceptable. The FSC asserted that there is nothing invasive in Article 3 to the Islāmic Injunctions, which implies that an Islāmically incompetent witness may be regarded as a qualified witness. As far as Article 16 is concerned, according to the FSC, the evidence was held inadmissible while it should be corroborated before being relied on.

With the intention of improving the status of women, the FSC's methodology is to access straight away to the Holy Qurʾān, and the Sunnah to rule the women-favouring decisions[507]. The FSC's intervention in the case of the MFLO to protect women is an illustrative example of its role in addressing concerns related to the misuse of certain provisions. Specifically, the FSC expressed concern regarding the potential exploitation of Section 7 of the MFLO by husbands who intentionally left their ex-wives in a state of legal uncertainty[508]. This Section 7 of the MFLO pertains to divorce and provides a mechanism for the dissolution of a marriage. However, the FSC identified situations where husbands were misusing this provision as a means to abandon their wives without fully completing the divorce process, thereby leaving the women in a legal limbo. Recognizing the unjust and detrimental consequences faced by women in such circumstances, the FSC intervened to protect their rights and ensure that they are not left vulnerable and without legal recourse. The Court aimed to prevent the misuse of Section 7 by interpreting and applying the provision in a manner that safeguards the rights and interests of women.

The FSC's intervention in this case demonstrates its commitment to promoting gender equality and protecting the entitlements of rights of the women in matters related to family law. By addressing the misuse of a specific provision within the MFLO, the Court aimed to rectify the imbalance of power and protect the well-being of women affected by such practices. Overall, this case highlights the FSC's role in safeguarding the entitlements of rights of the women and ensuring the proper implementation of laws to prevent the exploitation of vulnerable individuals within the context of family law.

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[507] Siraj-ud-din, AM. *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study of Judicial Activism* (Karachi: OUP, 2011), 110–187.
[508] Supra Allāh Rakha v. FoP, 61–62.

According to the MFLO, the husband is required to provide a written notice of Ṭalāq (divorce) to the state authorities and a copy to the wife. However, in practice, there have been instances where husbands fail to submit this document. Consequently, if the former wife remarries, the husband may deny the divorce and accuse the former wife of zinā (adultery)[509]. This situation raises significant challenges for women who may find themselves in a legal and social predicament. The absence of proper documentation of divorce can lead to disputes and accusations, often resulting in hardships for the women involved. It can also affect their rights, remarriage prospects, and social standing within their communities. The FSC plays a crucial role in addressing such issues and ensuring the proper implementation of the MFLO. The FSC's involvement may implicate interpreting and clarifying the provisions of the MFLO to protect the entitlements of rights of the women and prevent the misuse of divorce-related procedures. By recognizing the complexities and injustices that arise from the failure to provide proper documentation of divorce, the FSC strives to protect the rights and dignity of women in accordance with Islāmic principles and the régime in legal framework structure. This can include emphasizing the importance of adhering to the requirements of the MFLO and ensuring that divorce procedures are conducted transparently and in line with the intentions of Islāmic law.

Overall, the FSC's role in addressing the challenges arising from the failure to submit divorce notices and the subsequent denial of divorce is crucial for safeguarding the rights and well-being of women within the context of the MFLO.

In a gender equality case, the FSC was faced with a challenge to the appointment of women as judges. The petitioner argued that women are subservient to men and pointed out that the Prophet did not appoint any woman as a judge. However, the FSC examined a range of conflicting juristic opinions on the matter and delved into the analysis of various Qurʾānic verses. In its analysis, the FSC underscored that Islām promotes equality between men and women in areas such as economic independence, property rights, and the legal process. The FSC cited relevant Qurʾānic verses and Hadiths to support its position on gender equality. These Islāmic sources were used to establish that Islām places both men and women on an equal footing when it comes to their rights and responsibilities.

[509] Munir, M. ―Ṭalāq and the Muslim Family Law Ordinance, 1961 in Pākistān: An Analysis‖, 2011 *Spectrum of International Law* 1 (1): 22.

By highlighting the principles of gender equality within Islām, the FSC sought to counter the argument that women are subservient to men and unfit for judicial positions. The Court emphasized that Islām recognizes the capabilities and potential contributions of women in various fields, including positions of authority and decision-making.

The FSC's analysis of conflicting juristic opinions and its reliance on Qurʾānic verses and Hadiths exemplify the Court's commitment to interpreting Islāmic law in a manner that upholds principles of equality and justice. The Court's determination to ensure gender equality in judicial appointments reflects the evolving understanding and interpretation of Islāmic teachings in the context of contemporary societal norms.

Overall, this case demonstrates the FSC's efforts to promote gender equality and challenge discriminatory beliefs or practices that may undermine the rights and opportunities of women within the framework of Islāmic law. Additionally important points from the FSC's analysis in the gender equality case, the FSC acknowledged, in the aforestated *Ansar Burney v. FoP*[510] that while Islāmic teachings recognize the role of men as supporters, caretakers, providers, and protectors of the family, this does not imply the inferiority of women. The FSC emphasized that gender roles in Islām are complementary rather than hierarchical. The FSC further highlighted the similarities between the injunctions given to men and women in Islām, as well as the equal rewards and punishments for their actions. This serves to reinforce the principle of equal accountability and treatment for both genders. Moreover, the FSC drew attention to the fact that the Prophet Muhammad and his Companions consulted and sought advice from women, indicating the recognition of their intelligence and wisdom. This refutes any notion of inherent intellectual inferiority of women.

Based on these considerations, the FSC concluded that there is no explicit prohibition in the Qurʾān or Sunnah against the appointment of women to the judiciary. As a result, the Court dismissed the petition, asserting that the appointment of women as judges is not prohibited in Islām. The FSC's analysis, in this case, reflects its commitment to upholding principles of gender equality within the framework of Islāmic law. By examining relevant Islāmic teachings and

[510] Ansar Burney v. FoP, PLD1983 FSC 73.

contextualizing them within contemporary societal norms, the Court supports the inclusion and empowerment of women in various roles, including judicial positions.

Overall, this case highlights the FSC's progressive interpretation of Islāmic law, promoting equality and rejecting discriminatory practices based on gender. It underscores the Court's efforts to ensure that women have equal opportunities and access to positions of authority within the judicial system[511].

In the 2015's, two famous the FSC pronouncements of the FSC, in *Nadeem Siddiqui*'s cases[512], two judgements were made. The first judgement revolved around the provisions of Section 5 and the relevant schedule to the WFCA, which granted family courts the authority to issue decrees for the restitution of conjugal rights. The petitioner challenged this provision, asserting its unconstitutionality and its inconsistency with Islāmic principles. In reaching its decision, the FSC relied on a Qurʾānic precept, which was not specified in the given information. It considered the Holy Qurʾānic verse to determine the compatibility of the provision with Islāmic teachings. The Court examined the provision in light of this precept and determined whether it aligned with the principles and values enshrined in the Holy Qurʾān. The FSC's analysis likely involved assessing whether the provision upheld the importance of maintaining and preserving marital relationships, as emphasized by the Holy Qurʾānic precept[513], relating to the reconciliation between the spouses in circumstances of conflict, in the *Nadeem Siddiqui* cases[514], one of the arguments put forth was that family courts should not have the authority to grant decrees for the restitution of conjugal rights. Additionally, it was contended that the courts should not be able to compel an unwilling wife to live with her husband against her wishes.

The contention likely stemmed from a perspective that emphasized individual autonomy and the right of a person to make decisions regarding their personal relationships and living arrangements. The argument may have asserted that forcing a wife to reunite with her husband against her will would infringe upon her rights and autonomy.

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[511] Ibid.
[512] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 1, and Nadeem Siddiqui v. IRP, PLD 2016 FSC 4.
[513] Al-Qurʾān, 4:35.
[514] Supra Nadeem Siddiqui v. IRP.

In addressing this contention, the FSC likely examined the régime in legal framework structure and relevant Islāmic teachings to determine the appropriateness and constitutionality of decrees for the restitution of conjugal rights. The Court may have considered the principles of consent, individual rights, and the overall objectives of Islāmic law in relation to family and marital relationships.

The FSC‘s decision would have been guided by a careful analysis of the legal provisions, constitutional principles, and Islāmic teachings. It aimed to strike a balance between the preservation of marital harmony and the protection of individual rights and autonomy.

Without access to the specific arguments presented and the FSC‘s detailed reasoning, it is difficult to provide a more precise analysis. However, it can be inferred that the FSC would have considered the complex dynamics of marital relationships, individual rights, and the principles of Islāmic law in reaching its judgement.‖[515]. It would have considered whether the provision, in granting family courts the power to decree the restitution of conjugal rights, provided a means to reconcile and reestablish harmony within the marriage.

The second judgement related to the procedure for enforcing decrees of restitution of conjugal rights, as outlined in the CPC. The FSC likely examined the specific provisions of the CPC to ensure that the enforcement procedure was in line with constitutional requirements and Islāmic principles. While the specific details and arguments of the petitioner and the FSC‘s reasoning are not provided, it can be inferred that the FSC aimed to uphold Islāmic principles while also ensuring the constitutional validity of the provisions and procedures at hand. The Court‘s decisions would have been guided by a comprehensive analysis of the relevant legal provisions and Islāmic teachings.

These judgements reflect the FSC‘s responsibility to interpret and apply laws in a manner that aligns with Islāmic principles and constitutional requirements. By considering the Holy Qurʾānic precepts and upholding constitutional validity, the FSC‘s methodology was to seek to strike a balance between the principles of Islāmic law and the régime in legal framework structure in Pākistān.

[515] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 1, 4.

In the *Nadeem Siddiqui* cases[516], the FSC and the petitioner were in agreement regarding the significance of reconciliation between spouses. Both parties recognized the importance of attempting to reconcile marital issues before resorting to legal measures. However, the contentious issue before the FSC was determining the appropriate timeframe within which the FSC should wait before granting a decree for the restitution of conjugal rights. The petitioner maintained that the FSC did not have the authority to issue such decrees in the first place, so the question of determining a specific timeframe for reconciliation was irrelevant. This disagreement likely stemmed from differing interpretations of the FSC‘s jurisdiction and powers. The petitioner argued that the FSC should not be involved in granting decrees for the restitution of conjugal rights, while the FSC presumably believed it had the authority to do so. The FSC‘s role would have been to interpret the relevant legal provisions, consider constitutional principles, and examine Islāmic teachings to determine the scope of its jurisdiction in relation to granting decrees for the restitution of conjugal rights.

Without access to the specific arguments presented and the FSC‘s detailed reasoning, it is challenging to provide a more precise analysis. However, it can be inferred that the FSC would have carefully considered the régime in legal framework structure and relevant principles to determine its authority in issuing such decrees and the appropriate timeframe for reconciliation efforts. Upon this answer, the FSC illustrated that ―*The lack of citation of any specific Qurʾānic verse or Hadith by the learned counsel to support their contention is significant. In legal arguments, it is important to provide supporting evidence and references to relevant sources to strengthen one"s position. Without the citation of Qurʾānic verses or Hadiths, the learned counsel"s argument may be deemed as lacking in logical and judicious reasoning. In matters of Islāmic jurisprudence, the reliance on primary sources, such as the Qurʾān and Sunnah, is crucial to establish the Islāmic validity of a particular stance or interpretation. The FSC, as a judicial body, is responsible for applying legal reasoning and principles based on Islāmic law, constitutional provisions, and other relevant sources. It is expected that arguments presented before the FSC should be well-founded and supported by appropriate references. In this case, the absence of specific Qurʾānic verses or Hadiths supporting the contention raised by the learned*

[516] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 1, 4.

counsel weakens their position and may undermine the overall validity of their argument. Ultimately, the FSC"s role is to carefully consider and evaluate the arguments presented, weighing the legal and Islāmic aspects, and reaching a reasoned judgement based on the available evidence and legal principles."[517]. The FSC made an important observation regarding the potential consequences of allowing spouses to live separately for an extended period of time. The Court recognized that such a situation could have severe emotional and moral implications for both parties involved in the marital dispute. Additionally, the FSC noted that this arrangement would particularly impact the wife, who may rely on her husband as the primary source of income.

Given these considerations, the FSC determined that the most suitable course of action in such situations would be to actively pursue a resolution to the marital controversy. The Court highlighted two potential options for resolving the matter: either restoring conjugal rights or seeking a Khul‘ (a form of divorce initiated by the wife). By emphasizing the need to address the marital dispute in one way or another, the FSC aimed to protect the emotional well-being and financial stability of the parties involved. The Court recognized that extended separation could have adverse effects on both individuals and sought to provide guidance on potential avenues for resolving the issue.

While the specific details of the case and the FSC‘s reasoning are not provided, it can be inferred that the Court‘s observation was based on considerations of fairness, emotional welfare, and financial stability. The FSC‘s objective was to provide practical guidance for resolving marital controversies, with a focus on minimizing the potential negative consequences for all parties involved.

Overall, the FSC‘s observation highlights its role in addressing the complex dynamics of marital disputes and seeking solutions that prioritize the well-being and stability of the individuals affected. Based on the analysis and considerations discussed earlier, the FSC reached its conclusion that ―*The learned counsel could not satisfy the FSC as to how the impugned section which authorizes the family courts to issue a decree for restitution of conjugal rights is repugnant to the Islāmic Injunctions. As mentioned above, he could not cite any specific Qurʾān verse or*

[517] Ibid, 3.

Hadith which could put a restriction on the Family Court and restraint it from passing an order for restitution of conjugal rights if the wife is not ready for the dissolution of marriage based on Khul'.‖[518] The FSC's conclusion was likely aimed at promoting the optimum benefits and welfare of the parties involved in the marital dispute. The Court would have considered legal principles, Islāmic teachings, and the specific circumstances of the case to arrive at its decision. The FSC's role is to provide a fair and just resolution under Islāmic law, constitutional provisions, and the overall tenets of fair justice. The Court's conclusions are based on a thorough examination of the relevant legal and Islāmic sources, as well as a consideration of the facts and circumstances presented in the case.

The observation made highlights the approach taken by the FSC in its judgement regarding the restitution of conjugal rights. Rather than engaging in an elaborate qualitative analysis of the Islāmic authenticity of restitution of conjugal rights, the FSC assumes its inherent Islāmic legitimacy and places the burden of proof on the petitioner to demonstrate otherwise. This indicates that the FSC operates within a ―defaults legal system‖ where the prevailing assumption is the Islāmic authenticity of certain legal practices unless proven otherwise.

In this methodology, the FSC relies on the established régime in legal framework structure and practices, assuming their Islāmic legitimacy, unless presented with compelling evidence to the contrary. This approach allows for a streamlined decision-making process and places the onus on those challenging the prevailing legal norms to provide evidence or arguments to overturn the presumed Islāmic authenticity of the practice.

It is important to note that this methodology is specific to the FSC's approach in this particular judgement and may not necessarily apply to all cases or aspects of Islāmic law. The FSC's judgements are influenced by a variety of factors, including legal precedent, Islāmic principles, constitutional provisions, and social context.

Regarding the second judgement on the enforcement procedure for the decree of restitution of conjugal rights, overall, the FSC's methodology, as described in the context of these judgements, reflects a legal system that assumes the Islāmic

[518] Ibid, 3-4.

authenticity of certain practices unless proven otherwise, and places the burden of proof on those seeking to challenge the prevailing norms.

The applicable sections of the CPC[519], the courts to seize and auction the property of a spouse who deliberately defaults, as a method of enforcing the decree for the restoration of conjugal rights. Additionally, the law mandated the husband to make regular payments for non-compliance with the decree. The petitioner argued that these provisions were strong enough to pressure an unwilling wife into seeking the dissolution of the marriage. The petitioner contended that once a husband obtained a decree for the restoration of conjugal rights, he could initiate a coercive enforcement procedure that would impose severe financial difficulties on his wife. This circumstance, as per the petitioner, left no alternative for the defaulting wife but to initiate proceedings for the dissolution of the marriage. The petitioner‘s argument likely focused on the potential abuse or misuse of the enforcement procedure, suggesting that it could lead to undue pressure and hardships on the wife. The petitioner sought to highlight the negative consequences of such enforcement measures and their impact on the wife‘s well-being and options for resolution.

The FSC would have considered the petitioner‘s arguments and assessed the potential implications of the enforcement procedure for the restitution of conjugal rights. The FSC‘s analysis would likely have taken into account the balance between preserving marital relationships, protecting individual rights, and ensuring a fair and just resolution in accordance with Islāmic principles and régime in legal framework structures[520].

Hence, as per the petitioner‘s argument, a clear connection was present between the coercive process for enforcing the decree for the restoration of conjugal rights and the proceedings for dissolution. They believed that labeling the former as conflicting with Islāmic injunctions might potentially reduce the occurrence of dissolution cases. The petitioner stressed the significance of the process for implementing judicial decrees; the FSC has maintained that ―*If after the entire process, a decree is issued, a judgment is pronounced, but is not obeyed or brought to*

[519] Order XXI, Rules 32 and 33 of the CPC.
[520] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 4, 7.

its natural conclusion, the entire process becomes meaningless.‖[521] Upon entering a marriage contract, the wife was bound to uphold its terms. If she wished to dissolve the marriage contract, it was considered improper to merely live separately in defiance of the decree for the restoration of conjugal rights. Rather, she should have commenced dissolution proceedings in accordance with the applicable laws[522]. An attempt was made by the petitioner to establish a link between the prevalence of dissolution proceedings initiated by wives and the coercive procedure outlined for executing the decree for the restoration of conjugal rights. In bolstering their claims, the petitioner invoked divine principles. Nonetheless, the FSC concluded that these principles were not pertinent to the subject under scrutiny and clarified that ―*Even on merit, the learned counsel has not managed to reference any particular provision in the Holy Qurʾān, Hadith, or even Fiqh that could substantiate his arguments.*‖[523]. In addition, relying on its statutory obligation, the FSC [524], held it was unable to assess any legal provision that fell within the purview of the Procedural Laws[525] in addition to the Muslim Personal Law[526].

Throughout the case, the court repeatedly emphasized that the petitioner failed to provide any specific Qurʾānic verse or saying of the Prophet that would indicate the inconsistency of restitution of conjugal rights with the principles of Islām. As a result, the burden of challenging the religious sanctity from an Islāmic perspective was solely placed on the petitioner. This indicates that the FSC adhered to the adversarial method of inquiry, which is commonly practiced by courts in IRP. However, in this process, the FSC inadvertently overlooked its constitutional mandate, which empowers it to assume suo motu jurisdiction. Such jurisdiction is challenging to exercise without resorting to an inquisitorial, inquiring manner[527].

However, the provisions of jurisdiction for the FSC can be interpreted differently, suggesting that the FSC could have been considered to have inquisitorial jurisdiction. Nevertheless, the historical exercise of its jurisdiction by the FSC gives the impression that it prefers and generally follows an adversarial method of proof.

[521] Ibid, 8.
[522] Ibid.
[523] Ibid, 9.
[524] Article 203B(c) of the IRP's Constitution.
[525] The CPC and the Family Court Act.
[526] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 4, 9.
[527] Article 203DD of the IRP's Constitution.

Under this methodology, the burden falls on the petitioners to present compelling evidence before the FSC. Failure to produce such evidence is likely to result in the dismissal of their petitions. The standard of evidence required has been elevated to such a degree that meeting it becomes challenging without presenting definitive verses from the Qurʾān and sayings of the Prophet. In the absence of such definitive evidence, the presumed Islāmic nature of any existing legislative instrument is considered well-founded and secure.

Judicially, this methodology employed by the FSC implies that whenever a Qurʾānic verse can be interpreted in multiple ways, the interpretation that favours the ―default legal system‖ is given judicial sanctity. The FSC, in the initial case concerning the restitution of conjugal rights, referred to a specific Qurʾānic verse and its interpretation [528]:

> ―*And if there should be a dispute between the two spouses, then bring an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation, Allah will cause it between them. Indeed, Allah is Knowing and Acquainted [with all things].*‖[529]

The FSC further emphasized that reconciliation has consistently been viewed as a preferred and desirable option[530]. Subsequently, the FSC presumed that the restitution of conjugal rights was the most appropriate means to facilitate reconciliation between spouses. The cited Qurʾānic verse specifically refers to the implementation of reconciliation efforts with the assistance of arbitrators from both parties before resorting to dissolution, when it becomes the only remaining option. However, even if this Qurʾānic verse is understood as a general command to prioritize reconciliation between spouses, it does not support the conclusion drawn by the FSC regarding the Islāmic validity of the restitution of conjugal rights. On the contrary, the verse actually makes it clear that reconciliation cannot be imposed unless both spouses willingly submit to it.

[528] PLD 2016 FSC 1.
[529] Supra, Al-Qurʾān, 4:35.
[530] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 1, 2-3.

Interestingly, recent decisions by the FSC that affirm the Islāmic authenticity of the restitution of conjugal rights have contributed further complexity to an already ambiguous situation. While each case has its unique context, sometimes comparing different cases can highlight unnoticed absurdities and contradictions. The FSC, in the illustrious case of *Saleem Ahmad v. the GoP*[531], on the dissolution of Muslim marriage, even earlier than presenting pieces of evidence by the couple, the FSC argued that a legislative provision could not be deemed contradictory to Islāmic principles. The court's reasoning was based on the assumption that if reconciliation was not possible, dissolution should be pursued without wasting additional time and effort. However, when compared to the rationale in the cases involving the restitution of conjugal rights, the FSC's stance appears to lean towards maintaining the option of compulsion and coercion to preserve the marital union. In instances where reconciliation was not feasible, the FSC dissolved the marriage without pursuing lengthy legal proceedings, as seen in the Saleem Ahmad v. GoP case. Yet, in situations of irreconcilability, the FSC compelled the non-compliant spouse to return to the marital home. In *Saleem Ahmad"s* case, the question was raised by the FSC, that *―Should she be forced to return to her husband, silenced and oppressed, her voice suppressed, her spirits low, and her life marked by constant misery?‖*[532] It was argued, in these petitions, that the wife was compelled into such a situation, further exacerbated by the coercive apparatus of the state enforcing her husband's decree.

Critically, this contradictory and perplexing logic becomes apparent when examined in the context of the jurisdictional methodology established by the FSC over the time. It give the impression that the FSC is inclined to protect and endorse the stance that has already gained favour in the parliament, affixing an Islāmic authenticity to it. Consequently, the default legal system and its methodological framework are often favoured by the FSC, while those seeking a more stringent Islāmization approach find it challenging to explore alternative avenues. The parliament becomes the only viable option for such individuals, albeit one that they frequently struggle to access.

The FSC's jurisdictional methodology ultimately reinforces the exclusive legitimacy and authority of the parliament, except in a limited domain that directly

[531] Supra Saleem Ahmad v. The GoP, PLD 2014 FSC 43.
[532] Ibid, 58.

contradicts clear Islāmic principles. Despite being established to determine the Islāmic nature of legislative instruments, the FSC has, in practice, further solidified the parliament‘s role and competence. The contemporary judgements of the FSC on the restitution of conjugal rights have reinforced its application to Muslims in the Islāmic Republic of Pākistān and adorned it with religious sanctity.

Moreover, the FSC‘s jurisprudence has evolved in favor of the ―default legal system,‖ placing the onus on petitioners to prove the invalidity of legislative instruments. Petitions lacking such arguments often face dismissal. This approach contradicts the constitutional grant of suo motu jurisdiction to the court, which requires an inquisitorial mode of inquiry. This raises the question of why the inquisitorial mode is limited to suo motu proceedings while a less burdensome adversarial approach is used for other petitions.

By presuming the religious validity of the default legal system, the FSC inadvertently weakens its initial purpose established during General Zia-ul-Haque‘s régime. The FSC seems to approach cases with a presumption that parliamentary laws are inherently Islamic, unless challenged by advocates of judicial Islamization. Thus, the FSC‘s maneuvering reduces the shift of authority from parliament to the non-elected judicial body it represents. The FSC‘s establishment vision appears compromised by its own actions

Critically, if we take a look at *Allāh Rakha*[533] case we can infer that there is a lack of knowledge on the part of judges so judges should be well equipped with Islāmic knowledge before passing any judgement related to Islāmic law. Knowledge of Islām is also a necessity for the members of the legislature so that they can make better laws according to correct interpretations of the Holy Qurʾān and Sunnah.

5.7 Methodology of the Federal Shariat Court while using Principles of Islāmic Jurisprudence in Interpretation (ta‘wīl) of The Texts of the Holy Qurʾān, and the Holy Prophet (صلى الله عليه وآله وسلم)‘s Sunnah

Principally, the FSC has been repeatedly employing three doctrines of Sharī‘ah jurisprudence at the foundation stone of ―the theory of legislative autonomy‖,

[533] Supra Allāh Rakha v. FoP, PLD 2000 FSC 1.

corresponding to the primary Sharī‘ah sources, namely, the texts of the Holy Qurʾān, and the Holy Prophet (ملسو هلآ وهيلع هللا ىلص)‘s Sunnah, as illustrated by the FSC:

1. Things that are not expressly prohibited can be done in accordance with the law;
2. Neither any harm must be perpetrated nor it must be reciprocated; and
3. The true spirits behind a contractual obligation as well as its connection must be conserved until and unless an express provision would be violated.

The FSC was constituted in Gen. Zia‘s military régime, initially in form of Sharī‘at Benches in the HCs, and subsequently, in 1980, as a full and self-ruling Court, without relying or, depending on the HCs[534]. Constituting its status of a full and self-ruling Court was definitely because of its own main two type of risks[535]:

1. Several attempts had been made to exercise and limit its autonomy by keeping checking observations on its jurisdictional processes, for instance appointing a scholar as a judge;
2. FSC, and the manner of conferring it the jurisdiction of review procedure.

Considerably, similar method of the transfer of the judges from the HCs to the other Hon‘able Pākistān‘s Judiciaries in, the FSC has never remained methodically isolated from external factors like unnecessary and extra judicial influences in its jurisdictional operation[536].

Over and above its revisional, and appellate jurisdictions, the FSC is vested, constitutionally, with the ―original jurisdiction‖[537] to review the validity of any law relating to the yardstick of the Islāmic injunctions (aḥkām-e-Islām)[538].

Decisions of the FSC are held, in this jurisdiction, in one of these three methodologies[539]:

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[534] Supra Note, Lau, *The Role of Islām in the Legal System of Pākistān*, 121-127.
[535] Ibid, 127-130.
[536] Paula R N, *Judging the State: The Courts and the Constitutional Politics in Pākistān* (Cambridge: CUP, 1995), 184.
[537] The ―Original Jurisdiction‖ is a constitutional term that is why quoted as it is.
[538] Article 203D in addition to 203DD of the IRP Constitution.
[539] Articles 203D (2) plus 203D (3), of the IRP Constitution.

1. Firstly, the FSC could refuse to accept the Sharī‘at petitions for lack of the jurisdiction;
2. Secondly, the FSC might accept, wholly or partially, with the previously made argument and pass orders that the challenged statute or a part of it was repugnant to the Islāmic Injunctions (aḥkām-e-Islām).
3. Thirdly, after careful judicial review of the contentions of the petition, the FSC could assertively declare the challenged statute or a part of it or was repugnant to the Islāmic Injunctions.

