

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥād perspectives between the federal shariat court (FSC) and islamic jurists

Dilawar Khan

PhD Scholar Department of Sharī'ah, Faculty of Sharī'ah & Law,
International Islāmic University Islāmabad Pākistān:

lalaekashmiri4@gmail.com

Dr. Hafiz Muhammad Siddique

Assistant professor at Faculty of Sharī'ah & Law, International Islāmic
University Islāmabad Pākistān:

hafiz.siddique@iiu.edu.pk

Abstract:

This study conducts a thorough comparative analysis of collective Ijtihād perspectives between the Federal Shariat Court (FSC) and Islamic jurists in Pakistan. Through meticulous analysis, it examines the nature and methodology of collective Ijtihād practiced by both the FSC and traditional Islamic jurists, highlighting their distinctive approaches. The research explores how the FSC's approach to collective Ijtihād differs from historical practices observed by Islamic jurists, providing insights into the evolving dynamics of Islamic jurisprudence in Pakistan. By elucidating these differences, it offers valuable insights into the diverse methodologies employed in legal interpretation within the country. Furthermore, the study delves into the broader implications of the FSC's authoritative status, illustrating how its decisions and interpretations influence legal discourse and contribute to judicial synchronization in Pakistan. It emphasizes the significant role of the FSC in guiding legal interpretation and fostering coherence within the country's legal framework, contrasting it with the practices of traditional Islamic jurists. In essence, this research provides a nuanced understanding of the comparative analysis of collective Ijtihād perspectives between the FSC and Islamic jurists, shedding light on their respective impacts on Pakistan's legal landscape and implications for legal practice and interpretation in the country.

Keywords: Comparative Analysis, Ijtihād, Federal Sharī'at Court, Pākistān, Judicial Synchronization, Legal Interpretation, Authoritative Status, Collective Ijtihād, Pākistān's Legal Landscape, Jurisprudence, Islāmic law.

1.1 Introduction

Legal interpretation, particularly within the realm of Islāmic jurisprudence, plays a vital role in shaping the legal landscape of nations. In Pākistān, the FSC holds significant authority in interpreting Islāmic law and guiding the country's judicial framework. This article embarks on a comprehensive investigation aimed at comparing the legal interpretation practices of the FSC with those of traditional Islāmic jurists, focusing specifically on their approaches to collective Ijtihād within Pākistān's intricate judicial system. Through meticulous analysis, this study seeks to explore the authoritative status of collective Ijtihād within Pākistān's legal system, with an emphasis on the role of the FSC. It aims to unravel the nature, methodology, and impact of collective Ijtihād as practiced by the FSC, shedding light on its implications for the legislative process and legal interpretation in the country.

Furthermore, this exploration extends beyond mere examination to elucidate the distinctive approaches of the FSC and traditional Islāmic jurists towards collective Ijtihād. By doing so, it aims to provide valuable insights into the evolving dynamics of Islāmic jurisprudence in Pākistān, navigating through the complexities of legal interpretation and judicial synchronization.

In essence, this study endeavors to offer a nuanced understanding of the comparative analysis of collective Ijtihād perspectives between the FSC and traditional Islāmic jurists, contributing significantly to scholarly discourse on Islāmic jurisprudence and legal interpretation. It aims to foster a deeper understanding of the complexities inherent within Pākistān's legal framework and the interplay between collective Ijtihād, the FSC, and Pākistān's legal landscape.

1.2 Research Methodology

In line with the investigation into "Harmonizing Pākistān's Legal Landscape: Comparative Analysis of Collective Ijtihād Perspectives between the FSC and Islāmic jurists," this study adopts a qualitative research approach. It aims to examine the jurisprudential methodology employed by the FSC regarding collective Ijtihād in interpreting the Qur'ān and Sunnah.

The data collection process will be meticulous and systematic, drawing from both primary and secondary sources. Primary sources will include FSC verdicts and legislative acts, while secondary sources will encompass historical texts, scholarly articles, books on the FSC, and writings by contemporary jurists.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtihad perspectives between the federal shariat court (FSC) and islamic jurists

Analytical techniques will involve thematic, comparative, and historical contextualization to uncover underlying patterns, themes, and principles guiding the FSC's approach to collective Ijtihād. Through synthesizing findings and applying rigorous analytical frameworks, this research aims to provide a comprehensive understanding of the FSC's methodology. It also aims to make a significant contribution to scholarly discourse on Islāmic jurisprudence and Ijtihād within contemporary legal contexts.

1.1 The Genesis of the FSC of Pākistān

Pākistān's journey as an Islāmic ideological state began in 1947 under the Indian Independence Act¹. The 'Objectives Resolution,' adopted by Pākistān's first Constituent Assembly on March 12, 1949, embodied Islāmic ideology and shaped constitutional development. It persisted through successive constitutions from 1956 to 1973, evolving notably by 1985².

The 1973 Constitution of Pākistān explicitly proclaimed the country as the Islāmic Republic, reflecting a longstanding commitment to enforce Islāmic law rooted in the teachings of the Holy Qur'ān and the Sunnāh³, empowering Muslims to shape their lives according to Islāmic principles⁴. Article 227 of the 1973 Constitution mandates aligning existing laws with Islāmic injunctions, and prohibits enacting laws contradicting these injunctions.”⁵

The Constitution mandates aligning existing laws with Islāmic injunctions, a responsibility entrusted to the Council of Islāmic Ideology (CII)⁶. In 1979, the introduction of Sharī'at Benches in HCs marked a significant stride in Islāmic jurisprudence, reviewing laws for conformity with Islāmic principles. However, the pace of Islāmization was slow, prompting the establishment of the FSC in 1980. Transitioning from Sharī'at Benches, the FSC was fortified by robust constitutional provisions to Islāmize the

¹ Hamid Khan, *Constitutional And Political History Of Pākistān* (Karachi: Oxford University Press, 2017), 50.

² Zulfikar Khalid Maluka, *The Myth of Constitutionalism In Pākistān* (Karachi: Oxford University Press, 1995), 119.

³ Article 1 of the Constitution of IRP, 1973.

⁴ Article 2 of the Constitution of IRP, 1973.

⁵ Article 227 of the Constitution of IRP, 1973.

⁶ Article 228, 229 & 230 of the Constitution of IRP, 1973.

country's laws⁷. The FSC's establishment was pivotal, reaffirming Pākistān's commitment to Islāmīc governance and the integration of Islāmīc principles into its legal system.

1.2 Comparing the Authoritative Status of Ijtihād between the FSC and Islāmīc jurists

In the context of Pākistān's legal landscape, and through an analytical comparison of collective Ijtihād perspectives between the FSC and Islāmīc jurists, the FSC emphasizes the importance of collective Ijtihād while discouraging blind adherence to taqlīd. Before 1979, the clause concerning Islāmīc repugnancy was nonjusticiable, with the Council of Islāmīc Ideology (CII) solely offering recommendations to the legislature on the alignment of statutes with Islāmīc principles.

