Non-Repugnancy Decisions of the Federal Shariat Court of Pakistan: An Analysis of Politico-legal Ramifications

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Abstract

The Federal Shariat Court (FSC) of Pakistan is vested with an extraordinary jurisdiction to examine laws and customs having the force of law in terms of their conformity to Islamic injunctions. The role of the FSC is evaluated from the perspective of those decisions in which it has declared various laws as repugnant to Islamic injunctions. This paper brings into focus those decisions of the FSC in which laws have not been declared as repugnant to Islamic injunctions and attempts to figure out the implications of such decisions. These particular decisions, though far surpass from the decisions of repugnancy, have attracted less scholarly attention. This paper posits that the 'non-repugnancy' decisions strengthen the statehood and constitutional polity of Pakistan in several ways: they broadly identify a theory of legislative competence and autonomy of the state from the Islamic perspective; extend religious sanctity to laws many of which were enacted during British colonial period, and, by doing so, problematise politically motivated calls for 'Islamisation' of laws in Pakistan.

Keywords: Non-Repugnancy, Federal Shariat Court, Islamisation, Islamic Injunctions, Islamic State, Islamic law

Introduction

The Federal Shariat Court (FSC) is an important institution of Pakistan's judicial structure. Its significance in the statecraft necessitates exploring various facets of its working and how they impact statehood and the constitutional polity. The establishment of the FSC is usually appreciated as an instrument for legitimising, authenticating, and reinforcing the government of General Zia-ul-Haq who laid its foundation.[1] General Zia initiated the process of Islamisation, of which the FSC was a central component, to divert

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[1] Farzana Shaikh, *Making Sense of Pakistan* (Columbia University Press 2009) 101-4.

criticism away from the proclaimed objective of the military coup of July 5, 1977.[2] The objective of the coup was initially claimed to be the restoration of the democratic process by conducting transparent and fair general elections. Nevertheless, once the court had been established, its political ramifications could not exclusively be confined to that particular context.

Martin Lau has exhaustively analysed the role of Islam in the judicial system of Pakistan.[3] More than half of the chapters of his *magna opus* examine different aspects of the FSC's contribution. He believes that the role of Islam has been enlarged progressively by the superior judiciary to amass unprecedented judicial power and for bringing legitimacy to its ever-expanding accumulation of jurisdiction. The superior judiciary, which the FSC is a part of, has employed the phraseology and idioms of Islam particularly for protecting and preserving its independence and autonomy in times of crises.[4]

Like those of other living institutions, the FSC's decisions' ramifications are vast and diverse, which prevents one from forming a coherent theory and perspective. This paper brings into focus those decisions of the court, which declare that impugned laws or customs having the force of law are not repugnant to Islamic injunctions. Such decisions are termed as 'non-repugnancy decisions' in this paper. While exploring these decisions, the present analysis figures out their implications for the polity of Pakistan.

It is worthwhile to mention that the judgments of the FSC that declare a law or custom repugnant to Islamic injunctions are generally covered more in academia and media as compared to the non-repugnancy decisions. This trend of giving salience to the repugnancy decisions is evident in law reports published in Pakistan. For instance, Pakistan Legal Decisions (PLD) –a pioneering law journal – has usually preferred to publish its first decision of the FSC from this category of judgments.[5] This is because these judgments,

[2] Husain Haqqani, *Pakistan: Between Mosque and Military* (Carnegie Endowment for International Peace 2005).
[3] Marin Lau, *The Role of Islam in the Legal System of Pakistan* (Martinus Nijhoff Publishers 2006).
[4] Ibid 159.
[5] Suo moto case no. 1/K of 2006 PLD 2008 FSC 01; *Federal Government v Provincial Governments* PLD 2009 FSC 01; *Dr. Muhammad Aslam Khaki v State* PLD 2010 FSC 01;

with the background of the Islamisation process, seem to encroach upon the legislative domain of the Parliament.[6] Such judgments also open up avenues for debate as to whether they are reformative and progressive, or whether they have merely reiterated the traditional understanding of Islamic law.[7] However, such debates are less likely to surface in the non-repugnancy decisions, which usually maintain the status quo in the legal arena.

This paper argues that although the non-repugnancy decisions do not attract much attention or debate, as do the repugnancy decisions, the implications that they bear for the polity of Pakistan are no less significant. The non-repugnancy decisions define and carve out the space for the Pakistani state for conducting its legislative and administrative activities with its requisite autonomy. Additionally, these decisions provide such activities with an aura of authenticity from the Islamic perspective by an institution established with the purpose of the Islamisation of laws. They identify the province in which the state has an ample discretion to legislate and formulate policies. It is necessary consequence of such decisions that once a law is held to be non-repugnant by the court, it absolves the state from the constitutional burden of bringing it in conformity to Islamic law.[8]

Main Abdul Razzaq Aamir v Federal Government of Islamic Republic of Pakistan PLD 2011 FSC 01.

[6] For instance, Babar Sattar, 'Gratitude for bigotry?' (*The News*, 30 January 2016) <https://www.thenews.com.pk/print/94710-Gratitude-for-bigotry> accessed 02 September 2019; Salman Akram Raja, 'An Act of Appeasement?' (*The News* 2016) <https://www.thenews.com.pk/print/90659-An-act-of-appeasement> accessed 02 September 2019; Afiya Shehrbano, 'The gift of Zia – keeps on giving' (*The News* 2016) <https://www.thenews.com.pk/print/94299-The-gift-of-Zia-keeps-on-giving> accessed 02 September 2019; Tahir Siddique, 'The dark side' (*Dawn.com* 2013) <http://www.dawn.com/news/1046168> accessed 02 September 2019; Yasser Latif Hamdani, 'Ijtihad and Islam' (*Dailytimes* 2016) <http://dailytimes.com.pk/opinion/16-May-16/ijtihad-and-pakistan> accessed 02 September 2019; Qaiser Butt, 'Women Protection Act: Top Islamic court rules against law' (*Express Tribune,* 2010) <http://tribune.com.pk/story/93167/shariat-court-terms-women-protection-act-clauses-repugnant/> accessed 02 September 2019.

[7] Ihsan Yilmaz, 'Pakistan Federal Shariat Court's Collective Ijtihad on Gender Equality, Women's Right and the Right to Family Life' (2014) 25(2) *Islam and Christian Muslims Relations* 181-92; Shahbaz Ahmad Cheema, 'Federal Shariat Court as a Vehicle of Progressive Trends in Islamic Scholarship in Pakistan' (2013) 28(39) *Al-Adwa* 41-52.

[8] See Articles 2A, 20, 31 and 207 of the Constitution of Pakistan, 1973.