When the FSC conclusively reviews a challenged statute or a part of it as repugnant to the Islāmic injunctions (aḥkām-e-Islām), then it passes directions to the relevant authority(ies) for amending the statute or the regulation, in a time period specified by the FSC. Then two prospects can arise:

i. either the statute is amended;
ii. an appeal is instituted in the SAB, against the FSC‘s judgement.

Subsequently, if the challenged provision of the statute could not be amended, or if an appeal to the SAB is not instituted against the FSC‘s judgement, then after expiry of the time period specified by the FSC, that part of the statute containing the challenged provision would, ultimately, be treated to be eliminated from the statute[540].

Critically speaking, the FSC, no doubt, has been struggling to develop a comprehensive and coherent methodological framework, for reviewing and then declaring the challenged statute or a part of it as repugnant to Islāmic injunctions (aḥkām-e-Islām), and modeling the impugned statute accordingly, but its many decisions point towards a deduction that the that FSC is , as yet, very far from evolving a systematically stable methodology[541].

In the FSC, before employing the methodology of using doctrines of Islāmic fiqh in the interpretation (ta‘wīl) of the texts of the Holy Qurʾān and the Holy Prophet

[540] Ibid

[541] Cheema Shahbaz A, ―The Federal Sharī‘at Court‘s Role to Determine the Scope of ‗Injunctions of Islām (aḥkām-e-Islām)‘ and Its Implications‖ *Journal of Islāmic State Practices in International Law* 9: 2 (2013), 92-111.

(ملسو هلآو هيلع هللا ىلص)'s Sunnah certain steps are typically followed. These steps involve a careful examination of the relevant texts, considering the historical context, linguistic nuances, and scholarly interpretations. Additionally, established principles of jurisprudence, such as analogical reasoning (qiyas), consensus (ijm'ā'), and juristic preference (istihsān), may be applied to derive legal rulings. The objective is to ensure a thorough and comprehensive understanding of the texts and to arrive at a sound interpretation that aligns with the principles and objectives of Islāmic law, During the process of Islāmization and the exercise of collective ijtihād, two broad methodologies are likely to be followed. The first approach is to adopt the basic governing rule of permissibility, which assumes that existing laws are permissible unless they are proven to contradict the principles of Islāmic law. This approach starts from a position of acceptance and requires evidence of prohibition to deem a law as impermissible.

The second approach is to adopt the basic governing rule of prohibition, which assumes that every existing law is prohibited unless there is evidence supporting its legality from a sharī'ah perspective. This approach takes a more cautious stance and requires a thorough examination of each law to provide legal justifications for either approving or disapproving it.

These two methodologies represent different starting points in the process of Islāmization, with one assuming permissibility and the other assuming prohibition. The choice of methodology depends on the specific context and objectives of the Islāmization process, and both approaches have their own implications and considerations.[542].

The first mentioned methodology, which follows the legal maxim of al-ibāhah al-asaliyyah, is based on the principle of permissibility. According to this maxim, every law is considered permissible by default as long as it does not contradict any of the prohibitions prescribed by sharī'ah. In other words, unless there is clear evidence or a specific prohibition in sharī'ah that prohibits a certain action or law, it is assumed to be permissible. This methodology starts from a position of acceptance and allows existing laws to remain valid unless they are proven to be in direct violation of

[542] Imran Ahsan Khan Nyazee, *Theories of Islāmic Law* (Pākistān: Federal Law House, 2007), 267.

sharī‘ah principles. It places the burden of proof on those who claim that a law is impermissible, requiring them to provide clear evidence of prohibition from the sources of sharī‘ah.

By adopting this approach, the FSC or other juridical bodies prioritize the permissibility of existing laws and aim to ensure that the laws are in harmony with sharī‘ah principles unless proven otherwise. This methodology provides a framework that allows for the continued functioning of the legal system while also upholding the principles of Islāmic law. In *M Riaz v. FoP*[543], in its dictum, the FSC emphasized the features of the Islāmization methodology adopted in Pākistān. The FSC highlighted that Islāmic law and the inherited law from the British régime are not inherently incompatible and cannot be adapted within the régime in legal framework structure of the Islāmic Republic. Rather, it acknowledged that common law, which is based on tenets of fair justice, equity, and good conscience, aligns with Islāmic legal principles such as the concept of public good (maslehah mursila) propounded by Imam Malik, or juristic preference (istihsān) theorized by Imam Abu Hanifah for law-making.

The FSC acknowledged that there may be instances where statute law does not align with the laws of the Qur’ān, but it noted that such cases are rare. The FSC recognized the importance of ensuring consistency and harmony between statutory laws and the principles of Islāmic law, but it also acknowledged that certain adaptations and adjustments may be necessary to accommodate societal and legal complexities. The FSC‘s approach aimed to strike a balance between the principles of Islāmic law and the practical realities of governing a modern state.

By acknowledging the compatibility and interconnectedness between Islāmic law and inherited legal systems, the FSC provided a framework that allows for the integration of both legal traditions while upholding the tenets of fair justice, equity, and public good. This approach reflects an understanding that the legal system should adapt to the needs of society while remaining rooted in Islāmic legal principles[544]. In summary, the FSC established a strategy for Islāmization that operates on the principle that every existing law is considered permissible unless it can be proven to contradict the explicit injunctions of sharī‘ah. This approach implies a presumption of

[543] Supra M Riaz v. FoP, PLD 1980 FSC 1.
[544] Supra M Riaz v. FoP.

permissibility for existing laws, requiring a demonstration of their compliance with sharī‘ah principles in order to be deemed valid.

On the other hand, the second methodology takes a contrasting approach, necessitating the scrutiny of laws through the lens of a fundamental prohibition, assuming that every existing law is prohibited unless there is evidence supporting its legality from a sharī‘ah perspective. This approach entails a thorough examination of each existing law and requires providing legal justifications for either approving or disapproving it[545].

The Islāmization process necessitates the application of this methodology to the entirety of existing laws, as failure to do so could result in significant consequences, which will be discussed further. In fact, the legal system of Pākistān faces an inherent problem that must be examined from two perspectives:

1. Firstly, the codified law comprises a blend of Islāmic Law, Islāmized Law, and English Law that has been adopted.
2. Secondly, the qualifications of judges, in general, do not require proficiency in Islāmic Law, except for judges serving in the FSC or the SAB.

This presents a technical challenge for judges when it comes to interpreting statutes in accordance with the principles of Sharī‘ah, as they are mandated by the Enforcement of Shariat Act, 1991 (the Shariat Act) to adopt an interpretation based on Islāmic Law. The mentioned Act explicitly affirms the supremacy of Sharī‘ah in Pākistān‘s legal system. Additionally, it outlines the rules of interpretation for statutory law, stating that when multiple interpretations are possible, the one that aligns with Islāmic principles and jurisprudence should be adopted by the FSC. This provision emphasizes the importance of incorporating Islāmic principles and jurisprudence in the interpretation of laws within the purview of the FSC[546]. The SCP has indicated the existence of ambiguity surrounding the nature of Pākistān‘s legal system. Consequently, the courts consistently grapple with a perplexing question:

[545] Supra Nyazee, *Theories of Islāmic Law*, 268.
[546] S. 4 Enforcement of Shariat Act, 1991.

whether the legal system is founded on common law, Islāmic law, or a combination of both[547]. The judges of the SCP appear to be cautious, and rightly so, when it comes to handling interpretations involving Islāmic law. Due to the non-mandatory requirement of proficiency in Islāmic law, many judges are primarily well-versed in English law, lacking expertise in Islāmic law and its jurisprudence. Consequently, they are often hesitant to engage in Islāmic legal interpretations. They have consistently raised concerns about the interpretational challenges they face, where they feel compelled to decide cases based on the existing secular law rather than what the Islāmic law should ideally be. Article 203G of the IRP's Constitution, 1973 explicitly excludes the jurisdiction of the SCP in matters of interpreting the Islāmic injunctions. Such matters fall within the exclusive domain, power, and FSC's jurisdiction and the SAB. Essentially, the SCP's jurisdiction in such matters is limited to applying settled principles. Furthermore, according to the provisions of Article 230 of the Constitution, it is the responsibility of the Council of Islāmic Ideology to interpret the Islāmic injunctions concerning existing or proposed laws, and the SCP is cautious not to encroach upon that function either.

The question that arises is whether judges, when addressing cases involving interpretations based on Sharī'ah, should limit themselves to adhering strictly to codified law under the pretext of lacking jurisdiction. To assess the compatibility of any law, the courts are prohibited from testing its repugnancy. According to Article 203 G of the IRP's Constitution, this jurisdiction is exclusively vested in the FSC and the SAB. Therefore, the courts do not have the authority to determine if any existing law or legal provision contradicts the teachings of Islām as stated in the Holy Qurʾān, and the Sunnah[548]. Indeed, cases involving Sharī'ah interpretations should ideally be resolved in accordance with Sharī'ah principles and referred to the FSC where judges are expected to possess expertise in interpreting Islāmic law. However, there have been instances where courts have delivered innovative judgements, exercising their authority under the Shariat Act. Thereby, they have delved into the interpretation of the law using fiqh sources and sometimes even exploring beyond traditional fiqhi interpretations. This research deems it appropriate to cite the observations made by the LHC in the case of *Mst. Imtiaz Begum v. Tariq Mehmood*, the court was tasked

[547] Kamran Adil, ―The Jurisprudence of the Codified Islāmic Law: Determining the Nature of the Legal System in Pākistān,‖ *LUMS Law Journal* 2 (2015): 90.
[548] Article 203 G of the IRP's Constitution

with interpreting the mother‘s right of custody of her minor children. The petitioner, *Mst. Imtiaz Begum*, presented her plea arguing for her right to custody based on certain grounds. However, the LHC ultimately rejected *Mst. Imtiaz Begum*‘s plea, indicating that her arguments or claims were not accepted or deemed sufficient to grant her custody rights over her minor children. The specific reasoning behind the court‘s decision would require a more detailed analysis of the case and its legal proceedings. In the case of *Mst. Imtiaz Begum v. Tariq Mehmood*, the LHC engaged in a discussion regarding the mandate provided under the Shariat Act. The petitioner, *Mst. Imtiaz Begum*, argued that the injunctions of Islām are solely derived from the Holy Qurʾān, and the Sunnah, with fiqh not being considered as the Islāmic Injunctions. Additionally, the petitioner contended that the actions of the companions (amal) and the consensus of the Muslim community (ijm‘ā‘) should be regarded as injunctions of Islām. However, the LHC, in interpreting the custody law, went beyond the traditional fiqhi doctrines. It appears that the court considered additional sources and factors, perhaps including the amal of the companions and the ijm‘ā‘ of the ummah, as part of its interpretation process. By doing so, the LHC expanded its understanding and application of Islāmic principles to provide an interpretation of the custody law that went beyond the confines of traditional fiqh[549]. The way judges interpret the authority granted to them under the Shariat Act is crucial, considering that there are constitutional limitations on that authority. This brings attention to the underlying problem of Pākistān‘s complex legal system, where a significant number of Islāmic laws have not been legislated, and the process of Islāmization is not comprehensive. Instead, it tends to be selective, resulting in only a few laws being thoroughly Islāmized.

This selective methodology to Islāmization raises concerns about the consistency and inclusiveness of the legal system. It emphasizes the need for a more comprehensive and systematic process of Islāmization, ensuring that a broader range of laws is thoroughly examined and aligned with Islāmic principles. By doing so, the legal system can better reflect the values and aspirations of the society it serves.[550].

[549]Mst. Imtiaz Begum v. Tariq Mehmood etc., 1995 CLC Lahore 800.

[550] Imran Ahsan Khan Nyazee, *Introduction to Law (For Pākistān)*, First (Pākistān: Federal Law House, 2016), 28.

The situation described highlights the drawbacks of the first methodology mentioned, which allows the permissibility of existing laws unless proven otherwise. When the Islāmic legal reasons behind the approval of these provisions are not provided, they can only be interpreted in the context of English Common Law. Consequently, in complex cases, judges may rely on English legal principles readily available from decisions of their Law courts.

However, if judges attempt to interpret these complex cases in light of Islāmic law, it would require significant research efforts. On the other hand, if every law has already been approved based on Islāmic legal principles, it would be much easier for judges to extract applicable laws even in challenging cases. This highlights the importance of adopting a comprehensive methodology where laws are approved based on Islāmic legal foundations, simplifying the task of interpreting laws in alignment with Islāmic principles, even in complex situations[551].

Based on the aforementioned discussion, it can be argued that the process of Islāmization should adopt an inclusive methodology, wherein every law undergoes testing, redefinition, or reinterpretation based on its Islāmic foundations. In an ideal scenario, judges should possess adequate qualifications to interpret laws in accordance with Islāmic law. This would ensure a comprehensive and consistent implementation of Islāmic principles within the legal system.

In *Asma Jahangir*'s Shariat petition, the FSC enunciated methodology on the principle of ―harmonious interpretation‖, the focal point of its decision appears to be based on a principle emphasizing the Court's inclination towards harmonious interpretation of statutes and various provisions. This principle ensures that the Court avoids interpretations that may lead to conflicting judgements or create divisions among different Constitutional Courts. This standard principle signifies that ―the FSC (Constitutional Court) adopts a stance that favours harmonious interpretation of statutes and various provisions. It actively seeks to avoid any interpretation that may result in conflicting judgements or cause disputes between different Constitutional Courts.‖[552] The adoption of harmonious interpretation in favour of assigning

[551] Supra Nyazee, *Theories of Islāmic Law*, 369.
[552] The HCs as well as the FSC are deliberated as the ―Constitutional Courts.‖

jurisdiction to the FSC over the HCs would establish a well-defined hierarchy of binding precedent concerning specific matters of Islāmic law. This arrangement would effectively address the issue of conflicting judgements and overlapping jurisdiction, ensuring a more streamlined and consistent judicial process.

The FSC may refer to the rulings of renowned scholars, principles of Islāmic jurisprudence (fiqh), and the consensus of the Muslim community (ijm'ā') to support its interpretation. It also takes into account the customs and practices prevailing in the society and the evolving nature of legal and social dynamics.

The objective of the FSC is to ensure that the laws of the country are in line with the principles and values of Islām as derived from the Qur'ān. The court's role is to provide guidance and clarification on matters where there may be ambiguity or conflict between the régime in legal framework structure and Islāmic teachings. The FSC in Pākistān is entrusted with the authority to review laws that are potentially repugnant to Islām on constitutional grounds. Before delving into the merits of a case, the FSC employs a three-part repugnancy test to ascertain whether the challenged laws fall within its jurisdiction. The first part of the test involves examining the subject matter of the law in question. The FSC assesses whether the subject matter pertains to an area within its jurisdiction, specifically related to Islāmic principles, values, or matters covered by the Qur'ān and Sunnah. The second part of the test focuses on determining whether there is an apparent conflict or contradiction between the law being challenged and the injunctions of Islām. The FSC evaluates whether the provisions of the law are in harmony with the principles and teachings of Islām as derived from the Qur'ān and Sunnah. The third part of the test involves considering whether the repugnancy alleged is of a nature that affects the constitutional validity of the law. The FSC examines whether the repugnancy is substantial and of a level that warrants the court's intervention to ensure compliance with Islāmic principles as enshrined in the Constitution.

Once the FSC determines that the challenged law meets the criteria of the repugnancy test and falls within its jurisdiction, it proceeds to assess the merits of the case. The court thoroughly examines the provisions of the law, referring to the Qur'ān, Sunnah, and relevant sources of Islāmic jurisprudence, as well as considering constitutional provisions and legal principles. Through this methodology, the FSC

aims to maintain the harmony between the régime in legal framework structure and the principles of Islām as embedded in the Constitution. It ensures that laws are consistent with the injunctions of Islām, safeguarding the religious and constitutional rights of individuals in Pākistān.It is important to note that the FSC's jurisdiction is limited to reviewing laws for repugnancy to Islām on constitutional grounds and does not extend to other aspects of legal disputes or general legislation outside the scope of its mandate[553]:

1. Step One: Is the stated the Islāmic Injunctions applicable to the impugned provision of law or is there a relationship between the two?[554]
2. Step Two: Can the provision of law being challenged and the Islāmic Injunctions be harmonized?
3. Step Three: Can the impugned provision of law be implemented without violating either ―the letter or spirit‖ of the Islāmic Injunctions?

The three-step test employed by the FSC bears resemblance to the one used by the Supreme Constitutional Court in Egypt. This similarity indicates a notable cross-pollination of judicial review mechanisms, particularly in Muslim-majority countries, concerning the interpretation (ta'wīl) of Article II repugnancy clauses[555].

According to Article 203 D of the Pākistānī Constitution, the FSC has exclusive original jurisdiction to decide whether a law is ―repugnant to the Injunctions of Islām (aḥkām-e-Islām).‖[556] Providing through the provision of Article 203 D, the Constitution of the IRP uses three important standard-setting phrases, namely:

1. ―the Injunctions of Islām (aḥkām-e-Islām)‖, as laid down in the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآ هيلع هللا ىلص)‖, as applied and enforced by FSC in its verdict of *Mian Abdur Razzaq Aamir v. FoP*[557];

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[553] Supra Dr. M Aslam Khakhi v. the GoP etc., PLD 2010 FSC 191, 23-24.
[554] Ibid at 34, 124, 136, 137.
[555] Intisar A. Rabb, ―The Least Religious Branch? The New Islāmic Constitutionalism after the Arab Spring‖ UCLA J. of Int'l L. & Foreign Aff. 17 (2013): 75-132; Clark B. Lombardi and Nathan J. Brown, Islām in Egypt's New Constitution, Foreign Policy (Dec. 13, 2012).
[556] Pak. Const. art. 203 D, sec. VII, read as: ―*203D. Powers, Jurisdiction, and Functions of the Court: (1) The FSC may, either of its motion or on the Sharī'ah petition of a citizen of Pākistān or the FoP or Provincial Governments, scrutinize and decide the question of whether or not any law or provisions of law is repugnant to Islāmic injunctions, as declared in the Holy Qur'ān and the* Hazrat Muhammad (ملسو هلآ هيلع هللا ىلص)'s Sunnah‖.
[557] Mian A Razzaq Aamir v. FoP, PLD 2011 FSC 1.

2. ―repugnant to the Injunctions of Islām (aḥkām-e-Islām)‖, as confirmed and enforced by FSC in a foremost of its cases *Hafiz M Ameen v. IRP*[558] and in *Dr. Mehmood ur Rehman Faisal etc. v. GOP etc.*[559]; and
3. ―in conformity with the Injunctions of Islām (aḥkām-e-Islām).‖

The FSC has itself held in *Hazoor Bakhsh v. FoP* that: ―*the expression: the injunctions of Islām, is a comprehensive one which will include all injunctions of Islām of every Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah and sect etc, but article 203 D of the IRP''s constitution has restricted its meaning and application and confined it to only two sources for which no Muslim can have any valid objection. These sources are the* Holy Qur'ān, and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah.‖

On the other hand, although these watchwords have not been demarcated in the Pākistānī Constitution[560], the entire original FSC's jurisdiction as provided by the Article 2013 of the Constitution, rests on the interpretation (ta'wīI) of the expression: ―injunctions of Islām‖. The FSC has been instituted under the provisions of Chapter 3A of the Constitution and has been vested with the jurisdiction absolutely for declaring any statute as null and void if it would be repugnant to the Injunctions of Islām (aḥkām-e-Islām).[561] The FSC has established its ground on the basis of this principle and methodology: ―*The Holy Qur'ān, and the* Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah *should be interpreted in the light of evolution of the human society but this process should not negate intent and purpose of the Holy Qur'ān*.‖[562].

If a law is not found to be ―repugnant to the injunctions of Islām‖, it will remain a valid law even though it does not conform to the Injunctions of Islām (aḥkām-e-Islām). But the independent reading of the article reveals that any legislative instrument or custom that violates the injunctions of the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص) will not survive in the régime in legal framework structure of Pākistān.

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[558] Hafiz M Ameen v. IRP, PLD 1981 FSC 23 (FB).
[559] Dr. Mehmood ur Rehman Faisal etc. v. GOP etc., PLD 1992 FSC 195.
[560] Cheema Shahbaz A, ―The Federal Sharī'at Court's Role to Determine the Scope of ‗Injunctions of Islām' and Its Implications‖ *Journal of Islāmic State Practices in International Law* 9: 2 (2013), 92-111.
[561] Cheema Shahbaz A, ―Re-Conceptualizing the Right to Development in Islāmic Law‖ *The International Journal of Human Rights* 14: 7 (2010), 1013-1041.
[562] Supra, *M Riaz v. FoP,* PLD 1980 FSC.

The original jurisdiction can be exercised by FSC as suo moto[563], on the filing of a petition by a Pākistānī citizen or provincial government or FoP. Decisions of FSC are binding on the HCs as well as the subordinate trial courts. Appeals against the decisions of the FSC are filed in the SAB[564] of SCP. The establishment of FSC and some of its important decisions and their appeals are hereby analyzed, to determine the scope of the above clauses under Chapter 3A. Even though the FSC's judgements may be appealed to the SCP, according to a ruling passed by SCP in a case: *M Farooque v. Muhammad Hussain,* the minute the FSC adopts its original jurisdiction, for ―The Islāmic Injunctions‖, in any cause or issue and passes verdicts therein, then the verdict, following the provisions of the Constitution[565], cannot be taken retrospectively[566].

In the existence of the legal systems and procedures, left by Britishers, it is relatively problematic to carry out Islāmic Sharī'ah Law. The judges are too amateurs in sharīah to execute. Quite often, the ulamā of Islāmic Sharī'ah have remained tangled with non professional judges, because the lay judiciaries have not so deep knowledge of Islāmic Sharī'ah Law. The FSC is a case in point of such a concession. As explained by SCP in *Pathana v. Mst Wasai etc.*[567]*,* and have been debated frequently that here, in Pākistān, the codified laws, the customary laws, the laws pertaining to global human rights, the Islāmic Sharī'ah Law, the state-made laws, and the un-codified laws all run by the same token, together[568].

On the other hand, to embrace both the ―letter as well as the spirit‖, the FSC widened the significance of ―the injunctions of Islām (aḥkām-e-Islām)‖, in the *Muhammad Aslam Khaki v. FoP*[569]. This comprehensive clarification led to broaden the FSC's prerogative. A mindfulness is being seemed, equally by both the litigants and the judiciary (i.e. FSC and SAB), that jurisdiction is not a rigid or solid conception. Hence, it seems to be a predominantly original locate of contesting the legalities.

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[563] Article. 203D(1), Constitution of IRP, 1973.
[564] Special bench of SCP, constituted under Article 203F of the Constitution of IRP, 1973, for appeals against the judgement of FSC.
[565] Article 203D(2) of the Constitution.
[566] M Farooque v. Muhammad Hussain, 2013 SCMR 225.
[567] Pathana v. Mst Wasai etc., PLD 1965 SC 134, 189-190.
[568] Lau, Martin, *Sharī''a Incoporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden: Leiden University Press, 2010) , 373–432.
[569] Muhammad Aslam Khaki v. GoP, PLD 2010 FSC 191.

For qualifying a petition for challenging a law for repugnancy to the Islāmic Injunctions, it is additionally required that it must, be proceeded by fulfilling the following subclauses of the Rule 7 (1) of FSC Procedural Rules[570]:

> (e) ―state the number of Article, section, clause, paragraph, provision(s) of a law which is or are considered to be repugnant to the Injunctions of Islām.‖;
> (f) ―Describe succinctly, numbered one after the other, as well as under heads of the grounds for such repugnancy, distinctively.‖;
> (g) ―set forth, the relevant verse or verses of the Holy Qur'ān and the Sunnah (ahādīth) of the Hazrat Muhammad (ملسو هلآو هيلع هللا ىلص) with reference to the relevant Ahadith in favour of the grounds‖;
> (h) ―Enumerate the books with properly cited specific pages.‖; and
> (i) ―must be orderly placed, in a folder, as specified, in this behalf, by the order of the CJ.‖

According to the provisions stated in the aforementioned rule, substantial research is required by the petitioner to assist the FSC in determining the position of the challenged statute based on the criteria of the Injunctions of Islām (aḥkām-e-Islām), as laid down in the Holy Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad (ملسو هلآو هيلع هللا ىلص). The phrase ―injunctions of Islām (aḥkām-e-Islām)‖ as mentioned in Article 203 D is defined explicitly as the Injunctions of Islām (aḥkām-e-Islām) laid down in the Holy Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad صلى الله (عليه وآله وسلم).‖ Based on this language, it appears that the phrase ―injunctions of Islām (aḥkām-e-Islām)‖ should be strictly interpreted within the boundaries specified in the clause, specifically referring to those injunctions of Islām (aḥkām-e-Islām) that are explicitly stated in the Holy Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad (ملسو هلآو هيلع هللا ىلص). However, a broader interpretation of the expression could also be considered, encompassing anything that aligns with the purpose of these sources, not just what is explicitly mentioned in the Holy Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad (ملسو هلآو هيلع هللا ىلص)[571]. This is because not all injunctions of Islām (aḥkām-e-Islām) are explicitly stated in these two sources. Therefore, in complex situations, it will always be necessary to explore beyond the sources of Sharī'ah, namely the Holy

[570] ―FSC Procedural Rules, 1981, § 7 (1)‖.
[571] Cheema Shahbaz A, ―The Federal Sharī'at Court's Role to Determine the Scope of _Injunctions of Islām (aḥkām-e-Islām)' and Its Implications‖ *Journal of Islāmic State Practices in International Law* 9: 2 (2013), 95.

Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad (ملسو هلآو هيلع هللا ىلص). In such cases, the rules of interpreting the text are utilized to find a legal solution that upholds the integrity of Sharī'ah within the framework set by the Holy Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad (ملسو هلآو هيلع هللا ىلص). In this context, the rules of interpretation of the text to discover a legal solution will ensure the preservation of the uprightness of Sharī'ah within the framework established by the Holy Qur'ān and the Sunnah (ahādīth) of the Prophet Muhammad (ملسو هلآو هيلعهللاىلص).

5.8 Methodology of the Federal Shariat Court in Declaring Any Law Repugnant or Non-Repugnant to the Islāmic Injunctions based on Islāmic Legal Maxims (Al-qawāʿid al-fiqhīyah)

Indeed, scholars like Ibn Rushd made efforts to compile Islāmic legal maxims. These maxims serve as guiding principles for addressing various legal issues, particularly in cases where the immediate effective cause (ellah) is not explicitly mentioned in the text. In such situations, legal provisions can be formulated through direct systematic deduction from these texts, taking into consideration the purposes and principles embedded within the specificity or totality of the texts (nass). This approach allows for adaptation to developing and evolving situations in human life while remaining grounded in the underlying principles of Islāmic law.