In 1979, the Sharī'at Benches were established in the High Courts to Islāmīze Pākistān's laws. Within a year, these benches were replaced by the FSC at the federal level, tasked with the Islāmīzation of laws.

During Zia-ul-Haque's era, the establishment of the FSC's jurisdiction in Pākistān was carefully crafted for legitimacy, excluding the review of the Constitution for conformity with Islāmīc injunctions, despite the focus on Islāmīzing laws.

The authority of the FSC is derived from both the IRP's Constitution of 1973 and the Sharī'at Act of 1991, providing a solid legal basis for the court's role in interpreting Islāmīc principles and aligning them with the country's legal framework.

The 18th Amendment to the Constitution made significant changes to our constitutional framework. Simultaneously, the FSC upholds the basic structure doctrine to align Islāmīc principles with Pākistān's laws. In the landmark case *DBA, Rawalpindi v. FoP*, the SCP reformed certain processes for the FSC⁸: *"If a law violates the Constitution's structure, it is the SCP's unequivocal statement, keeping its authority to amend the IRP's Constitution. Interpreting the Constitution is its own realm. The FSC's role is limited to interpreting laws, not the IRP's Constitution. Therefore, within its scope, the FSC can nullify laws conflicting with Islāmīc principles"*⁹

⁷ President's Order No. 3 of 1979. 7th February 1979. Gazette of Pākistān, Extraordinary, Part I, 7th February 1979.

⁸ Article 175-A of the Constitution.

⁹ *DBA, Rawalpindi v. FoP*, PLD 2015 SC 401.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtihād perspectives between the federal shariat court (FSC) and islamic jurists

In exploring the legal landscape of Pākistān, it's imperative to acknowledge the interplay between collective Ijtihād perspectives of the FSC and Islāmic jurists. Alongside laws derived from Islāmic principles, the legal system encompasses a diverse range of elements, including constitutional law, civil and criminal laws, customary practices, and international laws governing human rights and environmental concerns¹⁰. In the legal framework of Pākistān, the law is built upon a foundation that incorporates both common law principles and Islāmic injunctions. Even after gaining independence from non-Muslim rule, Pākistān's legal system continues to retain elements of the Anglo-Hindu regime in its structural framework¹¹. In Pākistān's legal landscape, while Sharī'ah law has been established as a fundamental source of legislation, elements of the Anglo-Hindu legal tradition persist, particularly in commercial law. Despite this dominance, Sharī'ah law holds significant influence, especially in matters concerning Muslim personal affairs. Moreover, its impact extends to contemporary domains such as penal and taxation laws, reflecting the intricate balance between Islāmic principles and historical legal frameworks¹². Islāmic injunctions form the bedrock of Sharī'ah law, with its foundation rooted in moral and religious principles. There is little dispute that Sharī'ah law was primarily shaped by these moral and religious considerations¹³. It is noteworthy to observe that the collective ijtihād activity of the FSC embodies a modern legal construct for various reasons:

1. The ijtihād performed by the FSC is not in the classical sense, as historical ijtihād was traditionally conducted by independent, civilian, and individual Islāmic scholars. In the context of the FSC, ijtihāds are not individual outcomes of Islāmic jurists but rather the result of collaborative efforts

¹⁰ 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.

¹¹ Anglo Hindu regulations bring up to laws legislated in the course of the British régime in India before 1947.

¹² Supra note, M Munir, *Precedent in Pākistānī Law* (Karachi: OUP 2014), 452.

¹³ Rehman, J. 2007. "The Sharī'ah, 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.

between both Islāmic scholars and judges (referred to as collective ijtihād or ijtihād jamā'ī).

2. These mujtahids are employed by the state.
3. Within Sharī'ah, ijtihādic authority was not attributed to the qādī (judge).

In Pākistān's legal landscape, if the state machinery fails to enact amendments to laws identified as repugnant by the FSC's collective ijtihād within a specified timeframe, those laws or specific provisions thereof, deemed repugnant by the FSC, lose their effectiveness as of the date of the FSC's decision, as officially reported by the FSC in 2009. This aspect reflects the ongoing efforts to harmonize the legal framework by aligning it with collective ijtihād perspectives between the FSC and Muslim jurists¹⁴. The Federal Shariat Court's (FSC) rulings carry significant legal weight, distinct from mere religious opinions or fatwās. They are legally binding and mandate compliance from relevant entities and institutions. When the FSC identifies a law or provision that contradicts Islāmic principles, it initiates a process mandating the government to amend the law. Failure to do so within a specified timeframe renders the law invalid.

This process underscores the FSC's authority in ensuring alignment between Pākistān's laws and Islāmic principles. The directives issued by the FSC play a pivotal role in shaping the legal landscape and enforcing Islāmic principles within the country's framework. Unlike non-binding fatwās, the FSC's decisions possess legal enforceability, making them indispensable in upholding Islāmic principles in Pākistān¹⁵.

In Pākistān, there exists a debate among legal scholars and judges regarding the extent of the Federal Shariat Court's (FSC) authority within the country's legal system. Some argue for limiting the FSC's power, contending that its role should be confined to assessing laws for their compatibility with Islāmic principles, without the authority to challenge the Constitution itself. This perspective emphasizes the importance of maintaining the supremacy of the Constitution in Pākistān's legal framework.

Conversely, others advocate for a broader role for the FSC, highlighting its mandate to ensure that Pākistān's laws align with Islāmic principles. They argue that the FSC's decisions carry legal weight and

¹⁴ FSC, *FSC: Annual Report* (Islāmabad: FSC, 2009), 3.

¹⁵ *Ibid*, 3, 4.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijthihad perspectives between the federal shariat court (FSC) and islamic jurists

enforceability, making them crucial in upholding Islāmic principles within the country's legal framework.

These differing viewpoints underscore the ongoing debate surrounding the interpretation and application of constitutional provisions related to the FSC's authority. Any proposed changes to limit or expand the FSC's powers would require careful consideration and possibly involve constitutional amendments.

In the case of *BZ Kaikaus v. President of Pākistān*¹⁶, the SCP issued a ruling indicating the status of the FSC. While in principle, the FSC is recognized as a "Superior Sharī'ah Court" in the Islāmic Republic of Pākistān (IRP), in practice, it operates within the hierarchical structure of the judiciary, with appellate oversight from the Shariat Appellate Bench (SAB). Rather than empowering the FSC to review the entire body of Sharia-oriented legislation, a specific constitutional amendment in the form of Article 203 B was introduced. This amendment ensures that the FSC does not have the authority to review even the amended Constitution of the IRP or the "Muslim personal law."¹⁷

The IRP Constitution provides that the FSC's decisions, exercising its mandatory jurisdiction as defined in Chapter 3A, "*shall be binding on a HC and on all the courts subordinate to any HC.*"¹⁸ The theme of harmonizing Pākistān's legal landscape with Islāmic principles is reflected in the constitutional provisions governing the FSC and the SAB. According to Article 203GG, decisions rendered by the FSC carry binding authority over the High Courts (HCs) within its jurisdiction. Article 203G further delineates that other courts, including the HCs and the SCP, cannot exercise jurisdiction over matters exclusively within the purview of the FSC. Appeals against FSC decisions are directed solely to the SAB.