In addition to emphasising the legislative competence and autonomy of the state, non-repugnancy decisions have other political and social ramifications. In the political domain of Pakistan, the sloganeering for the Islamisation of laws has never receded from the political narrative and unprioritised by the religio-political parties. Numerous laws still in force in Pakistan were at first enacted by the British Raj (1857-1947), and after the independence of Pakistan, they were adopted without substantial amendments with the majority of them still holding sway. The Islamisation of such laws is an easily marketable argument by the religio-political parties. These political parties harness support for their political agendas by positing that the laws enacted by the British colonial government are still implemented by the state irrespective of their authenticity from Islamic perspective, and that the state demeanour appears to be in conflict with the constitutional mandate of bringing all laws in conformity with Islamic injunctions. The supporters and sympathisers of such parties, with an aim to rediscover 'true Islam' and reconnecting with the 'glorious past' hampered by British colonial era, have caused – and may continue to cause – unexpected political disruption and upheaval in times of crises.[9] In this background, when any law is declared as non-repugnant to Islamic injunctions by the FSC, it defuses or at least problematises the 'Islamisation rhetoric' and fizzles misguided religious fervent. The FSC's role in this context cannot be confined to legalities or otherwise, it is bound to have ramifications for the politically contested domain as well. Thus, non-repugnancy decisions are likely to reinforce the statehood of Pakistan by augmenting trust and confidence that the laws implemented by the state are unblemished from a religious perspective.

Jurisdictional and Methodological Aspects of the Analysis

The FSC was established during the rule of General Zia-ul-Haq in 1979 as Shariat Benches in provincial High Courts, and then as a full-fledged and

[9] The *Nizam-e-Mustafa* movement of 1977 was a morphed form of a political agitation to unseat Prime Minister Zulfiqar Ali Bhutto who was allegedly elected by engineered elections according to the opposition parties. Ultimately, this political upheaval paved the way for imposition of Martial Law by General Zia. Another recent illustration of such political capitalization by a religious party is a *dharna* (lockdown) organised by *Tehreek-e-Labaik* Pakistan in twin cities of Islamabad and Rawalpindi in the background of acquittal of Asia Bibi in an alleged blasphemy case. For detail of fact and legal reasoning, see Zia Ullah Ranjah 'A Critical Review of Asia Bibi Case' (2018) 5 *LUMS Law Journal* <https://sahsol.lums.edu.pk/law-journal/critical-review-asia-bibi-case> accessed 18 August 2019.

autonomous court independent of high courts in 1980.[10] The crafting of an independent court was not without perils of its own kind: numerous attempts were made to manoeuvre and curtail its autonomy by keeping a controlling gaze over the judicial process of the court, such as the appointment of scholars as judges; the transfer procedure of judges from various high courts to FSC, and the conferring of review jurisdiction to the court.[11] Much like the other courts in Pakistan, the FSC has never been thoroughly insulated from extraneous and extra-judicial factors in its judicial functioning.[12]

In addition to the appellate and revisional jurisdictions that are exercised in cases concerning Hudood laws, the FSC is conferred with original jurisdiction to examine the validity of any law on the touchstone of the 'injunctions of Islam'.[13] Its decisions under this jurisdiction are pronounced in one of three formats. First, the court may refuse to entertain petitions based on a lack of jurisdiction. Second, it may accept – partially or wholly – the argument made before it and pronounce that the impugned law or any of its part is repugnant to Islamic injunctions. Third, it may declare, after judicially examining the contentions, the impugned law as non-repugnant to Islamic injunctions. When the FSC determines a law or any of its provisions to be repugnant to Islamic injunctions, the Court directs the concerned government to amend the law within a specified period of time. If the law is not amended, or if an appeal is not initiated against the decision of the FSC to the Shariat Appellate Bench of the Supreme Court, the law or its provision is treated to be obliterated from the statute after the expiry of the prescribed period.[14] In another study, it has been pointed out that the Court struggles to evolve a coherent and comprehensive framework for determining the 'injunctions of Islam' and its numerous judgments indicate that it is still far from developing a thoroughly consistent framework.[15]

[10] (n 4) 121-127.
[11] Ibid 127-130.
[12] Though the FSC was established to underline Zia-ul-Haq regime's Islamisation drive, at times when the Court made attempts to cause hurdles for political agenda of the government, it was not allowed that sort of autonomy. Paula R Newberg, *Judging the State: Courts and Constitutional Politics in Pakistan* (Cambridge University Press 1995) 184.
[13] The Constitution of Pakistan 1973, A. 203D and 203DD.
[14] The Constitution of Pakistan 1973, A. 203D (2) and 203D (3).
[15] Shahbaz Ahmad Cheema, 'The Federal Shariat Court's Role to Determine the Scope of 'Injunctions of Islam' and Its Implications' (2013) 9(2) *Journal of Islamic State Practices in International Law* 92-111.

It would be appropriate to explain some methodological aspects of the present analysis. It is a qualitative study and does not aim to accomplish any quantitative accuracy. Constitutionally, the FSC and its appellate body, the Shariat Appellate Bench of the Supreme Court, are two different tiers of the same judicial process of Islamisation, but the paper does not take into account this distinction and treats them both as Shariat Courts having jurisdiction for ascertaining the Islamic validity of laws. Furthermore, the paper has mostly relied upon those decisions of the FSC, which have held laws as non-repugnant to Islamic injunctions, but occasionally it has referred to those decisions in which it has leant in favour of non-repugnancy or partially declared an impugned law as non-repugnant to Islamic injunctions.

A constitutional instrument established the FSC; hence, it is obliged to remain within the boundaries carved out for its judicial activity. Some areas, i.e., Constitution, procedural laws, financial matters, and Muslim personal law were originally excluded from its jurisdiction.[16] The jurisdictional clog with respect to financial matters has expired. With respect to other subjects, e.g. Muslim personal law, the court has made significant inroads through interpretive techniques.[17] The most potent clog still intact is the Constitution on which the court has resisted any attempt to question the authenticity.[18]

One may object that the analysis carried out in the paper cannot be holistic considering the importance of the areas left outside of the Court's jurisdiction. It is submitted that a qualitative analysis cannot claim to be comprehensive. The paper may not appear thorough and in-depth analysis of a very precisely focused area of law since it focuses upon numerous subjects such as family law, criminal law etc. while dealing with non-repugnancy decisions. The purpose is to highlight a particular facet of the court's contribution, which hitherto was neglected and remained substantially unexplored and unanalysed within academia. Moreover, the conclusions drawn or opinions expressed during the analysis provide a starting point for developing more rigorous analytical and quantitative projects.

[16] The Constitution of Pakistan 1973, A. 203B(c)
[17] (n 4) 138-9; 155-60.
[18] *Muhammad Saifullah v Federation of Pakistan* PLD 1992 FSC 376.

Theory of Legislative Autonomy of an Islamic State

The identification of the boundaries of legislative authority of an Islamic state in modern era is not an easy task. What acts are permissible or prohibited? In case of any prohibition, is such prohibition partial or absolute? If a state's legislative body is empowered to legislate in a specific field, the issue is how far this competence will extend from the Islamic perspective. Similarly, if a particular administrative authority is vested in a state, the contours of discretion need to be delineated from the standpoint of Islam. The FSC has debated such issues and attempted to articulate a theory in a practical setting for legislative competence and administrative autonomy of an Islamic state, albeit being far from comprehensive.