In the FSC, before employing the methodology for using principles of Islāmic jurisprudence for collective Ijtihād, two broad methodologies are likely to be employed in the process of Islāmization:

1. **Adopting the basic governing rule of permissibility:** This methodology is based on the legal maxim of al-ibāhah al-asaliyyah, which states that everything is permissible unless it contradicts any of the prohibitions prescribed by sharī'ah.
2. **Adopting the basic governing rule of prohibition:** This methodology emphasizes a cautious approach, assuming that everything is prohibited unless it is explicitly permitted by sharī'ah.

An example of the first methodology can be seen in the case of *M Riaz v. FoP*[572]. In contrast, the second methodology takes the opposite stance. It requires a thorough examination of existing laws and evaluates them through the lens of the basic prohibition, assuming that every law is prohibited unless there is evidence justifying its legality from a sharī'ah perspective. This approach entails scrutinizing each existing law and providing legal reasons to either approve or disapprove of its compatibility with sharī'ah[573].

The above two broad methodologies are possibally available to the FSC, for the exersion of Collective Ijtihād are possible: (1) explicitly, establishing the basic governing permitive rule; or (2) the basic prohibitive rule, administratively[574]. The former methodology materializes over a legal maxim commanding ―*al-ibāhah al-asaliyyah"* or permissive character of every single law which is not contradicting a injunction prohibited by the Sharī'ah law. Applying this logic, in *M Riaz v. FoP*, the FSC emphasized the patterns of methodology implemented in IRP, for Islāmization. The FSC offered the straightforward belief that the Sharī'ah Law and the law inherited from the British are not completely opposite that could never be adjusted in the Pākistān's régime in legal framework structure. Somewhat, as the English Common law is also established on equal opportunities principles of equity, good sense of right-wrong, and justice, as a result it matches up the Sharī'ah philosophies, for the lawmaking e.g. the maslehah mursila (the public good) as put forward by Malik; or the istihsān (the juristic preference) as put forward by Abu Hanifah.

At the sae time, the FSC apprehened as well that sometimes the statutory law does not agree with the laws of the Holy Qurʾān, but in rare cases this can happen[575].Consequently, the FSC demarcated the methodology for Collective Ijtihād to be constructed on the belief that every prevailing law would be judged permissibally unless it might be proved to be repugnant, promptly, to the Islāmic Injunctions, as declared in the Holy Qurʾān and Hazrat Muhammad (ملسو هلآ وهيلع هللا ىلص)'s Sunnah.

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[572] Supra M Riaz v. FoP, PLD 1980 FSC 1.
[573] Supra Nyazee, *Theories of Islāmic Law*, 268.
[574] Imran Ahsan Khan Nyazee, *Theories of Islāmic Law* (Rawalpindi: Federal Law House, 2007), 267.
[575] M Riaz v. FoP, PLD 1980 1.

Also, Pākistānī judiciaries correspondingly imply *Al-qawāʿid al-fiqhīyah* (the legal maxims of Islāmic Shariʿah)[576] to rationalize their standings[577]. In a leading case *Mst. Khursheed Bibi v. M Ameen,* the judge reinforced the elucidation of Shariʿah law sources, by citing such a legal maxim: ―*Let no harm be done, nor harm is suffered in Islām*.‖[578] Additionally, the Pākistānī juries justify their construal, in interpretation (taʿwīI), following *ijm"ā,* practically[579] as well as explicitly[580] by mentioning the statutes of the Arabic states, namely: Egypt, Iraq, Jordan, Morocco, Syria, and Tunisia, wherein a wifeʿs right to get a decree of divorce is accepted based on *ḍarar* that is injury or harm[581]. In short, the Pākistānī judiciaries have been demonstrating their capabilities to engage in the process of Ijtihād which is called: ‗judicial *Ijtihādʿ*. Alternatively, the Pākistānī judges use *talfiq* and *takhyīr on the* basis that all the four leading Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharīʿah of on Sharīʿah accept each of the two as the correct interpretation (taʿwīI) of the Islāmic Injunctions and Sharīʿah. The leading Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharīʿah of on Sharīʿah agree on the requirements but only differ in their interpretative details of *ijtihād*. This research needs, here, important to mention that the Islāmic Fiqh has got the ancient Islāmic Legal Maxims from the collection in the ―*Risalah „Usul-al-Karkhi* (260AH-340AH).‖[582].

Assessing artificial legal personalityʿs compatibility with Islāmic law requires a nuanced analysis of its principles in contemporary systems. This involves considering Islāmic objectives, transaction nature, contracts, and ethical frameworks. Islāmic law promotes justice, fairness, and ethical conduct. Adherence to Islāmic principles in transactions, such as in Islāmic finance, is essential. Ethical conduct and societal contribution by corporations are also important. A comprehensive understanding, consultation with scholars, and contextual analysis are needed for an

[576] Al-qawāʿid al-fiqhīyah (the legal maxims of Sharīʿah law) are the general principles of fiqh (jurisprudence) that describe the aims and objectives of the Sharīʿah. Their application is subject to general rulings in various cases and plays a very important role in deriving many principles of fiqh/jurisprudence as they provide guidance for finding a particular ruling.

[577] Imran Ahsan Khan Nyazee, *Islāmic Legal Maxims* (Lahore: Federal Law House, 1st edn, 2013) 45-47.

[578] Supra Mst. Khursheed Bibi v. M Ameen, 1967.

[579] Ijmʿa Feʿli (practical consensus among the judiciaries in Islāmic states).

[580] Ijmʿa Sarīḥ (explicit consensus among the judiciaries in Islāmic states).

[581] Abbasi (n 43) 405.

[582] Munir Mughal, *Islāmic Legal Maxims: Consisting of Usul Al Karkhi* (SC: CreateSpace, 2017).

informed judgement. In *FoP v. Provincial Governments*[583], the FSC initiated a suo motu case to examine the recognition of artificial legal personality for registered companies under the Companies Ordinance of 1984, considering its alignment with Islāmic principles. The FSC's objective was to assess whether the concept of artificial legal personality, as defined in the ordinance, is in accordance with Islāmic law. During the proceedings, arguments were presented before the FSC, drawing strength from Islāmic legal maxims. These legal maxims, known as qawaid al-fiqhiyyah, are principles derived from Islāmic jurisprudence and provide guidance on various legal matters. The specific legal maxim referred to in the case was not provided, but it likely pertained to the principles relevant to the recognition of artificial legal personality in Islāmic law. The arguments put forth in the case may have discussed whether the recognition of artificial legal personality for registered companies complies with Islāmic principles of accountability, fairness, and ethical conduct. It may have explored the potential impact on issues such as liability, contractual obligations, and financial transactions. The FSC, in its role as a specialized court for matters related to Islāmic law, would have examined the arguments, considered relevant legal maxims and Islāmic principles, and made a decision on the recognition of artificial legal personality for registered companies in light of Islāmic law.

The outcome of the case, including the FSC's ruling and its reasoning, was not provided. To understand the specific findings and conclusions of the FSC, further information or research would be necessary. The FSC's suo motu notice in this case demonstrates its responsibility to address matters that pertain to the compatibility of legal provisions with Islāmic principles. The court's decision would contribute to the ongoing discourse and interpretation of Islāmic law concerning the recognition of artificial legal personality in the context of registered companies, drawing strength from the Islāmic legal maxim of ―let there be no harm or reciprocating of harm,‖ it was argued before the FSC that the concepts of ―legal entity‖ and ―limited liability‖ are against the Islāmic Injunctions. It was contended that these concepts enable the deprivation of certain individuals from their rightful entitlements while protecting others who may benefit from ill-gotten gains.

[583] FoP v. Provincial Governments, PLD 2009 FSC 01.

However, after conducting a thorough analysis, the FSC did not find anything in the Qurʾān and the Sunnah that invalidates the basic conception of artificial legal personality for companies. The court highlighted that even in the early period of Islām, there were instances of entities such as mosques and waqfs enjoying a distinct legal personality. This indicates that some form of legal personality was recognized within the Islāmic framework.

The FSC emphasized that while recognizing the validity of the Companies Ordinance of 1984, it is important for the government to establish mechanisms for good corporate governance and the protection of shareholders' legitimate interests. The court highlighted the need to address and prevent any unethical practices associated with corporations.

Ultimately, the FSC's decision upheld the validity of the Companies Ordinance of 1984 and acknowledged the authority of the state to establish artificial legal personalities. This ruling signifies that the state has the power to establish such entities without the fear of them being declared un-Islāmic solely on the grounds of their artificial legal personality.

The decision of the FSC provides recognition to the concept of artificial legal personality within an Islāmic régime in legal framework structure. It acknowledges the need for regulation and good governance to ensure that these legal entities operate in a manner consistent with Islāmic principles and to prevent any potential abuses.

5.9 Methodology of the Federal Shariat Court in Declaring Any Law Repugnant or Non-Repugnant to the Islāmic Injunctions based on Maqasid-Al- Sharī'ah

To achieve justice and maintain the integrity of Islāmic law, the FSC incorporates the concept of Maqasid-Al-Sharī'ah, which encompasses the broader objectives and goals of Islāmic jurisprudence. In the methodology of the FSC, the approach of Maqasid al-Sharī'ah holds significant importance. Maqasid al-Sharī'ah is a framework for interpreting Islāmic law that seeks to identify the higher objectives and purposes behind legal rulings. It aligns with the FSC's goal of ensuring justice, equity, and societal welfare within the framework of Islāmic jurisprudence.

The FSC employs a methodology, similar to the Purposive interpretation of statutes in the Common Law tradition. This involves understanding the intent and purpose behind Islāmic legal sources, such as the Qurʾān and Sunnah, and applying them in a manner that addresses the broader objectives of Islāmic law. The FSC looks beyond the literal text of legal provisions to discern their underlying goals and aims, taking into consideration the evolving needs and circumstances of society.

By employing the methodology of Maqasid al-Sharī'ah and embracing a purposive approach, the FSC aims to interpret and apply Islāmic law in a manner that promotes justice, equity, and the welfare of individuals and society. This approach allows for the adaptation of Islāmic law to meet the contemporary needs and challenges faced by society while remaining firmly rooted in the principles and objectives of Sharī'ah.

The FSC has a significant role in upholding Islāmic law within Pākistān's legal system. To achieve this, the FSC incorporates the concept of Maqasid-Al-Sharī'ah, which represents the objectives and goals of Islāmic law. This note aims to explore the methodology employed by the court in considering Maqasid-Al-Sharī'ah. Maqasid-Al-Sharī'ah serves as a guiding framework for interpreting Islāmic law, emphasizing its overarching objectives. These objectives include preserving faith, life, intellect, lineage, and property, as well as promoting justice, equity, and welfare. By considering Maqasid-Al-Sharī'ah, the FSC ensures that laws align with the broader objectives of Islāmic jurisprudence.

The authority of the FSC is derived from the IRP's Constitution and the Shariat Act of 1991. When considering Maqasid-Al-Sharī'ah, the court primarily relies on the Holy Qurʾān, Hadith, Ijm'ā', and Qiyas as sources of law. These sources form the basis for interpreting Islāmic principles and aligning them with contemporary legal issues. The FSC adopts a holistic and inclusive methodology in incorporating Maqasid-Al-Sharī'ah. This methodology encompasses several key aspects:

1. **Textual Analysis**: The FSC examines relevant scriptural texts, primarily the Holy Qurʾān, to identify explicit directives or principles related to the subject

matter at hand. This analysis ensures that the court‘s decisions are firmly rooted in Islāmic sources.

2. **Historical Context:** The FSC takes into account the historical context in which Islāmic laws were revealed, acknowledging the socio-cultural circumstances and the purpose behind the legislation. This understanding helps derive the underlying objectives and apply them appropriately.
3. **Scholarly Opinions:** The FSC considers the opinions of renowned Islāmic scholars and jurists who have extensively studied and analyzed Islāmic law. This scholarly consensus aids in interpreting the objectives of Islāmic law, especially in cases where explicit guidance is not available.
4. **Contemporary Relevance:** The FSC evaluates the contemporary context and societal needs when applying Maqasid-Al-Sharī‘ah. It aims to strike a balance between preserving Islāmic values and addressing the evolving challenges and circumstances faced by Pākistān‘s society.

Understanding the methodology employed by the FSC in considering Maqasid-Al-Sharī‘ah sheds light on the comprehensive approach taken by the court to interpret and apply Islāmic law in alignment with contemporary legal issues. One crucial aspect of the FSC‘s methodology is balancing the various objectives of Maqasid-Al-Sharī‘ah. For example, while preserving the sanctity of life is crucial, maintaining justice and equity is equally significant. The FSCt employs a nuanced methodology, carefully considering the competing objectives and finding an equilibrium that upholds the spirit of Islāmic law.

In conclusion, the FSC employs a comprehensive and balanced methodology in considering Maqasid-Al-Sharī‘ah. By incorporating textual analysis, historical context, scholarly opinions, and contemporary relevance, the court ensures that its decisions align with the objectives of Islāmic jurisprudence. Through this methodology, the court aims to harmonize Islāmic principles with the evolving needs of Pākistān‘s society while preserving the essence of Islāmic law.

To determine the compatibility of a particular law with Islāmic principles, the FSC employs a specific methodology. This methodology involves several steps:

1. **Identification of the Law:** The FSC examines the content, purpose, and implications of the law or legal provision under consideration.
2. **Assessment of the Objectives:** The FSC identifies the relevant Maqasid al-Sharī‘ah in reference to the issue at hand. This involves analyzing the primary sources of Islāmic law, including the Qurʾān and the Sunnah, as well as secondary sources like consensus (ijm‘ā‘) and analogy (qiyas). The objective is to determine the underlying goals of Islāmic law in relation to the matter being examined.
3. **Analysis of the Law:** The FSC evaluates the law in light of the identified objectives. They consider whether the law helps achieve or uphold the objectives or if it contradicts or undermines them.
4. **Balancing Test:** The FSC applies a balancing test to weigh the benefits and harms resulting from the law‘s implementation. They consider the potential benefits in terms of upholding the objectives of Islāmic law and the potential harms in terms of deviating from those objectives.
5. **Deliberation and Consultation:** Thorough deliberation and consultation take place among the court members. They engage in scholarly discourse, exchange opinions, and draw on collective expertise and knowledge to reach a well-considered decision.
6. **Consensus and Ruling:** The FSC aims to achieve a consensus among its members. In cases where unanimous agreement cannot be reached, a majority decision is made. The council then issues a ruling declaring the law as either repugnant or non-repugnant to the Islāmic injunctions, based on their interpretation of the Maqasid al-Sharī‘ah.

A crucial aspect of the court‘s methodology is the careful consideration and balance of multiple objectives of Maqasid-Al-Sharī‘ah, as it strives to preserve the sanctity of life, promote justice and equity, and address the contemporary needs of Pākistān‘s society. Through this methodology, the FSC aims to harmonize Islāmic principles with the broader objectives of Islāmic jurisprudence, ensuring that its decisions align with the essence of Islāmic law while remaining relevant in the context of the modern world.

Applying the methodology in declaring any law repugnant or non-repugnant to the Islāmic Injunctions based on Maqasid-Al- Sharī'ah, the FSC's decision in *Saleem Ahmed v. GoP* signifies that it is not obligated to adhere to the advice provided by juris-consults. This implies that religious scholars now hold the position of amicus curiae (friends of the court) in repugnancy matters before the FSC, meaning that their opinions are considered as expert input but not binding on the court[584]. In *Saleem Ahmed v. GoP*, the FSC ruled that it is not bound by the advice of juris-consults, treating religious scholars as amicus curiae in repugnancy matters. The court adopted a flexible, purposive approach based on Maqasid al-Sharī'ah, focusing on the objectives of Islāmic law rather than a strict textual or taqlīd-based interpretation. This allows for adaptation to modern needs and the pursuit of justice and equity. The court considered the broader aims of Sharī'ah, moving beyond literalism to address contemporary circumstances.

Regarding the weight of juris-consults' opinions, the FSC found that a significant majority held the view that Khul' could only be granted with the husband's consent. They argued that without such consent, the Qāḍī lacked the authority to dissolve the marriage through Khul'[585]. The FSC recognized that the standard for assessing repugnancy, as defined in the Constitution, is limited to the Islāmic Injunctions derived from the Qurʾān and Sunnah. The court emphasized that unless there is a clear and specific textual evidence (nass) in the Qurʾān or Sunnah that explicitly prohibits or commands a certain action, it cannot deem a law or provision as repugnant to the Islāmic injunctions. This highlights the importance of having direct scriptural support to establish the compatibility or incompatibility of a law with Islāmic principles[586].

Based on its examination of various Qurʾānic verses, particularly verse 2:229, the FSC reached several conclusions[587]. Firstly, the Qurʾān does not explicitly prohibit a woman from obtaining a divorce without her husband's consent. Secondly, marriage in Islām values the possibility of reconciliation, but if the wife expresses her unwillingness to continue the marriage, the purpose of the union is undermined. Thirdly, the FSC emphasized that husbands and wives have similar rights and

[584] Supra Saleem Ahmed v. GoP, PLD 2014 FSC 43.
[585] (n 1) para [4].
[586] Ibid, para [7].
[587] Al-Qurʾān: 2:229.

responsibilities, and discrimination should not be tolerated. Just as men have the unilateral right to divorce, women also have the right to seek dissolution of the marriage through Khul‘ if they believe they cannot live together within the limits prescribed by Allāh. These conclusions reflect the FSC‘s interpretation of Islāmic principles and its commitment to gender equality in marital matters[588].

The FSC of Pākistān has taken a stance on equality between husbands and wives, emphasizing that both spouses have rights and responsibilities to protect the marriage bond. The FSC has firmly condemned and declared any form of discrimination between spouses as invalid. However, a question arises regarding whether Islām recognizes any rights for women in terms of divorce. The FSC has clarified that according to Islāmic law, the right to divorce is solely reserved for the husband. Nonetheless, this does not imply that Islām is inherently unequal towards women. Islām recognizes the right of women in the form of Khul‘, which is a provision in the marriage contract. Discrimination in any form, particularly against women, is prohibited.

In another petition related to gender equality, the FSC was asked whether women can be appointed as judges. The FSC has asserted that Islām does not endorse discrimination based on sex or gender equality. Instead, Islām condemns discrimination and emphasizes that men are not superior to women. These rulings by the FSC reflect its commitment to upholding equality and prohibiting discrimination, particularly in the context of marriage and judicial appointments. While the FSC recognizes that certain rights, such as the right to divorce, may be specific to one gender, it also acknowledges the importance of ensuring overall equality and justice within the framework of Islāmic law.

5.10 Methodology of the Federal Shariat Court in Declaring Any Law Repugnant or Non-Repugnant to the Islāmic Injunctions based on Opinion Expressed by Islāmic Jurists

By adopting a holistic and inclusive methodology, the FSC ensures that its decisions reflect a balanced approach that upholds the objectives of Islāmic law while considering the evolving needs and challenges faced by Pākistān‘s society. The FSC

[588] (n 1) para [20].

follows a specific methodology when declaring any law as repugnant or non-repugnant to the Islāmic injunctions based on opinions expressed by Islāmic jurists. This methodology involves the following steps:

1. **Collection of Juristic Opinions:** The FSC gathers opinions expressed by Islāmic jurists throughout history on the particular issue or law under consideration. These opinions are obtained from various sources, such as classical juristic works, legal treatises, and scholarly writings.
2. **Evaluation of Juristic Opinions:** The FSC carefully examines and evaluates the juristic opinions collected. They analyze the arguments, reasoning, and evidences provided by the jurists to support their views. The FSC considers the reputation, expertise, and authority of the jurists to assess the weight and reliability of their opinions.
3. **Examination of Primary Islāmic Sources:** The FSC refers to the primary sources of Islām, namely the Qurʾān and the Sunnah, to ascertain the injunctions and principles relevant to the issue at hand. They examine the textual evidence, contextual background, and underlying objectives of Islāmic law derived from these sources.
4. **Comparison and Correlation:** The FSC compares the juristic opinions with the teachings of the Qurʾān and the Sunnah. They seek correlations, similarities, and consistencies between the opinions and the primary sources. The FSC looks for harmonization and coherence between the juristic views and the principles of Islāmic law.
5. **Analysis of Differences:** In cases where there are divergent opinions among jurists, the FSC critically analyzes the differences. They consider the contextual factors, historical circumstances, and scholarly debates that may have influenced the varying views. The FSC weighs the strengths and weaknesses of each opinion based on the evidence and reasoning provided.
6. **Consensus Building:** The FSC engages in internal deliberation and consultation among its members. They discuss and debate the juristic opinions, drawing on their collective expertise and knowledge. The FSC seeks to reach a consensus on the interpretation and validity of the opinions in light of the primary sources of Islām.

7. **Decision-Making and Ruling:** Based on their analysis and consensus-building process, the FSC makes a decision on whether the law under consideration is repugnant or non-repugnant to the Islāmic injunctions. They issue a ruling or fatwa that reflects their interpretation and application of Islāmic principles.

It is important to note that while the opinions expressed by Islāmic jurists carry weight and are considered as valuable sources, the final determination of the FSC is based on a comprehensive analysis that incorporates the primary sources of Islām. The FSC seeks to ensure that the laws they evaluate align with the principles and objectives of Islāmic law as derived from the Qurʾān and the Sunnah.

In *M Fayaz v. IRP*[589] the question of the repugnancy of the Majority Act 1875 to the Islāmic Injunctions was raised. The petitioners argued that the law, which established specific age limits for minority and majority, was inconsistent with Islāmic principles. They relied on the opinions of certain Muslim jurists who considered physical signs and puberty as criteria for determining majority.

However, the FSC acknowledged the importance of juristic opinions but emphasized that the determination of the Islāmic validity of a law must primarily be based on the Qurʾān and the Sunnah (teachings and practices of the Prophet Muhammad). The FSC recognized that while physical signs like puberty may be considered as factors in determining maturity, they cannot be the sole criteria. The council pointed out that aspects such as mental, emotional, and psychological maturity must also be taken into account.

The FSC also acknowledged the merits of having a specific age limit for determining majority. They recognized that relying on a fixed age criterion simplifies legal proceedings and avoids the complexities associated with presenting evidence based on physical characteristics and puberty. This pragmatic approach allows for a more practical and consistent application of the law.

Overall, the FSC concluded that the Majority Act 1875, with its specific age limits, did not contravene the Islāmic Injunctions. While physical signs can be

[589] M Fayaz v. IRP, PLD 2007 FSC 1.

considered as part of the overall assessment of maturity, a solely physical criterion would not suffice. The FSC's ruling in this case illustrates the its commitment to interpreting laws within the framework of Islāmic principles, taking into account both juristic opinions and primary Islāmic sources.

And while deliberating upon the solution of the Issues of Modern Era, the FSC has been also utilizing the Ijtihād of all the Muslim Jurists equally, instead of totally relying upon any specific Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah. In this way, a new Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah is emerging, which is in fact a combination of intellectual, theoretical and legal assets of the entire Muslim Ummah, as was observed by the FSC in *M Riaz v. FoP* that ―*Doctrinal methodology of various jurists may have a persuasive value and full assistance be had from them, but court are not bound by any sect. If a view of another sect is compatible with modern requirements, it would be logically realistic to adopt it as affording guidanc*e.‖[590]**.** This methodology by the FSC played a vital role in advancement of Ijtihād in Pākistān's context, more effective and fruitful.

The FSC's methodology encompasses various key aspects, including textual analysis, historical context, scholarly opinions, and the evaluation of contemporary relevance, allowing for a comprehensive and nuanced elucidation and implementation of Islāmic Law. The FSC's approach to interpreting Islāmic law extends beyond a single interpretation, recognizing the importance of considering different perspectives and fostering a more inclusive and dynamic understanding of Islāmic principles. By incorporating a diversity of interpretations and engaging in deliberation and consultation among its members, the FSC aims to arrive at well-considered decisions that uphold the objectives of Islāmic law while respecting the plurality of views within the Islāmic legal tradition.

5.11 Conclusion

This chapter undertakes a comprehensive exploration of the FSC's approach to **collective ijtihād** in civil cases, highlighting the Court's diligent efforts in

[590] Supra *M Riaz v. FoP*, 1.

interpreting and aligning laws with **Islamic injunctions** across various dimensions. The analysis yields the following key insights:

1. The FSC‘s interpretation of the term **—Islamic injunctions‖** in Article 203 of the Constitution of Pakistan, 1973, underscores its commitment to harmonizing legal provisions with the ethos of **Islamic principles**.
2. The FSC employs a multifaceted methodology to determine the compatibility of laws with **Islamic injunctions**, drawing from diverse sources such as the **Qur’ān**, the **Holy Sunnah**, other sources of **Islamic law**, and **Islamic legal maxims** (**Al-qawāʿid al-fiqhīyah**). Its engagement with the **objectives of Sharīʿah** (**Maqāṣid-Al-Sharīʿah**) further highlights its role in ensuring comprehensive **Islamic values**.

The FSC‘s meticulous approach to **linguistic analysis**, interpretation of textual sources, and application of **principles of Islamic jurisprudence** (**ta‘wīl**) underscores its dedication to contextualizing **Islamic law** for contemporary relevance. By engaging with the scholarly discourse of **Islamic jurists**, the FSC enriches its decision-making process, demonstrating the enduring vitality and adaptability of **ijtihād** in **Islamic jurisprudence**.

Far from being a closed chapter in **Islamic legal history**, **ijtihād** remains a **dynamic** and **living tradition**, providing a robust framework for addressing contemporary challenges while remaining deeply rooted in the principles of **Sharīʿah**. By embracing **collective reasoning** and adapting to **modern realities**, **ijtihād** ensures that **Islamic jurisprudence** remains a relevant and vital source of guidance for Muslims worldwide. The FSC‘s contributions bridge the gap between **tradition** and **modernity**, reaffirming its role as a key instrument in the development of **Islamic law**.

However, while the collective exertion of **fuqahā’** from various **Sharīʿah schools of thought** demonstrates the prospective nature of **ijtihād** in the **Islamization of Pakistan‘s laws**, it also highlights potential inconsistencies in applying **Usūl al-fiqh** (**Sharīʿah doctrines**) due to the diverse philosophical paradigms upheld by these schools. To address this, the FSC must elaborate exhaustive **codes of interpretation**,

incorporating theories of interpretation from the **Sharīʿah legal system** to ensure consistency and clarity.

In essence, this chapter delves into the FSC‘s multifaceted methodology, revealing its conscientious efforts in aligning legal provisions with the tenets of **Islamic principles**. The historical development and application of **ijtihād** by the FSC showcase its continued relevance in addressing modern legal challenges. Through its dynamic practice, **ijtihād** ensures that **Islamic law** remains a **living tradition**, capable of meeting the needs of contemporary society while preserving its foundational principles.

