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Islamisation of Restitution of Conjugal Rights by the Federal Shariat Court of Pakistan: A Critique

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Abstract

In Pakistan's constitutional dispensation, the Federal Shariat Court (FSC) is empowered to ascertain the invalidity of laws from the perspective of Islamic injunctions. The paper problematises the constitutional authority of the FSC by exploring the process of Islamisation of the suit for restitution of conjugal rights (RCR). The RCR was grafted during British colonial era onto Muslim personal law (Anglo-Muhammadan Law) as applied in Indian subcontinent. This has recently been held by the FSC to be in consonance with injunctions of Islam. In this background, the paper raises some questions as to the jurisdiction of the court and how that jurisdiction/authority is exercised. It posits that the "default legal system" is placed at a privileged position and its Islamic validity is presumed to be well established, unless it is questioned on the basis of definitive verses of the Qur'ān and unequivocal sayings of Prophet Muḥammad (peace be on him). It is the outcome of this judicial approach that the FSC has sanctified from Islamic perspective an instrument (i.e., RCR) that is peculiar to the Christian ideal of monogamous and indissoluble marriage, without having any plausible foundation in Islamic legal sources.

Keywords

Islamisation, Federal Shariat Court, restitution of conjugal rights, RCR, Muslim personal law, Anglo-Muhammadan law, British India.

Introduction

The Federal Shariat Court (FSC) was constituted by President Muhammad Zia-ul-Haq (d. 1988) and assigned the task to ascertain and adjudicate upon the Islamic validity of existing and future legislative instruments. The Shariat benches were initially established in 1979 as special benches in the High Courts of each province,[1] which were later converted into the FSC in 1980 as

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[1] Constitution (Amendment) Order 1979 (P.O. no. 3 of 1979).

an autonomous judicial institution, independent of the mainstream judiciary.[2] The FSC exercises its jurisdiction by hearing the petitions filed by individuals, as well as on its own motion, vide *suo motu* powers of the court.[3] Some limitations were initially also placed on the jurisdiction of the FSC in the Constitution of 1973, which included the Constitution, Muslim personal law, and procedural and financial laws.[4]

Since independence, the role and status of religion in Pakistani legal system has been a moot question.[5] The religious groups/parties of the country have been of the opinion that Islam should have a decisive role in the constitution and the judiciary should be conferred on an authority to adjudicate upon and ascertain Islamic nature of legislation. Prior to the establishment of the FSC, a political consensus was manifested by all constitutional instruments[6] that the process of Islamisation would be spearheaded exclusively by the elected representatives of the people, i.e., the parliament. The institutions other than the parliament would have advisory role only and many such institutions and bodies were established, such as Advisory Council of Islamic Ideology (now Council of Islamic Ideology) and Central Institute of Islamic Research (now Islamic Research Institute). The establishment of the FSC undermined this consensus and made the judiciary an integral part of the process of Islamisation in the country. General Zia-ul-Haq usurped power by dislodging the existing democratic setup with an agenda of Islamising the system.[7] To squeeze out the parliament of its authority permanently, he came up with an innate idea to constitute the FSC.

The FSC has over the years adopted a jurisdictional approach to confine itself to the explicit dictates mentioned in the primary sources of Islamic law (i.e., the Qur'ān and the *sunnah* of Prophet Muḥammad (peace be on him). In this approach, it assumes that all legislations are valid under Islamic law unless their Islamic validity is questioned on the basis of explicit dictates from the primary sources (i.e., the Qur'ān and the *sunnah* of the Prophet). The court does not get into those controversies in which Islamic dictates could be

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[2] Constitution (Amendment) Order 1980 (P.O. no. 1 of 1980).

[3] Constitution of Pakistan 1973, art. 203D.

[4] Ibid., art. 203B(c).

[5] Ishtiaq Ahmed, *The Concept of an Islamic State in Pakistan: An Analysis of Ideological Controversies* (Lahore: Vanguard Books, 1991); Leonard Binder, *Religion and Politics in Pakistan* (Berkeley, CA: University of California Press, 1961); Martin Lau, *The Role of Islam in Legal System of Pakistan* (Leiden: Martinus Nijhoff Publishers, 2006); Shariaf al Mujahid, *Ideological Orientation of Pakistan* (Karachi: National Committee for Birth Centenary Celebrations of Quaid-i-Azam, 1976).

[6] Constitutions of 1956, 1962, 1972, and 1973.