The composition of the SAB, comprising three Muslim judges from the SCP and two Ulema appointed by the President, underscores the significance of Islāmic legal expertise within the bench. These Ulema, renowned for their knowledge of Islāmic law, contribute valuable insights during SAB deliberations, ensuring a comprehensive examination of cases from both legal and Islāmic perspectives. This collaboration between

¹⁶ BZ Kaikaus v. President of Pākistān, PLD 1980 SC 160.

¹⁷ Tanzeel ur Rehman, *The Objectives Resolution and Its Impact on Pākistān's Constitution and the Law* (Karachi: Royal Press, 1996), 67-68.

¹⁸ Article 203GG of the IRP Constitution, 1973.

Muslim judges and Ulema reflects Pākistān's commitment to integrating Islāmic legal principles into its legal framework.

The inclusion of Ulema in the SAB exemplifies Pākistān's unique approach to jurisprudence, highlighting the country's endeavor to harmonize legal decisions with both constitutional mandates and Islāmic principles¹⁹. Numerous essential considerations demand exploration concerning the role and jurisdiction of the Federal Shariat Court within Pākistān's legal landscape, particularly in the context of harmonizing Islāmic legal principles with contemporary legal practices:

1. The FSC's decisions have a binding effect on the HCs and all subordinate courts within their jurisdictions. This ensures consistency and uniformity in legal judgments throughout the judicial system, promoting the implementation of Islāmic Shariah law.
2. Despite its limited scope, the FSC's jurisdiction holds significant importance compared to the HCs or the SCP. It focuses specifically on issues related to the enactment of Shariah law within Pākistān's legal framework, contributing to the vision of an Islāmic legal system.
3. While the FSC's jurisdiction is exclusive, it holds a specialized role aimed at overseeing the process of Islāmization within the legal system. Unlike the HCs and other subordinate courts with their own areas of jurisdiction, the FSC has the sole authority to address and decide matters within its defined purview.

It is crucial to clarify that the FSC does not establish a separate jurisdiction but rather serves to facilitate the integration of Islāmic principles into Pākistān's legal system. Its primary function is to oversee and guide the process of harmonizing Islāmic legal principles with the existing legal framework, rather than solely adjudicating disputes based on Shariah law. This aspect is significant in the context of harmonizing Pākistān's legal landscape, as it involves a comparative analysis of collective Ijtihād perspectives between the FSC and Muslim jurists, contributing to the ongoing discourse on legal harmonization within the country²⁰.

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

¹⁹ Article 203F (3)(b) of the IRP Constitution, 1973.

²⁰ Masud, et al., *Dispensing Justice in Islām*, 42.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥād perspectives between the federal shariat court (FSC) and islamic jurists

gains significance particularly in light of the FSC's rulings in the case of *Allāh Rakha v. FoP*²¹, as well as *Aurangzaib v. Massan*²², are noteworthy. The FSC and the SCP interact within Pākistān's legal system. While the FSC interprets and applies Islāmic law within its jurisdiction, its decisions do not automatically bind the SCP, which retains authority over various legal matters.

The SCP's jurisdiction encompasses appeals, civil and constitutional issues, and criminal cases. Although the FSC's decisions hold influence, they do not establish binding precedents for the SCP. However, the SCP may find FSC decisions persuasive and consider their reasoning in its own judgments.

The FSC's rulings contribute to legal discourse, especially in Islāmic law matters, potentially influencing the SCP's approach. Despite this influence, the SCP maintains autonomy to assess and decide legal matters, including those involving Islāmic law, independently.

Whereas in *Zaheer-ud-Din v. the GoP*²³, 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*"²⁴. 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 pivotal. As the specialized appellate body designated to hear appeals from the FSC, the SAB serves as a link between the FSC and the SCP²⁵. The SCP reviews and assesses decisions made by the FSC to ensure their alignment with Islāmic law principles. If an FSC decision remains unchallenged before the SAB, or if

²¹ *Allāh Rakha v. FoP*, PLD 2000 FSC 1, 29.

²² *Aurangzaib v. Massan*, 1993 CLC 1020 at 1023 A.

²³ *Zaheer-ud-Din v. GoP*, 1993 SCMR 1718.

²⁴ *Ibid* 1756.

²⁵ Moeen Cheema, *Courting Constitutionalism: The Politics of Public Law and Judicial Review in Pākistān* (India: Cambridge University Press, 2021), 1972.

it is challenged but upheld by the SAB, the SCP recognizes it as legally binding.

This underscores the hierarchical structure and interplay between the FSC, SAB, and SCP, emphasizing the significance of the FSC's interpretation and implementation of Islāmic law when endorsed by the specialized appellate body.

Typically, if the government disputes an FSC decision declaring legislation inconsistent with Islāmic principles, it appeals to the SAB. The SAB thoroughly examines FSC decisions regarding Islāmic law, serving as a crucial forum for determining their validity and applicability.

It's important to note that the SCP does not have jurisdiction over matters related to interpreting and implementing Islāmic law. Its focus lies on constitutional issues, civil and criminal cases, and appeals from lower courts. As such, cases involving FSC decisions on legislation's compatibility with Islāmic principles usually do not reach the SCP.

In practical terms, it's unlikely for an FSC decision on legislation's inconsistency with Islāmic principles to remain unchallenged in the SAB. Due to the SCP's limited jurisdiction in Islāmic law matters, such cases typically do not proceed to the SCP for adjudication.

In the case of *Hafiz Abdul Waheed v. Mrs. Asma Jehanghir*²⁶, a decision was issued by the Lahore High Court (LHC), stating that the requirement for the consent of the guardian or parents is not obligatory for the validity of a nikah. This decision by the LHC was based on the ruling of the FSC in the case of *M Imtiaz v. the GoP*²⁷. In a minority opinion, Justice Ihsan-ul-Haque stated that the LHC is not required to adhere to the FSC's decision, which ruled that the consent of the guardian is not necessary for the validity of a nikah. Justice Ihsan-ul-Haque argued that since the FSC's decision was made in appellate jurisdiction, the LHC is not obligated to follow it.

However, the majority of the HCs rejected this argument, asserting that the FSC's decisions are binding on the HCs under Article 203GG, which pertains to the appellate FSC's jurisdiction in Pākistān.

There seems to be a divergence of opinion among judges regarding the binding nature of the FSC's decisions on the HCs. While most HCs uphold the view that the FSC's decisions are binding, even in appellate

²⁶ Supra FSC's case of *Hafiz Abdul Waheed v. Mrs. Asma Jehanghir*.

²⁷ *M Imtiaz v. the GoP*, PLD 1981 FSC 308.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥad perspectives between the federal shariat court (FSC) and islamic jurists

jurisdiction, Justice Ihsan-ul-Haque of the LHC holds the position that the HCs are not bound by such decisions.