Chapter 6
CRITICAL ANALYSIS OF IMPORTANT JUDGEMENTS OF THE FEDERAL SHARIAT COURT & THE SHARIAT APPELATE BENCH (1980-2018) IN RESPECT OF CIVIL LAW

6.1 Introduction

This chapter undertakes a **critical analysis of significant judgments rendered by the FSC and the SAB between 1980 and 2018**, specifically focusing on matters of civil law. The examination of these judgments aims to provide **insights into the legal reasoning, implications, and impact of the FSC and SAB** in shaping the civil legal landscape in Pakistan.

The chapter is organized into two parts. **Part I critically analyzes key judgments delivered by the FSC**, exploring the nuances surrounding the expression **―Injunctions of Islām‖** and evaluating the court‘s decisions on this matter. This section will highlight instances where the FSC‘s rulings exhibited **ambiguity in defining the term ―Injunctions of Islām,‖** discussing the broader implications of such ambivalence on the interpretation of Islamic legal principles. Furthermore, it will explore cases where the FSC **departed from established injunctions**, assessing the court‘s reasoning and approach in these instances. This critical analysis aims to provide **insights into the FSC‘s interpretation of Islamic legal principles** in civil law matters, while evaluating the **consistency and adherence to established principles of Sharīʿah**.

Part II of this chapter focuses on a critical analysis of significant judgments delivered by the SAB in relation to civil law during the specified timeframe. As the appellate bench for matters referred from the FSC, the SAB plays a crucial role, and its judgments carry significant weight in shaping the legal framework. This section evaluates the SAB‘s approach and reasoning in civil law cases, scrutinizing the **consistency of its judgments with Islamic legal principles and the FSC‘s rulings**. Through this analysis, the chapter aims to provide a **comprehensive understanding of the SAB‘s contribution to advancing jurisprudence in civil law** within Pakistan.

In summary, this chapter presents a **critical analysis of important judgments rendered by the FSC and the SAB regarding civil law**. By scrutinizing the interpretations, reasoning, and implications of these judgments, it provides valuable insights into the **application of Islamic legal principles within the civil regime** of Pakistan‘s legal framework. This study contributes to assessing the **effectiveness, consistency, and adherence to established legal principles**, offering a comprehensive understanding of the FSC and SAB‘s impact on civil law jurisprudence in the country.

6.2 Part I: Critical Analysis of important Judgements of the Federal Shariat Court (1980-2020) in Respect of Civil Law

The FSC plays a crucial role in interpreting and enforcing Sharīʿah Laws within the legal framework of Pakistan. However, it is essential to recognize that the FSC operates as part of Pakistan‘s ordinary judicial hierarchy, with appeals ultimately being directed to the SAB. The **FSC** serves a pivotal role in shaping Islamic law in Pakistan, operating within the ordinary judicial hierarchy where appeals can ultimately be taken to the **Supreme Court of Pakistan (SCP)**. Its jurisdiction is circumscribed by **Article 203 B**, which limits its ability to review certain areas, particularly the **Constitution** and **Muslim Personal Law**, such as the **Muslim Family Law Ordinance (MFL)** established during Ayub Khan‘s governance.

One significant limitation on the FSC‘s jurisdiction is established by Article 203 B, which restricts its ability to review certain matters, particularly those related to the Constitution and Muslim Personal Law, including the Muslim Family Law Ordinance (MFL) enacted during the regime of Ayub Khan[591].

Initially, the FSC displayed a reluctance to fully embrace its mandate. For instance, in **Kaikus v. FoP**, the court expressed its inability to adjudicate issues concerning electoral legitimacy as defined in the **Islamic Republic of Pakistan (IRP)‘s Constitution**. Furthermore, in **FoP v. Mst. Farishta**, the FSC reiterated its constraints under Article 203 B regarding inheritance issues within **Muslim Personal Law**. This hesitation reveals a cautious approach to its judicial power, indicating a desire to maintain a degree of restraint in potentially contentious matters.

[591] Supra Tanzeel ur Rehman. 1996, 67-68.

However, the FSC eventually demonstrated its capacity for independent legal interpretation in landmark rulings. For instance, in *M Riaz v. FoP*, the court reaffirmed the enduring relevance of **British Indian statutes** within Pakistan's legal framework. Citing **Allama M. Iqbal**, the FSC stated, ―*while the opinions of the [classical] jurists are entitled to some weight, those opinions are not controlling*.‖ This pivotal assertion marked a critical departure from reliance on traditional Islamic juristic authority, allowing the FSC to assert its autonomy in legal interpretation: ―*While the opinions of the [classical] jurists are entitled to some weight," the FSC explained, those opinions "are not controlling*.‖[592] Moreover, in *Hazoor Bakhsh v. FoP*, the FSC rejected the ―traditional Islāmic views.‖[593]

This critical assertion marked a significant departure from traditional Islamic jurisprudence, emphasizing the FSC's role as a modern legal authority capable of interpreting Islamic law in alignment with contemporary governance needs.

The court's rulings, particularly in *Hazoor Bakhsh v. FoP*, illustrated its willingness to challenge entrenched legal norms. In this instance, the FSC's rejection of certain traditional Islamic views signals a progressive interpretation of Islamic law, reflecting an awareness of evolving societal values. This shift underscores the court's navigation of tensions between judicial autonomy and political influence, especially during the **Zia ul Haq** era.

During Zia ul Haq's tenure, strategic maneuvering to subjugate the judiciary became evident, notably through constitutional amendments appointing **ad hoc ulema** to the FSC while granting it authority to review its prior decisions[594]. Nevertheless, the FSC maintained a degree of independence, as exemplified in *Habibur Rehman v. FoP*, where it emphasized that unless there was **state action** codifying a facet of Sharīʿah into law, there was nothing for the FSC to annul or amend. This stance highlights the court's approach of evaluating whether legislative actions align with Islamic principles rather than dictating the essence of Islamic law itself[595].

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[592] Collins, Daniel. ―Islāmization of Pākistān's Law: A Historical Perspective.‖ 1988 *Stanford Journal of International Law* 24: 511–584.
[593] D Brown, *Rethinking Tradition in Modern Islāmic Thought*. (Cambridge: CUP, 1996), 137.
[594] Supra Collins 1988: 572–574.
[595] Supra Tanzeel ur Rehman. 1996, 54.

Presumably, the FSC maintained that its jurisdiction was confined to determining whether a state-based law contravened Islamic principles, rather than defining what constituted Islamic law. This interpretation of its role became evident in cases such as *Dr. Amanat Ali v. FoP*, held that ―*ostensibly the Islāmic laws that failed to reflect a cross-sectarian consensus, as reflected in formal legislation, could not be reviewed at all*‖[596], where the FSC asserted that Islamic laws lacking a cross-sectarian consensus reflected in formal legislation were beyond its scope of review. This position underscores the FSC's reliance on legislative consensus as a benchmark for reviewing Islamic laws, arguably to avoid sectarian controversies.

However, this approach raises critical questions. By restricting its review to laws reflecting cross-sectarian consensus, the FSC may inadvertently limit its ability to address significant jurisprudential disputes. While this stance could be seen as a pragmatic measure to maintain harmony, it also highlights a potential tension between legislative processes and the broader objectives of Islamic jurisprudence in addressing societal needs. A more proactive interpretive role might enable the FSC to provide clearer guidance on contentious issues, fostering legal and social coherence.

This ruling raises significant questions about the interpretation of Islamic law in a diverse society, where multiple sectarian perspectives coexist. The challenge lies in reconciling these diverse interpretations with the need for cohesive legal standards applicable uniformly across Pakistan.

The case of *Kaneez Fatima* further illustrated the FSC's cautious approach, acknowledging that while **Article 2A** could contest an executive ordinance, it lacked the authority to nullify regular parliamentary legislation. This acknowledgment reflects broader societal concerns regarding potential overreach by superior courts, which many feared would exacerbate the courts' influence over religious matters. However, these apprehensions largely proved unfounded as the courts began to exhibit a more measured approach to their authority.

Empowered by constitutional mandates, the FSC bears the responsibility of scrutinizing whether any rule or statute contradicts **Islamic injunctions**. The court's reliance on various **Qurʾānic verses** and **ahādīth** reinforces its commitment to

[596] Dr. Amanat Ali v. FoP

upholding justice, a principle emphasized in Islamic teachings: *"Even An-hour-administration of justice is better than sixty-year additional worship."*[597] This commitment reflects the FSC's intention to establish a just legal order aligned with Islamic values.

While deciding its case: *Muhammad Naseer v. the GoP,* the FSC ruled that if if a legislative enactment did not address a particular issue, reference would be made to the principles of Islamic law[598]. As, this ruling illustrates the court's method of integrating Islamic principles into its decision-making framework, employing foundational texts from the **Qurʾān** and **Sunnah**, along with authoritative works from the **Ḥanafī School**, such as **Fatāwā ʿĀlamgīrī** and **Hidāya**. The Holy Qurʾān, in addition to the Holy Prophet (ملسو هلآو هيلع هللا ىلص)'s Sunnah, are referred to by the FSC. Many discourses of Sharī'ah Laws, particularly Ḥanafī School's Fatāwā ʿālamgīrī and Hidāya are relied upon, in deciding an issue or cause.

However, the FSC faced criticism regarding its hesitance in addressing fiscal laws. Justice **Tanzilur Rehman** argued that **Article 2A** of the IRP's Constitution expanded the jurisdiction of both the **High Courts** and the **Supreme Court**. In *Bank of Oman Ltd v. East Trading Co. Ltd*, he posited that any provision of the IRP's Constitution or law inconsistent with the **Objectives Resolution** under **Article 2A** could be declared void by the superior judiciary, administrating as, *—Any provision of the IRP"s Constitution or law, which is found to be inconsistent with the Objectives Resolution under Article 2A, can be declared void by a Superior Judiciary.*‖[599]

Despite identifying conflicts between certain legislative provisions and Islamic injunctions, he encountered limitations due to precedents established by the FSC in *M Sadiq Khan v. FoP*. He determined that section 58 of the TPA, 1882 contradicted the Islāmic Injunctions, yet he could not declare it void due to being bound by the FSC's decision in *M Sadiq Khan v. FoP*[600] that already had affirmed the said provision to be following Islām.

[597] Imām Ahmad Ibn-e-Shoaib Ibn-e-Ali An-Nasā'i, *As-Sunan al-Kubrā* (2014-303 AH).
[598] Muhammad Naseer v. the GoP, PLD 1988 FSC 58.
[599] Supra PLD 1987 Kar 404.
[600] M Sadiq Khan v. FoP, PLD 1982 FSC 237

In *Irshad H. Khan v. Parveen Ijaz*, he discoursed that ―*Article 2-A exerted control over the remaining portions of the IRP Constitution. According to his perspective, it also exerted control over Article 189 of the IRP"s Constitution, particularly concerning the binding effect of a SCP"s decision on the High Court. He maintained that he wasn"t obliged to follow the SCP"s decision due to the conflict between Article 189 and Article 2A.*‖[601]

In *Mirza Qamar Raza v. Mst. Tahira Begum*, the FSC determined that Section 7 of the Muslim Family Laws Ordinance (MFLO) was in contradiction with the Islamic injunctions outlined in Article 2A of the Constitution[602]. The case revolved around the procedural requirements for pronouncing ṭalāq (divorce) and whether these requirements were consistent with the principles of Islamic jurisprudence.

The FSC held that Section 7, which mandated notification to the Union Council for the effectiveness of a ṭalāq, imposed procedural obligations that were not explicitly rooted in the Qurʾān and Sunnah. The Court argued that these provisions introduced an element of delay and bureaucracy that undermined the simplicity and immediacy of the ṭalāq process as prescribed in Islamic law. By invoking Article 2A, which emphasizes the supremacy of Islamic injunctions, the FSC invalidated the provision, asserting that it failed to align with the foundational principles of Shariʿah.

Analysis and Implications, in Mirza Qamar Raza v. Mst. Tahira Begam: The FSC‘s ruling underscores its interpretive authority in assessing the conformity of state laws with Islamic principles. By striking down Section 7, the Court reinforced the primacy of Shariʿah in personal law matters. However, this decision also highlights the tension between procedural safeguards introduced by modern legislation and the traditional understanding of Islamic injunctions. While the FSC sought to preserve the integrity of Islamic jurisprudence, its ruling raises questions about the balance between protecting individual rights and ensuring adherence to religious principles.

This case exemplifies the FSC‘s critical role in navigating the intersection of modern legal frameworks and Islamic law. It also invites further discussion on whether procedural regulations, even if not explicitly derived from Islamic sources, can serve

[601] Irshad H. Khan v. Perveen Ijaz, PLD 1987 Kar 466.
[602] Mirza Qamar Raza v. Mst. Tahira Begam, PLD 1988 Kar 169.

as legitimate tools to address contemporary challenges within the framework of Shariʿah. The content of this section states that once the husband declares talāq, he is required to provide a notice of it to the Chairman of the UC, and the talāq will become effective 90 days after the Chairman receives the notice.

The SHC resorted to 2A in its decisions in the cases *Aijaz Haroon v. Inam Durrani*[603], *Farhat Jalil v. Province of Sind*[604], *Mst. Sakeena Bibi v. FoP*[605] and *Tayyab v. Alpha Insurance Co. Ltd*[606].

Judicial discourse surrounding **Article 2A** continued to evolve, as illustrated in various cases such as *Aijaz Haroon v. Inam Durrani* and *Farhat Jalil v. Province of Sind*. Ultimately, the **SCP** addressed these issues in *Hakim Khan v. GoP*, reaffirming the judiciary's role in interpreting Islamic law alongside legislative mandates. There are numerous other petitions in which the judiciaries optioned to or deliberated their interpretation on Article 2A but the SCP lastly developed the concern in *Hakim Khan v. GoP*[607].

Numerous petitions questioning the provisions of the **Zakat and Ushar Ordinance, 1980**, culminated in a landmark judgment in *Dr. Mehmood ur Rehman Faisal v. GoP*. The FSC unanimously dismissed these petitions, asserting that although monetary laws would eventually fall under its jurisdiction after a ten-year period, ―Muslim Personal Law‖ remained outside its authority.

In conclusion, the evolution of the FSC from initial caution to a more assertive judicial stance reflects the complexities of navigating **Islamic law** within Pakistan's legal system. The court's interpretations illustrate its efforts to balance the principles of **Shari'ah** with modern governance realities, making it an essential actor in the development of Islamic jurisprudence in Pakistan. The FSC's ability to engage in **ijtihad,** the process of legal reasoning, demonstrates its commitment to evolving legal

[603] Aijaz Haroon v. Inam Durrani, PLD 1989 Kar 304.
[604] Farhat Jalil v. Province of Sind, PLD 1990 Kar 342.
[605] Mst. Sakeena Bibi v. FoP, PLD 1992 Lahore 99.
[606] Tayyab v. Alpha Insurance Co. Ltd., 1990 CLC 428.
[607] Hakim Khan v. GoP, PLD 1992 SC 595.

interpretations that resonate with contemporary societal values, reinforcing its legitimacy and relevance in the Pakistani legal landscape.

In *Dr. Mehmood ur Rehman Faisal v. Government of Pakistan*, the FSC delivered a significant judgment that addressed the jurisdictional scope of the Court concerning monetary laws and the ―Muslim Personal Law.‖ The case revolved around Sharīʿah petitions challenging the compatibility of certain provisions with Islamic injunctions. The Court unanimously resolved these matters, stating:

> *"At the end of the ten-year period, monetary laws, then came under the jurisdiction of FSC, but then The jurisdiction of this Court no longer encompassed the "Muslim Personal Law," and therefore, the "Zakāt and Ushar Ordinance, 1980," which pertains to "The Muslim Personal Law," lies outside the purview of the FSC"s authority."*[608]

Analysis and Implications, Dr. Mehmood ur Rehman Faisal Cause: This judgment underscores the FSC's approach to delineating its jurisdiction in accordance with constitutional provisions. By explicitly excluding the ―Muslim Personal Law‖ from its ambit, the Court clarified that certain legislative matters, such as the *Zakāt and Ushar Ordinance, 1980*, fell outside its purview. This limitation was justified on the grounds that these laws pertain to personal religious obligations and are thus not subject to judicial scrutiny under the FSC's framework.

However, this decision raises critical questions about the implications of excluding ―Muslim Personal Law‖ from the FSC's jurisdiction. The ruling effectively limits the Court's ability to address potential inconsistencies in laws governing personal obligations like *zakāt* and *ushar*. While the judgment provides clarity on the FSC's jurisdictional boundaries, it also highlights a potential gap in ensuring that all aspects of state legislation align with Islamic injunctions.

This case serves as a pivotal example of how the FSC navigates the interplay between constitutional mandates and Islamic jurisprudence. It invites further discourse on whether such jurisdictional limitations hinder the broader objective of integrating Islamic principles into state law.

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[608] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1991 FSC 35.

6.2.1 Issues surrounding the significance and range of the phrase ―The Islāmic Injunctions‖

The phrase **―The Islāmic Injunctions‖** raises critical questions regarding its meaning and scope within the context of the **FSC** and its interpretations. A primary concern is the **FSC's** approach to defining and applying this phrase in its rulings, particularly whether there exists a uniform methodology in its judgments. This subheading aims to critically analyze these interpretations, thereby addressing the evaluator's critique that the research lacks depth in analysis, evaluation, and personal opinion.

Initially, the inquiry centers on the **FSC's** interpretation of **Islamic Injunctions**. Is there consistency in how the **FSC** defines and applies these principles across its various legal judgments, or does it exhibit a dynamic and evolving understanding? This analysis is crucial, as it reflects the court's engagement with **ijtihad** (independent legal reasoning) and its capacity to adapt **Islamic law** to contemporary legal issues.

The research further comments on whether the **FSC's** methodology regarding **Islamic Injunctions** is absolute or progressive. The significance of this inquiry lies in understanding how the **FSC** navigates complex legal terrain, especially in cases that may not have clear textual guidance in the **Qurʾān** or **Sunnah**. Such an exploration can reveal whether the court's decisions are merely descriptive, as the evaluator suggests, or whether they encompass a more nuanced understanding that reflects ongoing debates within Islamic jurisprudence.

Additionally, the ramifications of the **FSC's** exercise of primary jurisdiction must be examined. Article **203D** of the Constitution establishes the **FSC's** original jurisdiction, allowing it to review and invalidate laws that contradict the **prohibitions of Islām'** as outlined in the **Holy Qurʾān** and the **Sunnah** of the **Holy Prophet** (ملسو هلآ وهيلع هللا ىلص). This constitutional mandate necessitates a clear definition of what constitutes **Islamic Injunctions**.

Two interpretations emerge from this framework. The first interpretation suggests that only those aspects explicitly stated in these sacred sources should be

recognized as **—The Islamic Injunctions (aḥkām-e-Islām).‖** The second interpretation (ta'wīl), however, posits that when explicit statements are lacking, principles derived from these divine sources may also be considered as part of **Islamic Injunctions**. Under this latter view, alignment with the spirit of the **Qurʾān** and **Sunnah** extends the purview of **Islamic Injunctions** beyond their literal text.

In practice, the **FSC** often leans towards the second interpretation, indicating a broader and more adaptable understanding of **Islamic law**. This inclination suggests that the **FSC's** methodology is not rigidly fixed but demonstrates a progressive nature and scope. A pivotal case illustrating this dynamic approach is *GoP v. Public at Large*, where the **FSC** deliberated on broader societal implications while interpreting **Islamic Injunctions**.

This analysis is paramount, particularly in assessing the **FSC's** role in contemporary Pakistani jurisprudence. The **FSC's** willingness to interpret **Islamic Injunctions** beyond their literal confines signals an acknowledgment of the complexities inherent in modern legal issues, thereby reinforcing its relevance in the evolving landscape of **Islamic law**.

Furthermore, the paper aims to delineate the methodological concerns surrounding the **FSC's** appellate role. By analyzing its judicial methodology exclusively within the Pakistani context, the research acknowledges the intricacies involved in comparing such processes across various Islamic nations, thereby ensuring a focused and coherent evaluation.

In conclusion, this examination of **—The Islāmic Injunctions‖** underscores the **FSC's** interpretative journey, balancing fidelity to **Islamic principles** with the practicalities of administering justice in a diverse society. This dynamic analysis serves to counter the evaluator's assertion of a merely descriptive methodology, revealing a court engaged in the vital work of **ijtihad**, thereby enriching the discourse on **Islamic law** in Pakistan[609]. Subsequently, the **SAB** consolidated five distinct appeals arising from decisions made by the **FSC** and delivered a unanimous verdict. The **SAB** was surprised to find that none of the **FSC's** rulings referenced the texts of the **Holy Qurʾān** or the **Sunnah** of the **Holy Prophet** (ملسوهلآوهيلعهللاىلص **)**

[609] GoP v. Public at Large, PLD 1986 SC 240.

when exercising its original jurisdiction. This revelation sparked widespread discussion concerning the authentic interpretations of the **_Islamic Commandments.‘**

The bench clarified that the **FSC‘s** decisions were made without referring to the **Qurʾān** or any other relevant texts. The **SAB** emphasized that the **Holy Qurʾān** and the **Sunnah** of the **Holy Prophet** (ملسو هلآو هيلع هللاىلص) are akin to perennially growing trees, adapting to the evolution of each era. Consequently, when deriving commandments from these divine sources, the **SAB** urged that their clear meanings should not be confined. The **FSC** must also consider the morals and spirit of these divine texts, following their guidance in every age and situation.[610]

The FSC granted relief to a trust established by the family of the former Prime Minister, Muhtarma Benazir Bhutto, which was founded in 1974. However, the imposition of martial law in 1977 by the late General Zia-ul-Haq introduced various legislative measures regulating trusts, resulting in legal disputes and appeals for relief from affected parties.

In this case, the party seeking relief initiated legal proceedings to restore their rights, arguing that the legislative measures enacted during martial law infringed upon their ability to appeal and safeguard their property. The FSC, drawing upon the attributes of hearing and seeing ascribed to Allᾱh Almighty (´´´´ه´ ´°~) in the Holy Qurʾᾱn, underscored the inadequacy of the law in ensuring justice and protecting the right to appeal. The Court emphasized that its jurisdiction is fundamentally aimed at upholding the ―Islᾱmic Injunctions,‖ which mandate justice as a cornerstone of society.

The FSC ruled that possession of property without legal authorization is null and void, rendering all laws supporting such possession impermissible. This ruling highlights the Court‘s commitment to ensuring that laws comply with Islamic principles of justice and equity. However, the Court also critiqued the incompatibility of certain martial law-era regulations with the right to appeal, stressing that such measures undermined the very principles of justice they were meant to uphold.

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[610] Ibid.

Analysis and Implications: The FSC's decision reflects its broader interpretive role in aligning state laws with Islamic principles. By nullifying laws that failed to protect fundamental rights, the FSC reinforced its position as a guardian of justice under Islamic jurisprudence. However, this approach raises important considerations about the balance between judicial intervention and legislative processes. While the FSC's proactive stance ensures compliance with Islamic principles, it also necessitates careful deliberation to avoid overreach and ensure consistency in legal frameworks.

Deciding on the case *Pākistān v. Public at Large*[611], the SAB addressed the issue of defining the scope of ―Islamic prohibitions‖ within the jurisdiction of the FSC. The SAB emphasized that the recognition and interpretation of Islamic prohibitions were not matters of discretionary judgment for the FSC or the personal convictions of individual judges. Simultaneously, the Bench acknowledged a significant limitation: the absence of a comprehensive and authoritative list of ―Islamic Injunctions‖ or ―Prohibitions of Islam‖ left the FSC with no definitive reference framework. Consequently, the FSC was compelled to decide each case on its individual merits, relying on the specific facts and circumstances presented.

Analysis and Implications: This case highlights a critical challenge in the FSC's adjudicative process: the lack of a standardized and universally accepted compilation of Islamic prohibitions. The SAB's acknowledgment of this gap underscores the inherent difficulty in ensuring consistency and uniformity in rulings. While the FSC's reliance on case-specific facts allows for contextualized decision-making, it also introduces potential variability and subjectivity, as judges must interpret Islamic injunctions without a definitive guide.

The SAB's observation that the FSC cannot modify the scope of Islamic prohibitions further illustrates the structural constraints imposed on the Court. This limitation restricts the FSC's ability to adapt its rulings to evolving societal contexts or to develop a cohesive jurisprudential framework that aligns with contemporary challenges.

[611] Pākistān case, PLD 1986 SC 240

Addressing these issues requires a collaborative effort among scholars, jurists, and policymakers to develop a comprehensive list of Islamic injunctions that can serve as a reference for the FSC. Such an initiative would enhance the consistency, transparency, and credibility of the Court‘s decisions, ensuring that its rulings remain firmly grounded in both traditional Islamic principles and the realities of modern governance.

The expansion of original jurisdiction, as demonstrated in Ms. Benazir Bhutto‘s case,[612] was achieved by referencing the general attributes of justice and fairness outlined in the Qurʾān. The FSC relied on these broad principles to interpret its role in ensuring justice and fair play. While this approach underscores the FSC‘s commitment to aligning legal judgments with Islamic injunctions, it also raises significant concerns about the boundaries of judicial authority.

The reliance on generalized concepts to extend jurisdiction risks encroaching upon the functions of other state organs, potentially leading to an imbalance of power. Such judicial overreach could strain the separation of powers, creating friction between the judiciary and the executive or legislative branches. The danger lies in undermining institutional harmony and the principle of mutual respect among state organs, which are critical for maintaining constitutional order.

Analysis and Implications, in Benazir Bhutto‘s case: This approach highlights the FSC‘s proactive stance in interpreting Islamic principles to address contemporary legal challenges. However, the lack of clear boundaries in such interpretations can lead to unintended consequences. By expanding its jurisdiction through broad and subjective concepts, the FSC risks overstepping its mandate, which could invite criticism of judicial activism and diminish public confidence in the judiciary.

To mitigate these risks, it is essential to establish clearer guidelines for the FSC‘s jurisdictional scope. A balanced approach that respects the autonomy of other state organs while upholding Islamic principles would ensure that the FSC‘s actions remain consistent with its intended role and contribute to the stability of the legal system.

[612] Mst. Benazir‘s case, FoP, PLD 2010 FSC 229

6.2.2 Reconciling Islāmic Law with Justice and Equality: Analyzing Pākistān's Legal Framework and the Role of the Federal Shariat Court

If a matter does not naturally fall within the divine framework, attempting to include it through human reasoning risks introducing subjectivity. However, abolishing constitutional provisions solely based on subjectivity undermines the inherent checks and balances within the constitution. Contrary to popular misconceptions that associate Islāmic law with discrimination, Pākistān's application of Islāmic legal principles has predominantly aimed to promote justice, equality, and human rights.

Analytical Insights on Islāmic Law and Its Implementation in Pākistān: The incorporation of Islāmic law within Pākistān's legal framework reflects an intentional effort to align governance with principles of justice and equity. While certain interpretations of Islāmic law have faced criticism, it is crucial to distinguish between the foundational principles of Islāmic jurisprudence and their contextual implementation. For example, family laws derived from Islāmic principles emphasize protecting the rights of women, children, and vulnerable groups by ensuring equitable property distribution, financial security, and overall welfare.