[7] Stephen Philip Cohen, *The Idea of Pakistan* (Washington, DC: Brookings Institution Press, 2004), 84.

construed in more than one way and generally leaves such spaces to the parliament to decide. In this context, the present author argues that the jurisdictional approach evolved by the FSC is in favour of the "default legal system." He will take up this issue in detail in the second part of the paper that analyses the FSC's judgements on the restitution of conjugal rights (RCR). This jurisdictional approach has its own merits, but the same may lead the FSC to the murky area of conferring Islamic validity on such instruments grafted onto the legal system during British Indian era, though they did not possess Islamic foundations.

In this context, the paper problematises the jurisdiction of FSC by analysing its two recent decisions, which have conferred Islamic sanctity on suits of the RCR. The paper also explores some landmark decisions pronounced during the British colonial era, which formed the bases for the RCR in the Indian subcontinent. The purpose of this analysis is to establish how an apparently normal suit of contemporary times within Pakistani legal system—whose Islamic authenticity was difficult for the FSC to doubt—has troubled and shaky foundations. Additionally, the paper points out that the RCR is different from reconciliation and that the coercive jurisdiction of any outside institution is likely to destabilise, rather than strengthen, a marital relationship. Without assuming absoluteness of the analysis conducted, this paper primarily focuses on bringing to light anomalies in the jurisdiction of the FSC and problematising a perspective often peddled by aspirants of the judicial Islamisation, that is, it would lead to the establishment of an authentic Islamic legal system in Pakistan.

In addition to the introduction and conclusion, the paper is divided into three parts. The first part deals with important cases on the RCR during the British Raj to trace the evolutionary grafting of the RCR through judicial process. The second part analyses the recently pronounced decisions of the FSC on the RCR with an object to explore how the court concluded its Islamic validity. The last part argues that "reconciliation" as ordained by the Qur'ān for maintenance of the relationship of spouses is difficult to be equated with the "restitutive" apparatus of the RCR.

Important Cases on the RCR during the British Raj

This section presents an analysis of historical roots of the RCR in the Indian subcontinent, with particular reference to important cases. The analysis of these cases highlights how the RCR was initially perceived in the legal system of the subcontinent and how such perceptions underwent a paradigmatic shift within a short span of time by judicial engineering at various levels/forums.

It is argued that before the advent of the British Raj no comparable remedy like the RCR was available in either Muslim or Hindu religious laws.[8] Al-Haj Mahomed Ullah ibn S. Jung, after discussing some aspects related to the RCR, concludes, "This part of Anglo-Muslim Law is absolutely the product of legislative and judicial development."[9] The same author further argues that the cases "conclusively show that the Courts in British India [with reference to the RCR] have been more guided by the principles of the English Law."[10]

The first case in this context is *Ardaseer Curestjee v. Perozeboye*.[11] The parties to the suit were a Parsee married couple living in Bombay, which was a presidential town then under the British Raj. The husband contracted a second marriage and left his first wife—the respondent in the present case—unattended. She filed a suit against her husband to take her back to the marital home. The suit was tried in the Ecclesiastical side of Supreme Court of Bombay, which passed the decree against the husband. During the course of the proceedings, the husband challenged the jurisdiction of the court as to maintainability of such suits, but his objections did not convince the Chief Justice whose opinion according to the charter of the court had to prevail. The husband filed appeal against the Supreme Court's decision to the Privy Council. This was the first case decided by the Privy Council dealing with maintainability of the RCR suits in the Indian subcontinent.

At that time, the judicial system under the British Raj was bifurcated into Ecclesiastical side and civil side of the courts. The suits in the Ecclesiastical side were decided according to Ecclesiastical law, which was based on "doctrines of Christian church."[12] According to Ecclesiastical law, polygamy was not permitted and was treated as adultery. In case of adultery, a Christian wife was entitled to have separation from bed and board along with alimony only. Though the spouses were entitled to enforce their matrimonial rights through the RCR in Ecclesiastical side of the jurisdiction, the RCR was not granted in case of adultery. However, in the present case, the husband contracted another

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[8] Preet Singh, "Restitution of Conjugal Rights: A Comparative Study" (PhD diss., Maharshi Dayanand University, 1995), 98–99.

[9] Al-Haj Muhomed Ullah ibn S. Jung, *A Dissertation on the Development of Anglo-Muslim Law in British India* (Allahabad: Juvenile Press, 1932), 27.

[10] Ibid., 28. Under Muslim personal law, the RCR was imported from British common law and its application was extended under the phrase "equity, justice, and good conscience." See M. Gangadevi, "Restitution of Conjugal Rights: Constitutional Perspective," *Journal of Indian Law Institute* 45, nos. 3-4 (2003): 453–55.

[11] 1856 IA (Privy Council) 265.