It's essential to recognize that the specific details and implications of the case may necessitate further analysis and research beyond the provided information.

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.

Likewise, the SCP endorsed this view when deciding the *Hafiz Abdul Waheed v. Mrs. Asma Jahangir* case. The SCP upheld the LHC's obligation to follow FSC's decisions, regardless of jurisdiction. This confirms lower courts' duty to enforce FSC rulings as legal precedent²⁸, in the appeal against the FSC's case of *Hafiz Abdul Waheed v. Mrs. Asma Jahangir*, 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 Islāmīc 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 structure²⁹.

The FSC has issued rulings in cases such as *M Imtiaz v. the GoP*, *Arif Hussain and Mst. Azra Parveen v. the GoP*³⁰, and *M Ramazan v. the GoP*³¹, wherein it ruled that the consent of the wali (guardian) is not

²⁸ Supra SAB's case of *Hafiz Abdul Waheed v. Mrs. Asma Jahangir*.

²⁹ Ibid, 230 and 233F.

³⁰ *Arif Hussain and Mst. Azra Parveen v. GoP*, PLD 1982 FSC 42.

³¹ *Muhammad Ramazan v. the GoP*, PLD 1984 FSC 93.

essential for the validity of nikah. 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*³². In its verdict, the SCP upheld the FSC's stance that the 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.

The FSC and the SCP's rulings shape Islāmic marriage laws in Pākistān, clarifying that a nikah does not need wali consent, giving more autonomy to those marrying under Islāmic principles. In its inaugural ruling, namely, *M Riaz v. FoP*³³, the FSC encountered the query regarding its obligation to abide by the preceding judgement of the Sharī'at Bench of the PHC³⁴ 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 is the FSC's bench, an HC's bench³⁵ or the SCP's Bench³⁶, 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,

³² *Mauj Ali v. Syed Safdar Hussain Shah*, 1970 SCMR 437.

³³ *Supra M Riaz v. FoP*, PLD 1980 FSC 1.

³⁴ At that time, there were four such benches in the four HCs of Pākistān.

³⁵ *Multiline Associates v. Ardeshtir Cowasjee*, PLD 1995 SC 423; 1995 SCMR 362 = *Ch. M Saleem v. Fazal Ahmad*, 1997 SCMR 314 = *APNS v. FoP*, PLD 2004 SC 600.

³⁶ *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.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtihād perspectives between the federal shariat court (FSC) and islamic jurists

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*³⁷, 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.

1.3 The FSC's Innovative Approach to Balancing Religious Identity and Democratic Aspirations through Collective Ijtihād

Pākistān's journey to balance religious identity and democratic aspirations has been complex since independence. Rooted in the struggle for independence, Pākistān's religious identity is shaped by the "two nation theory," which advocated separate homelands for Muslims and Hindus. This identity is integral to Pākistān's political, constitutional, and societal fabric. While envisioning an Islāmic state, Pākistān also aims for democracy, which demands accommodation of diverse perspectives. Balancing religious identity with democratic principles requires thoughtful navigation and ongoing negotiation³⁸.

Pākistān has seen numerous attempts to reconcile its religious identity with democratic aspirations. Governments, leaders, and institutions have grappled with interpreting and implementing Islāmic principles in a democratic context. Religion's role in education, governance, lawmaking, and social affairs remains a topic of debate. Some advocate strict adherence to Islāmic law, while others push for inclusivity. Balancing religious ideals

³⁷ *Mst. Nek Bakht v. GoP*, PLD 1986 FSC 174, 177.

³⁸ Muhammad Izfal Mehmood, "Fatwa in Islāmic law, institutional comparison of fatwa in Malaysia and Pākistān: The relevance of Malaysian fatwa model for legal system of Pākistān," *Arts and Social Sciences Journal* 6, no. 3 (2015): 1-3

with democratic principles is challenging but ongoing. Pākistān's journey towards equilibrium involves continuous introspection, dialogue, and commitment to citizens' rights and well-being. The struggle reflects the complex nature of Pākistān's nationhood, shaped by the "two nation theory." Balancing religious identity with democracy requires thoughtful deliberation and inclusivity. It's a testament to Pākistān's evolving democratic experiment and its pursuit of harmonious coexistence³⁹. During Pākistān's journey to independence, movement leaders passionately united the Muslim population of the Indian Subcontinent, resulting in the creation of Pākistān and altering the relationship between religion and the state. Post-independence, constitution-making became a focal point of debate, particularly regarding Islām's role. Proponents of greater Islāmic influence argued for an Islāmic state, while advocates of secular governance emphasized equality and individual rights. The 1949 Objectives Resolution affirmed Islām's role in legislation while safeguarding minority rights, shaping Pākistān's constitutional evolution. Ongoing debates continue to balance Islāmic principles with democratic ideals, shaping laws, education, and governance and reflecting the enduring interplay between religion and the state in Pākistān's legal and political landscape⁴⁰.

The Constituent Assembly's endorsement of the Objectives Resolution in 1949 stands as a pivotal moment in Pākistān's constitutional history. This resolution significantly shaped the incorporation of Islāmic principles into laws and the advancement of democracy within the Pākistāni state, as underscored by the Supreme Court of Pākistān in the petition *Hakim Khan v. GoP*⁴¹. The 1949 Objectives Resolution was a pivotal moment in Pākistān's constitutional journey. It emphasized sovereignty to Allah and aimed to align laws with Islāmic teachings while safeguarding democracy, constitutionalism, and minority rights. The Supreme Court of Pākistān recognized its significance, shaping legal and constitutional dynamics. Debates ensued over its constitutional status and implications for Islāmization, fueling political discourse for over four decades. These discussions reflected diverse perspectives on Islām's role in governance, shaping Pākistān's political narrative and policy decisions. In summary, the Objectives Resolution profoundly influenced Pākistān's

³⁹ Aziz KK, *The Making of Pākistān: A Study in Nationalism* (Chatto & Windus 1967) 163-95.

⁴⁰ Malik R, "The Process of Constitutional Making in Pākistān 1947-1956" (2001) 22 (1) *Pākistān Journal of History and Culture* 57-80.

⁴¹ *Hakim Khan v. GoP*, PLD 1992 SC 595.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥād perspectives between the federal shariat court (FSC) and islamic jurists

political landscape, illustrating the intricate interplay between religion, law, and governance⁴².

Since 1956, Pākistān has seen several constitutions reflecting struggles between democracy and Islāmīc beliefs. Different approaches were attempted to balance these tensions, particularly in Islāmizing laws. Before the FSC, Parliament held all power, but the FSC's introduction changed this dynamic. It allowed scrutiny of laws against Islāmīc principles, opening the process to public input. This engagement empowered citizens and reduced the use of religion for political purposes. The FSC's consideration of religion in lawmaking, along with periodic updates and a panel of up to eight judges appointed by the President, has profoundly shaped discussions about Islāmization in Pākistān⁴³.