The first principle of this theory is what is not explicitly prohibited or forbidden in the primary sources of Islamic law, i.e. the Quran and Sunnah of the Prophet Muhammad (PBUH), cannot be held repugnant to Islamic injunctions. The jurisdiction of the FSC is derived from the phrase 'injunctions of Islam' as determined by the Quran and Sunnah of the Holy Prophet. This phrase was defined by the Shariat Appellate Bench of the Supreme Court in *Pakistan v Public at Large*.[19] As per this decision, without specific reference to the primary sources or principles directly entrenched in them, no law can be declared repugnant to Islamic injunctions. Thus, when a law is enacted by the Parliament, which is not in conflict with explicit text of the Quran and Sunnah, the Court cannot declare such legislative instrument as repugnant to Islamic injunctions. This judicial approach confers wide-ranging autonomy on the state in those matters, which have not been dealt with in the primary sources.

This principle is consistently followed by the FSC for dismissing numerous Shariat petitions, though the phraseology employed for this purpose might have little variation. For instance, in *Nadeem Siddique v Islamic Republic of Pakistan*,[20] the court stated "[the petitioner] could cite no specific Verse or Hadith." In *Muhammad Akram v Federation of Pakistan*,[21] the FSC observed, "[t]he learned petitioner could not specifically point out any verse of the Holy Quran or Hadith of the Holy Prophet…to support his

[19] PLD 1986 SC 240.
[20] PLD 2016 FSC 1, 4.
[21] PLD 2017 FSC 24, 32.

contentions." In another case entitled, *Syeda Viquar un Nisa Hashmi v Federal Government of Pakistan*,[22] the court pointed out that the verse relied upon by the petitioner did not have any bearing direct or indirect on the issue under review, while he "could not make reference to any other 'NASS' of Holy Quran or Sunnah" in support of his case.

This approach can be illustrated by referring to a few cases. In *Maqbool Ahmad Qureshi v Government of Punjab*,[23] the minimum age at 25 years for election of chairman and vice-chairman of municipal bodies was challenged. It was argued that when Prophet Muhammad, in spite of his reputation as trustworthy and truthful person, was well established at the age of 25, he was not conferred with the responsibility of prophethood until he attained the age of 40. Therefore, how could anyone else at this young age be assumed to handle such a vital role? While dismissing the example of the Holy Prophet as 'absolutely irrelevant' in the present case, the Court turned down the petition and held that "no direct injunction is available in the Holy Quran regarding the age limit for appointment, selection or election of a person to a public office."[24]

In another case entitled *Hammad Murtaza v Federation of Pakistan*,[25] the court, dealing with the question of appointment of women as family courts' judges, demonstrates the same approach. The FSC, while dismissing the petition, observed, "[t]he petitioner in spite of opportunity could not refer to any specific NASS from the Holy Quran in support of his plea that a woman is disentitled to be appointed as Judge/Qazi."[26]

When there are specific guidelines in the primary sources of the Quran and Sunnah, the FSC ensures that these guidelines are not violated. Even in terms of specific guidelines, the court has given credence or relied on explicit and unequivocal meanings of particular words. When any dictate or precept is ambiguous and capable of numerous meanings, the court avoids giving preference to one interpretation over others. For instance, in *Seyda Viquar un Nisa Hashmi v Federal Government of Pakistan*,[27] the petitioner referred to a

[22] PLD 2017 FSC 8, 12.
[23] PLD 1992 FSC 282.
[24] PLD 1992 FSC 282, 284.
[25] PLD 2011 FSC 117; See also *Ansar Burni v Federation of Pakistan* PLD 1983 FSC 73.
[26] PLD 2011 FSC 117, 120.
[27] PLD 2017 FSC 8, 12.

Quranic verse which is translated as "… for what offence was she killed"[28] for arguing the non-compoundability of honour killing. Though the petition was dismissed primarily on the ground that appropriate legislative safeguards had already been enacted by the Parliament, but with reference to the above verse, the court observed that it was not in any way linked to the issue of compoundability in honour-related crimes. Metaphorically, the verse could have been stretched to have implications for the issue under inquiry, but in line with its judicial approach, the FSC refrained from imposing its own preference over the legislative body.

In case, there are different rather conflicting interpretations of an Islamic precept, the FSC favours that construction which strengthens statehood and the constitutional polity. For instance, in *Mahroze v Government of NWFP*,[29] one of the arguments of the petitioners was supported by the saying of Prophet Muhammad reported in Sahih Bukhari, the most authentic collection of Hadiths, that whosoever cultivates a barren land which is not owned by anybody would acquire proprietary rights. There is a difference of opinion among Muslim scholars about the role and authority of a state for the acquisition of proprietary rights.[30] The FSC has opted out of deciding from various interpretations, which attribute a dominant role to the state, i.e., prior permission of ruler or a government is a prerequisite for the purpose of acquiring proprietary rights.[31]

In case of absence of any specific prohibition in Islamic injunctions, then "[t]he principle governing such situations is that whatever has not been disallowed is allowed" governs the Court's reasoning.[32] The Court observed that the Muslim *ummah*, through its representatives, is authorised to legislate in those matters where there is no precise guidance in the primary sources of Islamic law. The main principle of legislation in Islam guiding in such eventualities is the public welfare, otherwise known as *maslaha*: what is

[28] Al-Quran 81: 9.
[29] PLD 1993 FSC 38.
[30] Muhammad Hashim Kamali, *Principles of Islamic Jurisprudence* (2nd edn, Ilmiah Publishers 1998) 56.
[31] PLD 1993 FSC 38, 43.
[32] *Abdul Majid v Government of Pakistan* PLD 2004 FSC 1, 6. In this case, the regulatory regime for keeping arms and its licensing system was questioned from the Islamic perspective, but the FSC refused to uphold this as repugnant. This decision of the FSC was later upheld by the Shariat Appellate Bench of the Supreme Court in *Abdul Majid v Government of Pakistan* PLD 2009 SC 861.

advantageous for the public at large and appealing to logic and reason should be enacted as law. The main object to be achieved by the state is to protect the rights of people and ensure justice to all. While underlining the principle of relativity in this respect, the court observed "[t]he concept of justice is eternal but its dynamics may change in the changing circumstances. A certain law may be just in one time but may entail injustice at another time and in another context."[33] Mindful of the impossibility of eliminating all evil from society, the FSC maintained, "every harm and corruption, in whatever form and whatever degree and proportion it may be, should be removed and exterminated as far as possible". Islamic law confers vast and extensive powers to authorities for legislating laws in public welfare. Exploring the boundaries of permissible legislation, the court made an apt observation that even "if a permissible act becomes a source of trouble and harm to the public, it will be prohibited in the interest of the public".[34]