[12] This phrase again has been borrowed from the judgement of the Privy Council (ibid.) and refers to that Christian faith, which had official support of the Crown then.

marriage without dissolving the first one, which was lawful under Parsee law according to the Privy Council. The husband was happily living with the second wife and the first wife was claiming to have conjugal unity enforced in the Ecclesiastical jurisdiction of the British courts. It is interesting to note that the parties were Parsee, the courts were established under the British Raj, and the jurisdiction in which the wife initiated her remedy was governed by the rules of Christianity. The wife's object to get her martial rights enforced through the Ecclesiastical side of the court's jurisdiction and not from the civil side was because of the fact that the RCR was granted in this jurisdiction, treating the remedy as of Christian origin exclusively.

In the present case, the conundrum before the Privy Council was that if the RCR decree was granted by it to Parsee wife despite her husband's second marriage, it would amount to enforcing and recognising polygamy, which was nothing other than adultery according to doctrines of Christianity. The Privy Council ruled that "change in essential character" by enforcing the RCR and indirectly recognising polygamy would militate against the sanctity of Ecclesiastical law. Hence, the apex court in categorical terms said, "A suit for the restitution of conjugal rights—strictly an Ecclesiastical proceeding—could not consistently with the principles and rules of Ecclesiastical Law, be applied to the parties who profess the Parsee religion."[13] In such uncharacteristic situation, where Privy Council was hesitant to indirectly recognise polygamy under Ecclesiastical law, it found a tactical way to pronounce a possibility that such remedy could be availed on civil side of the Supreme Court's jurisdiction that had more flexibility and adaptability to accommodate various religions and local customs.[14]

The significance of *Ardaseer Curestjee v. Perozeboye* lies in the fact that on the one hand, it asserted Christian roots of the RCR in absolute terms for enforcing indissoluble monogamy, and on the other, it opened window for the natives, having different religions and customs, to seek this remedy from civil jurisdiction of British Indian courts. Therefore, *Ardaseer Curestjee v. Perozeboye* was the foundation block of the process of "indigenisation" of the RCR in the Indian subcontinent, which unknotted it from its Christian roots.[15] It further made available a space to various religious communities, located in the Indian subcontinent, to construct their own justifications for resorting to the RCR.[16]

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[13] Ibid., 265, 267–68.

[14] Ibid., at 267.

[15] Rebecca R. Grapevine, "Family Matters: Citizen and Marriage in India 1939–1972" (PhD diss., University of Michigan, 2015), 110.

[16] Shahbaz Ahmad Cheema, "Indigenization of Restitution of Conjugal Rights in Pakistan: A Plea for Its Abolition," *LUMS Law Journal* 5, no. 1 (2018): 1–18.

From the perspective of Muslim personal law, the most important case on the RCR is *Moonshee Buzloor Ruheem v. Shumsoonissa Begum*.[17] In this case, the court emphasised the contractual nature of marriage under Islamic law and expressed astonishment as to how a marital contract could be envisioned without the prospect of "specific performance." The Privy Council, while addressing the question of whether a Muslim husband could force his wife, without the latter's consent, to return to cohabitation through civil courts of India, observed "If a law which regulates the relations of the parties gives to one of them a right, and that be denied, the denial is wrong; it must be presumed that for that wrong there must be a remedy in a Court of Justice."[18] The Council concluded, "Their Lordship have no doubt that the Mussulman Husband may institute a suit [for the RCR] in the Civil Courts of India, for declaration of his right to the possession of his Wife, and for a sentence that she return to cohabitation; and that suit must be determined according to the principles of the Mahomedan law."[19] While providing reasoning behind the judgement, the Privy Council acknowledged that it did not discover any comparable remedy to the RCR in *Hidāyah*,[20] which only stated that the disobedient wife or the wife going abroad without her husband's consent would be deprived of maintenance until she returns to submission. The Council held, "It seems implied throughout, that she, from the time she enters his house, is under restraint, and can only leave it legitimately by his permission, or upon a legal divorce or separation, made with his consent."[21] Therefore, *Moonshee Buzloor Ruheem v. Shumsoonissa Begum* confirmed the possibility of pursuing the RCR through civil jurisdiction of British courts as articulated in *Ardaseer Curestjee v. Perozeboye* with an additional proclamation that the parties to the suit might raise defenses under their religious personal laws, which they were supposed to follow.

The third important case in this domain is *Abdul Kadir v. Salima*,[22] which was decided by Allahabad High Court. It provided the much-needed religious sanctity to the RCR, by equating it with the spouses' right of cohabitation

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[17] (1867) 11 Moore's Indian Appeals 551.