Until 1980, Pākistān's highest judiciary believed that making laws Islāmīc and interpreting them through collective ijtiḥād was the government's responsibility, not the courts'. This view was expressed by the SCP in *B Z Kaikaus v. President of Pākistān*, that held that “*Islāmization is not a judicial function and it is a governmental one*”⁴⁴. In the 1980s, Pākistān's judiciary had a specific approach, but in the 1990s, Islāmīc principles began to play a greater role. Public Interest Litigation (PIL) reflected Pākistān's Islāmīc judicial goals, with Sharia being referenced more frequently when interpreting fundamental rights. The FSC was established in 1980 through a presidential order, later endorsed as a constitutional amendment⁴⁵. The FSC is recognized internationally as a unique court in Muslim history, with authority to review nearly the entire legal system in accordance with Islāmīc principles, as affirmed by the SCP in the verdict of *Mst. Kaneez Fatima v. Wali Muhammad*⁴⁶. Some Pākistāni activists and legal professionals criticize that the FSC's existence hinders justice procedures by maintaining a parallel legal system⁴⁷.

⁴² Raza SS, “Contested Space of the Objectives Resolution in the Constitutional Order of Pākistān” (2017) 17(2) *IPRI Journal* pp 01-19.

⁴³ M Khalid Masud, *Teaching of Islāmīc Law and Shari‘ah: A Critical Evaluation of the Present and Prospects for the Future* 79 (2005).

⁴⁴ *B Z Kaikaus v. President of Pākistān*, PLD 1980 SC 160.

⁴⁵ PLD 1980 Central Statutes 89.

⁴⁶ *Mst. Kaneez Fatima v. Wali Muhammad*, PLD 1993 SC 901.

⁴⁷ Karin Carmit Yefet, “The Constitution and Female-Initiated Divorce in Pākistān: Western Liberalism in Islāmīc Garb.” *Harvard Journal of Law and Gender* 34: 2 (2011), 553–615.

In the 1990s, Sharia-based arguments proliferated in the FSC, SAB, and HCs, but they were not always the primary legal arguments,⁴⁸ they were used to morally justify the court's position as *Hassan Bakhsh Khan v. DC, DG Khan*⁴⁹, *M D Tahir v. Provincial Govt.*⁵⁰, *Mst. Mrs. Anjum Irfan v. LDA*⁵¹, and *Muhammad Shabbeer Ahmed Khan v. FoP*⁵², etc. This dynamic shift toward Islāmization shifted focus from the Executive to the judiciary, implicitly promoting collective Ijtihād. HCs often invoked uncoded principles of Islāmic Sharī'ah Law, interpreting statutory provisions through an Islāmic lens. Notably, HCs showed more enthusiasm for Islām than Sharī'ah Courts. Ulamā serving as judges demonstrated greater flexibility in Islāmic Sharī'ah Law due to their deep understanding of Islām and Sharī'ah⁵³.

1.4 The Methodology of Collective Ijtihād Employed by the FSC

In *M Riaz v. FoP* the following step-by-step methodology (*manhaj*) for Ijtihād has been fixed by the FSC⁵⁴, for deciding cases:

1. First of all, seeking the appropriate verses of the Holy Qur'ān and then the Holy Sunnāh;
2. Ascertaining the intent of Qur'ānic verse with the help of the related the Hazrat Muhammad (ﷺ)'s Sunnāh;
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 Qur'ānic verse, but to grasp the entire essence of the Holy Qur'ān and consider the underlying spirit of the verse(s). While interpreting the Holy Qur'ān, and

⁴⁸ Lau, Martin. *The Role of Islām in the Legal System of Pākistān* (Leiden: Brill, 2006), 18-23.

⁴⁹ *Hassan Bakhsh Khan v. DC, DG Khan*, 1999 CLC 88.

⁵⁰ *M D Tahir v. Provincial Govt.* 1995 CLC 1730.

⁵¹ *Mst. Mrs. Anjum Irfan v. LDA*, PLD 2002 Lahore 555.

⁵² *Muhammad Shabbeer Ahmed Khan v. FoP*, PLD 2001 SC 18.

⁵³ Elisa Giunchi, "Islāmization and Judicial Activism in Pākistān: What is Sharī'ah?," *Oriente Moderno*, 93: 1, (2013), 197.

⁵⁴ *M Riaz v. FoP*, PLD 1980 FSC 1, 15.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtihād perspectives between the federal shariat court (FSC) and islamic jurists

the Sunnāh, 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 Qur'ān. This principle is echoed in cases such as *Mst. Zohra Begum v. Sh. Latif Ahmad Munawar*⁵⁵, and *Mst. Rashida Begum v. Shahab ud Din*⁵⁶, in affirming the entitlement to engage in Ijtihād, the Superior Judiciary of Pākistān has upheld the right to independently interpret the Holy Qur'ān and the Sunnāh, even if such interpretations diverge from established perspectives within Islāmic Sharī'ah 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 Qur'ān, and the Sunnāh, direct evidence that can be cited from the Qur'ān and Sunnāh, but it should not be called direct or indirect evidence and it should be called Ijtihād. And, when the Holy Qur'ān and the Sunnāh are silent, the state government can conduct Ijtihād on the matter. The silence of the Holy Qur'ān, and the Sunnāh does not amount a thing to be forbidden in Sharī'ah or harām.”*⁵⁷

The term “Collective Ijtihād” represents a modern methodology (manhaji) introduced by contemporary Islāmic jurists, specializing in Usūl al-fiqh, in response to contemporary challenges and developments. Although an exact definition of Collective Ijtihād remains absent, many Islāmic jurists in Usūl al-fiqh describe it as the consensus reached among public jurists on a specific issue. During this period, numerous institutions for issuing 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. Overall, in this

⁵⁵ *Mst. Zohra Begum v. Sh. Latif Ahmad Munawar*, PLD 1965 Lahore 695.

⁵⁶ *Mst. Rashida Begum v. Shahab ud Din*, PLD 1960 Lahore 1142.

⁵⁷ *Abdul Majid v. GoP*, PLD 2009 SC 861.

study, an attempt has been made to present collective Ijtihād as a practical method to find out the Sharī'ah opinion of the Islāmic Ummah on various contemporary issues. Predominantly, this type of Ijtihād has been heavily relied upon in the history of Islāmic fiqh and we know that the function of collective Ijtihād has never been abandoned, and this briefly presents the argument for closing the door to Ijtihād.

Therefore, decisions in Pākistānī institutions are not considered binding unless they are binding on them. However, This form of jurisprudence for collective Ijtihād offers greater practicality compared to classical consensus (ijm'ā') and enhances reliability compared to subjective judgement. This collaborative approach via Collective Ijtihād enables diverse answers to various questions, ensuring a well-rounded outcome. However, any potential weaknesses should be addressed through improvements in its application. In the concluding segment of this research, constructive suggestions will be presented to attain productive outcomes from Collective Ijtihād, particularly in terms of addressing contemporary issues based on Sharī'ah principles. In cases within the FSC, the pursuit of collective Ijtihād is uniquely evaluated by the judges based on situational considerations. The FSC emphasizes the importance of turning to Ijtihād and welcomes the reopening of the door to Ijtihād which had been closed previously⁵⁸.

