

The Social and
Political
Foundations of
Constitutions

Islamic Law in an Islamic Republic: What Role for Parliament?

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Policy Brief

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The Social and Political Foundations of Constitutions

Constitutions take various forms in different societies, but essentially determine how policy issues, often of fundamental social importance, are to be decided and implemented.

Constitutions and constitutionalism are usually studied either doctrinally, as the source of fundamental legal doctrine, or conceptually, as the subject of philosophical methods of analysis. The approach of this programme offers a third way: the study of constitutions and constitutionalism in their social context, emphasizing their social character and role, their social goals, and their links to other parts of society, especially economic and political aspects.

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Executive Summary

- In recent years, several Muslim-majority countries have reconsidered the constitutional status of Islamic law: Afghanistan, Iraq, Tunisia, Egypt, to name a few. This trend is likely to continue.
- In Muslim-majority states, the different ways in which constitutions wrestle with the combination of Islamic law and parliamentary power remains rather poorly understood. Some see Islamic law as inflexible. However, anthropologists, political scientists, and legal scholars have gone out of their way to illuminate the ways in which it is also historically flexible.
- In Muslim-majority states, different political parties often have different perspectives on this issue: Islamists often stress the fixity of Islamic law; secularists either ignore Islamic law or stress its flexibility.
- Grounded in the shifting terrain of electoral politics, the cut and thrust of parliamentary practice generally favours flexibility. However, this push towards flexibility often leads countervailing executive and/or judicial actors to argue that the terms of shari'ah might be used to *limit* the domain of popular sovereignty. These actors often refer to shari'ah as a type of supra-constitutional meta-structure standing outside and above the realm of legislative politics.
- In many Muslim-majority states the question is not *whether* the terms of shari'ah suggest a set of overarching legal norms. The question is *how* those norms might be illuminated and, thus, which actors/institutions are in a position to control their selection and interpretation. In this context, overarching constitutional questions regarding the separation of legislative, executive, and judicial powers figure prominently.
- Pakistan has wrestled with the constitutional relationship between Islamic law and parliamentary power for nearly seventy years, developing some of the most sophisticated thinking on these issues. A deeper understanding of competing constitutional approaches to the relationship between Islamic law and parliamentary power in Pakistan sheds a great deal of light on the relationship between Islam and democracy more generally.

Islamic Law in an Islamic Republic:

What Role for Parliament?

Islamic law and state power: The issue

On 5 May 2015 an article appeared in Pakistan's most prominent English-language newspaper, *Dawn*, in relation to the Pakistan Supreme Court. The Court had been hearing a case regarding constitutional amendments passed by the National Assembly that address the relationship between the legislature, the judiciary, and the executive. At issue was the ability of the *legislature* to reframe (via such amendments) the 'basic structure' of the state. 'What ... if, by popular demand, ... [legislators press] for changing the basic structure ... to secularism?' one justice asked. It would be odd, noted another, if the judiciary were to strike down constitutional amendments simply by referring to some theory of supra-constitutional 'basic structure'. Indeed, the Chief Justice explained, such theories (originating in Germany) were 'never accepted by the court'. In Pakistan, the court has always 'acknowledged the supremacy of parliament'.¹

Throughout the Muslim world, constitutions frame the terms within which Islamic law is combined with, or separated from, state power. In recent years, several Muslim-majority countries have reconsidered the constitutional status of shari'ah: Afghanistan, Iraq, Tunisia, Egypt, to name a few. This trend is likely to continue; however, the ways in which constitutions wrestle with the combination of *Islamic law* and *parliamentary power* is poorly understood. Some see Islamic law as religiously fixed. However, scholars have gone out of their way to illuminate the ways in which it is also historically flexible. The cut and thrust of parliamentary practice, grounded in the shifting terrain of electoral politics, generally favours flexibility. However, this push in the direction of

flexibility occasionally leads executive and judicial actors to argue that the terms of shari'ah should be used to *limit* the domain of popular sovereignty. Indeed, executive and judicial actors often reference shari'ah as a type of irrefutable basic norm (in Hans Kelsen's terms, a legal '*grundnorm*') standing outside and above the realm of legislative politics.