[18] Asaf A. A. Fyzee, *Cases in the Muhammadan Law of India and Pakistan* (Oxford: Oxford University Press, 1965), 294.

[19] Ibid., 296.

[20] *Hidāyah* was one of the most revered books of Ḥanafī school of law written by Burhān al-Dīn al-Marghīnānī (d. 1197 CE). It was translated into English by Charles Hamilton under the auspices of the British Raj and treated by the British Indian courts as standard version of Islamic law. For details, see Shahbaz Ahamd Cheema and Samee Oziar Khan, "Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan," *al-Adwa* 28, no. 40 (2013): 23–36.

[21] Fyzee, *Cases in the Muhammadan Law*, 296.

[22] (1886) 8 All 149.

under Islamic law. In his judgement, Justice Syed Mahmood (d. 1903)[23]—the first Muslim judge of any High Court in British India—reproduced extracts from legal texts to conclude that the incidents of a Muslim marriage, such as husband's obligation of dower and mutual rights of cohabitation, flowed simultaneously. His analytical discourse, based on authoritative books, gave an unflinching impression as if the spouses' mutual rights of cohabitation in Islamic law were equivalent to the RCR.[24]

The RCR—which is treated today as a normal remedy in matrimonial disputes in Pakistan—was originated in Christianity where it was employed to enforce indissoluble monogamy. It was grafted onto Indian subcontinent as a civil remedy shunning away its Christian distinctiveness. Then it crept into the personal laws of all religious communities of the subcontinent.[25] The distance travelled by the RCR within three decades from the first decision of Privy Council to the last-mentioned decision of Allahabad High Court was nonetheless amazing. Three decades ago, the Privy Council was hesitant to extend the RCR under Ecclesiastical jurisdiction to natives due to its distinctive Christian roots. About a decade later, the same Council despite enforcing the RCR for Indian Muslims candidly acknowledged that such remedy was not found in *Hidāyah*. Lastly, Justice Syed Mahmood portrayed it as comparable to spouses' mutual rights of cohabitation under Islamic law.

Judgements of the FSC on the RCR

In 2015, the FSC pronounced two judgements relating to the RCR. Both are titled as *Nadeem Siddiqui v. Islamic Republic of Pakistan*.[26] The first judgement relates to Section 5 (along with its Schedule) of the Family Courts Act 1964, which empowers the family courts to grant the decree for the RCR, whereas the second judgement pertains to the procedure for enforcement of such decrees as laid down in Civil Procedure Code 1908. In the first reported judgement, the petitioner challenged the provision, which empowered the family courts for granting the relief of the RCR, as unconstitutional and against the injunctions of Islam. While relying on Qur'ānic precept contained in 4:35, related to reconciliation between spouses in cases of discord, it was contended that the family courts could not grant decrees for the RCR nor

[23] See Alan M. Guenther, "Syed Mahmood and the Transformation of Muslim Law in British India" (PhD diss., Institute of Islamic Studies, McGill University, 2004).
[24] Shahbaz Ahmad Cheema, "Revisiting *Abdul Kadir v Salima*: *Locus Classicus* on Civil Nature of Marriage?" *al-Adwa* 33, no. 49 (2018): 63–78.
[25] Grapevine, "Family Matters."
[26] PLD 2016 FSC 01 and PLD 2016 FSC 04.

could "force an unwilling wife to live with her husband against her wishes."[27] This implied that the spouses could be reconciled in the event of discard with the assistance of arbitrators and that the process of reconciliation should be voluntary and not compulsive. The court did not have any objection as to the importance of reconciliation between spouses, and to this extent, both the court and the petitioner held the same views. However, the thorny issue that the court was interested to determine related to the length of time, which the court should wait before granting the decree for RCR. The petitioner ardently maintained that the court was not authorised to issue such decrees in the first place, hence, the question of ascertaining time for this purpose was of no consequence. On this response, the court noted, "The learned counsel, however, could not cite any Verse or Hadith to support his contention. Obviously, the stance taken by the learned counsel is neither logical nor judicious."[28] The court further observed that if the spouses were allowed to live separately for some time, it would have severe emotional and moral consequences for both, in addition to adversely affecting the wife, who does not have any other source of income than her husband. The best course in this situation according to the court would be to resolve the marital controversy in either way—restituting conjugal rights or petitioning for *khul'*. After this analysis, the court concluded,

> The learned counsel could not satisfy the Court as to how the impugned section which authorizes the family courts to issue decree for restitution of conjugal rights is repugnant to injunctions of Islam. . . . He could cite no specific Verse or Hadith which puts an embargo on the Family Court and restraint it from passing an order for restitution of conjugal rights if the wife is not ready for dissolution of marriage on the basis of Khula.[29]