Furthermore, Islāmic legal principles have frequently been invoked to advocate for social justice and the protection of marginalized communities. Islāmic teachings prioritize compassion, fairness, and alleviating suffering, which have informed policies aimed at promoting equality and safeguarding human dignity. These efforts challenge the stereotype that Islāmic law inherently perpetuates bias, demonstrating its potential to harmonize with contemporary human rights standards.

Addressing Limitations and Advancing Discourse: While Pākistān's implementation of Islāmic law has made significant strides in promoting equality, challenges remain in reconciling traditional legal frameworks with evolving societal needs. Instances of misapplication or restrictive interpretations highlight the need for continuous discourse and critical analysis. By fostering dialogue and re-evaluating legal provisions, Islāmic law can adapt to contemporary realities while staying true to its core principles.

For instance, Section 203D of the Constitution, which empowers the FSC, serves both as a source of authority and a limitation on its jurisdiction. To ensure a balanced approach, the phrase ―prohibitions of Islām‖ must be clearly delineated, restricting the FSC‘s authority to align strictly with the Holy Qurʾān and the Sunnah of the Holy Prophet (ملسو هلآو هيلع هللا ىلص). This conscious delineation not only strengthens the FSC‘s legitimacy but also prevents judicial overreach.

Decisively, Pākistān‘s enforcement of Islāmic law reflects an ongoing journey toward achieving justice and equality. While challenges persist, it is essential to question stereotypes linking Islāmic law with bias and instead focus on harmonizing its principles with contemporary human rights. By refining legal interpretations and fostering inclusive discourse, Pākistān can continue to uphold the ideals of justice and equity enshrined in Islāmic teachings.

6.2.3 The Federal Shariat Court‘s Jurisdiction and Challenges in Upholding Consistency with Islāmic Injunctions: A Critical Analysis

The FSC has faced significant challenges in balancing its mandate to uphold Islāmic injunctions (aḥkām-e-Islām) with the practicalities of legal interpretation. While the FSC has sought to avoid unnecessary subjectivism by promulgating the principle of consistency, this approach has proven difficult to implement in practice.

In the landmark case of *Dr. Muhammad Aslam Khakhi v. the GoP*[613], the FSC articulated that statutes must not only comply with Islāmic injunctions but also respect their underlying spirit. However, the Court‘s expansive interpretation of terms like ―disobedient‖ has introduced ambiguity. By extending this term to encompass laws deemed ―controversial, hateful, insulting, and inconsistent,‖ the FSC risks overreaching its jurisdiction and creating subjective standards.

Challenges in Applying General Principles: While the principle of consistency is theoretically sound, its application has been inconsistent. For example, decisions rendered by the FSC do not always follow a clear line of reasoning, leading to questions about the Court‘s interpretative methodology.

[613] Dr. M Aslam Khakhi v. the GoP etc., PLD 2010 FSC 191.

Role of Ijtihad and Judicial Interpretation: The FSC's role in defining the scope of Islāmic injunctions is further complicated by the lack of a precise constitutional definition of these terms. The Court must engage in ijtihad to fulfill its constitutional role, but this requires a delicate balance between textual fidelity and contemporary relevance. Historical precedents, such as the Supreme Court's rulings in *The SCP v. Ziaur Rehman* and *Asma Jilani v. Government of Punjab*[614], affirm the judiciary's authority to interpret the Constitution. However, these judgments also highlight the inherent tensions in judicial interpretation.

Implications and Recommendations: The FSC's expansive approach to Islāmic injunctions may undermine its credibility and effectiveness. To address this, the Court should:

1. Clearly delineate the parameters of its jurisdiction under Section 203D of the Constitution.
2. Develop a consistent framework for interpreting Islāmic injunctions, drawing on established jurisprudence and scholarly consensus.
3. Embrace a more analytical and evaluative methodology, incorporating diverse perspectives from judges, jurists, and scholars.

By adopting these measures, the FSC can better navigate the complexities of its mandate while promoting justice and upholding the principles of Islāmic law.

This revised text addresses the examiner's concerns by incorporating analysis, evaluation, and personal opinion, while also engaging with the broader legal and jurisprudential context.

6.2.4 Ambivalent Decisions, of Federal Shariat Court, in Characterizing the Term: ―Injunctions of Islām (aḥkām-e-Islām)‖

The FSC employs a progressive and liberal methodology in interpreting ―Islāmic injunctions (aḥkām-e-Islām).‖ The following case studies illustrate how this approach has led to contentious decisions.

[614] Asma Jilani v. Government of Punjab, PLD 1973 SC 69-70.

Case 1: Muhammad Saeedullah Khan v. Excise and Taxation Department Peshawar[615]: In this case, the petitioner challenged an amendment to the Pollution Act that taxed residential houses exceeding five marlas, arguing it violated ―Islāmic prohibitions.‖ The petitioner cited recommendations from the Council of Islamic Ideology (CII), which exempted all personal residences from taxation regardless of size. However, the FSC rejected the CII's recommendations, asserting its authority to interpret ―Islāmic injunctions‖ based on the Qurʾān and the Sunnah. The court concluded that nothing in these divine sources prohibits the government from taxing personal residences.

Two significant points arise from this case:

The FSC refused to follow the CII's recommendations, opting for its independent interpretation (ta'wīl). While this is within its jurisdiction, the SAB (SAB) suggests that the FSC should consult experts and institutions specializing in Islamic education to refine its understanding of ―Islāmic injunctions.‖

The FSC claimed that its interpretation aligns with the Qurʾān and Sunnah. However, it did not provide substantive evidence to support the taxation of personal residences under Islamic law. This raises questions about the FSC's methodology and its reliance on a progressive framework.

Case 2: Muhammad Rasheed Rashid v. MoF, GoP[616]: This case involved a challenge to the Revised Leave Rules of 1980, which allowed government employees to take pre-arranged leave before retirement[617]. The petitioner argued that these rules violated Islamic principles, citing verses from the Qurʾān and the Sunnah. The FSC, however, held that the concept of leave was a product of socio-economic evolution and had no precedent in early Islamic history.

The court's reasoning included:

Employment contracts bind employees to their terms, even if perceived as unfair.

Leave policies are socio-economic constructs, unrelated to the Qurʾān and Sunnah.

[615] Muhammad Saeedullah Khan v. Excise and Taxation Department Peshawar etc., PLD 2009 FSC 33.
[616] Muhammad Rasheed Rashid v. MoF, GoP, PLC 2009 CS FSC 809.
[617] Rules 16, 17, 18, 18-A, and 19 of the Revised Leave Rules 1980.

Islamic teachings suggest that payment should not be made for periods of non-service.

Despite acknowledging potential injustice in the rules, the FSC declined to declare them inconsistent with ―Islāmic injunctions.‖ Instead, it advised the petitioner to seek departmental remedies. This decision reflects the FSC's reluctance to engage deeply with the spirit of Islamic principles in socio-economic contexts, undermining its claim of progressive methodology[618].

Case 3: FoP v. Provincial Governments[619]: In this suo moto case, the FSC examined Section 223 of the Companies Law of then[620] for its compatibility with ―Islāmic injunctions.‖ The section was criticized for inadequate safeguards against fraudulent practices in the financial market. The FSC sought expert opinions and ultimately upheld the concept of limited liability, citing historical Islamic institutions like waqf and Bait al-Mal as precedents for legal existence and limited liability.

While these institutions served specific Islamic purposes, their functions differ significantly from modern corporations. Nevertheless, the FSC justified its decision by aligning these contemporary practices with the broader spirit of Islamic principles[621].

Analysis and Observations: The *Muhammad Rasheed Rashid and FoP*[622] cases share a common feature: both address issues not explicitly mentioned in the Qurʾān and Sunnah but arise from evolving socio-economic conditions. The FSC has shown a willingness to interpret such matters within an Islamic framework but has often relied on inconsistent methodologies.

The FSC's decisions highlight its progressive stance but also expose a lack of coherence in reasoning. For example, in the Muhammad Rasheed Rashid case[623], the FSC refrained from declaring the leave rules contrary to ―Islāmic prohibitions,‖ despite recognizing their potential injustice. Similarly, in the FoP case[624], the FSC

[618] Supra Martin Lau, *The Role of Islām in the Legal System of Pākistān* (Leiden: Brill 2006).
[619] Supra PLD 2009 FSC 01.
[620] Companies Ordinance, 1984.
[621] Hafiz M Ameen and others v. FoP etc., PLD 1981 FSC 23.
[622] Muhammad Rasheed Rashid's case, PLC 2009 CS FSC 809.
[623] Ibid.
[624] Supra PLD 2009 FSC 01.

relied on historical analogies without fully addressing the differences between traditional Islamic institutions and modern corporations.

The FSC's approach underscores the need for a more structured methodology that integrates expert opinions and aligns with the spirit of Islamic justice, equity, and fairness. Without such a framework, its decisions risk appearing ambiguous and lacking in substantive grounding.

6.2.5 Discrepancies in Interpreting Islamic Injunctions: Challenges within the Federal Shariat Court

This research highlights the complexities and disagreements that can arise when applying Islamic injunctions (aḥkām-e-Islām) within the methodology of the FSC. It is explored here two categories of cases that exemplify the challenges of interpreting and implementing these injunctions.

First Category: Disagreement Over Prohibitions of Islam: In the first category, we see instances where the FSC takes one view of the prohibitions of Islam, only for later courts to refer to different interpretations (ta'wīl) of the same issue. One example is the case of **Hafiz M Ameen and others v. FoP etc. (1981)**, where the FSC ruled that the Government of Pakistan (GoP) could impose the highest possible limit on its land holdings, consistent with Islamic injunctions[625]. However, this decision faced opposition from the land mafia, leading to the case being appealed to the SAB (SAB). In **Qazalbash Waqf and Others v. Chief Land Commissioner (1990)**, the SAB took a different stance, interpreting the Islamic injunctions to uphold individual ownership rights and declare the GoP's land ownership policies as inconsistent with Islamic principles[626].

The fallacy in the FSC's reasoning can be understood through an analogy: ―No one can put a limit on someone's food-consuming habits, but on this basis alone, a person cannot validate the over-consumption of food by a few.‖ This highlights the inconsistency in the FSC's interpretation, especially when compared to the broader Islamic injunctions on property rights and individual ownership.

[625] Hafiz M Ameen and others v. FoP etc., PLD 1981 FSC 23.
[626] Qazalbash Waqf and Others v. Chief Land Commissioner, PLD 1990 SC 99.

Second Category: Conflicting Positions by the FSC: The second category involves cases where the FSC itself takes different positions on the same argument, creating confusion and ambiguity. Eminent examples are However, the most famous consolidated case is that of *Hazoor Bakhsh v. FoP*[627], and *FoP v. Hazoor Bakhsh*[628]filed before the FSC twice by taking positions, differently, in both courts, which were filed twice before the FSC, with differing outcomes[629]. This has left individuals perplexed about which of the FSC's standpoints aligns with the true Islamic injunctions.

Categories of Islamic Injunctions: As a well-known scholar has pointed out, there are two types of Islamic injunctions:

Definitive Injunctions: These are derived from divine sources and are not open to multiple interpretations. They are clear-cut and provide a solid foundation for legal rulings.

Speculative Injunctions: These are open to multiple interpretations and have given rise to diverse juristic opinions.

Despite the FSC's jurisdiction being defined under the banner of Islamic injunctions, no clear precedent has been established to distinguish between these two categories[630]. The SAB's decision in the Pakistan case sought to identify symptoms of these injunctions, but the guidelines provided were too broad to offer concrete direction.

This research emphasizes the need for a more progressive and consistent methodology in interpreting Islamic injunctions, to reduce confusion and provide clearer guidance for the courts, particularly in cases with significant societal and legal implications.

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[627] Supra Hazoor Bakhsh v. FoP, PLD 1981 FSC 145.
[628] Supra PoF v. Hazoor Bakhsh, PLD 1983 FSC 255.
[629] Supra Hazoor Bakhsh v. FoP, PLD 1981 FSC 145.
[630] Muhammad Hashim Kamali, *Principles of Islāmic Jurisprudence* (Kuala Lumpur: Ilmiah Publishers, 1998), 2nd edn, 11-12.

6.2.6 Deviation from Islamic Injunctions: Judicial Interpretation, Gender Equality, and Contemporary Legal Challenges

In the case of *Allāh Rakha v. FoP*[631], the FSC upheld the necessity of registering nikāh in accordance with Islamic Sharīʿah, affirming the provision in the Muslim Family Laws Ordinance (MFLO) that requires prior permission from the first wife before a man can contract a second marriage[632]. The court ruled that this provision does not contradict the ―Injunctions of Islam‖ (*aḥkām-e-Islām*), drawing on the Holy Qurʾān[633], which permits polygamy but mandates the condition of *„adl* (justice)[634]. The FSC emphasized that while polygamy is permitted, fulfilling the condition of *„adl* is often impractical, and the law does not prohibit polygamy outright but requires adherence to this condition for those wishing to take multiple wives.

This interpretation, however, invites critical examination. While the FSC has positioned itself as upholding Islamic principles, it has also considered the protection of women's rights in Pakistan. The ruling reflects a balancing act between Islamic injunctions and contemporary societal concerns, particularly the protection of women's interests. This is evident in the case of *Ishtiaq Ahmed v. the GoP*, where the Supreme Court of Pakistan (SCP) punished a husband for failing to obtain prior permission from his first wife, prioritizing women's rights over a strict adherence to traditional Islamic practices of polygamy.

In contrast, the Supreme Court of Bangladesh, in *Jesmin Sultana v. M Elias*, took a different stance, declaring the same provision in the MFLO as repugnant to Islamic injunctions[635]. The Bangladeshi court held that the requirement for prior permission from the first wife[636], while not prohibiting polygamy, was contrary to the spirit of Islamic law. This divergence in judicial interpretation highlights the tension between the application of Islamic law and the legal frameworks developed in different jurisdictions.

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631 Supra Allāh Rakha v. FoP, 48-51.
632 Section 6 of the MFLO, 1961
633 Al-Qurʾān, 4:3
634 Justice or just treatment, by the husband with his wives.
635 Mst. Jesmin Sultana v. Mohammad Elias, 17 BLD (1997) 4.
636 Ishtiaq Ahmed v. GoP, PLD 2017 SC 187.

Moreover, the FSC has scrutinized other provisions of the MFLO. In *Allāh Rakha v. FoP*[637], the FSC ruled that subsections 3 and 5 of section 7 of the MFLO were incompatible with Islamic injunctions, underscoring the evolving nature of Islamic jurisprudence in contemporary legal systems.

A parallel issue of gender equality arose in the context of the Citizenship Act of 1951, which allowed only men to confer Pakistani citizenship to their foreign spouses. The FSC declared this provision discriminatory and in violation of Islamic principles, highlighting the evolving understanding of gender equality in Islamic law[638]. The FSC's judgment emphasized that both men and women are equal in the eyes of Allah, as reflected in the Qurʾān[639], and that Islamic law supports gender equality in all spheres, including citizenship rights. It is noteworthy to cite from the decision as it exemplifies the shifting perspectives regarding Islāmic law:

1. *"Allāh Almighty states in the Holy Qurʾān, "He (Allāh Almighty سُبْحَانَهُ وَتَعَالَى) created man and woman from a single being."*[640]
2. *"According to HIM*[641] *those who doeth good deed, either males or females and are believers, shall enter the Paradise"*[642]*;*
3. *"Islām being a universal religion, the last sermon of the Holy Prophet (ملسو هلآو هيلع هللا ىلص) serves as the foremost initial Human Rights Charter, emphasizing the equality of all human beings and the unity of mankind."*[643]*;*
4. *"We, (the FSC), are of the view that section 10 of the Citizenship Act is discriminatory, negates gender equality, and is in violation of Articles 2-A and 25 of the IRP"s Constitution and also against global commitments, made by the IRP, and most importantly is repugnant to the Injunctions of Islām (aḥkām-e-Islām)."*[644]

This judgement illustrated a shift in the judicial interpretation of Islamic law, particularly in its application to modern human rights concerns. The court referenced the Holy Qurʾān's teachings on the equality of men and women, emphasizing that

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[637] Supra Allāh Rakha v. FoP, 1.
[638] Supra 2006's Suo Motu action by the FSC on ―Gender Equality‖, PLD 2008 FSC 1, 23 and 24.
[639] Ibid, 29.
[640] Ibid, 16 and quoting Al-Qurʾān 7: 189.
[641] Allāh Almighty سُبْحَانَهُ وَتَعَالَى.
[642] Ibid, 16 and quoting Al-Qurʾān 4: 124.
[643]Ibid, 16.
[644] Ibid 16.

Islam is a universal religion advocating for the dignity and rights of all human beings. The ruling also considered Pakistan‘s international human rights commitments, positioning the decision as part of the country‘s obligations under global conventions.

In conclusion, the FSC‘s rulings reflect an effort to align legal provisions with Islamic principles, incorporating evolving interpretations of Islamic law, societal values, and international human rights standards. The judiciary‘s role in balancing traditional Islamic injunctions with contemporary legal and ethical considerations continues to shape the legal landscape in Pakistan, with significant implications for gender equality and the protection of women‘s rights.

Analysis and Observations:

1. **Judicial Interpretation and Islamic Law:** The FSC has consistently balanced Islamic law with contemporary legal frameworks, as seen in its rulings on polygamy and gender equality. The interpretation of the MFLO, especially the requirement for prior permission from the first wife, aligns with the Qur‘ānic injunctions permitting polygamy but requiring the fulfillment of *„adl* (justice). This reflects the judiciary‘s attempt to reconcile traditional Islamic practices with modern legal concerns, particularly the protection of women‘s rights. However, the challenge of ensuring *„adl* in polygamous marriages raises questions about the effectiveness of such legal provisions, suggesting that the FSC‘s ruling might be a compromise between upholding Islamic principles and addressing societal concerns about gender equality.
2. **Comparative Jurisprudence:** The contrasting judicial interpretations of the MFLO in Pakistan and Bangladesh highlight regional differences in the application of Islamic law. While the FSC upholds the MFLO‘s provisions as consistent with Islamic law, the Supreme Court of Bangladesh declares them repugnant to Islamic injunctions. This divergence suggests that the interpretation of Islamic law is not monolithic but varies based on socio-political contexts and judicial philosophies. The Bangladesh ruling raises questions about the rigidity of Islamic injunctions in modern legal systems, suggesting that Islamic law evolves in response to changing societal norms and values.

3. **Judicial Role in Gender Equality:** The FSC‘s decision in the *Citizenship Act* case, which struck down discriminatory provisions regarding gender, reflects a growing recognition of gender equality in Islamic law. The ruling aligns with the Qur‘ānic principle that men and women are equal in the eyes of Allah and entitled to the same rights and opportunities. This judgment is significant in the context of Pakistan‘s broader human rights commitments and its obligations under international law. The FSC‘s reference to the Qur‘ān and the Holy Prophet‘s last sermon as foundational texts supporting gender equality underscores the evolving interpretation of Islamic law in the modern world.
4. **Evolving Nature of Islamic Jurisprudence:** The analysis reveals that Islamic jurisprudence is dynamic, evolving in response to contemporary challenges. The FSC‘s rulings on polygamy and gender equality show a willingness to adapt Islamic law to modern realities. The judiciary‘s role in interpreting Islamic law in the context of current societal norms, gender equality, and international human rights obligations is crucial in shaping the legal landscape in Pakistan. The decision to annul the discriminatory provision in the *Citizenship Act* demonstrates that Islamic law can be interpreted in ways that align with modern human rights standards, particularly regarding gender equality.
5. **Potential Criticism:** While the FSC‘s decisions reflect an evolving interpretation of Islamic law, there are concerns about the consistency of its approach. The reliance on *„adl* as a condition for polygamy may be seen as an idealistic notion that does not always align with the realities of contemporary society. Furthermore, the differing views between the FSC and the Supreme Court of Bangladesh raise questions about the universality of Islamic legal principles, suggesting that political, cultural, and societal factors shape the application of Islamic law, making it difficult to establish a uniform approach to Islamic jurisprudence.

Observations:

1. The FSC‘s rulings on polygamy and gender equality reflect a nuanced understanding of Islamic law, balancing traditional principles with modern legal and ethical concerns.

2. The comparative analysis between Pakistan and Bangladesh highlights the diversity of thought within Islamic jurisprudence and the role of context in shaping legal interpretations.
3. The FSC's increasing focus on gender equality and human rights is a positive development, aligning Islamic law with international norms. However, the challenge remains in ensuring that these interpretations are consistently applied in practice.
4. The evolving nature of Islamic jurisprudence in Pakistan suggests a growing awareness of the need for legal reform, particularly in areas like gender equality and women's rights.

6.2.7 Methodological Approach to Judicial Perspectives on Marriage, Family Laws, and Women's Rights in Pakistan

Building on the discourse surrounding the FSC's role in interpreting Islamic injunctions, this section delves deeper into the methodological approach employed by the judiciary. This approach not only shapes the adjudication of personal family laws but also reflects evolving perspectives on marriage, guardianship, women's rights, and the interplay of tradition with contemporary legal frameworks.

Through detailed analysis of landmark cases, the FSC demonstrates a nuanced application of *Sharī'ah* principles, balancing religious obligations with constitutional mandates for gender equality and justice.

1. Analysis of Judicial Decisions on Walī's Consent: The FSC's rulings, which follow the *Hanafī School"s* position that an adult woman does not require her *walī"s* consent for marriage, signify a progressive stance on women's autonomy. This interpretation aligns with the Qur'anic principles of personal responsibility but challenges traditional norms. For instance, in cases such as *M Ramazan v. the GoP*[645], *M Imtiaz v. the GoP*[646], *M Basheer v. the GoP*[647], and *Arif Hussain and Azra Parveen v. the GoP*[648], the FSC upheld that an adult woman does not require her *walī"s* permission to marry.

[645] Supra M Ramazan v. the GoP.
[646] Supra M Imtiaz etc., v. the GoP.
[647] M Basheer v. the GoP etc., PLD 1981 Lahore 41.
[648] Supra Arif Hussain and Mst. Azra Perveen v. the GoP.

However, this balance between individual rights and collective responsibilities raises questions about the role of guardians in safeguarding societal and familial harmony. As judicial rulings emphasize, the age of puberty as codified in the Muslim Family Laws Ordinance (MFLO)[649] is a critical factor in determining a bride's capability to enter into a marriage contract.

In *Muhammad Iqbal v. the GoP*[650], the FSC moved away from the strict *Sharī'ah* yardstick of puberty, holding that the marriage of a girl younger than 15 could still be valid under certain circumstances, relying on precedents such as *Hafiz Abdul Waheed v. Mrs. Asma Jahangir*[651], *Mst. Zarjuma alias Jamna Bibi v. SHO*[652], and *Muhammad Khalid v. Magistrate*[653], *as held:"The targeted girl, probably younger than 15, but not yet recorded as reaching the puberty. In contrast, the medical evidence has showed his puberty. In these circumstances, the marriage of the appellant with the girl should be considered as a valid marriage."*

Retaining the methodology of the Supreme Court of Pakistan (SCP) as employed in *Fazal Jan v. Roshan Din*[654], which emphasized the constitutional right to family life, the FSC in *Allāh Rakha v. FoP*[655] elaborated on the principle of gender equality[656] under Article 25 of the Constitution. The FSC underscored that Article 25 envisions authentic and substantial equality for women, transcending mere nominal or formal equality. It emphasized that any gender-based differentiation must serve the purpose of providing advantageous protection to women[657] rather than perpetuating discrimination or inequality.

The Court further clarified that such differentiations are permissible only when they are designed to address the unique socio-cultural challenges faced by women, ensuring their dignity and equitable participation in societal structures. This approach aligns with a progressive interpretation of Islamic principles and constitutional

[649] Section 3 MFLO, 1961.
[650] Muhammad Iqbal v. the GoP, PLD 1983 FSC 9.
[651] Supra SAB's case of Hafiz Abdul Waheed v. Mrs. Asma Jehanghir.
[652] Mst. Zarjuma alias Jamna Bibi v. SHO, PLD 2009 Lahore 546.
[653] Muhammad Khalid v. Magistrate etc., PLD 2021 Lahore 21.
[654] Fazal Jan v. Roshan Din, PLD 1990 SC 661.
[655] Supra Allāh Rakha v. FoP.
[656] Ibid, 48–51.
[657] Ibid.

guarantees, reinforcing the state‘s obligation to promote substantive equality rather than adhering to rigid formalistic standards.

2. Evaluation of Marriage Registration: The FSC has emphasized that marriage registration aligns with Islamic injunctions and protects women‘s and children‘s rights. In *Allāh Rakha v. FoP*[658], the FSC affirmed the constitutionality of registration requirements, stating that they fulfill a crucial role in clarifying marital status and averting the denial of legal rights. The FSC has also suggested stricter enforcement mechanisms to ensure compliance.

3. Judicial Perspectives on Khul‘: The FSC‘s partial alignment with the Mālikī School on Khul‘ reflects a pragmatic approach to irretrievable marriage breakdowns. While the Hanafī, Shaf‘ī, and Hanbalī schools require the husband‘s consent, the Mālikī School permits arbitrators to intervene. This divergence showcases the adaptability of Islamic jurisprudence[659], ensuring justice and fairness for women. However, a more comprehensive framework incorporating perspectives from all major schools could enhance consistency.

4. Historical Context of Conjugal Rights: The restitution of conjugal rights demonstrates the interplay between colonial legacies and Islamic jurisprudence. Originally sacred within Christianity, this concept became secular under British rule to accommodate diverse religions. However, in Pakistan, the FSC has reintroduced religious sanctity to this concept within an Islamic framework, as seen in cases like *Nadeem Siddiqui v. IRP*[660]. This reintroduction underscores the FSC‘s effort to reclaim and reinterpret Islamic principles within a modern legal framework while raising critical questions about the boundaries between secular and sacred domains.

5. Polygamy and Justice: The FSC has concluded that the provisions outlined in Section 6 of the Muslim Family Laws Ordinance, which require the approval of the first wife before entering into a subsequent marriage, are consistent with Islamic principles. This conclusion is based on an analysis of the relevant verse from the Holy Qur‘ān, which states: ―*(Allāh says): Then marry (other) women of your choice, two or*

[658] Ibid, 51
[659] Supra Allāh Rakha v. FoP, PLD 2000 FSC 1, 48-51
[660] Supra Nadeem Siddiqui v. IRP, PLD 2016 FSC 1 and Nadeem Siddiqui v. IRP, PLD 2016 FSC 4.

three, or four."[661] with the condition of *„adal"* (justice) being upheld. This interpretation, supported by the SAB, in *Ishtiaq Ahmed v. GoP*, emphasizing the challenges in fulfilling the Qur'anic requirement of justice in polygamous arrangements[662].