When legislators attempt to redistribute land, regulate interest charges in the banking sector, protect heterodox beliefs, abolish the death penalty, or extend equal inheritance rights to sons and daughters, references are often made to Qur'anic verses or injunctions spelled out in digests of classical Islamic jurisprudence (*fiqh*) in order to suggest that this or that legislative effort lies 'outside the boundaries of Islam'. The effect of such efforts, however, does not lie in clarifying the historically flexible boundaries of Islamic law once and for all. Instead it lies in suggesting that those boundaries should be defined by actors *other* than elected legislators. The question is not *whether* the terms of shari'ah suggest an overarching set of legal norms. The question is, simply, *who* should define those norms—elected legislators or someone else?

In Pakistan, as in many other countries, a deeper understanding of competing constitutional approaches to the relationship between Islam and democracy requires a more nuanced understanding of the relationship between Islamic law and questions of parliamentary sovereignty.

Islamic law and the state: Why parliamentary power is important

Historians, political scientists, and legal scholars writing about the link between shari'ah and the state often focus on different issues. Historians and

anthropologists tend to focus on what might be described as alternative ‘spaces’ of shari’ah: non-state muftis issuing non-enforceable fatwas, on the one hand; state-based *qazis* working with particular caliphs to enforce a state-based form of ‘siyasa shari’ah’, on the other. Dismissing the idea of an ‘immutable’ shari’ah, these scholars describe the ways in which shari’ah as a ‘living law’ has been — or has not been — historically tied to the *state*.

More recently, however, political scientists like Jillian Schwedler have focused on the conditions under which efforts to ‘shari’ah-ify’ the state, on the part of ‘Islamist’ political parties, might unfold in ‘moderate’ ways.² These scholars often shy away from an account of different groups competing to define what shari’ah itself might mean. Instead, they draw attention to variables like Islamist party structure and overarching political conditions, asking whether Islamists seeking to enforce something broadly called ‘shari’ah’ will work with other parties — say, non-religious leftist or liberal parties — or not. (According to Schwedler, moderates will, but non-moderates won’t.)

Islamic legal scholars, however, often try to peek *inside* the discursive tradition of shari’ah, fleshing out alternative approaches to issues like the constitutional separation of powers. Here, one of the most important questions concerns the relationship between executive and judicial power: *qazis* working for executive caliphs, if you will, versus strictly judicial muftis issuing non-enforceable fatwas. More recently, however, greater attention has been paid to the work of elected Muslim *parliaments* — not parliaments constitutionally divorced from the work of the *ulema* (as in Turkey) or categorically subordinated to it (as in Iran), but, as the Chief Justice of Pakistan pointed out, Muslim parliaments charged with considering the non-binding advice of the *ulema* while remaining fully *sovereign*.

Here one might consider the work of legal scholars like Khalid Abou El Fadl or Mohammed Fadel.³ How should we think about the role of multi-party Muslim parliaments with respect to matters of *shari’ah*? How is shari’ah tied, not merely to a ‘fixed’ politics of religious *being*, but also to a vigorously contested parliamentary politics of Muslim adaptation or *becoming*? This is the issue I examine in what follows, focusing on the case of Pakistan.

Analysis: Islamic law and parliamentary power in Pakistan

For nearly seventy years Pakistan has struggled with the constitutional relationship between its parliament and shari’ah. As a state created to advance the well-being of a particular religious group, while at the same time grappling with a deep-rooted legacy of European colonialism, however, the constitutional history of Islam in Pakistan differs somewhat from that of many other Muslim countries: Egypt and Turkey, for instance, were not created as states defined by religion; Iran and Afghanistan did not experience the same type of European colonialism; Indonesia has its own rather distinctive constitutional vision of *pancasila*; Malaysia has its federalization of shari’ah. Similarly, many states struggling with the status of shari’ah focus on high-profile constitutional clauses — clauses regarding the status of Islamic law as ‘a’ or ‘the’ source of legislation.⁴ But, in Pakistan, many of the most important debates regarding shari’ah involved, not the substantive features of shari’ah, but rather the separation of powers.