The above-mentioned judgement does not engage in an elaborate analysis of the Islamic validity of the RCR on its own. The most noteworthy aspect of the judgement is that it assumes the inherent Islamic authenticity of the RCR and then requires the petitioner to prove otherwise. The court asked the petitioner to substantiate that the RCR was against the injunctions of Islam as detailed in the Qur'ān and the *sunnah* and when the petitioner did not bring any explicit Islamic dictate before the court, it swiftly took refuge in the well-settled jurisdictional approach evolved to extend its blessings to "default legal system." Since the RCR was part of the default legal system and there was no

[27] PLD 2016 FSC 01, 02.
[28] Ibid., at 03.
[29] Ibid., at 03–04.

explicit Islamic injunction to the contrary, the FSC found it difficult to question its Islamic authenticity.

The second judgement of the FSC on the RCR distinctively pertained to the procedure for enforcement of the decree of the RCR. The relevant provisions of the Civil Procedure Code (i.e., Rules 32 and 33 of Order XXI) empower the courts to attach and sell the property of the willfully defaulting spouse along with legally obliging the husband to pay a periodic amount for non-compliance of such decree. The petitioner was of the view that the RCR and its enforcement procedure were threatening enough to compel an unwilling wife to seek dissolution. A husband, after securing a decree for the RCR, might initiate a coercive procedure for enforcement of the decree exposing his wife to unbearable economic crises. This situation did not leave any opening for the defaulting wife except to file proceedings for dissolution.[30] Hence, according to the petitioner, there was a direct nexus between the coercive procedure for enforcement of decree for the RCR and dissolution proceedings, and declaring the former as against Islamic injunctions might reduce the frequency of the dissolution suits. While highlighting the significance of the procedure for enforcement of judicial decrees, the court said, "If after the whole exercise, a decree passed, a judgment delivered is not complied with or not taken to its logical end, the whole exercise becomes meaningless."[31] A wife once entering into a marital bond was bound to follow its conditions and if she wanted to get rid of the bond, it was not appropriate to stay away in contravention of the RCR decree. She should rather initiate dissolution proceedings as per the court.[32]

Since the petitioner attempted to forge a nexus between the frequency of dissolution proceedings initiated by wives and the coercive procedure laid down for execution of the RCR decree, he referred divine precepts in this context and based his arguments on them. But the court found such precepts as unrelated to the matter under inquiry and concluded, "Even on merits, the learned counsel has not been able to refer to any specific provision in the Holy Quran, Hadith or even Fiqh which could support his contentions."[33] Additionally, relying on its constitutional mandate,[34] the court held that it could not evaluate from Islamic perspective any legal provision falling within the domain of Muslim personal law and procedural law.[35]

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[30] PLD 2016 FSC 04, 07.
[31] Ibid., at 08.
[32] Ibid.
[33] Ibid., at 09.
[34] Constitution of Pakistan 1973, art. 203B(c).
[35] PLD 2016 FSC 04, 09.

There are some points to be highlighted that the court kept on emphasising that the petitioner was unable to specify any Qur'ānic verse or saying of the Prophet which could point out that the RCR was inconsistent with the injunctions of Islam. Hence, the burden to problematise the religious sanctity from Islamic perspective was exclusively put on the petitioner. It means that the court succumbed to the adversarial method of inquiry, to which the judges in Pakistan are accustomed to. The court unconsciously overlooked the constitutional mandate[36] that empowered it to assume *suo motu* jurisdiction, which was difficult to be exercised without resorting to inquisitorial manner of inquiry.

Though the jurisdictional provisions of the FSC could be read otherwise and the court could have been held to have inquisitorial jurisdiction, the manner in which the court has exercised it over the years gives the impression as if it would exercise its jurisdiction preferably and generally through adversarial method of proof. This approach puts the burden on the petitioners to bring convincing evidence before the court. If they could not produce that quality of evidence, their petitions are destined to be dismissed. The standard of quality of such evidence has been raised to such a degree that it is difficult to meet without bringing before the court some definitive verses of the Qur'ān and sayings of the Prophet. In absence of such definitive evidence, Islamic validity of any existing legislative instrument is presumed to be well founded and secured. The FSC does not require the "injunctions of Islam" for maintaining validity of any legislation. However, it obliges the petitioners challenging any such legislative instrument to bring definitive evidence for invalidation. Furthermore, such judicial approach of the FSC implies that whenever any verse is capable of reading in more than one way, that interpretation would be given judicial sanctity that favours the "default legal system." There is no specific verse and hadith, which affirm unambiguously the Islamic validity of the RCR, but there are plenty to show that an ideal married life can never be maintained under Islamic law by compulsive and coercive mechanism, which is an integral part of enforcing the RCR decrees.