The FSC has repeatedly reiterated the idea that though it holds great regard for the opinions and *fatawa* of scholars, it cannot put them into effect in the absence of any unambiguous precept in the primary sources.[35] Likewise, the court has also asserted its autonomy in construing *Islamic injunctions* from the Quran and Sunnah without being influenced by any other institution exercising comparable jurisdiction. For instance, in *Muhammad Saeedullah Khan v Secretary, Government of NWFP Excise and Taxation Department, Peshawar*,[36] while dismissing the petition, the FSC questioned the petitioner's contention that the law in question should be declared repugnant on the recommendations of the Council of Islamic Ideology.[37]

In *Saleem Ahmad v Government of Pakistan*,[38] section 10(4) of the West Pakistan Family Courts Act, 1964 was challenged as it conferred the authority to dissolve a marriage on the Family Court on the basis of *khula* at

[33] *Abdul Majid v Government of Pakistan* PLD 2004 FSC 1, 6.
[34] Ibid, 7.
[35] *Muhammad Fayyaz v Islamic Republic of Pakistan* PLD 2007 FSC 01; *Saleem Ahmad v Government of Pakistan* PLD 2014 FSC 43.
[36] PLD 2009 FSC 33.
[37] The Council of Islamic Ideology is an advisory body assigned to assist the Parliament for the Islamisation of laws, but the Parliament does not accord it much credence and conveniently bypasses its recommendations. In this backdrop, when the FSC does not give unqualified credence to the recommendations of the Council, this expands the legislative freedom of the Parliament enormously.
[38] PLD 2014 FSC 43.

the pre-trial stage without framing issues and recording evidence in case there is no likelihood of reconciliation between spouses. Relying on various *fatawa* from the Hanafi school of thought, it was contended that this manner of pronouncing *khula* was against Islamic injunctions.[39] Since the Court did not find anything to the contrary in the prescribed procedure to the Quran and the Sunnah, it refused to declare the impugned provision as repugnant. This decision has important repercussions for the legislative competence of the state. Firstly, if a *fatwa* is not directly rooted in the primary sources of Islamic law, it cannot prevent the state from carrying out its legislative activity autonomously. Secondly, with an overwhelming majority of the Muslim population in Pakistan conforming to the Hanafi school of thought, it implies that even *fatawa* revered by followers of Hanafi school do not enjoy any distinctive impact on the legislative autonomy of the Parliament unless solidly entrenched in the primary sources.

Whenever there is a difference of opinion among various schools of thought, the state can exercise its legislative discretion to opt any perspective, which it appears to be more suitable. This aspect of legislative discretion has been emphasised by the FSC while interpreting the phrase 'Muslim Personal Law' occurred in article 203(b) of the Constitution of Pakistan, 1973. In *Khawar Iqbal v Federation of Pakistan*,[40] section 8 of the Dissolution of Muslim Marriages Act (1939), which empowers the delegation of divorce to spouse or any other person known as *talaq-e-tafveez*, was questioned. The FSC refused interference on two grounds: merit and jurisdiction. With respect to the first ground, the court found nothing in the primary sources that prevented the state from enacting this manner of dissolution of marriage. On the basis of jurisdiction, the FSC maintained that the impugned provision was beyond its ambit, as it was not mutually agreed between various schools of thought, considering the variant juristic opinion of Shia school of thought on this issue. The court explained that 'Muslim Personal Law', for the purpose of excluding jurisdiction of the FSC, is a law which, in addition to being statutory law, must not be agreed upon from an Islamic perspective by all schools of thought. Thus, when a law in the domain of family law is enacted in conformity with one or more schools of thought but not all, it cannot be examined on the touchstone of Islamic injunctions by the FSC as it falls in the

[39] Muhammad Zubair Abbasi, 'From Faskh to Khula: Transformation of Muslim Women's Right to Divorce in Pakistan (1947-2017)' (2019) 3 *The Asian Yearbook of Human Rights and Humanitarian Law* 331-56.
[40] 2013 MLD 1711.

category of 'Muslim Personal Law'. On the contrary, when a law is supposedly enacted in the field of family law, which is also in accord with all schools of thought, it is not considered 'Muslim Personal Law' and the FSC may exercise its jurisdiction to assess its Islamic credentials.

These judgments entail that a statutory provision, which is agreed upon by Muslims of various schools of thought is within the jurisdiction of the FSC, while a statutory provision that is not agreed upon is out of the jurisdiction of the court. This construction provides the state a vast field for legislative activity in the domain of Islamic family law with a guarantee that such enactments would not be declared as repugnant by the FSC, provided the legislature ensures, while enacting such laws, that all schools of thought do not agree on the enacted perspective.[41]

In line with the primary sources of Islamic law, there are three frequently employed principles of Islamic jurisprudence at the cornerstone of the theory of legislative autonomy as expounded by the FSC. First, what is not explicitly prohibited can be done and carried out by permissible means; second, no harm should be inflicted nor reciprocated; and third, the sanctity of contractual relationship and obligations is to be maintained unless it violates any explicit provision.

The State's Authority in Financial and Regulatory Affairs

This subsection illustrates non-repugnancy decisions in financial and regulatory affairs to underline the sphere recognised by the FSC for legislative and administrative autonomy of an Islamic state. In a case related to the law of possession of arms,[42] it was held that the state is vested with the authority to establish a regulatory/licensing system and charge fees accordingly.

The imposition of taxes other than those sanctioned by Islam is a contested issue, with some Muslim scholars who view it unfavourably,[43] and there are still people who fantasise an idea that proper implementation of *zakat* would completely alleviate the necessity of imposing taxes.[44] The FSC

[41] (n 4) 138-9; 155-60.
[42] *Abdul Majid v Government of Pakistan* PLD 2009 SC 861.
[43] Robert W. McGee, *The Philosophy of Taxation and Public Finance* (Springer 2014) 67-68.
[44] Ishtiaq Ahmed, *The Concept of an Islamic State in Pakistan: An Analysis of Ideological Controversies* (Vanguard 1991) 105.

was once approached for questioning the regime of income tax law, and it was contended that this regime was inconsistent to Islamic injunctions due to its transplantation during the British colonial period.[45] While dismissing the petition, the FSC traced the history of taxation in Islamic law and discussed the competency of an Islamic state for exploring the legitimate contours of the taxation system. While highlighting the objects on which *zakat* could be spent according to Quranic precepts, the Court enlisted numerous other areas and activities of a modern state in which it requires financial resources.[46] The Court conceded that the substantial discourse in the writings of revered Muslim scholars in this domain premised on activities related to war and the defence of an Islamic state, but the same discourse may be altered in terms of the economic stability and developmental responsibilities of a modern state. Without economic development and stability, no state could maintain a peaceful atmosphere and an orderly society, which were considered integral components of defense and political stability.[47]

In *Dr. Mahmood-ur-Rehman Faisal v Government of Pakistan*,[48] in addition to some other matters related to the Zakat and Ushr Ordinance, 1980, the provision of deduction of Zakat on maturity of investments on 1st of Ramadan was assailed. The contention was that in Islam, Zakat becomes payable on the date when one year passes on assets in possession, and not necessarily on 1st of Ramadan. The petition was dismissed as nothing was found to be transgressing Islamic injunctions.