What the Chief Justice of Pakistan described as Pakistan’s attachment to ‘the supremacy of parliament’ was not a foregone conclusion when Pakistan was formed in 1947; instead it emerged over several years — including (somewhat ironically) several years of martial law — in a series of political battles involving two distinct groups of religious actors — the modernist *Jama’at-e-Islami* and the traditionalist *ulema* — as well as two groups of actors that did not self-identify as religious — namely the military and competing Muslim nationalists. Since 1947 both the *Jama’at* and the *ulema* have collaborated to oppose what they saw as an ‘un-Islamic’ military and/or a parliamentary claim to ‘unfettered’ legislative power in matters of religion. These actors opposed state-based efforts to ‘rewrite the laws of God!’⁵ And, yet, some of the most energetic battles did not concern legal substance; they unfolded between the military and parliament in a tussle to define the constitutional separation of powers. In fact, both Charles Kennedy and Martin Lau have argued that, in the battle between Pakistan’s military and civilian leaders, appeals to the judiciary became so prevalent that, ultimately, it was

neither the executive nor the legislature but the judiciary that stepped in to define 'Islam'.⁶

In what follows, however, I draw a different conclusion. Agreeing with the Chief Justice mentioned earlier, I draw on an account of Pakistan's constitutional history to show that, in the end, it was actually Pakistan's *parliament* that emerged as constitutionally supreme.

Islamic law and parliamentary power in Pakistan 1947–1958

The members of Pakistan's first Constituent Assembly began their work with a landmark resolution known as the Objectives Resolution.⁷ In 1949, this Resolution set Pakistani constitutionalism apart from the secular language of India while at the same time seeking to stitch the provinces of East and West Pakistan together within the terms of Islam. This Resolution — construed as a non-binding constitutional preamble — began as follows:

Whereas sovereignty over the entire universe belongs to God almighty ... and [whereas] the authority which He has delegated to the state of Pakistan through its people ... is a sacred trust, ... this Constituent Assembly, representing the people of Pakistan, resolves to frame a Constitution for the sovereign independent state of Pakistan; wherein the state shall exercise its power ... through the chosen representatives of the people; ... [and] Muslims shall be enabled to order their lives ... in accordance with Islam.

Approved under the prime minister, who migrated from East Punjab after the partition of India, as well as Pakistan's governor-general, hailing from East Bengal, this resolution sought to balance the rhetorical priorities associated with specific religious actors (regarding the sovereignty of 'Allah') with the terms of Muslim nationalism (and, therein, the sovereignty of the 'state'). At the same time, however, this Resolution went out of its way to avoid any references to classical jurisprudence or *fiqh*. Instead, Pakistan's prime minister proposed that the head of state should create a strictly advisory Board of Ulema to rule on the religious 'repugnancy' of individual laws (with a unanimous vote of this Board forcing any impugned law back to the *legislature* for amendment). Eventually, however, even this

accommodation of the *ulema* was rejected, with the Constituent Assembly recommending that any declaration of repugnancy should be made by the Supreme Court alone.

The marginalization felt by Pakistan's religious actors was severe. They deeply resented any push to share power vis-à-vis the delineation of Islamic law. And, beginning in 1952, they turned to riots in a rather cynical bid to reassert their religious authority. In effect, religious activists encouraged the public to recognize the authority of particular religious elites in defining the boundaries of the community, including the relocation of a heterodox group known as the Ahmadiyya *outside* of the community's walls.⁸

Several weeks of riots brought about Pakistan's first period of martial law. Shortly thereafter, the courts stepped in to clarify that the vigilantism of self-styled religious elites was incompatible with public order. The terms of Islam, they argued, must be defined via the ongoing task of state-based legislation (drawing attention to a particular view of constitutional 'non-establishment' focused, not on *religious* non-establishment, but rather *doctrinal* non-establishment and, thus, stressing the value of competing Muslim views driving the practice of ongoing legislation within a broad reading of Islam).

The chief author of this judgment did not believe that the boundaries of non-establishment should be decided by a powerful group of *parliamentarians* (particularly insofar as many MPs had shown themselves to be susceptible to 'populist fevers'). Instead, the lead author felt that the clarification of religious boundaries required the fortification of Pakistan's *executive*.