This jurisdictional approach is consistently followed by the FSC for dismissing numerous Shariat petitions, though the phraseology employed for this purpose might have slight variations. For instance in *Muhammad Akram v. Federation of Pakistan*,[37] the FSC observed, "The learned petitioner could not specifically point out any verse of the Holy Quran or Hadith of Holy Prophet . . . to support his contentions." It was held in *Maqbool Ahmad Qureshi v. Government of Punjab* that "no direct injunction is available in the

[36] Art 203D.
[37] PLD 2017 FSC 24, 32.

Holy Quran regarding the age limit for appointment, selection or election of a person to a public office."[38] In another case entitled *Syeda Viquar un Nisa Hashmi v. Federal Government of Pakistan*, the court pointed out that the petitioner "could not make reference to any other 'NASS' of Holy Quran or Sunnah" in support of his case.[39] The above jurisdictional approach of the FSC was initially earmarked by the Shariat Appellate Bench (SAB) of the Supreme Court of Pakistan in *Pakistan v. Public at Large*.[40] Since then the FSC has been provided a ready-made jurisdictional argument to avoid taking up matters for scrutiny from Islamic perspective. In this way, the FSC favours the default legal system and occasionally ventures into the ascertainment of any legislative instrument when its provisions are found to be contrary to an explicit and definitive dictate of the Qur'ān and the *sunnah* of the Prophet. When an Islamic argument is dispelled by the FSC either for confining itself to the technicalities of jurisdictional approach or by not resorting to inquisitorial manner of inquiry, this approach by necessary implication establishes Islamic validity of such impugned legal provision. This manner of exercising jurisdiction may have its own advantages, but in context of Islamisation of the RCR, it has ended up adorning an alien instrument having distinctive roots in Christian ideal of monogamous and indissoluble marriage with Islamic authenticity.

Restitution versus Reconciliation

The FSC in the first case on the RCR made a reference to verse 4:35 of the Qur'ān[41] and highlighted that reconciliation is always a preferred option.[42] Thereafter it assumed that the RCR was the most appropriate way to make spouses reconcile. This Qur'ānic verse has a specific reference to carry out reconciliatory efforts with the assistance of arbitrators nominated from the families of both spouses before dissolution—if that remains the only option. Even if this verse is interpreted as a general command to resort to reconciliation between spouses, it does not support the conclusion drawn by the FSC as to rule Islamic validity of the RCR. Rather the verse makes the opposite clearer, that is, reconciliation will not be effective unless both spouses

[38] PLD 1992 FSC 282, 284.
[39] PLD 2017 FSC 08, 12.
[40] PLD 1986 SC 240.
[41] "If ye fear a breach between them twain, appoint (two) arbiters, one from his family and the other from hers. If both wish for peace, Allah will cause their reconciliation. For Allah hath full knowledge, and is acquainted with all things." 'Abdullah Yūsuf 'Alī, *The Meaning of the Holy Qur'ān* (Beltsville, MD: Amana Publications, 2004), 196.
[42] PLD 2016 FSC 01, 2–3.

agree to it voluntarily. In light of the above-mentioned Qur'ānic verse, the process of reconciliation is voluntary and it could not be enforced against the wishes of one spouse. Contrarily, the RCR is threatened with sanctions of various categories. Even if those punitive sanctions are not enforced strictly as a matter of course, it may have numerous unintended and adverse consequences for wives as mentioned later in this part.

Restitution generally entails some sort of compulsion and coercion, which is difficult to be watered down to the level of reconciliatory efforts by any judicial or legislative engineering. The provisions relating to enforcement of the RCR decree in Civil Procedure Code 1908 bear sufficient proof that coercive mechanism is an integral part of enforcing it. It would not be out of place to mention that when Justice Syed Mahmood pronounced his aforementioned decision,[43] imprisonment of the defaulting spouse was one of the options for execution of the RCR decrees. This option was removed in the first quarter of twentieth century from the Civil Procedure Code 1908 while leaving other options intact (e.g., attachment and sale of property).[44] Assuming in this context of coercive enforcement through attachment and sale of property that the RCR is similar to reconciliation is not less than self imposed fantasy.