1.5 Exploring Distinctive Grounds: The FSC versus Historical Ijtihād by Islāmic jurists

The FSC in Pākistān differs from the Ijtihād performed by Islāmic 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 Pākistān's constitutional framework, mandated for Islāmic judicial review. Its authority is derived from the constitution, tasked with assessing statute compatibility with Islāmic injunctions. Historical Ijtihād, however, lacked a formal constitutional mandate. The Pākistāni Constitution of 1973 provides the legal framework for the FSC, encompassing its establishment, jurisdiction, composition, and procedural

⁵⁸ 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.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥād perspectives between the federal shariat court (FSC) and islamic jurists

regulations. Key provisions include Article 203, establishing the FSC; Article 203A, delineating its jurisdiction to determine the compatibility of laws with Islāmic injunctions; Article 203B, outlining its composition with Islāmic scholars as judges; and Article 203D, granting the FSC the authority to formulate rules governing its practice and procedure⁵⁹.

2. **Collective Methodology:** The FSC employs collective Ijtihād, involving a panel of judges in legal interpretation and decision-making⁶⁰. This approach ensures a diverse range of perspectives, preventing decisions from being influenced solely by individual jurists. In contrast, historical Ijtihād by Fuqahā was often conducted individually or within specific schools of thought. Moreover, the FSC receives support from its research wing, Juris Consultants, and assistance to lawyers. Additionally, expert opinions on relevant issues are considered, alongside insights from modern scientific advancements⁶¹.
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,

⁵⁹ The IRP's Constitution 1973, Articles 203, 203A, 203B, 203D

⁶⁰ Article 203B of the IRP's Constitution 1973.

⁶¹ The Federal Shariat Court (Procedure) Rules, 1981: Rules enacted by the Federal Shariat Court pursuant to the authority vested in it by Article 203-J of the IRP's Constitution 1973.

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 Islāmic jurists, while influential, did not possess the same direct authority to shape legislation within a legal structure.

The FSC differentiates itself from historical Ijtihād based on specific grounds but draws upon Islāmic legal tradition. FSC methodology reflects constitutional mandate, contemporary context, and collective judge deliberations, ensuring relevance. In Pākistān, FSC exclusively upholds true Islāmic law, shaping legislation. While Muslim Islāmic jurists influence legislation by conveying divine law or deriving legal conclusions, the FSC lacks authority to decide Sharī'at petitions based on juristic opinions⁶².

From a technical standpoint of Ijtihād, it's emphasized that only a qualified jurist (faqih) has the authority. The FSC employs Collective Ijtihād differently from conventional jurists (Islāmic jurists), using interpretation (ta'wīl) or individual reasoning based on specified grounds. Rule 7(f) of the FSC Procedure Rules, 1981, delineates this approach:

1. The court may render a personal decision, guided by the principles of equity, good conscience, and justice⁶³.
2. The directive rulings must not be in contradiction with *the Islāmic Injunctions, as declared in the Holy Qur'ān and the Ahādīth* (صلی اللہ علیہ وآلہ وسلم)⁶⁴, 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 Qur'ān and the Sunnāh remains subject to identification and interpretation by the FSC. This authority is granted to the FSC through Article 203 D (2) of the IRP's Constitution.*"⁶⁵;

⁶² Supra note M Munir, *Precedent in Pākistānī Law* (Karachi: OUP 2014).

⁶³ Coulson J. Noel, *Conflicts and Tensions in Islāmic Jurisprudence* (Chicago: CUP, 1969), 106.

⁶⁴ Esposito (n 40) 124.

⁶⁵ Supra 2006's 1/K Suo Motu action by the FSC, PLD 2008 FSC 1.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥād perspectives between the federal shariat court (FSC) and islamic jurists

4. The FSC follows only the constitutional mandate, within the limits of the Islāmic injunctions;
5. The FSC exerts Ijtiḥād 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 problems⁶⁶.

Within the context of harmonizing Pākistān's legal landscape through a comparative analysis of collective Ijtiḥād perspectives between the FSC and Islāmic jurists, it's crucial to note that the responsibility for legislating laws lies with the Legislature. However, the Executive branch is tasked with proposing necessary amendments in response to judgments handed down by the FSC. If a law deemed repugnant by the FSC is not amended within a specified period, the said law or its relevant provisions cease to have effect from the date the FSC's decision takes effect.

The FSC's judgments go beyond fatwas, carrying legal weight and shaping Pākistān's legal terrain. By focusing on human and family rights in its decisions, the FSC upholds and safeguards these fundamental rights.

The FSC's conversion of judgments into binding orders underscores its substantial legislative influence, especially regarding human and family rights. This solidifies the FSC's pivotal role in Pākistān's legal system, offering a mechanism for Islāmic judicial review and ensuring alignment with Islāmic principles. Through Ijtiḥād and binding orders, the FSC actively advances human rights, promotes justice, and upholds Islāmic law⁶⁷.

Furthermore, the Islāmic family law, Sharī'ah reforms have been adopted by the legislators in numerous Muslim states, through deciding on academic methodologies of Islāmic jurists from one or more Islāmic Schools of thoughts, upholding diverse philosophical paradigms, of Sharī'ah of law. These methodologies are called "takhyīr" or eclecticism⁶⁸,

⁶⁶ Article 189 of the IRP's Constitution, 1973.

⁶⁷ Supra Ihsan Y, "Pākistān Federal Sharī'at Court's Collective Ijtiḥād on Gender Equality, Rights of the women and the Right to Family Life," (2014) 25 Islām and Christian-Muslim Relations 181.

⁶⁸ M Munir, 'The Law of Khul' in Islāmic Law and the Legal System of Pākistān" *LUMS Law Journal* 2, no. 33, (2015): 58-59.

and “talfīq” (piecing together)⁶⁹, since policymakers choose and sometimes link different intellectual perspectives⁷⁰. 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 Qur’ān, and the Sunnāh without relying on juristic opinions. But the 1991’s Act⁷¹ supplemented an extra source for the judges to consider: “Shari’ah” meaning the precepts of the Holy *Qur’ān* and Islām⁷².

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

1. The ijtihād conducted by the FSC differs from classical ijtihād, which was traditionally carried out by independent civilian Islāmic jurists, and individual Islāmic scholars. In the FSC’s case, ijtihāds are not the outcomes of individual Islāmic jurists but rather of a collective group comprising both ‘Islāmic scholars’ and judges (known as collective ijtihād or ijtihād jamā’ī).
2. These mujtahids are employed by the state.
3. Traditionally and conventionally, the Sharī’ah did not confer ijtihādic authority upon the qādī (judge). The qādī (judge) was only required to infer and decide cases based on the ijtihād already conducted by the mujtahids. In contrast, the work of the FSC’s judges involves collective ijtihād.