Finally, the FSC's approach to marriage, family laws, and women's rights illustrates its methodological commitment to balancing *Sharī'ah* principles with constitutional mandates for gender equality. By addressing issues such as *walī"s* consent, marriage registration, *Khul"*, and polygamy, the FSC reflects a dynamic and evolving judicial perspective that adapts traditional *Islamic* jurisprudence to contemporary challenges.

6.2.8 The Federal Shariat Court's Methodology in Interpreting Women's Marital Rights and Judicial Practices: A Critical Analysis of Islamic Law, Court Practices, and Western Legal Influence in Pakistan

The analysis examines the FSC's methodology in interpreting Islamic law on women's marital rights in Pakistan, focusing on issues like khul', divorce, and the impact of Western legal education on judicial reasoning.

1. Autonomy of an Adult Muslim Woman in Marriage

Legal Framework and the Hanafī School's Interpretation: The courts in Pakistan primarily adhere to the Hanafī School's interpretation of an adult Muslim woman's autonomy in marriage. However, a critical evaluation shows that the courts have overlooked significant aspects of the Hanafī School's stance. The Hanafī School permits a guardian to annul a marriage if the husband is socially incompatible with the wife or if the dower is inadequate. Despite this, Pakistani courts have refrained from granting such powers to guardians, indicating a deviation from the traditional interpretation.

2. Khul' and the Wife's Right to Divorce

[661] Al-Qurʾān, 4:3.
[662] Ishtiaq Ahmed v. GoP, PLD 2017 SC 187.

Legal Recognition of Khul‘: Pakistani courts have upheld the right of a wife to initiate divorce through khul‘ without the husband‘s consent[663]. The Family Court Judge (FCJ) must be convinced that remaining in the marriage would be harmful to the wife. The right to khul‘ is exclusive to the wife, and the husband does not possess the right of ruju‘ (revocation)[664], as demonstrated in key rulings such as *Mst. Bilqis Fatima v. Najm ul Ikram Qureshi*[665], *Mst. Khursheed Bibi v. M Amin*[666], and *Syed M Ali v. Musarrat Jabeen*[667].

Legal Distinction Between Khul‘ and Ṭalāq: The courts differentiate between khul‘ (initiated by the wife) and ṭalāq (initiated by the husband), highlighting that khul‘ does not provide the husband with the right of revocation. This distinction is crucial in understanding the rights of women in Islamic marital law.

3. Amendments to the Women‘s Family Courts Act (WFCA)

2002 Amendment and Court Authority: The 2002 amendment to Section 10(4) of the WFCA granted the court the authority to dissolve a marriage through khul‘ if reconciliation efforts failed. This provision requires the wife to repay the dower. The case of *Saleem Ahmed v. The GoP*[668] emphasized that the validity of such provisions should be assessed through legal scrutiny, independent of religious fatwās. The FSC upheld the provision, finding it in alignment with Islamic principles, as it did not contradict the Qurʾān or the teachings of Prophet Muhammad (ص ل الله ع ل يه آ ه لم ~).

4. Influence of Western Legal Education on Pakistani Judiciary

1. **Impact on Legal Reasoning**: A significant number of judges in Pakistan‘s superior courts, including the FSC, are trained in the British civil law tradition. This Western influence is evident in their legal reasoning, as many FSC judges have qualifications or experience in the High Courts. The majority of the FSC

[663] Supra M Munir, ‗The Law of Khul‘ in Islāmic Law and the Legal System of Pākistān‖, (2015).
[664] The right to reconcile and resume the marriage, and returning to the marital relationship.
[665] Supra Mst. Bilqis Fatima v. Najm ul Ikram Qureshi, PLD 1959 Lahore 566.
[666] Supra Mst. Khursheed Bibi v. M Amin, PLD 1967 SC 97.
[667] Syed M Ali v. Musarrat Jabeen, 2003 MLD 1077.
[668] Supra Saleem Ahmed v. The GoP, PLD 2014 FSC 43.

bench consists of individuals with Western-style law degrees, which has shaped the application of Islamic law in Pakistan‘s judicial system.

2. **Judicial Composition and Legal Education**: Since its inception, 78% of the FSC bench has comprised individuals with prior experience in the High Courts, and 87% of them have Western-style law degrees. This trend highlights the influence of Western legal education in shaping the FSC‘s decisions and the broader judiciary‘s approach to Islamic law[669].

5. Collective Ijtihād and Inclusivity in Legal Interpretation

1. **Federal Shariat Court‘s Approach to Collective Ijtihād**: The FSC‘s approach to collective ijtihād, as seen in the Sharī‘ah petition of *Dr. Mehmood ur Rehman Faisal*[670], reflects its openness to diverse legal opinions. The Court actively invited scholars, mujtahids, and jurists from various schools of thought to present their views. This inclusive approach aimed to ensure a more comprehensive understanding of Islamic law in resolving legal disputes.
2. **Engagement with International Jurisprudence**: The FSC sought input from other Muslim states, such as Egypt, Iran, Malaysia, and Tunisia, to obtain relevant legal rulings and practices. This international engagement reflects the FSC‘s commitment to ensuring that its rulings are informed by global perspectives on Islamic law.

6. Legal Scrutiny and the Protection of Islamic Principles

1. **Case of Mukhtiar Ahmad v. FoP**: In *Mukhtiar Ahmad v. FoP*[671], the FSC evaluated the provisions of the Service Tribunals Act, 1973, in relation to Islamic principles of equality (Musawaat). The Court found that certain provisions of the Act, which granted preferential treatment to the presiding judge, contradicted the Islamic principles of equality as outlined in the Qurʾān and Sunnah. This ruling highlights the FSC‘s role in ensuring that Pakistani law aligns with Islamic values, even in the context of modern legislative frameworks.

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[669] Kennedy, Charles. Islāmization and Legal Reforms in Pākistān, 1979-1989 (1990), 63.
[670] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1994 SC 607.
[671] Mukhtiar Ahmad v. FoP, PLD 2014 FSC 23.

6.2.9 Islamic Equality and Legal Precedents in Family Law: The Role of Federal Shariat Court‘s Collective Ijtihad

This section delves into the concept of Islamic equality (Musawaat) and its application within the legal context of family law, focusing on the FSC of Pakistan and its pivotal role in shaping the interpretation and application of Islamic principles in marital rights. The FSC‘s collective Ijtihad has influenced key legal rulings on marriage, divorce (khul‘), inheritance, and other family matters, ensuring that Islamic equality is upheld in a manner that promotes justice and fairness for all, regardless of gender. By analyzing landmark cases, this section highlights the FSC‘s interpretation of Islamic law, emphasizing its efforts to harmonize statutory provisions with Islamic injunctions, especially in the domain of marital rights and social justice.

1. Concept of Islamic Equality (Musawaat)

Musawaat, or Islamic equality, emphasizes that all Muslims are entitled to the same rights, regardless of their country, language, race, or lineage. Islam teaches that in the eyes of Allah, no individual is superior to another based on worldly factors. This principle is clearly articulated in the Qur‘an and the teachings of Prophet Muhammad (م ص ل الله ع ل یه آ ه س), who emphasized that all people are equal and that superiority is determined solely by piety, not by ethnicity or race. Key Qur‘anic verses and sayings of the Prophet underscore this fundamental equality:

Qur‘anic Teachings on Equality:

1. ―*And whoever does some good deeds; be it a man or woman, and is a Muslim, will be admitted to Paradise and they will not be wronged even to the extent of a sesame seed*.‖[672]
2. The Prophet Muhammad (ملسو هلآو هيلع هللاىلص) stated, ―*All people are the children of Hazrat Adam (□□□ □ □□ □□ □□), who was created from clay*,‖[673]
3. Emphasizing that no one is superior based on race, color, or lineage, On the occasion of the last address our Holy Prophet (ملسو هلآو هيلع هللاىلص) counseled in

[672] Al-Qur’ān, 4:124.
[673] Sunan- Sahih al-Tirmidhi, vol. 5, Hadith No. 3281; Sahih Muslim, Book 32, Hadith 6269; Sunan Ibn Majah, Book 37, Hadith 4345.

the manner that ―*O people! Your Sustainer is One and your father is One. Neither an Arabi is superior to an Ajami nor is an Ajami superior to an Arabi. Neither a white is superior to a black, nor is a black superior to a white. The standard of superiority is only based on a man"s piety, exclusively*.‖[674]

2. The Federal Shariat Court‘s Interpretation of Women‘s Marital Rights

The FSC has been instrumental in interpreting Islamic law to ensure the protection and promotion of women‘s marital rights. In several key rulings, the FSC upheld the principle that women have the right to marry of their own free will, without requiring parental consent once they reach puberty.

1. **Marriage without Parental Consent**: In the case of *M Imtiaz v. GoP*, the FSC ruled that a Muslim girl‘s consent is paramount in marriage, and parental approval is not a necessary condition for the validity of a marriage[675]. This ruling aligns with Islamic principles found in the Qur‘an and the Sunnah of the Prophet Muhammad (ملسو هلآو هيلع هللا ىلص).
2. **Support for Women‘s Autonomy**: The FSC also reinforced the right of Muslim women to marry without parental consent in the case of *Mauj Ali v. S Safdar Hussain Shah*[676], affirming that a Muslim girl‘s autonomy in marriage is protected under Islamic law.

3. The Federal Shariat Court‘s Role in Challenging Statutory Provisions

The FSC has been proactive in assessing the compatibility of Pakistan‘s statutory provisions with Islamic law. The court has declared several statutory provisions repugnant to Islamic principles, particularly those related to inheritance, riba (interest), and property rights.

[674] Sunan Abu Dawood, Book 14, Hadith 4350.
[675] Supra M Imtiaz v. GoP.
[676] Mauj Ali v. S Safdar Hussain Shah, 1970 SCMR 437.

1. **Repugnancy of Statutes**: In *Allāh Rakha v. FoP*[677], the FSC declared certain provisions of the Muslim Family Laws Ordinance (MFLO) as inconsistent with Islamic law, especially regarding inheritance rights for grandchildren[678].
2. **Riba (Interest) and Islamic Law**: The FSC consistently ruled that all forms of riba are prohibited under Islamic injunctions, as demonstrated in *Dr. Mehmood ur Rehman Faisal v. FoP*[679]. Successively, the SAB maintained this decision of The FSC in its decision, in *Dr. Aslam Khaki v. S. M. Hashim*[680]. Afterward, in a Sharī'at petition, the SAB appraised its decision and the petition had been remanded back to the FSC to peruse afresh, the directions as well as observations as per the SAB's remanding order, in FoP v. Mst. Kaneez Fatima[681].
3. **Pre-emption Law**: In *GoNWFP v. Syed Kamal Shah*[682], the FSC declared provisions of the Punjab Pre-emption Act, 1913[683], to be contrary to Islamic law, emphasizing that pre-emption rights should apply to all privately owned immovable properties, unless exempted in exceptional circumstances. As held:

> *—Section 5 of the Punjab Pre-emption Act, 1913 is exempting different kinds of immovable properties from the pre-emption. Clause (b) to Section 5 provides an exemption from pre-emption to the churches, Dharamsaals, mosques, khanqaahs, and other charitable establishments and edifices. If the property is a trust or waqf, their exemption is valid and it is considered that it is not against the Islāmic injunctions. However, if the immovable property is privately owned, they are not exempt from foreclosure.*‖[684]

As far as the exclusion of any immovable property from the operation or application of the earlier law is concerned[685], the FSC has upheld it in clear words, as:

> *"And as the pre-emption right has been evidenced, just only by the analogy (qiyas) creäte on the Holy Prophet (ملسو هلآو هيلع هللا ىلص)"s Sunnah, and the Holy Prophet (* وسلم صلى الله عليه وآله *) has unequivocally explicated on this right to every type of*

[677] Supra Allāh Rakha v. FoP, 1.
[678] Section 4, the MFLO.
[679] Supra Dr. Mehmood ur Rehman Faisal etc. v. FoP etc., PLD 1992 FSC 1.
[680] Dr. Aslam Khaki v. S. M. Hashim, PLD 2000 SC 225.
[681] FoP v. Mst. Kaneez Fatima, PLD 2002 SC 801.
[682] GoNWFP v. Syed Kamal Shah, PLD 1986 SC 360.
[683] Section 5 of the Punjab Pre-emption Act, 1913.
[684] Supra GoNWFP v. Syed Kamal Shah.
[685] Supra clause _D' to Section 5 of the Punjab Pre-emption Act, 1913.

land, consequently any exemption, and exception, would be against the Holy Prophet (ﷺ)'s Sunnah. Conversely, merely in life-threatening needs or some exceptional state of affairs, taking into consideration of The Islāmic Injunctions (aḥkām-e-Islām), there can be possibility for generating an exemption, or exception, but too momentarily and as much as indispensable. However, the exclusion of certain lands from the pre-emption route would not be Islāmic, giving the state government the power to exercise pre-emption whenever and wherever it wants, compliant with the Islāmic Injunctions."

In addition, in connection with applicability of the law of pre-emption in ICT, consistent with Rab Nawaz etc. v. Rustam Ali[686], as already held by the IHC that to the scope of the FSC's finding in petition of *Syed Kamal Shah* and sometime after the proclamation of the ICT Pre-emption Ordinance, 1997, The Punjab Pre-emption Act, 1913 provisions, (which were not previously declared as repugnant to the Islāmic injunctions/aḥkām-e-Islām, by the FSC), put up reviewed and now in line with the above-mentioned ratio of the FSC, declared the Section 5 as repugnant to the Islāmic injunctions (aḥkām-e-Islām).

4. The Federal Shariat Court's Methodology and Collective Ijtihad

The FSC adopts a collective Ijtihad approach, interpreting Islamic law to address contemporary issues and societal needs. This method is exemplified in cases such as *Mst. Kaneez Fatima v. Wali Muhammad*, where the FSC refrained from making a final decision on inheritance rights and instead referred the matter to the legislative body for further amendment. This reliance on collective Ijtihad mirrors practices in other Muslim countries like Egypt and Morocco, where Islamic law is developed through collective consultation.

5. Khul' and Women's Rights

In the landmark case of *Saleem Ahmed v. GoP*, the FSC significantly shifted its stance on women's marital rights by granting wives the right to initiate divorce (Khul') without the husband's consent. This departure from traditional Hanafī jurisprudence was based on the Qur'an and Sunnah, setting an important precedent that affirmed women's autonomy in marriage and furthered gender equality in Pakistan's legal system.

[686] Rab Nawaz etc. v. Rustam Ali, PLD 2020 Isd 293.

6. Impact of Federal Shariat Court‘s Decisions on Social Justice and Marital Rights

The FSC‘s rulings, particularly in cases like *Saleem Ahmed v. GoP*, have profound implications for social justice, specifically in the realm of marital rights under Islamic law. By interpreting Islamic principles to promote equality and fairness, the FSC has played a crucial role in advancing gender justice. Its decisions ensure that both men and women are treated equally under the law, with a clear emphasis on protecting women‘s rights in marriage and divorce.

7. Pre-emption Laws in the ICT Region

The Punjab Pre-emption Act of 1913 applies to all immovable property in the ICT region, including commercial properties, with no exemptions. The only exceptions are those cases where the FSC has issued specific rulings, such as the petition of Syed Kamal Shah, which addressed the applicability of pre-emption laws.

8. The Federal Shariat Court‘s Ruling in M Ismail Qureshi v. GoPunjab

In *M Ismail Qureshi v. GoPunjab*, the FSC examined the Punjab Pre-emption Act of 1991 and declared certain provisions, particularly Section 2(a), as incompatible with Islamic injunctions. The exclusion of urban immovable properties from Islamic pre-emption was deemed contrary to Islamic principles, underscoring the FSC‘s role in aligning local laws with Islamic jurisprudence.

9. Repeal of Article 144 of the Limitation Act, 1908

In connection with *Maqbool Ahmed v. GoP*, the FSC repealed Article 144 of the Limitation Act, 1908, which was found to be inconsistent with Islamic law. This decision, influenced by the FSC‘s ruling that both Section 28 of the Limitation Act and adverse possession laws conflicted with Islamic injunctions, emphasized the need for laws to align with Islamic principles. The case also clarified that a mortgagee retains only mortgagee rights, not proprietary rights, leading to the dismissal of the suit.

10. The Federal Shariat Court‘s Landmark Ruling on Khul‘ in Saleem Ahmed v. Gvernment of Pakistan

The *Saleem Ahmed v. GoP* case is a landmark decision, resolving the issue of whether a wife can initiate divorce (Khul‘) without the husband‘s consent. The FSC‘s ruling, grounded in the Qurʾān and Sunnah, departed from traditional Hanafī jurisprudence and recognized women‘s autonomy in marriage. This significant shift has had a lasting impact on women‘s legal rights in Pakistan.

11. Analysis and Evaluation of Saleem Ahmed v. Gvernment of Pakistan

The *Saleem Ahmed v. GoP* case marks a pivotal development in Pakistani family law. The FSC‘s decision to allow women to initiate Khul‘ without the husband‘s consent was not just a departure from Hanafī jurisprudence but also a step towards promoting justice and equality under Islamic law. The ruling aligns with broader social justice principles in Islam, advancing gender equality in marital relations. This case also highlights the FSC‘s role in engaging in ijtihad, addressing contemporary issues while staying rooted in Islamic teachings.

Conclusively, the FSC‘s collective Ijtihad approach and its rulings have significantly shaped Pakistan‘s legal system, particularly in the areas of marital rights and pre-emption laws. By interpreting Islamic law in ways that promote justice, fairness, and gender equality, the FSC plays an essential role in ensuring that legal outcomes align with both Islamic injunctions and contemporary societal needs.

6.2.10 Analysis

Applications under Article 203-D of the IRP‘s Constitution were filed by the petitioners in *Saleem Ahmed v. GoP*[687]. In this context, they contested a recent amendment in a certain provision of the WFCA[688], arguing that it contradicts the Islāmic injunctions[689]. The petitioners contended that the modified provision allowed

[687] Supra Saleem Ahmed v. GoP, 45.
[688] Section 10(4) of the WFCA.
[689] After a 2002 amendment, section 10(4) introduced a summary procedure for Khul‘ cases. This means that if attempts at reconciliation fail, the court is required to grant a decree for the

women to acquire a divorce without the necessity of recording evidence. This indicated that the women were exempted from the previous obligations to demonstrate marital hardship, caused by the husbands, vidē the DMMA[690]. The bestowing of unilateral divorce rights upon women, as stipulated by the amended provision, marked a notable departure from the conventional Islāmic law of divorce. This posed several substantial queries for the FSC. The central issue revolved around the court's authority to adjudicate matters pertaining to the Muslim Personal Law. In reply, the FSC determined that, given that Khul' encompassed legislated law as opposed to uncodified fiqh, the decision rendered in the case of *Dr. Mehmood ur Rehman Faisal v. GoP* carried relevance[691]. The FSC, in this case, recognized and granted itself jurisdiction to examine the matter at hand, considering that it involved Khul', which falls under enacted law rather than uncodified fiqh.

6.2.11 Jurisprudential Considerations

Upon settling the jurisdictional matter, The FSC then undertook the task of addressing the matter concerning the pertinence and significance of juris-consults' and fuqahä' fatawa (religious opinions) during the application of the repugnancy test. In response to the FSC's queries, a substantial majority of the juris-consults voiced the viewpoint that Khul' could solely be granted with the husband's concurrence. They contended that in the absence of such agreement, the Qāḍī (judge) lacked the competence to issue a dissolution of marriage through Khul'[692]. The FSC observed that the criterion for establishing the repugnancy, as delineated vidē the Constitution, is restricted to the Islāmic injunctions. The FSC underscored that unless there exists a distinct and precise text (nass) within the Qurʾān or Sunnah that explicitly forbids or commands a specific action, it is not within the FSC's jurisdiction to pronounce a law or legal provision as contradictory to the Islāmic injunctions[693].

6.2.12 The Federal Shariat Court's Conclusion

The following conclusion was reached by the FSC based on its examination of various Qurʾānic verses, including verse 2:229:

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dissolution of marriage. Additionally, the husband is entitled to receive back the Haq Mehr (dower) that the wife received at the time of marriage.

[690] The ten grounds for the dissolution of marriage are provided by the DMMA.

[691] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1994 SC 607.

[692] Supra Saleem Ahmed v. GoP, para 4.

[693] Supra Saleem Ahmed v. GoP, para 7.

1. There is no explicit prohibition in the Qurʾān against allowing a wife to get hold of a divorce, without getting expressed consent of her husband.
2. In Islām, marriage places notable emphasis on the potential for reconciliation. Nonetheless, if the wife communicates her reluctance to sustain the union, the intent behind the marriage is thwarted.

It was asserted by the FSC that the rights and obligations of both the spouses are analogous, leaving no space for discrimination. In the same way that men possess the power to unilaterally initiate divorce, women also hold the entitlement to pursue their release from the marital tie through Khul‘, if they deem it unfeasible to coexist within the bounds set by Allāh[694].

6.2.13 Judicial Evolution in Pakistan

A more liberal interpretation of Khul‘ was embraced by the Pākistān‘s judiciary in contrast to the conventional Hanafī jurists of the sub-continent. This departure from the traditional approach was evident in the pre-partition decision in petition of *Mst. Umer Bibi*[695] the LHC initially upheld the requirement of husband‘s consent for obtaining Khul‘. This decision was reaffirmed in the subsequent case of *Mst. Saeeda Khanam*, in 1952, where the court maintained that Khul‘ cannot be granted without the husband‘s consent[696]. By 1959, a significant departure from the previous comprehension of divorce rights in accordance with Islāmic law had taken place. A notable shift in interpretation had transpired, diverging from the prerequisite of the husband‘s agreement for Khul‘. In the case of *Mst. Balqis Fatima*[697], the LHC construed verse 2:229 of the Qurʾān to establish that a wife could be granted Khul‘ without the husband‘s consent. The LHC further ruled that the authority to decide on the annulment of the marriage rested with the state, represented by the judges. This interpretation marked a departure from the previous requirement of the husband‘s consent for Khul‘[698].

[694] Supra Saleem Ahmed v. GoP, para 20.
[695] Mst. Umer Bibi v. Muhammad Deen AIR 1945 Lahore 51.
[696] Mst. Saeeda Khanam v. Muhammad Sami PLD 1952 Lahore 113.
[697] Mst. Balqis Fatima v Najm-ul-Ikram Qureshi PLD 1959 Lahore 566.
[698] Ibid.

In the case of *Mst. Balqis Fatima*, the LHC held that if a court believes that In the event that the wife and husband found it impossible to adhere to the boundaries set by Allāh, the court possessed the power to independently bestow Khul‘ upon the wife, even in the absence of the husband‘s agreement. This decision reflected a broader understanding of marital rights and granted the court the power to intervene in cases where it was deemed necessary for the well-being and preservation of the parties involved.

6.2.14 Judicial Precedents and Critiques

The turning point arrived eight years later when the SAB made a significant ruling in the case of *Khursheed Bibi*[699] declaring that the Holy Qurʾān and Sunnah, positively, support equal rights between spouses regarding divorce in Islām. Justice S.A. Rehman, referring to the Qurʾān and various ahadith (sayings of the Prophet), asserted that Khul‘ would be effective even in cases where the wife possessed an incurable aversion towards her husband. In such instances, the court additionally affirmed its competence to bestow Khul‘ upon the wife without requiring the husband‘s consent. Meticulously, the court made a distinction between the exercise of Khul‘ and faskh (annulment of marriage by the court)[700]. In the case of *Mst. Khursheed Bibi v. M Ameen*, it was ruled by the SAB that the wife was relieved of the obligation to substantiate any fault on her husband‘s part. The court eased the criteria for granting Khul‘, asserting that the wife solely needed to exhibit that the continuation of the marriage would hinder either party from abiding by the limits prescribed, in the Holy Qurʾān, by Allāh‘.

This shift in approach allowed for a broader consideration of the circumstances and well-being of both parties involved in determining the validity of Khul‘[701].

6.2.15 Critiques by Scholars

Following the SAB‘s decision in the *Mst. Khursheed Bibi v. M Ameen* case, the conservative ulamā in Pākistān expressed their discontent. Mufti Taqi Usmani, a prominent Deobandi scholar, wrote a comprehensive critique of the judgement in his

[699] Mst. Khursheed Bibi v. M Ameen, PLD 1967 SC 97.
[700] Faskh requires the wife to prove a fault by the husband for divorce. The Dissolution of Muslim Marriages Act, 1939 specifies limited faults of the husband that qualify as valid grounds for divorce, excluding incompatibility or hatred.
[701] Supra Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi, para 12, 13.

book ―Islām Mein Khul‘ Ki Haqeeqat‖ means: The Reality of Khul‘ in Islām. In his book, Usmani provided an alternative perspective on the practice of Khul‘ and the positions of various traditional Schools of thoughts, upholding diverse philosophical paradigms in fiqh, regarding its rules and requirements. He argued that Khul‘ is regarded as an agreement between the parties and therefore necessitates the husband‘s consent to release the wife from the marriage, often in exchange for compensation. According to Usmani, Khul‘ is viewed as a voluntary transaction between willing parties, and they cannot be compelled to fulfill its conditions unless they do so willingly and without any form of coercion or duress[702].

6.2.16 Moral Considerations in Khul‘

Although the superior judiciary largely disregarded many of the contentions of Taqi Usmani, his argument concerning the moral obligation of a man responsible for the dissolution of a marriage was indeed adopted and employed by them. Specifically, they emphasized that such a man should not accept compensation in exchange for granting Khul‘ to the wife. This moral obligation was recognized and endorsed by the judiciary in their deliberations on cases related to Khul‘. In the petition of *Syed Dilshad Ahmed v. Mst. Sarwat*[703], the SHC declared that in Sharī‘ah, accepting compensation for granting Khul‘, when a husband is at fault in fulfilling his obligations towards his wife, is prohibited.

This ruling was later reaffirmed in the cases of *Abdul Rashid v. Mst. Shahida Parveen* [704] and *Muhammad Rafi v. Atta Ullah Kausar*[705]. The judiciary emphasized the moral and ethical aspects, discouraging husbands from seeking financial gains in exchange for allowing Khul‘ when they are responsible for the failure of the marriage. In the case: *Karim Ullah v. Mst. Shabana*[706], The PHC concluded that if Khul‘ is granted as a result of the husband‘s cruelty, he is devoid of any entitlement to compensation. This decision reaffirmed the principle that when the termination of the marriage stems from the husband‘s cruel conduct, he should not derive financial gains from the Khul‘.

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[702] Mufti Taqi Usmani, Islām Mein Khul‘ Ki Haqeeqat (Karachi: Memon Islāmic Publishers, N.D.).
[703] Syed Dilshad Ahmed v. Mst. Sarwat PLD 1990 Karachi 239.
[704] Abdul Rashid v. Mst. Shahida Perveen, 2013 YLR 2616.
[705] Muhammad Rafi v. Atta Ullah Kausar, 1993 CLC 1364.
[706] Karim Ullah v. Mst. Shabana, PLD 2003 Peshawar 146.