In *Syed Maqsood Shah Bukhari v Federal Government*,[49] some provisions of the Punjab Rented Premises Ordinance 2007, the West Pakistan Urban Rent Restriction Ordinance, 1959, the Sindh Rented Premises Ordinance, 1979, and the Cantonments Rent Restriction Act, 1963 were challenged on the ground that without exerting labour and hard work, no one is entitled to any remuneration. Hence, charging rent is inconsistent with Islamic injunctions. The court held that the contract of *ijara*, or lease, is duly authenticated by the Quran, the Sunnah and *ijma* of the Companions. In addition to these sources, Islamic law recognises certain acts from which one acquires wealth without doing any hard work. Thus, the argument of the

[45] *Fazlur Rahman bin Muhammad v Wafaq of Pakistan* PLD 1992 FSC 329.
[46] Ibid 344-5.
[47] Ibid 352.
[48] PLD 2013 FSC 55.
[49] 2013 MLD 1808.

petitioner was dismissed and it was consequently held that legislation of this nature can be validly enacted and executed in an Islamic polity.

The concept of artificial legal personality is at the foundation of many institutions pertaining to economic and financial enterprises as well as to governance and regulation. Thus, it was necessitated to evaluate whether an artificial legal personality is in consonance with Islamic law. In *Federal Government v Provincial Governments*,[50] the FSC took *suo motu* notice to ascertain the recognition of artificial personality of a registered company as envisaged in the Companies Ordinance, 1984 on the touchstone of Islam. It was argued before the court, drawing strength from the Islamic legal maxim, 'let there be no harm or reciprocating of harm', that the concepts of 'legal entity' and 'limited liability' are against Islamic injunctions. They facilitate the deprivation of certain people from their due entitlement, along with the protection of others from enjoying their ill-gotten gains. After a thorough analysis, the Court did not find anything in the Quran and the Sunnah invalidating the basic conception of artificial personality of company; rather, it emphasised that some sort of concept of legal personality was in existence even in the early period of Islam – mosques and *waqfs* enjoyed (and continue to enjoy) a distinct legal personality, for example. The Court pointed out that, for the purpose of good corporate governance and protecting the legitimate interests of shareholders, the government should curb corporate-related evil practices. However, as a whole, there is nothing in the Companies Ordinance, 1984 to be declared as repugnant to Islamic injunctions. Even though this decision upholds the validity of the Companies Ordinance, 1984, in reality it recognises the authority of the state to establish such artificial legal personalities without having any fear of their being declared as un-Islamic on this ground alone.

In *Ch. Muhammad Aslam Ghuman ASC v Federation of Pakistan*,[51] the court observed that the terminology of 'master and servant' for employers and employees of autonomous bodies is derogatory and needs to be substituted with some more appropriate expressions. The government is

[50] PLD 2009 FSC 01.

[51] 2015 PLC (CS) 179. Rule 3(1) of the Security and Exchange Commission of Pakistan Service Rules 2007 was questioned for being inconsistent with Islamic injunctions along with section 19(1) of the Security and Exchange Commission of Pakistan Act 1997. As the impugned provision had been declared *ultra vires* of the Constitution, the Court pointed out that there remained no need to evaluate its validity from an Islamic perspective.

competent to enact laws for regulation of the domain of employer and employee. However, such regulations should not deprive the employees of their rights, such as the right to an inquiry by an impartial arbiter and an opportunity to be heard. It implies that a state is competent to make laws regulating the employer-employee relationship, including the manner of conducting inquiries against an employee, provided that such laws do not violate the rights recognised by the principle of natural justice and those incorporated in the Constitution.

The FSC in *Shaikh Aftab Ahmad v Government of Pakistan*[52] emphasized on the government's legislative competence to enact laws having prospective effect. While legislating, no past and closed transaction should be interfered with, and legislative instruments should have a prospective application according to the principles of Islam. Thus, a legislative body in an Islamic polity is empowered to make laws provided they do not reopen past and closed transactions.[53]

An interesting illustration of the court's approach in the domain of the employer-employee relationship is *Ch. Irshad Ahmad v Federation of Pakistan*.[54] In this case, the petitioner challenged the legal provision for confining the medical facility to one wife of the employee despite Islam not prohibiting having more than one wife.[55] The FSC, emphasising on the contractual nature of relationship between the employer and employee, held that the impugned rule did not offend any Islamic injunction.

It has repeatedly been posited before the FSC that laws specifying a limitation period for seeking relief through judicial bodies are repugnant to Islamic injunctions. The latest case in this respect is *Mukhtiar Ahmed Shaikh v Federation of Pakistan*.[56] In this case, the petitioner challenged the limitation

[52] 2016 CLD 544.

[53] In this case, the Section 18(3) of Financial Institutions (Recovery of Finances) Ordinance, 2001, was challenged on the basis of its repugnancy to Islamic injunctions as embodied in article 17(2) of the Qanun-e-Shahadat Order 1984. It was argued that the impugned provision exempts the applicability of the latter provision as it states that all financial transactions carried out prior to the enactment of the Financial Institutions (Recovery of Finances) Ordinance, 2001 would not be required attestation in the manner specified in article 17 of the Qanun-e-Shahadat Order 1984.

[54] PLD 1992 FSC 527.

[55] Al-Quran 4:3.

[56] PLD 2014 FSC 23.

period for filing an appeal before the Service Tribunal under sections 4(1)(a), 6 and 7 of the Service Tribunals Act 1973. The court dismissed this contention by emphasising the state's competency in this matter; had the state not been allowed to make laws for fixing a time period for various litigations and judicial proceedings, it would bring floodgate of litigation to courts and foreclose the attainment of finality of any litigation.

While dealing with an issue of compulsory hiring and requisitioning of private properties by state officials,[57] the FSC observed that individual properties are inviolable and sacred, and they cannot be interfered with unless their owners provide their consent in normal circumstances. Nevertheless, in extreme necessities, "the injunctions given for the normal circumstances are re-adjusted and made somewhat flexible to a certain extent to alleviate a particular unavoidable emergent condition."[58]

Authority in the Domain of Criminal Law

Criminal law is an important domain for legislative activity of a modern state. Over the years, its significance has increased and will continue to do so as the phenomenon of crime continuously evolves. No state can remain aloof from such developments and is required to maintain apparatus that would facilitate it to cope with the ever-evolving nature of crime. Keeping this in mind, this subsection explores the FSC's role in the domain of criminal law. It illustrates that according to the FSC the Pakistani state's authority and competency to regulate conduct of citizens in terms of *ta'zir* offences is wide and extensive. There is one domain, i.e., *hudood* and *qisas* offences, in which the state's authority is somewhat circumscribed because this subject is dealt with specific dictates in the primary sources of Islamic law.