If the state machinery in Pākistān fails to amend a law deemed repugnant by the FSC through collective ijtihad within a certain period, the entire repugnant law or specific provisions declared as such by the FSC cease to be effective as of the FSC’s decision date, as officially reported by the FSC in 2009⁷³. In the realm of aligning Pākistān’s legal framework, comparing collective Ijtihād perspectives of the FSC with those of Islāmic jurists, it’s crucial to grasp the weight of FSC decisions over mere religious opinions or fatwās. FSC rulings hold legal authority, demanding compliance from all parties and institutions involved.

⁶⁹ Salma Waheedi at el, “The Ambitions of Muslim Family Law Reform”, *Harvard Journal of Law & Gender*, no. 41 (2018): 301, 309.

⁷⁰ WB. Hallaq, *Sharī’ah: Theory, Practice, and Transformations* (Cambridge: CUP 2009) 459-73.

⁷¹ Section 2 of the Enforcement of Shari’ah Act, 1991.

⁷² M Munir, (n. 65), 59.

⁷³ FSC, *FSC: Annual Report* (Islāmabad: FSC, 2009), 3.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtihād perspectives between the federal shariat court (FSC) and islamic jurists

Unlike advisory fatwās, FSC decisions directly affect the legal validity and implementation of laws, mandating action and amendments by the Executive and Legislature for adherence. If the FSC deems a statute or provision contradictory to Islāmic injunctions, the Executive and Legislature must amend or abolish it within a specified period, or face nullification

The FSC's pivotal role in shaping Pākistān's legal system ensures laws align with Islāmic principles as interpreted by the court, distinguishing its decisions from mere fatwās⁷⁴.

The FSC asserts its right to engage in ijtihād, albeit in a distinct manner from conventional practices. Traditionally, independent ‘ulamā’, who were fuqahā’, conducted ijtihād individually. The state could then choose and adopt the ijtihād of any specific scholar⁷⁵.

The FSC's ijtihād differs significantly from traditional practices, where individual Islāmic jurists conducted ijtihād independently. Instead, a collective group consisting of both Islāmic scholars and judges, all part of a state institution, undertake this process. This collective variant of ijtihād is termed as “collective Ijtihād.”

In individual ijtihād, scholars exercise independent legal reasoning and interpretation based on their expertise, subject to state adoption or rejection. However, the FSC's process involves a collective deliberation among judges and Islāmic jurists, incorporating a diverse range of perspectives and expertise.

Acknowledging the unique nature of the FSC's ijtihād activity, the term “collective ijtihād” signifies the interpretation and application of Islāmic law within the FSC's mandate by a group of individuals with diverse backgrounds and expertise. This collaborative effort ensures comprehensive decision-making.

The significance of individual scholarship and the contributions of traditional Islāmic scholars in Islāmic jurisprudence remain vital despite the collective nature of the FSC's ijtihād. Rather than diminishing individual roles, this approach reflects the institutional framework and methodology adopted by the FSC.

In summary, the FSC's ijtihād is a collective endeavor conducted by a group of judges and scholars, which differs from the classical sense of

⁷⁴ Ibid, 3,4.

⁷⁵ Mehmood-ur-Rehman Faisal v. FoP, PLD 1992 FSC 1.

individual and independent Islāmic jurists, conducting ijtihād. This collective approach ensures a comprehensive interpretation and application of Islāmic law within the FSC's institutional framework.

The FSC's collective ijtihād underscores its unique position in Pākistān's legal landscape, providing a mechanism for the interpretation and application of Islāmic law within a state institution. By incorporating diverse perspectives, the FSC ensures robust decision-making aligned with its mandate and objectives⁷⁶.

The FSC has consistently demonstrated a pro-women and family rights stance through its ijtihād, particularly in cases related to females and family laws. Its gender-sensitive approach prioritizes the rights and well-being of women within the framework of Islāmic law, ensuring their equality, dignity, and agency in family and societal contexts.

Unlike blind adherence (taqlīd), the FSC's methodology for ijtihād is dynamic and independent, considering specific circumstances and needs of each case. This approach allows the court to address contemporary issues and challenges effectively, especially those related to women's rights and family laws.

Through its ijtihād, the FSC aims to uphold the principles of fair justice, equality, and human rights within the framework of Islāmic law. By engaging in this process, the court demonstrates its commitment to ensuring that its decisions align with these fundamental tenets.

The FSC's ijtihād on women's and family rights contributes significantly to the discourse on gender equality and women's empowerment in Pākistān. Its recognition of evolving social dynamics and the importance of safeguarding women's rights within Islāmic legal principles is evident in its gender-sensitive methodology⁷⁷.

1.6 Examining the Role of Ijtihād in Matters beyond the Jurisdiction of the FSC

The FSC works within the rules of the Constitution. Its job is to interpret and apply Islāmic law, but it can only do so within the limits set by the Constitution. One key limit is the Islāmic Republic of Pākistān's (IRP's) Constitution. Even when challenged, the FSC maintains its legitimacy based on the Constitution. This was confirmed in the case of *M Saifullah v.*

⁷⁶ 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.

⁷⁷ Supra Ihsan Y, "Pākistān Federal Sharī'at Court's Collective Ijtihād on Gender Equality," 2014, 185–188.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥād perspectives between the federal shariat court (FSC) and islamic jurists

FoP⁷⁸. The IRP's Constitution sets the rules for the FSC. The FSC must follow these rules in its operations. This ensures that the FSC's decisions stay within the boundaries of the Constitution. By sticking to these limits, the FSC maintains the balance of power outlined in the legal system. It is committed to working within these limits to ensure its decisions are legally sound and in line with the established legal framework.

However, Article 203B (c) of the Constitution restricts the FSC's jurisdiction in certain cases, particularly regarding Collective Ijtihād, as outlined in articles 203(B-C)⁷⁹. In Pākistān, the FSC does not have authority over certain areas like procedural laws, financial laws (related to banking, insurance, taxes), Muslim Personal Law, and aspects of the Constitution and MFLO. For matters beyond its scope, the FSC follows the interpretations of statutory law by the SCP and HCs. Statutory law is legislation made by bodies like Parliament. SCP and HCs, as superior courts, interpret and apply statutory law to ensure consistency. So, when dealing with matters beyond its jurisdiction, the FSC abides by SCP and HCs' interpretations to maintain consistency in legal implementation⁸⁰. The FSC must follow the Supreme Court of Pākistān's (SCP) interpretation of statutory law. If SCP hasn't made a decision, then the FSC follows the HC's interpretation. This applies to matters beyond the FSC's jurisdiction and even to non-statutory issues.

Like other courts, the FSC has to follow legal interpretations set by higher courts, even for general legal principles or non-statutory matters. Also, the FSC can review its own decisions to ensure consistency and accuracy in applying Islāmic law within constitutional and statutory limits.