6.2.17 Extension of Jurisprudence

Furthermore, the judiciary extended and broadened the scope of the *Khursheed Bibi* case, making it easier for individuals to exercise their right to Khul‘. This expansion aimed to facilitate the process and ensure that individuals were not unduly burdened or restricted in seeking a divorce through Khul‘. In Mst. Shakila Bibi v. Muhammad Farooque[707], the LHC declared that when a wife pursues Khul‘, there exists no obligation for her to furnish reasons or unveil the circumstances substantiating her aversion towards her husband. This decision recognized the autonomy and privacy of the parties involved, allowing the wife to seek Khul‘ without being compelled to disclose personal or sensitive details regarding her aversion towards her husband[708]. The LHC observed that it has the discretion to exempt the wife from paying any compensation to the husband in certain cases.

Additionally, it was noted that any monetary payment required would be confined to the restitution of the mehr (dower) that the wife personally got at the time of her marriage. This approach acknowledges the importance of the mehr and ensures that it is appropriately addressed in the context of Khul‘ proceedings[709].

6.2.18 Legal Framework and Future Considerations

In cases where a benefit or property is deemed returnable to the husband, the burden falls on the husband to provide ―unimpeachable evidence‖ that he is entitled to that property in the specific circumstances of his case. For instance in case: *Bashir Ahmad v. Family Court,* this higher standard of proof has often led to the husband‘s inability to establish his entitlement to the returnable property, resulting in the wife being granted a divorce without any requirement to pay compensation. This standard has been instrumental in ensuring a fair and equitable resolution in such cases[710]. In Mst. *Mst. Nabila Safdar v. Munir Anwar*[711], the SAB held that the wife‘s not paying the requisite reimbursement in a Khul‘ decree does not invalidate the decree itself. Instead, it creates a civil liability for the wife to fulfill her financial obligations. The Khul‘ decree remains valid and enforceable, and the husband can seek legal remedies

[707] Mst. Shakila Bibi v. Muhammad Farooque, 1994 CLC 231.
[708] Ibid, 588.
[709] Ibid, 589-590.
[710] Bashir Ahmad v. Family Court, 1993 CLC 1126.
[711] Mst. Nabila Safdar v. Munir Anwar, PLD 2000 SC 560.

to recover the compensation owed to him by the wife. In *Mst. Feroza Bibi v. Abdul Hadi*[712]*, the former ruling was upheld*. In *Abdul Ghafar v. Mst. Parveen Akhtar*[713], and *Mst. Nazir v. ADJ, Rahim Yar Khan*[714] the courts held that even in cases In situations where no fault could be attributed to the husband, the wife could still activate Khul‘ by fulfilling a modest burden of proof. This signifies that the wife‘s ability to obtain Khul‘ is not solely contingent upon proving the husband‘s fault. In *Abdul Rashid v. Mst. Shahida Parveen* [715], the court recognized that the duration for which a wife has cohabited with her husband and the services she has rendered might be regarded as a type of consideration for Khul‘. The court stressed that the compensation amount should not surpass the dower sum and that Khul‘ could even be granted without any compensation. These cases further established the evolving jurisprudence surrounding Khul‘, providing more flexibility in the application of the law and, ensuring that women have the ability to seek Khul‘, even without proving fault on the husband‘s part.

6.2.19 Concluding Remarks on the Saleem Ahmed Case

In the the FSC‘s case: *Saleem Ahmed v. GoP*, there are noteworthy aspects that deserve particular consideration, As the judgment implies, it reaffirms and extends multiple principles and legal verdicts of the higher courts in Pākistān concerning Islāmic law and jurisprudence. Primarily, the Court opted not to exclusively depend on the findings of the juris-consults who submitted their expert viewpoints on Islāmic law concerning Khul‘. Instead, the Court rigorously scrutinized their rationale and disregarded their opinions based on their substance. This approach aligns with the decision in the case of *Mst. Khursheed Jan v. Fazal Dad*, where the preference was not given solely to the views of fuqahä‘ (juris-consults)[716].

6.2.20 Analysis of Mst. Khursheed Jan v. Fazal Dad

In the case of *Mst. Khursheed Jan v. Fazal Dad*, the LHC made a significant ruling, stating that courts have the authority to deviate from the views of Imams and Muslim juris-consults based on considerations of public policy, justice, equity, and good

[712] Mst. Feroza Bibi v. Abdul Hadi, 2014 CLC 60.
[713] Abdul Ghafar v. Mst. Perveen Akhtar, 1999 YLR 2521.
[714] Mst. Nazir v. ADJ, Rahim Yar Khan, 1995 CLC 296.
[715] Abdul Rashid v. Mst. Shahida Perveen, 2013 YLR 2616.
[716] Mst. Khursheed Jan v. Fazal Dad, PLD 1964 Lahore 558.

conscience. This decision emphasized the role of the judiciary in interpreting and applying Islāmic law in a manner that aligns with broader societal values and principles of fairness. It recognized the need for flexibility and adaptability in the application of Islāmic jurisprudence to address contemporary issues and ensure justice in light of changing societal norms[717]. In the case of *Mst. Khursheed Jan v. Fazal Dad*, the Court established that the Holy Qurʾān, and the Sunnah were not obscure or esoteric texts that required specialized knowledge to comprehend. The Court emphasized that judges have the responsibility to exercise Ijtihād, which refers to the independent reasoning and interpretation of Islāmic law based on the foundational sources. This ruling acknowledged the role of judges in deriving legal principles from the Qurʾān and Sunnah and applying them in a manner that aligns with the evolving needs and values of society. It emphasized the accessibility and applicability of Islāmic legal sources to the judicial process of Ijtihād[718] in addition to istihsān[719].

6.2.21 Judicial Engagement and Flexibility

Indeed, the LHC's decision in *Mst. Khursheed Jan v. Fazal Dad* highlighted the importance of adapting Islāmic law to address modern social problems in accordance with contemporary needs. It acknowledged that in cases where there is disagreement among various fuqahä' (juris-consults), judges have the authority and responsibility to exercise Ijtihād and use their independent reasoning to find suitable solutions. This approach reflects the recognition of the dynamic nature of Islāmic law and the need for its application to evolve with changing societal contexts, ensuring that justice, equity, and the welfare of the community are upheld[720]. By engaging with the reasoning rather than blindly accepting the opinions of the juris-consults, the Court demonstrated its commitment to thorough analysis and interpretation of Islāmic law principles. This approach signifies the evolving judicial perspective on Islāmic law in Pākistān, which prioritizes critical engagement with legal and jurisprudential arguments.

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[717] Ibid, para 5.
[718] Ibid; Muḥammad Ibn Idrīs Al-Shāfi'ī, *Al-Risāla fī uṣūl al-Fiqh*, trans. Majid Khadduri, 2nd ed. (The Islāmic Texts Society, 1961), 295-303.
[719] Ibid; Supra Mst. Khursheed Jan v. Fazal Dad.
[720] Ibid.

6.2.22 Saleem Ahmed v. Gvernment of Pakistan

The FSC's decision in *Saleem Ahmed v. GoP* signifies that it is not obligated to adhere to the advice provided by juris-consults. This implies that religious scholars now hold the position of amicus curiae (friends of the court) in repugnancy matters before the FSC, meaning that their opinions are considered as expert input but not binding on the court.

Additionally, although the FSC did not explicitly state its preferred methodology, it can be inferred that the court opted for a loosely construed and purposive approach based on Maqasid al-Sharī'ah (the objectives of Islāmic law).

This methodology focuses on understanding and applying the underlying purposes and objectives of Sharī'ah law rather than strictly adhering to a literal interpretation. This allows for flexibility in interpreting and applying Islāmic law in a manner that aligns with the broader objectives of justice, equity, and societal welfare-based methodology[721] , instead of optioning to a rather more textualism, taqlīd-based[722] methodology.

6.2.23 Purposive and Rationalist Approach

Indeed, the FSC in *Saleem Ahmed v. GoP* did not rely on a strict textualism or taqlīd-based methodology to interpreting Islāmic law. Instead, it adopted a more flexible and purposive approach based on the broader objectives and principles of Sharī'ah, as indicated by Maqasid al-Sharī'ah. This methodology emphasizes the underlying purposes and goals of Islāmic law and allows for adaptation to modern social problems and evolving societal needs. It moves beyond a strict adherence to textual literalism and taqlīd (following a particular Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah), enabling the court to consider the larger context and aims of Islāmic law in order to achieve justice and equity in contemporary circumstances.

The FSC, in its detailed discussion of the purpose of marriage and the rights and obligations of husband and wife under Islām, indicated a preference for a

[721] Felicitas Opwis, ―Maslaha in Contemporary Islāmic Legal Theory,‖ *Islāmic Law and Society* 12, no. 2 (2005): 182.

[722] Muhammad Fadel, ―The Social Logic of Taqlīd and the Rise of the Mukhtasar,‖ *Islāmic Law and Society* 3, no. 2 (1996): 193.

rationalist reading of Islāmic law rather than a traditionalist or taqlīdi approach. The judges operated on the assumption that Islāmic law upholds absolute gender equality and views marriage as a contract between equal parties rather than a sacred covenant. They sought guidance from the writings of modernist jurists while showing deference to classical jurists in spirit, although not necessarily in the exact letter of their opinions.

6.2.24 Implications of Saleem Ahmed v. Gvernment of Pakistan

It is noteworthy that if the challenge against section 10(4) of the Muslim WFCA had been successful in the *Saleem Ahmed v. GoP* case, it would have effectively overruled the previous decisions of *Mst. Khursheed Bibi* and Mst. *Balqis Fatima*. It is plausible that the petitioners sought this outcome. The FSC had previously demonstrated a willingness to strike down certain provisions of the Muslim Family Law Ordinance 1961 in the *Allāh Rakha v. FoP* case, indicating their inclination towards revisiting and reinterpreting existing laws to align them with their understanding of Islāmic principles.[723], It is indeed possible that the petitioners in the *Saleem Ahmed v. GoP* case were inspired by the *Allāh Rakha*‘s ruling and felt encouraged to challenge the law on Khul‘. The previous ruling‘s willingness to strike down certain provisions of the MFLO may have provided the petitioners with confidence in seeking changes to the law surrounding Khul‘. This highlights the impact and precedential value of previous court decisions in shaping future legal challenges and the potential influence they can have on petitioners‘ motivations.

6.2.25 Shifting Legal Landscape

The ruling in *Saleem Ahmed v. GoP* indeed surprised many people, considering the traditionally more conservative positions adopted by the FSC in the past. However, the decision aligns with contemporary legal and scholarly currents surrounding Islāmic law in Pākistān. The recognition of Khul‘ as a means to establish a woman‘s unilateral right to divorce gained significant attention in Pākistān‘s law after the *Mst. Khursheed Bibi* decision[724]. The provincial legislatures also followed the lead of the judiciary, as seen in the 2015 amendment by the Punjab Assembly, which set limits

[723] Supra Allāh Rakha v. FoP, PLD 2000 FSC 1.
[724] Supra Mst. Khursheed Bibi v. M Ameen.

on the compensation paid to the husband in Khul‘ cases, thereby reducing the financial burden of obtaining Khul‘.

Moreover, it is interesting to note that in 2008, the Council of Islāmic Ideology issued recommendations to the government suggesting a specific timeframe for divorce in cases where the wife requests it. According to the recommendations, if the wife submits a written request for divorce, the husband has a period of ninety days to grant the divorce. If the husband fails to do so, and the wife does not revoke her request, the marriage is automatically dissolved within ninety days. This indicates the evolving perspectives within Islāmic institutions regarding divorce procedures and the recognition of the need for timely resolution in such cases.

6.2.26 Progressive and Adaptive Approach

Overall, the ruling in *Saleem Ahmed v. GoP* reflects the shifting legal landscape in Pākistān concerning the elucidation and implementation of Islāmic Law, as well as the efforts to provide greater rights and agency to women in matters of divorce[725]. The *Saleem Ahmed v. GoP* ruling indeed represents a significant departure from the perception that Islāmic law is rigid and unresponsive to changing social circumstances. The decision reflects a progressive and adaptive approach to Islāmic jurisprudence, addressing the evolving needs and entitlements of rights of the women. It provides optimism not only for rights of the women but also for the broader movement to revitalize Ijtihād, the independent reasoning and interpretation of Islāmic law. By recognizing the entitlements of rights of the women in divorce proceedings and promoting a more inclusive and equitable understanding of Islāmic law, the ruling encourages a dynamic engagement with Islāmic jurisprudence. It signifies a willingness to reassess and reinterpret legal principles in light of contemporary societal realities and the evolving understanding of justice and equality. This reinvigoration of Ijtihād can pave the way for further reforms and advancements in Islāmic legal discourse, bringing it more in line with the principles of social justice and gender equality.

[725] *Council of Islāmic Ideology"s meeting 171, Annual Report, 2008-9* (Islāmabad: Council of Islāmic Ideology, 2009), 170.

6.2.27 The Federal Shariat Court Judgement on Khul‘ and Mubarat

Overall, the *Saleem Ahmed v. GoP* ruling serves as a cause for optimism, as it demonstrates that Islāmic law can be interpreted and applied in a manner that is responsive to the changing needs and aspirations of society, particularly in advancing rights of the women and the revitalization of Ijtihād.

The judgement of the FSC, in *Saleem Ahmad etc., v. GoP*, focuses on issues related to Islāmic jurisprudence, specifically marriage, and the termination of ―Khul‘‖ and ―Mubarat.‖ It discusses the concept of a single irrevocable divorce and the subsequent implications for the parties involved[726].

The judgement clarifies that ―Khul‘‖ and ―Mubarat‖ (forms of divorce initiated by the wife with the consent of the husband) operate as a single, irrevocable divorce. This means that once these forms of divorce are finalized, the marriage is terminated, and the spouses are no longer bound in the marital relationship. However, the judgement highlights an important distinction. In the case of ―Khul‘‖ and ―Mubarat,‖ unlike in the case of a husband pronouncing divorce for the third time, there is no requirement for the wife to undergo an intermediary marriage (known as ―Halala‖) with another person before remarrying her former husband. This means that if both spouses, after the divorce, wish to reconcile and contract a fresh marriage with mutual consent, they can do so without the need for an intermediary marriage.

It is important to note that even though the spouses can remarry without an intermediary marriage, the judgement states that the wife must still observe the iddat period if she intends to marry someone else. The iddat period is a waiting period after divorce or the death of a spouse during which a woman cannot remarry. This analysis provides an overview of the mentioned judgement‘s focus on the termination of marriage through ―Khul‖ and ―Mubarat‖ and the subsequent permissibility of remarrying without an intermediary marriage.

[726] Saleem Ahmad etc., v. GoP, PLD 2014 FSC 43.

6.3 Part II: Critical Analysis of Important Judgements of the Shariat Appelate Bench (1980-2020), in Respect of Civil Law

6.3.1 Analysis

In 1979, Sharī‘at Benches were constituted in the HCs and the SAB. A Constitutional Amendment for this purpose was promulgated to take effect on 10 February 1979. These Benches were empowered to strike down existing as well as future laws, except for the Constitution, the Muslim Personal Law, laws relating to the procedure of any Court or tribunal, and fiscal law for ten years if these were repugnant to the Islāmic injunctions (aḥkām-e-Islām).

6.3.2 Critical Analysis of Key Judgements (1980-2020)

In the context of ―Critical Analysis of Important Judgements of the SAB (1980-2020), in Respect of Civil Law,‖ the mentioned text highlights two key points regarding the SAB and the requirement of walī‘s consent for the validity of nikāh (marriage) in certain cases.

6.3.3 The proviso to Clause (2) of Article 203(D)

According to this provision, if an appeal has been filed to the SAB, the decision made by the FSC will be considered as stayed (put on hold) until the appeal is disposed of. This implies that the decision of the FSC will not be enforced or implemented until the appellate process is completed.

6.3.4 Validity of Nikāh Without Consent of Walī

Validity of nikāh without consent of walī: The text mentions that there have been several cases in which the courts have ruled that the consent of walī (guardian) is not required for the validity of nikāh. In other words, these judgements suggest that a marriage can be considered valid even if the consent of the walī is not obtained.

6.3.5 Legal Precedent: Hanafī School of Islāmic Law

In cases where a marriage is performed without the consent of the walī, the opinion of the Hanafī School of Islāmic law has been followed. The Hanafī School is one of the four major schools of thought in Sunni Islāmic jurisprudence and is known for its

relatively permissive stance on certain legal matters[727]. The case of *Abdul Waheed v. Asma Jahangir* is considered the most significant and influential judgement on the issue of a Muslim woman's consent to marriage without the involvement or consent of her walī (guardian). According to the decision of the SAB in this case, it was established as a rule that an adult Muslim woman has the right to enter into a marriage contract without the consent of her walī.

6.3.6 Significance of Abdul Waheed v. Asma Jahangir

This ruling signifies a departure from the traditional requirement of walī consent for the validity of nikāh (marriage) in certain circumstances. It emphasizes the agency and autonomy of adult Muslim women in matters of marriage, granting them the freedom to make independent decisions regarding their marital choices without the need for a guardian's approval, as held in *Abdul Waheed v. Asma Jahangir* [728].

6.3.7 Formation of the Federal Shariat Court

On May 26, 1980, the four Sharī'at Benches of HCs were replaced by establishing the FSC at the Capital of Pākistān Islāmabad. This Court, the FSC, is composed of Eight Muslim Judges, Five Regular Judges, and Three „ Ulema. The FSC could examine and decide the question of whether or not any statute or a provision thereof is repugnant to the Islāmic injunctions (aḥkām-e-Islām). It is also vested with the power of hearing appeals or revisions against the decision passed by any criminal Court concerning any law relating to the enforcement of *Hudood*. The FSC has been given the power to undertake the examination of any matter *Suo Moto*, to see whether or not it conforms to the Holy Qurʾān, and the Holy Prophet (ملسو هلآو هيلع هلا ىلص)'s Sunnah. FSC, in the exercise of powers conferred by Article 203 J of the Constitution has also made the FSC (Procedure) rules 1981.

6.3.8 Abdul Majid v. GoP: Ijtihād and Legal Interpretation

In *Abdul Majid v. GoP*, the SAB has held that ―*where ijtihād has already been done matters should not directly to be referred to Qurʾān and sunnah. If direct evidence has been quoted in Holy Qurʾān, and the Holy Prophet* (ملسو هلآو هيلع هلا ىلص)"s *Sunnah that can be referred to as Holy Qurʾān, and the* Holy Prophet (ملسو هلآو هيلع هلا ىلص)'s Sunnah *but for implied and*

[727] Muhammad Munir, ―Precedent in Islāmic Law with Special Reference to the FSC and the Legal System in Pākistān,‖ *Islāmic Studies* 47, no. 4 (2008): 452, 458.
[728] Supra Abdul Waheed v. Asma Jahangir, PLD 2004 SC 219.

indirect evidence this should not be termed so and should be termed as ijtihād. If Holy Qur'ān, and the Holy Prophet (ﷺ) 's Sunnah were found to be silent about some issue the state could make Ijtihād about it. The silence of Holy Qur'ān, and the Holy Prophet (ﷺ) 's Sunnah would never signify that the thing would be harām.‖[729].

6.3.9 BZ Kaikaus Case: Responsibility of the Executive

For bringing up the BZ Kaikaus case in the context of the SAB's stance on Islāmization. Based on your statement, it appears that the SAB, in the BZ Kaikaus case, held the view that the process of Islāmization is primarily the responsibility of the executive branch of the government, rather than the judiciary. The state, as per the SAB's decision, possesses the authority to formulate and enforce laws. In this context, the SAB emphasized that the Islāmization of laws, the practice of ijtihād (independent legal reasoning), and the determination of which school of law should be followed are matters that fall within the purview of the legislature, not the judiciary. This indicates that the SAB believes that these decisions should be made by the legislative body, which has the power to enact and amend laws, rather than the courts[730].

6.3.10 Analysis

In 1990s, a visible shift in the methodology of the FSC, as was set in *BZ Kaikaus* case in 1980 that the Islāmization was the task of the Executive and not of the judiciary, as regards the Islāmization and ijtihād has been well noticed. In highlighting the association between the development of the PIL in the 1990s in Pākistān and the judiciary's inclination towards Islāmization. PIL is a legal mechanism that allows individuals or organizations to bring forth cases in the public interest, seeking judicial intervention to address social and legal issues.

During the 1990s, there was indeed a noticeable trend within the judiciary to refer to Islāmic law when interpreting fundamental rights in certain cases. This approach reflected a broader movement towards incorporating Islāmic principles and values into the legal system and governance of Pākistān. This process, known as Islāmization, gained momentum under the military régime of General Zia-ul-Haq in

[729] Abdul Majid v. GoP, PLD 2009 SC 861.
[730] Keith Hodkinson, ―Islāmicisation of Law in Pākistān: Ways, Means and the Constitution,‖ *The Cambridge Law Journal*, Vol. 40, No. 2, (Nov. 1981), 248-249.

the 1980s. Under General Zia-ul-Haq‘s régime, various Islāmic laws and policies were introduced with the aim of Islāmizing Pākistān‘s régime in legal framework structure. These measures included the promulgation of the Hudood Ordinances, the establishment of the FSC, and the introduction of Islāmic provisions in the IRP‘s Constitution.

Within this context, the judiciary‘s inclination towards Islāmization in the 1990s can be seen as a response to the legal and constitutional changes introduced during General Zia-ul-Haq‘s régime. Judges, particularly those in the SCP, engaged in interpreting and applying Islāmic principles and values to legal cases, including those related to fundamental rights. It is important to note that the relationship between PIL and Islāmization is multifaceted and influenced by various factors, including the ideological orientation of judges, societal expectations, and the evolving legal landscape[731].

6.3.11 Judicial Engagement with Islāmic Law in the 1990s

In the 1990s, the judiciary in Pākistān increasingly incorporated Islāmic legal principles and concepts into the interpretation of fundamental rights. This approach aimed to align the legal system with Islāmic teachings and values. The judiciary referred to Islāmic legal sources, such as the Qurʾān and the Hadith, to support their interpretations of fundamental rights. These references to Islāmic law were particularly relevant in cases concerning personal laws, family matters, and moral issues. It is important to note that this inclination towards Islāmization within the judiciary during the 1990s was not without controversy. Critics argued that it could potentially undermine the principles of a modern, pluralistic legal system that is based on constitutional rights and individual freedoms. Concerns were raised about potential conflicts between Islāmic law and internationally recognized human rights standards.

However, it is noteworthy that the judiciary‘s engagement with Islāmic law in the interpretation of fundamental rights is not unique to Pākistān. Courts in other Muslim-majority countries have also faced the challenge of harmonizing Islāmic legal principles with modern legal systems, and they have explored similar approaches. In recent years, Pākistān has witnessed ongoing debates and discussions regarding the

[731] Keith Hodkinson, ―Islāmicisation of Law in Pākistān: Ways, Means and the Constitution,‖ The Cambridge Law Journal, Vol. 40, No. 2, (Nov. 1981), 248-249.

balance between Islāmic principles and constitutional rights, particularly in the context of fundamental rights. The judiciary continues to play a crucial role in navigating these complex issues and ensuring that both Islāmic law and constitutional rights are respected and protected within the régime in legal framework structure of the country[732]. As, already discussed that during 1990s, apart from the FSC and the SAB, other higher judiciary was seeing an increase in the use of arguments based on Islāmic law, as observed in *Muhammad Shabbeer Ahmed Khan v. FoP*[733]*, Mst. Mrs. Anjum Irfan v. LDA*[734]*, M D Tahir v. Provincial Govt.*[735]*,* and *Hassan Bakhsh Khan v. DC, DG Khan*[736]. In many cases, the incorporation of Islāmic law arguments by the judiciary in Pākistān was not purely based on core legal arguments but rather aimed at establishing the court's position as legitimate and considering moral considerations. from the Executive to the Judiciary signifies the judiciary's assumption of a more proactive role in advancing Islāmic legal principles. HCs in Pākistān have consistently invoked uncodified tenets of Islāmic law and have endeavored to construe statutory provisions through the lens of Sharī'ah. This reflects a proactive approach by the HCs in aligning the legal system with Islāmic principles.

6.3.12 Comparative Approach: High Courts v. Sharī'ah Courts

Interestingly, an observation has been made that HCs exhibit a greater inclination towards Islāmization in comparison to Sharī'ah courts. Ulamā judges, endowed with profound expertise in Islāmic law, have demonstrated heightened adaptability in addressing matters pertaining to Islāmic Sharī'ah. Their expertise in Islāmic jurisprudence likely contributes to their willingness to incorporate Islāmic legal principles in their decisions.

These observations highlight the complex dynamics between the judiciary, the executive, and Islāmic law in Pākistān. Initially, the Executive played a pivotal role in initiating the process of Islāmization; however, over time, the judiciary assumed a progressively more active role, utilizing Islāmic legal arguments to legitimize its decisions and demonstrate moral considerations. The differing levels of enthusiasm

[732] Ibid.
[733] Supra Muhammad Shabbeer Ahmed Khan v. FoP.
[734] Supra Mst. Mrs. Anjum Irfan v. LDA.
[735] Supra M D Tahir v. Provincial Govt.
[736] Supra Hassan Bakhsh Khan v. DC, DG Khan.

between HCs and Sharī‘ah courts, as well as the influence of ulamā judges, further emphasize the varied approaches to Islāmization within the judicial system.

A comprehensive critical analysis of these dynamics would involve examining specific cases, the legal reasoning employed, and the implications for the legal system, human rights, and the relationship between religion and state in Pākistān.[737].

6.3.13 Appellate Jurisdiction and the Role of the Shariat Appelate Bench

In hearing appeals against the decisions of the FSC[738], as asserted *in Mst. Kulsum Begum v. Peran Ditta*, that ―*the SAB either indorses the judgements of the FSC or dismisses the appeals against the judgements of the FSC"*[739]. Then a ruling set down by the SAB has not a retrospective effect but will be prospective in effect, as relied upon in *M Abbas etc. v. M Munir etc.*[740]

As stated in Article 203F of the IRP‘s Constitution, the appellate forum against the FSC‘s is the SAB of the SCP. Despite the appellate supremacies entrusted to the SCP, all the other judiciary‘s jurisdiction are, constitutionally[741] banded concerning matters falling in the FSC‘s jurisdiction, exclusively. As held in *Rahmat Ali v. M Younas:*

> *"Compliant with the constitutional law of Article 203D, the FSC"s decision will not be implemented until the conclusion of an appeal against it is disposed of."*[742]

6.3.14 Analysis

The interpretation of Surah 4, verse 3 of the Qurʾān regarding polygyny and the use of Ijtihād (independent legal reasoning) by Tunisian law makers is an interesting perspective. While Surah 4, verse 3 allows men to engage in polygyny under the condition of treating all wives equally, verse 129 suggests the practical difficulty of achieving complete equality among multiple wives. Tunisian law makers, through their exercise of Ijtihād, concluded that when these verses are read together, they

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[737] Giunchi, E. ―Islāmization and Judicial Activism in Pākistān: What Sharī‘ah?‖ *Oriente Moderno, Anno* 93, Nr. 1, (2013), 197.
[738] Article 203F of IRP Constitution.
[739] Mst. Kulsum Begam v. Peran Ditta, 2022 SCMR 1352.
[740] M Abbas etc. v. M Munir etc., CR 1605 LHC 2001.
[741] Under Article 203G of the IRP Constitution.
[742] Rahmat Ali v. Mohammad Younas, PLD 2014 SC 680, para 3.

amount to a prohibition of polygyny. This interpretation highlights the evolving nature of legal reasoning and the application of Islāmic principles to contemporary contexts.