In his brief treatise on rights and duties of spouses, Sayyid Abū 'l-A'lā Maudūdī (d. 1979) has regarded mutual blissfulness and affection as one of the prime objectives of marriage under Islamic law.[45] There are many verses in the Qur'ān which portray a married life as an epitome of harmonious and affectionate relationship.[46] There are a number of other verses, which make a point that if marital relationship could not be maintained with affection and friendliness, it is better to dissolve it politely and courteously.[47]

Elsewhere,[48] the present author has shown how the RCR goes against harmony, affection, and serenity of married life and is reduced to an instrument for purposes other than these. It is not the tactical use that makes it objectionable; rather, the state's complicity, by retaining it as a legal remedy makes it more intolerable. Moreover, the recent decisions of the FSC conferring Islamic authenticity on the RCR have made the situation worse.

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[43] Abdul Kadir v. Salima (1886) 8 All 149.
[44] Rule 32 of the Civil Procedure Code, 1908.
[45] Sayyid Abū 'l-A'lā Maudūdī, *Ḥuqūq al-Zaujain* (Lahore: Idārah-i Tarjumān al-Qur'ān, 2008), 21.
[46] Ibid., 21–22.
[47] Ibid., 23–24.
[48] Cheema, "Indigenization of Restitution of Conjugal Rights in Pakistan."

It has specifically been dictated in the Qur'ān to husbands not to keep their wives for causing them harm and injury.[49] Though the verse last referred is in context of dissolution of marriage, according to Maudūdī its import is of generic nature obliging husbands to avoid causing harm/injury by all perceptible and insidious means.[50] The jurisprudence developed in Pakistan on the RCR demonstrates how it is bound to cause harm/injury to wives. If a wife does not comply with a RCR decree, she is likely to be deprived of her maintenance.[51] Further, in presence of a decree of the RCR, her claim for dissolution would generally be decided on the basis of *khul'* that makes her pay for her release irrespective of her financial position.[52] Hence, such a decree seems to have financial benefits for husbands from absolving them from payment of maintenance to enriching them at the eve of dissolution. If such disadvantages are not considered harm/injury to wives, the judiciary needs to rethink its constricted notion of harm/injury.

An analysis based on cross case comparisons makes contradictions more appreciable and evident. Many decisions of the FSC[53] guided the Supreme Court in *Abdul Waheed v. Asma Jehangir*[54] to articulate that an adult virgin cannot be married without her consent and there was no legal necessity to procure the consent of her *valī* (guardian). However, the same FSC ruled that what was necessary for contracting marriage (i.e., consent of the bride), was not so essential for continuing marriage, and some sort of compulsion and coercion in form of RCR was justified.

Under Islamic law, various modes of dissolution of marriage are demonstrative of how spouses could withdraw their consent to remain in marital tie. In Pakistani legal system, a husband may pronounce divorce, whereas a wife may initiate a judicial proceeding to dissolve her marriage either on the basis of divorce or *khul'*. One may argue that withdrawal of consent on the part of the husband is more efficacious as compared to the wife. Nevertheless, both the spouses possess option of withdrawing their consent despite variance in the procedure. Coming back to the RCR, it relates to a temporary separation between the spouses before they have actually made up their mind to dissolve the marriage. At this stage, if a wife is coerced either

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[49] Qur'ān 2:231.
[50] Maudūdī, *Ḥuqūq al-Zaujain*, 39, 102.
[51] Parveen Akhtar v. Javed Akhtar 1984 MLD 454 (Lahore); Israfel v. Nekam Zada 2016 YLR 1103 (Peshawar).
[52] Cheema, "Indigenization of Restitution of Conjugal Rights in Pakistan," 16–17.
[53] Muhammad Imtiaz v. State PLD 1981 FSC 308; Arif Hussain and Azra Parveen v. State PLD 1982 FSC 42; Muhammad Ramzan v. State PLD 1984 FSC 93; Muhammad Yaqoob v. State 1985 PCr. LJ 1064.
[54] PLD 2004 SC 219.

to resume cohabitation with her husband or prematurely initiate the proceedings for dissolution, under the threat of coercive procedure orchestrated by the state, it will place the wife in a disadvantageous position not countenanced by Islamic law. At this stage of temporary separation, spouses may be assisted with counsel and advice, but such proceedings should not cause further harm and injury to the wife.