In the end, however, fearing the emergence of an ever-expanding executive, Pakistan's first Constituent Assembly reasserted the power of parliament. First, they sought to create a purely advisory commission recommending the Islamization of existing laws (while, at the same time, protecting the sectarian diversity within 'Muslim personal law' from the homogenizing thrust of this process). And, then, having done so, they resolved that any statute deemed religiously repugnant by Pakistan's Supreme Court would be referred back to the *legislature* for amendment.⁹

Before these recommendations were fully enacted, however, political turmoil led the president to dismiss Pakistan's National Assembly, declaring martial law before, three weeks later, being removed by his own martial law administrator. Pakistan's first *Constitution*, if you will, imagined a powerful *parliament*, but during the mid-1950s real power still lay with Pakistan's executive.

Islamic law and parliamentary power in Pakistan 1958–1977

Even before Pakistan's new leader, General Ayub Khan, took up the task of formulating a new Constitution, however, he promulgated a dramatic set of reforms to Muslim family law by way of an executive ordinance, marginalizing the *Jama'at* and the *ulema* in ways that gave the state more power to define shari'ah for itself.¹⁰ In fact, when Ayub Khan finally turned to promulgating a new *Constitution*, he went out of his way to ensure that his rather audacious new Family Laws Ordinance was protected from the burden of judicial review. In effect, Pakistan's *second* Constitution defined the high watermark of a reformist approach to shari'ah led by a powerful executive.¹¹

Ayub began by retaining the 1949 Objectives Resolution as a non-binding preamble before going on to ensure that Pakistan's non-enforceable Directive Principles of State Policy were diluted to relax the possibility of any constraints defined by the *Jama'at* or the *ulema*. In particular, he attempted to ensure that any Islamization programme would depend on the ability of different schools of religious thought to arrive at a position of unanimity with respect to the basic 'principles' of Islam — a requirement that Ayub saw as politically indispensable precisely insofar as he believed that it was historically unprecedented.¹²

These changes, however, were fiercely opposed by Pakistan's religious lobby, and within a year, each was systematically reversed. In particular, the Constitution was amended to ensure that, in the course of state-based efforts to avoid any law deemed repugnant to Islam 'as set out in the Holy Qur'an and sunnah', the expression 'Qur'an and sunnah' would mean 'the Qur'an and sunnah as interpreted by each sect'. In other words, the sectarian

divisions that characterized the *ulema* would still have a role to play in formal declarations of 'repugnancy'. Still, Ayub's Constitution continued to require that any final decision regarding the *correction* of repugnancy would be made, not by the *ulema* or the superior judiciary, but rather by the *National Assembly*.

General Ayub was eventually forced to resign. But, when he did, he did not follow his own constitutional principle stating that a vacancy in the presidency would be filled by the Speaker of the Assembly. Instead, he appointed General Yahya Khan, who went on to hold national elections during the winter of 1970 — elections that threw the country into civil war (leading to the formation of Bangladesh).

This cataclysmic turn of events prompted wider efforts to reconstitute the state itself, during which Pakistan's new prime minister, Zulfikar Ali Bhutto, introduced a new Constitution preserving almost every existing article concerning the state's relationship with shari'ah (even to the point of protecting Muslim personal law — and, thus, at least ostensibly, Ayub Khan's controversial Muslim Family Laws Ordinance — from the burden of judicial review).¹³ In fact, with respect to the constitutional treatment of Islamic law, the dictatorship of Ayub and the democracy of Bhutto scarcely differed. The only important difference involved an amendment *unanimously approved by the National Assembly* excommunicating the Ahmadiyya.

Before long, however, Bhutto's opponents came together in an avalanche of political resistance. The elections that followed were rigged in Bhutto's favour, and, as protests spread, General Zia-ul-Haq enforced another coup.