The most important chain of decisions in the field of criminal law pronounced by the FSC relates to offences against the human body, including murder and other various kinds of bodily injuries. In *Gul Hasan Khan v Government of Pakistan*,[59] the Shariat Bench of the Peshawar High Court declared various provisions relating to offences against the human body as

[57] *Amin Jan Naeem v Federation of Pakistan* PLD 1992 FSC 252.
[58] Ibid 268.
[59] PLD 1980 Pesh 01.

enacted in the Pakistan Penal Code, 1860[60] and some provisions of the Code of Criminal Procedure, 1898 as repugnant to Islamic injunctions. After its reorganisation as an independent court, the FSC in *Muhammad Raiz v Federal Government*[61] and the Shariat Appellate Bench of the Supreme Court in *Government of Pakistan v Gul Hasan Khan* confirmed this judgement.[62] In these decisions, Chapter 16 of the Pakistan Penal Code, 1860 was reviewed on the touchstone of Islam and its provisions were found to be inconsistent with Islamic law. The remaining 22 chapters comprising 470 out of 511 legal provisions of the impugned law were not debated in this important chain of decisions. The provisions of these chapters are sanctified under a well-recognised doctrine of *ta'zir* that confers legislative authority on a state for prescription of offences and determination of their punishments in light of public good and necessity.

Under the doctrine of *ta'zir*, it is an important province of a state to lay down severe or lenient punishments considering the prevailing social circumstances. In *Habib-ul-Wahab Alkheri v Federation of Pakistan*,[63] the issue of inappropriate leniency of some punishments was brought before the FSC. The court cautiously proposed the revision of the impugned punishments that were prescribed more than a century ago during the British colonial period. However, as a matter of principle, it categorically refused to declare them repugnant with Islamic injunctions. The court explained its approach by clarifying that "it is within the legislative competence of our Parliament to prescribe such punishments for offences liable to *ta'zir* as it deems necessary and proper."[64]

In *Sohail Hameed v Federation of Pakistan*,[65] the principle of joint liability, as enacted in section 34 of the Pakistan Penal Code, was questioned as being inconsistent with various dictates of the Quran and the Sunnah.

[60] The Pakistan Penal Code 1860 s 54, 55, 302, 304, 304A, 324, 325, 326, 329, 331, 333, 335 and 338.
[61] PLD 1980 FSC 01.
[62] PLD 1989 SC 566. Pakistan Law Commission's Tenth Report deals with the Islamisation of the provisions relating to offences against the human body. The report was prepared considering the recommendation of the FSC in 1984. For more detail, please see http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/01/10.pdf> accessed 02 September 2019.
[63] PLD 1992 FSC 484.
[64] Ibid 495.
[65] PLD 1993 FSC 44.

Dismissing the petition, the Court observed that there was a consensus among the Companions of the Holy Prophet as to the culpability of several persons accused of the commission of an offence against a single victim, provided that it was committed in 'furtherance of common intention.' As to the competency of legislature, the Court said that "if the concept of joint liability is ignored, then "Mischief in the Land" spread in earth. … Therefore, in the interest of keeping peace and harmony in the society, if the acts committed with common intention be made punishable for all and each of them for committing such crime."[66]

Offences are considered as violations of public rights. The public is represented by a state. In this context, it is a sovereign privilege of the state to pardon offenders, remit punishments or withdraw criminal proceedings. The FSC has observed that such authority is vested in an Islamic state or its authorised officials in the domain of *ta'zir* offences under the principle of public interest.[67] Nonetheless, this authority could not be legitimately exercised in the offences punishable within the domain of *hudood* and *qisas*. The court noted that "the power to punish an accused coincides with the power to forgive and pardon … in order to enable [head of state] to achieve collective good, [and for] strengthening the collective system".[68] As to the withdrawal of criminal proceedings, the Court noted that the state can do this in *ta'zir* offences when necessitated by public interest without violating *haq al abd*.[69]

The state's legislative autonomy and competence in the domain of *ta'zir* offences is considerably wide and extensive under Islamic law. Nonetheless, the contours of such authority are repeatedly questioned from the Islamic perspective before the FSC which follows a consistent judicial approach of safeguarding it. The following examples will explain this approach.

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[66] Ibid, 50-1.
[67] *Habib-ul-Wahab Alkhairi v Federation of Pakistan* PLD 1991 FSC 236.
[68] Ibid 255.
[69] Ibid 267. Under Islamic law, offences are divided into three categories based on the nature of rights violated. One of them is *haq al abd*, which literally translates to the right of a human being. When a right of human being is considered to be involved in an offence, that offence cannot be pardoned without the consent of an aggrieved individual, e.g. *qatl* and bodily injuries. See Imran Ahsan Khan Nyazee, *General Principles of Criminal Law (Islamic and Western)* (Islamabad, Advanced Legal Studies Institute 2010).

In *M. Khalid v Federation of Pakistan*,[70] the prescription of the death penalty under section 9(C) of the Anti-Narcotic Substances Act, 1997 was challenged on the ground that no *ta'zir* punishment should exceed the punishment provided for *hadd* in any eventuality. The FSC dismissed the petition *in limine* by pronouncing that on the basis of "*Fasad fil Ard*" (mischief on earth), the person in authority or *imam* is empowered to award such an exceptional punishment in light of *Masalih* or public good.

In *Moulvi Iqbal Haider v Federation of Pakistan*,[71] some laws[72] were challenged on the ground that the infliction of death penalty without following the procedure of *tazkiya-tu-shuhood*[73] and without taking into consideration the concept of *afue* (pardon) by the victim's heirs was illegal. While dismissing the petition, the FSC held that the contentions of the petitioner were unmaintainable because the verses of the Holy Quran that he relied upon did not relate to *ta'zir* offences. The term *ta'zir* does not pertain to fixed punishments as laid down in the Holy Quran and the Sunnah, but rather refers to the discretionary space which has legally, as well as historically, been left for the head of state, *qazi* or *majlis shura* (legislative body) for punishing any anti-social conduct that seems repulsive to the peaceful and orderly existence of people in society. The Court observed that the necessity of *tazkiya-tu-shuhood*, as mandated for Hudood and *Qisas* cases, could not be extended to *ta'zir* offences. By warding off such an application of *ta'zir*, the Court in fact safeguarded the legislative autonomy of state. Similarly, the concept of *afue* by legal heirs is confined to *qisas* offences exclusively. Had it been extended to *ta'zir* offences as was prayed in the petition, it would have hampered the state's legislative discretion for categorising *ta'zir* offences into compoundable and non-compoundable offences, and would have limited its

[70] 1/L of 1999 and S.S.M.No.143/L of 2000.
[71] PLD 2006 FSC 26; SD 2006 377.
[72] Offence of Zina (Enforcement of Hudood) Ordinance 1979, s 10(4); Anti Terrorism Act 1997, s 7.
[73] It is a method devised by Muslim scholars for purgation of witnesses before giving credence to their evidence in offences of *hudood* and *qisas*. By employing this method, evidence about competency and reliability of witnesses is collected from the Islamic perspective and their general repute, i.e. whether they refrain from committing major sins and violating Islamic precepts, is ascertained. *See Sanaullah v State* PLD 1991 FSC 186 and *Sher Muhammad v State* 2018 PCrLJ 48 [Lahore].