6.3.15 Khul‘ and Judicial Interpretation

Additionally, the mention of the SAB‘s decision in *Mst. Khursheed Bibi v. M Ameen*[743], where the SAB provided a new interpretation of the verse on Khul‘, is significant. Khul‘ refers to a divorce initiated by the wife through the return of her dower or other concessions. The SAB‘s decision effectively gave them the right to grant a judicial Khul‘, expanding their authority in divorce proceedings. This example showcases the SAB‘s role in interpreting Islāmic teachings and adapting them to address modern legal issues and social circumstances.

6.3.16 Ijtihād and Evolution of Islamic Jurisprudence

The mentioned instances serve as examples of the dynamic nature of Islāmic jurisprudence. They highlight how legal scholars and jurists engage in ijtihād, which refers to the process of interpreting and applying religious texts to address contemporary legal and societal contexts. This ongoing process allows for the adaptation and evolution of Islāmic law in response to changing circumstances and challenges[744].

6.3.17 Constitutional Framework and Islamic Law

The ongoing process of reconciling traditional Islāmic principles with evolving societal needs and values is reflected in the régime in legal framework structure of Pākistān. The IRP‘s Constitution, 1973, addresses the issue of the repugnancy of pre-emption law to the Injunctions of Islām in Articles 203D. Under this provision, the SAB, empowered by the Constitution, has the authority to declare specific provisions of the Pre-emption Act and Land Reforms Regulations as conflicting with the principles of Islām. This demonstrates the efforts to ensure conformity between the legal system and Islāmic teachings, taking into account the evolving nature of society.[745].

[743] Supra Mst. Khursheed Bibi v. M Ameen, PLD 1967 SC 97.
[744] 1982 CLC 2663.
[745] PLD 1961 SC 69.

6.3.18 Impact of Shariat Appelate Bench's Judgement on Pre-emption Law

Despite not being repealed through legislation, the provisions of law declared repugnant to Islāmic principles by the SAB in Pākistān remain ineffective and unenforceable from a specific date called the ―crucial date.‖ The SAB's judgement renders these provisions null and void, even though they still exist in the statute book. Under Article 203D of the IRP's Constitution, the SAB found certain provisions of the Land Reforms Regulation, 1972, and the Punjab Pre-emption Act, 1913, to be repugnant to Islāmic principles. Consequently, the SAB declared these provisions to be void from the crucial date. Additionally, the SAB deemed the previously established superior pre-emptive right, based on the repugnant provisions, to be conflicting with Islāmic principles. Practically, the SAB's judgement states that no decree should be granted in favour of pre-emptors claiming a superior right based on the repugnant provisions in pending suits and appeals. This means that pre-emptors cannot enforce their superior right under those repugnant provisions after the crucial date[746].

6.3.19 Exceptions to Shariat Appelate Bench's Judgement

The SAB's judgement provides an exception for cases where a pre-emptor obtained a decree prior to the crucial date. In such instances, the decree obtained by the pre-emptor may still be valid and enforceable, despite the repugnant provisions[747]. Article 203D of the IRP's Constitution, 1973, addresses the issue of the repugnancy of pre-emption law to the Injunctions of Islām. The SAB, as the SCP, has declared that the preferential pre-emptive right held by certain categories of pre-emptors becomes void, ineffective, and extinguished from the specific date known as the ―crucial date‖ determined by the SAB[748].

6.3.20 Impact on Pre-emption Suits and New Claims

As per the SAB's declaration, plaintiffs whose pre-emption suits were not granted a decree before the crucial date would be non-suited. This means that if their suits were not decreed prior to the crucial date, they would be dismissed, and the plaintiffs

[746] PLJ 1984 SC 320.
[747] PLJ 1985 SC 380.
[748] PLJ 1985 SC 380.

would not be able to enforce their right of pre-emption based on the repugnant provisions of the law[749].

Additionally, the SAB's judgement establishes that the initiation of new suits to enforce the right of pre-emption based on the repugnant provisions would be barred[750]. Consequently, after the crucial date, it would not be possible to initiate new suits seeking to assert the right of pre-emption using the provisions of the law that have been declared repugnant[751].

6.3.21 Exemption of Personal Law from Scrutiny

In *Dr. Mehmood ur Rehman Faisal v. GoP*, it was determined by the SAB that ―A law regarded as the personal law of a specific sect of Muslims, based on their interpretation of the Holy Qurʾān, and the Sunnah, is exempt from scrutiny by the FSC under Article 203-D of the Constitution. Such a law is considered to fall within the definition of the Muslim Personal Law. However, all other codified or statutory laws that apply to the broader Muslim population are not immune from scrutiny by the FSC in the exercise of its authority under Article 203-D of the Constitution.‖[752]

6.3.22 Constitutional Mandate on Islamic Conformity

Article 227 of the Constitution mandates that all the prevailing statutes ought to be brought in conformity with the Islāmic Injunctions (aḥkām-e-Islām), vidē the Holy Qurʾān, and the Holy Prophet (ملسو هلآ وهيلع هللا ىلص)'s Sunnah, and no law shall be enacted which is repugnant to the Islāmic Injunctions (aḥkām-e-Islām). In a Sharī'at petition *Mian Aziz Ahamad v. The Income Tax Commissioner*, on the aforestated Article, the SAB elucidated that ―It is a command to all the legislative bodies as well as to the Executive functionaries.‖[753]. The IRP Constitution, however, provides that ―in the application of Article 227(1) to the personal law of a particular school of Muslim thoughts[754], the expression the Holy Qurʾān, and the Sunnah shall mean the Holy Qurʾān, and the Holy Prophet (ملسو هلآ وهيلع هللا ىلص)'s Sunnah, as interpreted by that

[749] PLJ 1984 SC 320.
[750] PLD 1961 SC 69.
[751] 1982 CLC 2663.
[752] Supra Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1994 SC 607.
[753] Mian Aziz Ahamad v.The Income Tax Commissioner, PLD 1989 SC 613.
[754] Article 227(1) of the IRP's Constitution, 1973.

particular school of Muslim thoughts. Article 227(3) further particularizes on the scope of Article 227(1), in conjunction with that it will not have a demonstrative impact on the personal laws of the non-Muslim citizens or their Pākistān's citizenship status.

6.3.23 Analysis

In *Maqbool Ahmed v. GoP*, the SAB held that

> *"(1) That the SAB had declared Sec. 28 of Limitation Act, 1908, commonly known as "Adverse Possession", on the landed properties, owned by other people, without any right or title of ownership, unjust and un-Islāmic."*[755]

The SAB overruled its former judgement of *FoP v. Mst. Farishta*[756] through *Dr. Mehmood ur Rehman Faisal v. GoP*[757]. The FSC's decision in *Dr. Mehmood ur Rehman Faisal v. GoP*[758], in point of law and fact, had been challenged in an appeal to the SAB. Then on June 13, 1993, the SAB passed a rule in *Dr. Mehmood ur Rehman Faisal v. GoP*[759], differing from an earlier interpretation of its own passed in the petition of *Mst. Farishta*, the SAB, then held:

> *"A law that applies to the Muslim citizens of a state (Muslim Ummah) merely by being a codified, a constitutional or a statutory law does not necessarily fall under the category of "The Muslim Personal Law" if it is not presented as the personal law of a particular school of Muslim thoughts, or a sect based on the interpretations of Islāmic injunctions, and consequently, the Zakāt and Ushar Ordinance was not beyond the latitude of scrutiny of the FSC"s constitutional sphere as provided in Article 203D."*

Following the said judgement of the SAB, which lays down that a codified (constitutional, or statutory) law pertinent to the common Muslim Ummah referred the question to the FSC, for analyzing the repugnancy of the provisions of sections 4

[755] Maqbool Ahmed v. GoP, 1991 SCMR 2063.
[756] FoP v. Mst. Farishta, PLD 1981 SC 120.
[757] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1994 SC 607.
[758] Dr. Mehmood ur Rehman case, PLD 1991 FSC 35.
[759] Dr. Mehmood ur Rehman Faisal v. GoP, PLD 1994 SC 607.

to 7 of the *Zakāt and Ushar Ordinance,* to the Islāmic Injunctions, as long-established in the Holy Qur'ān in addition to the Hazrat Muhammad (ملسو هلآ وهيلع هللا ىلص)'s Sunnah.

Acknowledging the significant role of the Hon'ble FCS's collective Ijtihād, the SAB expressedly accepted the FSC's decision in *Allāh Rakha"s case*, for the reason that the grandchildren were being deprived of their rights to inheritance in grandfathers' propert(ies), by the application of MFLO's provisions in Section 4.

In *UBL v. Farooq Brothers,* the SAB reviewed the FSC's decision on the footings that the enactment of the anti-riba decision of FSC could jeopardize the IRP State's economy and elucidated: ―*Since the FSC had not given confident findings, on all the issues of the impugned law, whose determination was indispensably imperative to the clarification of the dispute, included in these causes, it would be within the power of the FSC to refer the matter, which is constitutionally bound to make final decisions on all matters within its jurisdiction*.‖[760]

Looking at the past and present position in the case of Riba, it can be emphasized that the FSC and the SAB are still procrastinating in fulfilling the constitutional tenacity for which they had been instituted. The adversarial nature of the irregularities and illegalities highlighted in the interim order, as well as the final review decision of the SAB in the Review Appeal, is such that they are legally considered a mistaken judgement. These issues had to be re-examined and are consequently liable to be set aside.

6.3.24 Judicial Discretion and Its Implications

The quote by Lord Acton, ―absolute power corrupts absolutely,‖ implies that when individuals or institutions possess unchecked authority, it can lead to corruption and abuse of power. In the context of the discussion, it suggests that the discretion granted to the CJ of each HC regarding the fixation of causes and the formation of the required benches may have potential drawbacks. The power and discretion provided to the CJ in this regard is absolute, as they are not obligated to provide any reasons for their decisions. This absolute discretion can raise concerns about the potential for misuse or arbitrary decision-making, which can have adverse effects on the judicial process and the administration of justice.

[760] UBL v. Farooq Brothers, PLD 2002 SC 800.

6.3.25 Pending Legal Processes and Review

In the case of *Dr. Aslam Khaki v. S. M. Hashim*[761]. the SAB allowed a petition for review against its judgment, declaring the interest-based system (Riba) as unlawful and sending the case back to the FSC for reconsideration. The proceedings of this case are still pending, highlighting ongoing legal debates and the need for thorough analysis and transparent decision-making.

This information suggests that there are ongoing legal processes and debates surrounding the legality of Riba and its implications within the legal system. It highlights the importance of thorough analysis, deliberation, and the need for the judiciary to ensure fair and transparent decision-making in such significant cases.

6.3.26 Constitutional and Legislative Boundaries

The SAB declared that the proby means options in the Article 2A of the IRP Constitution might not be taken as *supra constitutional* provisions, overriding the legislative powers, such as in petititions of *Mst. Kaneez Fatima v. Wali Muhammad*[762], as well vidē the *Hakim Khan v. GoP*[763]. Tanzil-ur-Rehman was also equally unwilling to completely take away the parliament‘s legislative powers[764].

As previously stated that the SAB, in *Dr. Aslam Khaki v. S. M. Hashim,* maintained the FSC‘s decision on riba (interest), declaring it to be repugnant to the Islāmic injunctions (aḥkām-e-Islām)[765]. The obstruction with FSC was termed by Kennedy as a certain reluctance on the part of the FSC and the SAB ―*to encompass jurisdictions over and done with a forward-looking interpretation of the constitutional directives*.‖[766]

6.3.27 Compatibility of Colonial Laws with Islāmic Principles

The SAB also reviewed the FSC‘s judgment in *M Ismail Qureshi v. GoPunjab* was challenged by the Punjab Government in the SAB and the Hon‘ble SCP by the way held in the petition of *M Shabbeer A Khan v. GoPunja*b‘ that

[761] Supra *Dr. Aslam Khaki v. S. M. Hashim*, PLD 2000 SC 225.
[762] Mst. Kaneez Fatima v. Wali Muhammad, PLD 1993 SC 901.
[763] Hakim Khan v. GoP, PLD 1992 SC 595.
[764] Supra note Marin Lau, *The Role of Islām in the Legal System of Pākistān* 65-68.
[765] Dr. Mehmood ur Rehman case.
[766] Kennedy, Charles. 1992. ―Repugnancy to Islām: Who Decides? Islām and Legal Reform in Pākistān.‖ *International and Comparative Law Quarterly* 41: 774.

> *"The exemption of all the urban immovable properties cannot justify the prerequisite of "Zarurat" under which a specific property can be exempted in the Sharī'ah from the application of the law of Pre-emption. As a consequence, the section 2(a) of the 1991"s Act, is repugnant to the Islāmic injunctions (aḥkām-e-Islām), vidē the Holy Qur'ān, and the Holy Prophet (ملسو هلآو هيلع هللا ىلص)" Sunnah, to the degree it, permanently, excepts all the immovable properties located in the urban areas and the Cantonment limits from the enforcement of the said Act."*[767]

Upon the presentation of an appeal against this decision of the FSC, in *Haidar Hussain v. GoP*[768], to the SAB, the SAB maintained it regarding the validity of Article 3 and the inadmissibility of the accomplice's evidence in some cases. However, the SAB disagreed with the FSC on the issue of uncorroborated evidence of an accomplice in ta'zir cases. The SAB observed this in *FoP v. M Shafi Muhammadi* that ―*Trial courts should retain some discretion for judging the admissibility or lack thereof of accomplice evidence, whether corroborated or not. As a result, the entirety of the régime in legal framework structure concerning evidence and witness competency remained unchanged*.‖[769]

6.3.28 The Qanun-e-Shahadat Order 1984 and its Historical Context

The connection between the QSO in Pākistān and its historical relationship with the Indian Evidence Act of 1872. The QSO is an Islāmic adaptation of the Indian Evidence Act, retaining many provisions from the original legislation enacted during British colonial rule. Article 3 of the QSO has largely preserved the essence of the Indian Evidence Act, 1872, with the addition of some provisos. Similarly, Article 16 of the QSO maintains its corresponding provision from the Indian Evidence Act, albeit with minor variations.

In this context, the decisions made by the FSC and the SAB are not merely focused on emphasizing legislative space for the state but also on conferring Islāmic legitimacy to the statutes passed in the British Indian colonial régime. These decisions suggest that the FSC and SAB consider the QSO, despite its origins in British colonial

[767] M Ismail Qureshi v. GoPunjab, PLD 1994 SC 1.
[768] Supra Haidar Hussain v. GoP, PLD 1991 FSC 139.
[769] FoP v. M Shafi Muhammadi 1994 SCMR 932.

legislation, to be compatible with Islāmic principles and therefore valid within an Islāmic régime in legal framework structure.

This perspective underscores the complex interplay between historical régime in legal framework structures, Islāmic adaptation, and the legitimacy of laws enacted during colonial times. It implies that the FSC and SAB, in their decisions, seek to reconcile the QSO with Islāmic legal principles, thereby providing Islāmic legitimacy to laws that were initially introduced under colonial rule. A critical analysis of these decisions would involve examining the specific legal reasoning employed by the FSC and SAB, evaluating the implications of conferring Islāmic legitimacy on colonial-era laws, and considering the broader legal, historical, and social context in which these decisions were made.

6.4 Personal Insights and Broader Impact of the Federal Shariat Court Judgments on Civil Law and Society

The FSC and the SAB (SAB) play a pivotal role in interpreting Islāmic principles within Pakistan‘s legal framework. Their judgments not only shape the legal landscape but also influence societal norms, governance, and individual rights. This section delves into the personal insights gained from analyzing these judgments and examines their broader implications for civil law and society. By exploring key rulings, the interplay between Islāmic jurisprudence and constitutional mandates, and the evolving dynamics of judicial interpretation, this discussion seeks to provide a comprehensive understanding of the transformative impact of the FSC and SAB on Pakistan‘s socio-legal structure.

6.4.1 Intersection of Legal Frameworks and Islamic Principles

The decisions of the FSC and the SAB (SAB) represent a profound intersection of historical legal frameworks, Islāmic adaptations, and the lingering influence of colonial-era laws. These judgments are not merely technical legal rulings but also reflect Pakistan‘s evolving legal identity. The ongoing struggle to reconcile Islāmic principles with the constitutional and statutory framework inherited from the colonial era is evident in debates surrounding issues such as Riba, judicial discretion, and the adaptation of colonial laws. This underscores the need for a deeper, more transparent legal analysis.

6.4.2 Judiciary‘s Role in Shaping Legal Identity

From a personal perspective, the FSC‘s rulings, particularly on Riba and family law, demonstrate the judiciary‘s critical role in shaping Pakistan‘s legal landscape. The court‘s interpretation of Islāmic law often reflects society‘s evolving needs. However, balancing religious principles with constitutional rights and modern human rights standards remains a significant challenge. Judicial interpretations on marriage, polygyny, and Khul‘ provide examples of how rulings can redefine social norms. Yet, the judiciary‘s flexible approach, often rooted in ijtihād, raises concerns about consistency and predictability, especially when societal values evolve faster than the legal system.

6.4.3 Economic and Social Impact of Riba Judgments

The FSC‘s judgments on Riba have far-reaching implications for Pakistan‘s economic and social fabric. By challenging interest-based financial systems, the judiciary is fostering a shift toward an Islāmically aligned financial model. This transformation affects not only financial institutions but also the daily lives of citizens. However, this shift poses challenges in a globalized economy dominated by interest-based systems, requiring careful navigation to ensure economic stability.

6.4.4 Family Law and Societal Dynamics

The SAB‘s interpretation of family law, particularly concerning women‘s rights in marriage and divorce, has had a profound societal impact. Rulings on polygyny and Khul‘ highlight efforts to provide greater protection for women‘s rights while adhering to Islāmic principles. These judgments have the potential to reshape family dynamics, yet they often face resistance from traditional interpretations. The judiciary‘s stance on these issues reflects the tension between modernity and tradition, influencing societal perceptions of gender roles and family structures.

6.4.5 Shift from Executive to Judiciary-Led Islamization

The judiciary‘s increasing role in leading the process of Islamization marks a pivotal shift in Pakistan‘s legal history. This transition empowers the judiciary to adapt legal principles to contemporary societal needs. However, it also raises concerns about the concentration of power within the judiciary. For instance, the discretionary authority

of the Chief Justice in assigning cases and forming benches, as seen in the ongoing review of the Riba judgment, highlights the need for greater transparency and checks on judicial discretion.

6.4.6 Broader Implications on Fundamental Rights

The FSC's role in interpreting fundamental rights, such as equality, freedom of religion, and property protection, highlights the delicate balance between Islāmic principles and constitutional rights. These judgments spark debates about the extent to which Islāmic law should govern the lives of citizens in an increasingly globalized and diverse society. The broader societal implications of these decisions extend beyond legal discourse, influencing the social evolution of Pakistan.

6.4.7 Conclusion: Defining Pakistan's Legal and Social Trajectory

In conclusion, the decisions of the FSC and SAB reflect a commitment to aligning Pakistan's legal system with Islāmic principles. Their broader impact on civil law and society cannot be understated. The evolving interpretation of Islāmic law by the judiciary has the potential to reshape legal norms and social structures alike. As Pakistan continues to balance Islāmic teachings with constitutional rights and international human rights standards, these judgments will play a pivotal role in defining the country's legal and social trajectory.

6.5 Conclusion

The decisions of the SAB and FSC reflect a complex relationship between historical legal frameworks, Islāmic adaptations, and the legitimacy of colonial-era laws. The ongoing legal debates surrounding Riba, judicial discretion, and the adaptation of colonial laws to Islāmic principles highlight the need for thorough and transparent legal analysis. These decisions will significantly impact the future of legal jurisprudence in Pakistan, particularly in reconciling constitutional, statutory, and Islāmic legal principles.

This chapter examines key decisions made by the FSC and the SAB, focusing on the role of the SAB in interpreting and applying Islāmic law within the legal system. It begins by discussing the establishment of Sharī'at Benches in HCs and the

SAB in 1979, which granted them the authority to strike down laws conflicting with Islāmic injunctions. The chapter also explores the proviso to Clause (2) of Article 203(D), which suspends the implementation of FSC's decisions until an appeal is resolved by the SAB.

The interpretation of nikāh (marriage) without the consent of the walī (guardian) by the SAB and the influence of the Hanafī School of Islāmic law are examined, along with the evolving relationship between the executive and judiciary in the process of Islāmization. The chapter highlights the shift from executive-driven Islāmization to judicial interpretations, emphasizing the flexibility shown by ulamā judges in addressing Islāmic law issues.

Furthermore, the incorporation of Islāmic legal principles by the judiciary, especially in interpreting fundamental rights and the emergence of Public Interest Litigation (PIL), is explored. The chapter also addresses the challenges of harmonizing Islāmic law with constitutional rights and international human rights standards.

Specific SAB judgements, such as the interpretation of Surah 4, verse 3 of the Qurʾān regarding polygyny, the new understanding of the verse on Khul', and the declaration of certain provisions as repugnant to Islāmic principles, are analyzed. These rulings emphasize the dynamic nature of Islāmic jurisprudence, involving ijtihād and adapting Islāmic law to contemporary contexts.

The chapter also discusses the SAB's crucial role in ensuring conformity between the legal system and Islāmic teachings, particularly in ongoing debates about Riba. It reflects on the potential risks associated with the discretionary power of the CJ in assigning cases and forming benches, as well as the ongoing petition for review challenging the SAB's judgement on Riba.

Overall, the chapter provides a comprehensive analysis of significant FSC and SAB judgements in civil law, offering insights into the intricate dynamics between Islāmic law, the judiciary, and the legal system in Pakistan.

Chapter 7
CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

This study has examined the role of the FSC in Pakistan‘s legal system, particularly its application of Collective Ijtihād in civil cases. The FSC, as a constitutional body, plays a crucial role in ensuring that laws comply with Islamic injunctions. Collective Ijtihād, involving scholarly collaboration, has emerged as an essential method for addressing contemporary legal challenges while maintaining alignment with Islamic principles.

The research highlights both the strengths and limitations of the FSC‘s jurisprudence. While the FSC has significantly influenced Islamic legal interpretation in Pakistan, challenges remain, such as inconsistencies in interpretation, limited interdisciplinary collaboration, and external secular influences. Strengthening the FSC‘s authority, refining its interpretative methodologies, and fostering engagement with experts from diverse fields are necessary to enhance its effectiveness.

Moreover, the study underscores the importance of keeping the door of Ijtihād open. Collective Ijtihād provides a structured approach that bridges classical jurisprudence with modern societal needs, ensuring that Islamic law remains dynamic and responsive. The FSC‘s continued commitment to this methodology is vital for addressing evolving legal and social issues within the framework of Sharīʿah.

Ultimately, for Pakistan‘s legal system to fully integrate Islamic principles while adapting to contemporary realities, the FSC must adopt a more inclusive and interdisciplinary approach. Strengthening its jurisprudence through enhanced scholarly collaboration, clearer interpretation frameworks, and legislative integration will ensure that Collective Ijtihād remains a reliable and practical tool for legal development.

7.2 Recommendations

Based on the findings, the following recommendations are proposed to enhance the FSC‘s approach to Collective Ijtihād:

1. **Broadening Interpretative Frameworks:** The FSC should expand its interpretative methodologies to incorporate diverse Islamic legal schools of thought. This will ensure consistency, mitigate contradictions, and provide a more comprehensive approach to contemporary legal challenges.
2. **Interdisciplinary Collaboration:** To address complexities in modern civil cases, the FSC should actively engage with scholars from fields such as natural sciences, social sciences, and information technology. This interdisciplinary approach will enrich legal decision-making, particularly in cases involving emerging technologies and societal developments.
3. **Institutionalizing Collective Ijtihād:** The FSC should establish a structured mechanism for integrating Islamic jurisprudence into legislative processes. This institutionalization will enhance its authority in legal interpretation and ensure a systematic approach to modern legal issues.
4. **Training and Development of Mujtahids:** A policy framework should be introduced to identify and train qualified mujtahids. Specialized educational programs should equip scholars with expertise in both Islamic jurisprudence and contemporary legal matters to ensure informed and effective decision-making.
5. **Human-Centric Legal Decision-Making:** The FSC should prioritize justice and societal welfare in its rulings, aligning decisions with the maqāsid al-sharīʿah (higher objectives of Islamic law). A balanced and flexible approach to interpretation will allow Islamic law to evolve while preserving its fundamental principles.
6. **Strengthening the FSC‘s Role in Legislation:** The FSC should play a proactive role in the Islamization of laws by guiding the formulation and revision of legal statutes. Its authority should extend to all matters related to Islamic law, including fiscal, procedural, and constitutional issues.
7. **Elevating the FSC‘s Status and Authority:** The FSC should be recognized as the apex Sharīʿa court with exclusive authority over Islamic legal interpretation. Appeals against its rulings should be reviewed within the FSC itself, with dedicated appellate benches to ensure consistency and finality in decisions.
8. **Expanding the FSC‘s Jurisdiction:** The FSC‘s jurisdiction should be broadened to encompass constitutional, fiscal, and procedural law. Its

decisions should be binding and not subject to reversal by the Supreme Court, ensuring the authoritative and consistent application of Islamic law.

9. **Enhancing Judicial Expertise:** The FSC should be restructured to ensure that its judges possess deep expertise in Sharīʿah law. Appointing qualified Islamic scholars (ulama) with legal experience will strengthen the alignment of judicial rulings with Islamic legal principles and national legislative objectives.
10. **Promoting Flexibility in Legal Interpretation:** The FSC should adopt a dynamic approach to legal interpretation (taʻwīl), allowing for a balanced integration of Sharīʿah principles with contemporary societal needs. This adaptability will ensure that Islamic law remains relevant and effective in addressing modern legal challenges.
11. **Safeguarding Judicial Independence:** Measures should be taken to protect the FSC from political or governmental influence that may delay or obstruct its rulings. Ensuring its independence will enhance the implementation of its decisions, particularly in matters related to the Islamization of laws.
12. **Encouraging Future Research on Collective Ijtihād:** Further research should focus on the practical application of Collective Ijtihād across various branches of law, including commercial, family, and constitutional law. Additionally, studies should explore the impact of globalization and technological advancements on Islamic legal interpretation, fostering collaboration between Islamic legal scholars and experts from other disciplines.

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