Islamic law and parliamentary power in Pakistan 1977 to present

General Zia-ul-Haq is well known for his campaign of 'Islamization'. But, in so many ways, his efforts involved only slight modifications to all that had come before. In 1979, for instance, General Zia introduced a fresh constitutional amendment modifying earlier efforts to endow the Supreme Court with the power to identify repugnant laws —

this time declaring that laws impugned by Pakistan's *provincial High Courts* would be sent, not to the National Assembly, but rather to Zia (or his provincial governors) for amendment. In effect, Zia sought to shift the balance of power away from the legislature towards the executive. But, within a year, he had revised his own amendment, disbanding his 'provincial' shariat courts to create a new Federal Shariat Court (FSC) — appointed by the president — instead.

Some see this Federal Shariat Court as an 'apex' court concerning matters of Islamic law. But, technically speaking, it is actually located within Pakistan's ordinary judicial hierarchy, with appeals travelling to a Shariat Appellate Bench of the Supreme Court and, then, a full bench of Pakistan's highest court. In any case, Zia followed closely in the footsteps of his predecessors, ensuring that his Shariat Court would not be empowered to review the Constitution itself or any 'Muslim personal law' (including, at least ostensibly, Ayub's Family Laws).¹⁴

Oddly, the FSC appeared reluctant to exercise its powers. In one case, the Court held that it was not permitted to judge matters of concern to some Islamists, like the permissibility of elections, because these matters were addressed in the Constitution itself.¹⁵ In another, the Court held that it was unable to address cases of inheritance insofar as these cases pertained to 'Muslim personal law'.¹⁶ In fact, even when the Court *did* exploit its jurisdiction, it embarrassed Zia. Very early on, for instance, the Court declared that stoning was no longer seen as an acceptable punishment for adultery.¹⁷

This decision led Zia to add three additional *ulema* to the court, while, at the same time, permitting the court to revise its decisions.¹⁸ Apparently, judicial autonomy was not Zia's goal. On the contrary, Zia's new Shariat Court was clearly designed as a handmaiden to Pakistan's *executive*.

Even after the FSC was reconstituted to include additional *ulema*, however, it continued to challenge Zia. In one case the Court held that, where there was no 'state action' transforming an element of shari'a into a statute, there was actually nothing for the court to 'strike down' or send back to the president for amendment.¹⁹ Like Pakistan's ordinary Supreme

Court, in other words, the Shariat Court continued to insist that its role lay in deciding which statutes were *not* Islamic. Its role did *not* lie in deciding what any statute should say.

Frustration with the FSC eventually prompted Zia to amend the Constitution once again. This time, Zia recast the Objectives Resolution as an entirely new article within the Constitution itself: Article 2A. In effect, Zia wanted to provide his courts with the power to strike down disagreeable elements of the Constitution in keeping with an overarching '*grundnorm*'.²⁰

Unfortunately, even after the promulgation of Article 2A, Zia found that his own courts were *still* reluctant to support his executive-centred approach to shari'ah. In two key cases, the Supreme Court held that Article 2A was *not* a supra-constitutional provision superseding the power of parliament.²¹ (And, in one of these cases, it notes that, although Article 2A could be used to challenge an executive ordinance, it could *not* be used to strike down an ordinary piece of legislation.²²)

Finally, however, more than twenty years after its creation, the FSC stepped in to strike down a portion of Ayub Khan's notorious Family Laws Ordinance.²³ In particular, the Court annulled the executive ordinance through which a new set of inheritance rights for orphaned grandchildren had been created. Even after it highlighted the absence of any orphaned grandchildren in any known scheme of Qur'anic heirs, however, the FSC still refused to say what the terms of inheritance 'should be'. Instead, drawing attention to the experience of several other Muslim-majority countries (Egypt, Morocco, Syria, and so on), the FSC simply referred the issue of inheritance back to the *legislature* for amendment.

Conclusion and implications

Until 1980, Martin Lau notes that 'the locus for any introduction of Islamic law [in Pakistan] was parliament', but *thereafter*, he insists that the FSC became 'a ... mechanism to Islamize the [law] independently'.²⁴ 'In the absence of political leadership or societal consensus', Charles Kennedy writes, 'the real determinant ... of Islamic reform has been the ... courts themselves'.²⁵ 'It was well

established'; Lau adds, that Islamic law imposed certain limits 'on the legislative power of ... government'.²⁶

Given the lack of any clear social consensus regarding the specific terms of Islamic law, such claims are broadly understandable. But, as a constitutional matter, they are also vastly overstated. With respect to the Constitution, I would argue, the locus of power has not come to rest on the executive or the judiciary. With reference to the substantive parameters of Islamic law, power has always been vested in *parliament*.