role in devising the manner of compromise in an overwhelming number of criminal cases.[74]

Another case of significance in this context is *Haider Hussain v Government of Pakistan*,[75] in which the *vires* of articles 3 and 16 of the Qanun-e-Shahadat Order, 1984 were questioned from the Islamic perspective. Article 3 deals with the general competency of witnesses and establishes that whenever a witness possessing the qualifications provided in the Quran and Sunnah is not found, a court may accept evidence of any witness, while article 16 prescribes that evidence of an accomplice is acceptable without corroboration in all offences except *hudood*. The FSC held that there is nothing offensive in article 3 to Islamic injunctions, which implies that an Islamically incompetent witness may be regarded as a qualified witness in *ta'zir* offences. As far as article 16 is concerned, according to the FSC, the evidence of an accomplice was held inadmissible in cases of *qisas* and *hudood*, while it should be corroborated before being relied on in *ta'zir* cases. When an appeal against this decision was brought before the Shariat Appellate Bench of the Supreme Court,[76] the Court maintained it in respect of the validity of article 3 and the inadmissibility of accomplice's evidence in *qisas* and *hudood* cases, but it disagreed with the FSC on the issue of uncorroborated evidence of an accomplice in *ta'zir* cases. It was observed by the Shariat Appellate Bench that some discretion should be left to the trial courts for judging the admissibility or otherwise of an accomplice's evidence in *ta'zir* cases with or without corroboration. Consequently, the entire legal milieu pertaining to evidence and the competency of witnesses was kept intact except in cases of *qisas* and *hudood*, which form a small fraction of the corpus of criminal litigation.

It would be pertinent here to mention that the Qanun-e-Shahdat Order, 1984 was an Islamically adopted version of the erstwhile Indian Evidence Act, 1872. The former retained the majority of the provisions of the parent legislation originally enacted by the British colonial government. Article 3 has

[74] In another case of a similar nature titled *Mst. Ghafooran Bibi v Federal Government of Pakistan* (2006 PCrLJ 812), section 7 of the Anti-Terrorism Act 1997 was argued to be against Islamic law because it did not recognize the right of waiver by a victim's *wali* (guardian). Likewise, the petition was dismissed and the state's legislative autonomy was preserved.

[75] PLD 1991 FSC 139.

[76] *Federation of Pakistan v Muhammad Shafi Muhammadi* 1994 SCMR 932.

kept the pith of the original legislation with the addition of some provisos, while article 16 maintained its corresponding provision of the Indian Evidence Act, 1872 with minor variation regarding *hudood* offences. In this background, the above-mentioned decisions of the Shariat courts are not confined to emphasise on legislative space for the state in matters of *ta'zir*, but they also confer Islamic legitimacy on the law enacted during the colonial era.

Ushering Islamic Legitimacy to Laws of British Colonial Era

This section briefly explains how the process of Islamisation by the FSC has bestowed Islamic legitimacy to the laws dating back to the British Raj. Since the independence of Pakistan, it has been a consistent political demand of Islamists that 'British-derived civil and criminal laws' be substituted with Islamic laws.[77] Many legislative instruments in Pakistan still bear the dates of enactment from 1857 to 1947. Many of them were brought before the FSC for scrutiny from an Islamic perspective. It would be surprising for the readers that the majority of them were conferred with Islamic authenticity by the Court.[78] The Court either has not found anything offensive to the primary sources of Islamic law in them or thought that such enactments are well within the legislative competence of the state. If the state considers it appropriate, it may adopt suitable amendments, but the Court may resist any temptation – even on religious grounds – to interfere with the state's legislative autonomy for an alternative course of enactment. Some cases dealing with the laws enacted during British Raj have already been mentioned above. Some cases from the domain of family law highlighting the process of ushering back-dated Islamic legitimacy of the FSC to originally British colonial legislation will be illustrated.

A suit for the restitution of conjugal rights[79] and the procedure for the enforcement of its decree[80] against an erring spouse were the legal artefacts of the British colonial era.[81] They both were challenged in different petitions

[77] Stephen Philip Cohen, *The Idea of Pakistan* (Brookings Institution Press 2004) 166.
[78] Tentative statistical analysis of the judgments of the FSC shows that more than 70% petitions were dismissed.
[79] *Nadeem Siddique v Islamic Republic of Pakistan* PLD 2016 FSC 01.
[80] Ibid 04.
[81] Shahbaz Ahmad Cheema, 'Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for its Abolition' (2018) 5 (1) *LUMS Law Journal* 1-18; Shahbaz Ahmad Cheema,

before the FSC. As to the first issue, the Court did not find anything in the Quran and Sunnah to be incompatible with the suit. For the decree enforcement procedure for a restitution of conjugal rights suit, the court observed that judicial decrees are held with great reverence in Islamic law and any procedure not specifically prohibited by the primary sources could be devised for their implementation; otherwise, the aura and sanctity of the judicial system would be compromised and tarnished.

Another case dealing with a statute enacted during the colonial era was *Ambreen Tariq Awan v Federation of Pakistan.*[82] In this case, some important provisions of the Guardian and Wards Act, 1890, dealing with the qualification and appointment of guardians, were challenged. The petitioner questioned the principle of the 'welfare of the minor' from an Islamic perspective. The petition was dismissed by the FSC. The Court observed that persons in authority (legislature/judges/executive) are responsible for the appointment or termination of guardianship of a person – a term which includes minors and disabled people – and property in light of Islamic principles of justice, *Ihsan*, and for warding off harmful acts, evil deeds, oppressive conduct and for the actualisation of welfare-related precepts as laid down in the Quran and the Sunnah.

Similarly, the Majority Act 1875 was introduced by the British colonial government, which laid down specific age limits for minority and majority. In *Muhammad Fayyaz v Islamic Republic of Pakistan*,[83] it was questioned for alleged repugnancy to Islamic injunctions. For substantiating their perspective, the petitioners relied on opinions of certain Muslim jurists who identified some qualities of a physical nature and puberty as a criterion for majority and that an age limit was generally relied upon in the absence of such physical signs. The court noted that though it keeps the opinions of jurists in high esteem, it could not declare any law as repugnant to Islamic injunctions exclusively on juristic opinions: it has to ascertain Islamic validity from the Quran and the Sunnah. It further observed that no one could be treated as a major on the basis of some physical symptoms solely until other

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'Islamisation of Restitution of Conjugal Rights by Federal Shariat Court of Pakistan: A Critique' (2019) 58 (4) *Islamic Studies* 535-550.

[82] 2013 MLD 1885.

[83] PLD 2007 FSC 01.

aspects, e.g., mental, emotional and psychological, do not confirm the same. Furthermore, the fixation of a specific age has its own merits: this criterion may conveniently be followed during litigations and the parties are relieved from complexities of presenting evidence based on physical characteristics and puberty.