By following SCP and HC interpretations and reviewing its own decisions, the FSC helps maintain a coherent legal system in Pākistān.⁸¹ The constitution has granted the FSC exclusive revisional jurisdiction⁸². The FSC has the power to review cases from lower courts to ensure their accuracy and legality. It can request and examine case records and even suspend execution if needed. The FSC must follow SCP rulings and can

⁷⁸ M Saifullah v. FoP, PLD 1992 FSC 376.

⁷⁹ Rubya Mehdi, "The Protection of Women (Criminal Laws Amendment) Act, 2006 in Pākistān." *Droit et Cultures* 59: 1, (2010).

⁸⁰ Article 189 of the IRP Constitution.

⁸¹ Article 203E(9) of the IRP's Constitution, 1973.

⁸² Article 203DD of the IRP's Constitution, 1973.

overturn its own decisions like the SCP does. It also considers evolving legal interpretations and may reconsider earlier rulings.

Decisions by larger FSC benches carry weight over smaller ones, ensuring consistency. For general law matters, the FSC follows SCP decisions or, if none exist, decisions of the HCs. Similarly, HCs' benches do not give conflicting decisions. This ensures uniformity and avoids conflicting judgments. By following these principles, the FSC maintains consistency, upholds court hierarchy, and contributes to an effective legal system. This was emphasized through *BZ Kaikaus v FoP*⁸³. The FSC has said that it does not use Collective Ijtihād to interpret the Constitution or laws made to implement it. So, certain constitutional obligations are not part of the FSC's initial jurisdiction. Moreover, the FSC can only exercise its original jurisdiction for acts that are currently applicable. This ruling was established in the case of *Hakim Syed Muhammad Warsi v. GoP and Others*⁸⁴. So, if a law is no longer valid or does not exist, the FSC cannot use Collective Ijtihād to question it. The Judiciary follows the Objective Resolution to implement Islāmic principles in the Constitution⁸⁵, that in the IRP, the judiciary is constitutionally obligated. Any precedent conflicting with the Constitution will be deemed invalid, and the higher courts will declare it null and void. This principle was established by the High Court in *Bank of Oman Ltd v. East Trading Co. Ltd*⁸⁶. 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 cause of the creation of the Constitution might be challenged.”

In this context, the SCP highlighted the exclusive empowerment of the FSC to ensure Islāmic compliance with the Constitution. In the case of *Hakim Khan v. Government of Pākistān*, the SCP ruled that only the FSC has the authority to nullify any statute, precedent, or provision of the IRP's Constitution, based on Islāmic injunctions⁸⁷. This means that the Supreme Court of Pākistān (SCP) allows the FSC to use Ijtihād, even in matters beyond its jurisdiction, when the legislative or adjudicating body violates Islāmic teachings from the Quran and Sunnah. The SCP's decision gives significant power to the FSC, allowing it to nullify a constitutional

⁸³ BZ Kaikaus v FoP, PLD 1981 FSC 1.

⁸⁴ Hakim Syed Muhammad Warsi v. GoP and Others, PLD 1981 FSC 111.

⁸⁵ The doctrinal provisions of the Objectives Resolution, are in the IRP's Constitution vide Article 2A, and are equally admissible.

⁸⁶ Bank of Oman Ltd v. East Trading Co. Ltd. PLD 1987 Kar 404, 445.

⁸⁷ Hakim Khan v. GoP, PLD 1992 SC 595, 617.

Harmonizing Pakistan's Legal Landscape: Comparative analysis of collective ijtiḥad perspectives between the federal shariat court (FSC) and islamic jurists

provision that conflicts with Islāmic teachings. This perspective has been applied in other important SCP rulings as well, similar to *Hakim Khan v. GoP*⁸⁸, and *Mst. Kaneez Fatima v. Wali Muhammad*⁸⁹ etc., ruled that Article 2A can only be used to interpret statute laws and the IRP's Constitution. This empowers judges to play a significant role in the Islāmization process:

*“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 Qur’ān, and Holy Prophet (ﷺ)’s Sunnāh.”*⁹⁰

However, the responsibility of Islāmizing Pākistān's laws primarily lies with the Parliament, not the Judiciary. Only the Parliament can use Ijtihād to review existing laws based on Islāmic teachings from the Quran and Sunnah. Since 1985, the Superior Judiciary of Pākistān has been assessing statutes for inconsistency with Islāmic injunctions. Some argue that the Judiciary has assumed the primary role of legislative authority in the State largely by default, as: *“largely through default the primary locus of the legislative authority in the State.”*⁹¹ In 1982, amendments to the IRP's Constitution granted the FSC the power of *Suo Motu*, outlined in Article 203D. Initially, there was a restriction on the FSC's ability to review Fiscal Laws for three years. This period was extended to four, then five years, and ultimately to ten years through further amendments to the Constitution. In 1990, after the expiration of this ten-year period, 115 petitions were filed with the FSC for Ijtihād to review fiscal laws based on interest (*riba*)⁹². The FSC is not allowed to review laws related to procedures, the Constitution, and Muslim Personal Law. It's also restricted from reviewing fiscal laws, laws on taxes and duties, fees, banking regulations, and insurance laws. However, if the government finds a law conflicting with Islāmic principles, it must pass new legislation; otherwise, the law will become ineffective after a set time. This makes the FSC more than just an advisory body and is a unique institution not found elsewhere in the Islāmic world.

⁸⁸ *Hakim Khan v. GoP*, PLD 1992 SC 595.

⁸⁹ *Mst. Kaneez Fatima v. Wali Muhammad*, PLD 1993 SC 909.

⁹⁰ Article 2A of IRP's Constitution, 1973.

⁹¹ *Supra Kennedy, Repugnancy to Islām: Who Decides?* (1992), 787.

⁹² J. Shehzado Sheikh, *Historiographic Glimpses of the FSC of Pākistān* (Islāmabad: FSC, 2011), 10.

1.7 Conclusion

This study has conducted a thorough examination of the collective Ijtihād perspectives between the Federal Shariat Court (FSC) and traditional Islāmic jurists within Pākistān's legal system. Through meticulous analysis, we have elucidated the nature, methodology, and significant impact of collective Ijtihād as practiced by the FSC, highlighting its role in guiding legislative processes and legal interpretation in the country.

Furthermore, our research has revealed the distinct approaches of the FSC and traditional Islāmic jurists toward collective Ijtihād, providing insight into the evolving dynamics of Islāmic jurisprudence in Pākistān. By delving into the broader implications of the FSC's authoritative status, we have emphasized its pivotal role in shaping legal discourse and fostering coherence within Pākistān's legal framework.

This study contributes significantly to scholarly discourse on Islāmic jurisprudence and legal interpretation, offering insights into the complexities inherent within Pākistān's legal landscape. By navigating the intricacies of legal interpretation and judicial synchronization, this research lays the groundwork for informed dialogue and further exploration within the realm of Islāmic law and jurisprudence in Pākistān.