As Dieter Conrad points out, Pakistan's first Constituent Assembly took a crucial decision regarding 'the power of interpretation' in matters of Islamic law. 'The power to ... bring all legislation into accord with "the injunctions of Islam"', he explains, 'was vested in parliament as the final interpreting authority'. 'The general disposition', he notes, was 'to treat Islamic principles as a matter [for] the future' and, then, 'to entrust their realization to the ... political responsibility of the legislature'.²⁷

Democratic constitutionalism, in this view, is not defeated by the terms of religious establishment. Nor is shari'ah defeated by an appreciation for doctrinal non-establishment. On the contrary, following in the footsteps of early-twentieth-century Muslim philosophers like Mohammad Iqbal,

democracy is broadly tied to a *combination* of constitutional law and religion filtered *through* an elected parliament and, therein, a politics of Muslim 'becoming'.

The compatibility of Islam and democracy is closely tied to constitutional issues pertaining to the separation of powers. In Pakistan, the 'sovereignty' of Allah has been 'delegated' to elected representatives so that, in due course, via those representatives, the people of Pakistan shall be enabled to order their lives 'in accordance with Islam'. This is not (yet) a common formulation in the realm of Muslim constitutional law. But, for those with an interest in the relationship between Islam and democracy — not only in Pakistan, but elsewhere — I believe this formulation deserves a closer look.

With respect to parliamentary practice and the role of religious vigilantes, Pakistan cannot be described as a model for other parts of the Muslim world. However, Pakistani constitutional debates are often quite nuanced and sophisticated. And, with respect to the relationship between Islamic law and parliamentary power, the value of a certain familiarity with the experience of constitutionalism in Pakistan—both its stability and its flexibility—should not be overlooked. It is likely that other parts of the Muslim world will revisit many of the debates that Pakistan has already begun to examine.

Notes

¹ Nasir Iqbal, 'Can Parliament Alter Constitution's Structure, Asks SC', *Dawn*, 5 May 2015.

² Jillian Schwedler, *Faith in Moderation: Islamist Parties in Jordan and Yemen* (Cambridge: Cambridge University Press, 2006).

³ See Khaled Abou El Fadl, 'The Centrality of Shari'ah to Government and Constitutionalism in Islam', in *Constitutionalism in Islamic Countries: Between Upheaval and Continuity*, Rainer Grote and Tilmann Röder, eds. (Oxford: Oxford University Press, 2011), pp. 35-61; Mohammad Fadel, 'The Representational Ideal and the Sunni Conception of Public Law', Lecture, Aga Khan University Institute for the Study of Muslim Civilisations, London, 4 February 2014.

⁴ Similar issues faced constitutional drafters in Pakistan (often well before they surfaced in other places), making Pakistan an interesting site for those with an interest in the out-migration of constitutional ideas.

⁵ See Matthew Nelson, 'Inheritance Unbound: The Politics of Personal Law Reform in Pakistan and India', in *Comparative Constitutional Traditions in South Asia*, Sunil Khilnani, Vikram Raghavan, and Arun Thiravengadam, eds. (Delhi: Oxford University Press, 2012), pp. 219-46.

⁶ See Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: Brill, 2006); Charles Kennedy, 'Repugnancy to Islam — Who Decides? Islam and Legal Reform in Pakistan', *International and Comparative Law Quarterly* 41 (1992), 769-87.

⁷ See Dieter Conrad, 'Conflicting Legitimacies in Pakistan: The Changing Role of The Objectives Resolution (1949) in the Constitution', in *Legitimacy and Conflict in South Asia*, S.K. Mitra and D. Rothermund, eds., (Delhi: Manohar, 1997), pp. 122-51.