The FSC as a Complementary Institution of the Parliament

Since its independence, Pakistan has been struggling to carve out an equilibrium between its religious identity and desire for establishing a viable democratic setup in the country. The religious identity of Pakistan has deep roots in its independence movement that was inspired by the 'two nation theory'[84] enthusiastically put forward and brought into service by the movement leaders for bringing the Muslim populace of the Indian Subcontinent behind the cause of an independent homeland for Indian Muslims. This religiously tuned political movement led to the creation of Pakistan and sowed the seeds for an ever-evolving relationship between religion and state in the future. After Pakistan's emergence on the world map, the constitution-making process encountered one of the most debated issues as to what role Islam should play in the nascent polity of Pakistan.[85] The first constitutionally sanctified document, the Objectives Resolution, had multiple implications for the Islamisation of laws as well as for the democratisation of the Pakistani state, and was adopted by the Constituent Assembly in 1949. The debate over its real space within the constitutional setup and its repercussions on the Islamisation of laws continuously occupied the political narrative for more than four decades.[86]

The successive constitutions of 1956, 1962 and 1973 of the country reveal the same tensions as to how the country could be characterized with democratic stability on the one hand, while correspondingly fulfilling the Islamic impulse of the populace on the other. For attaining equilibrium among

[84] K. K. Aziz, *The Making of Pakistan: A Study in Nationalism* (Chatto & Windus 1967) 163-95. See also Venkat Dhulipala, *Creating a New Medina: State Power, Islam and the Quest for Pakistan in Late Colonial Northern India* (Cambridge University Press 2015).

[85] Rizwan Malik 'The Process of Constitutional Making in Pakistan 1947-1956' (2001) 22 (1) *Pakistan Journal of History and Culture* 57-80.

[86] *Hakim Khan v Government of Pakistan* PLD 1992 SC 595; *Syed Sami Raza*, 'Contested Space of the Objectives Resolution in the Constitutional Order of Pakistan' (2017) 17(2) *IPRI Journal* pp 01-19.

different factions of the society on this, some experiments had been conducted in various constitutions by establishing advisory bodies for the Islamisation of laws while confiding exclusive legislative authority to the Parliament. Such experiments, however, could not preclude the political calls for the Islamisation of laws, as well as calls by Islamists to relieve the Parliament from its constitutional obligation to carry out this legislative Islamisation. Moreover, considering the legislative activity was the exclusive domain of the Parliament before establishment of the FSC, the political space was proliferated with slogans of the Islamisation of laws.

After the engrafting of the FSC into the constitutional structure, the legislative activity – at least, for declaring the laws as repugnant and non-repugnant to Islamic laws – is shared by this judicial organ, exonerating the Parliament from exclusive constitutional responsibility of legislative Islamisation, and opening another avenue for the same purpose to the public. Citizens can file petitions to the FSC and present their arguments themselves in an open court hearing. The judges of the Court ask them to satisfy their judicial conscience as to the incompatibility of laws with Islamic injunctions. In such an open and accessible environment, when petitioners are unable to successfully carry their arguments forward, they at least leave the Court with the satisfaction of having a proper opportunity of a judicial hearing by a bench composed of competent and learned scholars and judges. This process, though not always culminating in the acceptance of the petitioners' arguments, at least helps maintain this class of enthusiastic petitioners within the constitutional polity.

The ingenuity of the FSC's process lies in the openness and accessibility that the Court provides for common people to debate the Islamic authenticity of laws. The accessibility of the Court creates far-reaching consequences for the Islamisation impulse of Islamists. If they do not bring their arguments before the court, it would imply that they are merely employing Islam as a political tool without any well-founded desire for its legal actualisation. Consequently, the burden of Islamising laws does not remain on the state machinery alone; rather, it is shifted on Islamists defusing their 'Islamisation rhetoric' as well. Furthermore, if Islamists bring petitions to the court, but fail to substantiate their arguments as to cogency and soundness, it would similarly leave them with their political slogans punctured. If the FSC is appreciated from this perspective, it appears to be an organ not for undermining the Parliament's legislative autonomy, but rather buttressing the same in religiously couched phraseology and vocabulary.

Conclusion

Prior to the FSC, only advisory jurisdiction and consultative domain was assigned to non-elected institutions relating to Islamisation in the constitutional structure of Pakistan, e.g. the Council of Islamic Ideology. Hence, its establishment marked a break from the past. The FSC is invested with the justiciability on the basis of Islamic injunctions that rivals the legislative power of the Parliament as an alternative and more accessible forum for the conformity of legislation with Islam. At the same time, the mere establishment of the FSC may be treated as an expression of a monopoly by the state over the process of legislative Islamisation and a resolve that this process can only be carried out within the constitutional framework under the auspicious ambit of the state machinery. In any case, the FSC's role for the polity of Pakistan is a significantly contested subject and will remain so for years to come; this contestation makes it necessary to explore various aspects of its working and their implications.

Bearing this in mind, the paper has highlighted three major contributions of the FSC by conducting a qualitative analytical study of the non-repugnancy decisions. Firstly, it lays down the legislative boundaries of the state from an Islamic perspective. The decisions of the court in this regard possess scattered traces of a theory of legislative and administrative competence of an Islamic state in the modern era. It is not argued that at present, this theory has assumed comprehensiveness in itself, but rather that it is evolving progressively and its salient features are found in the juridical discussions of the courts. Secondly, the non-repugnancy decisions have implications for the laws enacted in the colonial era and their continued applicability in the country. They are stamped with Islamic authenticity by the FSC when it does not find any contradictory dictate in the primary sources, i.e. the Qur'an and Sunnah. Finally, the non-repugnancy decisions adversely impact the political sloganeering for legislative Islamisation by problematising the authenticity of such calls and strengthening the statehood of Pakistan.

The debate over the legislative autonomy of an Islamic state in the modern era is not likely to dwindle considering the FSC's contribution in this regard. Nevertheless, the non-repugnancy decisions spanning over four decades are expected to add some valuable insights to the debate. Barring the guidelines provided in the primary sources, which are few as compared to the overall legislative activity of the modern state, the legislative body within an Islamic polity has a vast domain of autonomy and discretion. This legislative

autonomy has frequently been debated, emphasised and earmarked by the FSC. Furthermore, the very existence of the FSC has kept the contested debate of the Islamisation of laws within the constitutional arrangement by making an alternative forum available to Islamic enthusiasts for the vindication of their religious zeal and passion. Through the FSC, it is ultimately the state of Pakistan that exercises its exclusivity over the Islamisation process.

The way the FSC has tailored and anchored its jurisdictional approach over the years has resulted in a refreshing effect on contemporary discourse on Islamic law in Pakistan. Its exclusive reliance on the primary sources and burdening the petitioners to come forward with arguments directly substantiated from the primary sources not only brings these sources into focus, but also helps generate a sense legal authority and authenticity, while arguments that rest on the remainder are a matter of personal opinion.