⁸ For the link between these riots and Pakistan's constituent history, see Binder, 259-72, 281-96; see also Ali Usman Qasmi, *The Ahmadis and the Politics of Religious Exclusion in Pakistan* (London: Anthem, 2014).

⁹ See Richard Wheeler, *The Politics of Pakistan: A Constitutional Quest* (New York: Cornell University Press, 1970), p. 99.

¹⁰ See N.J. Coulson, 'Islamic Family Law: Progress in Pakistan', in *Changing Law in Developing Countries*, J.N.D. Anderson, ed. (London: George Allen and Unwin, 1963), pp. 240-57.

¹¹ See Ali Usman Qasmi, 'God's Kingdom on Earth? Politics of Islam in Pakistan 1947-1969', *Modern Asian Studies* 44/6 (2010), 1197-253.

¹² See Lau (2006), 7.

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- ¹³ At roughly the same time, the Supreme Court issued a landmark judgment (*The State vs. Ziaur Rahman* PLD 1973 SC 49) reinforcing the primacy of parliament and noting that, when it came to the delineation of Islamic law, the role of the judiciary was limited to defining what was *not* Islamic and *not* to defining what *was*. In effect, the Court gave responsibility for defining Islamic law in a 'positive' sense to parliament; neither the (non-binding) Objectives Resolution as a *grundnorm* nor the judiciary as an institution occupied an overarching supra-constitutional power. 'The Supreme Court voluntarily limited its power,' noted Martin Lau. 'It would not interfere with ... parliament's power to make laws or amend the constitution.' Lau (2006), 19.
- ¹⁴ Before 1962, the courts occasionally reinterpreted classical or Anglo-Mohammadan ideas about Muslim personal law. But, after 1962, most of these matters were covered by the (constitutionally protected) Muslim Family Laws Ordinance. The power to modify pieces of legislation deemed 'repugnant to Islam' was held by the National Assembly (with advisory support from the Council of Islamic Ideology). But, in 1979–80 Zia reinvigorated a wide range of debates regarding the relative power of the legislature, the executive, and the superior courts with respect to the issue of 'repugnancy'.
- ¹⁵ *Kaikus v. Federal Government*, PLD 1981 FSC 1.
- ¹⁶ *Federation of Pakistan v. Mst. Farishta*, PLD 1981 SC 120.
- ¹⁷ *Hazoor Bakhsh v. Federation of Pakistan*, PLD 1981 FSC 145.
- ¹⁸ See Daniel Collins, 'Islamization of Pakistani Law: A Historical Perspective', *Stanford Journal of Inter-national Law* 24 (1988), 511–84 (572-4); Tanzil-ur-Rahman, *Objectives Resolution and Its Impact on Pakistan Constitution and Law* (Karachi: Royal Press, 1996), p. 54.
- ¹⁹ *Habibur Rehman v. Federation of Pakistan*, PLD 1983 FSC 13; for additional examples see Kennedy (1992), 773 (fn15–21).
- ²⁰ See Tanzil-ur-Rahman (1996), 57, 58–63, 69–83; Kennedy (1992), 780, 783–4, 786 (fn75); Lau (2000), 58–62.
- ²¹ *Hakim Khan v. Pakistan*, PLD 1992 SC 595; *Kaneez Fatima v. Wali Mohammad*, PLD 1993 SC 901.
- ²² See *Kaneez Fatima*.
- ²³ *Allah Rakha v. Federation of Pakistan*, PLD 2000 FSC 1; for an account of the superior court judgments leading up to 'Allah Rakha', see Lau (2006), 138–9, 157–60.
- ²⁴ Lau (2000), 45, 48; Lau argues that the FSC should be understood as 'an institutional mechanism to Islamise the legal system independently from parliament' (2006), 9.
- ²⁵ Kennedy (1992), 787. For one case that appeared to challenge a general deference to legislative authority, see *Federation of Pakistan v. Gul Hasan Khan* (PLD 1989 SC 633), which prompted a new Qisas and Diyat Ordinance in 1995 — a rare case in which the shariat courts actually seemed to articulate what the terms of Islamic law *should be*.
- ²⁶ Lau (2000), 66.
- ²⁷ Conrad (1949), 133, 134, 135.



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