In its famous case titled *Saleem Ahmad v. Government of Pakistan*,[55] the FSC dealing with dissolution of marriage—even before adducing evidence by spouses—held that such legislative provision could not be declared as repugnant to Islamic dictates. Here the FSC assumed that when reconciliation was not possible, dissolution should have been resorted to, without wasting further time and energies in procuring evidence/proof. However, when it is compared with the rationale in the decisions under examination on the RCR, the FSC appears to lend its weight to maintaining the option of compulsion and coercion for continuity of married life despite the fact of failure of reconciliation. Failure of reconciliation made the FSC to dissolve without pursuing the long-drawn procedure of suits in *Saleem Ahmad v. Government of Pakistan*, the same situation of irreconcilability guided the FSC to compel the defaulting spouse into nuptial abode once again. In *Saleem Ahmad*, the FSC poised the question that "Should she be pushed back to her husband to remain tongue tied, tight lipped, depressed and dejected, having a miserable survival throughout her whole life?"[56] In the decisions under analysis on the RCR by the FSC, she was actually pushed to that situation reinforced by the threat of coercive mechanism to follow if she did not comply.

This contradictory logic demonstrated in the cases analysed in the preceding paragraph can only be brought home when it is examined in light of the jurisdictional approach evolved by the FSC over the years. It protects rather stamps with Islamic authenticity upon that stance which has already found favour of the parliament. It thereby means that "default legal system" always receives the blessing of the FSC. Consequently, the aspirants of rigorous judicial Islamisation have to explore some other option, which is not other than the parliament to which they always face difficulty to get in. Eventually, the court's jurisdictional approach makes it clear that though it was constituted to grab the authority of the parliament as originally envisioned by its architect President Zia-ul-Haq, however, it has ended up reassuring the exclusive legitimacy and competency of the parliament. The exception to this is a very narrow domain directly in conflict with definitive Islamic precepts contained in the Qur'ān and the *sunnah*, which are not

[55] PLD 2014 FSC 43.
[56] Ibid., at 58.

susceptible to more than one unambiguous interpretation. Whenever there is possibility of more than one construction, the FSC would stand behind the perspective adopted by the parliament.

Conclusion

Socio-political context in which institutions operate and function limits their options and shapes their opinions in many ways. It further prevents from recognising the alien-ness of those practices/things to which the institutions have become accustomed to over the years. Interpretive and constructive efforts are not carried out in vacuum; rather, they are carried out in structures, which have both cognitive as well as ontological existence. Hence, they are bound to be influenced by such factors. Sometimes piecemeal semblances and isolated normative sources join together to formulate a picture—under the influence of certain circumstances—which without such context would have been difficult, if not impossible, to achieve or had never been constructed in the past. This is how Anglo-Muhammadan law developed a theological foundation of the RCR, which has ultimately been upheld by the FSC.

The RCR was once recognised as a religious instrument coined by Christianity to enforce indissoluble monogamous marriages. However, later it was stripped of its distinctive religious character and transformed into a remedy of civil nature in order to make it accessible for the adherents of other religions in Indian subcontinent. During the British Indian era, various decisions of the superior courts including the Privy Council and high courts solidified its roots in the legal system of Indian subcontinent. The final turn, in the form of the FSC's recent decisions on the RCR, impinged it once again with religious sacredness. However, this time it was done not from the perspective of Christianity that initially espoused it but under the emblem of Islamic law. It is interesting to note that the British Raj denuded the sacred and religious aspect of the RCR for its smooth application to non-Christians in Indian subcontinent. However, the FSC adorned it with religious sanctity for maintaining its application to Muslims in Pakistan. In this background, swings in character of the RCR from religious to civil and then again from civil to religious nature are worthy to be noted. From a broader perspective, such swings are likely to inform us how categories of religion and civil are constructed and reconstructed in legal systems.

Additionally, the conferment of Islamic validity on the RCR would not have been accomplished if the FSC had not devised the jurisdictional approach it has adopted over the years. By following the adversarial method of proof, it puts burden of substantiating "invalidity argument" against legislative instruments on petitioners and dismisses their petitions when they fail to do

so. In this way, the FSC leans towards "default legal system," assuming it to be in conformity with Islamic injunctions unless any of its aspects is controverted successfully. This jurisdictional approach of the court seems to be in conflict with the constitutional mandate that specifically empowered the court to resort to *suo motu* jurisdiction, which is difficult to be exercised without resorting to inquisitorial mode of inquiry. One may pose a question: Why inquisitorial mode of inquiry has been confined to *suo motu* proceedings by the FSC and less cumbersome adversarial manner is generally adopted in individual petitions?

By presuming the Islamic validity of "default legal system," the FSC has basically jeopardised the very perspective with which it was initially established by President Zia-ul-Haq, that is, to create a parallel yet more effective institution than the parliament to carry out the mission of Islamisation of laws. Apparently, the FSC takes cognisance of such cases with a staunch presumption that the laws made by the parliament are valid from Islamic perspective unless their Islamic authenticity is definitively disputed by the aspirants of judicial Islamisation. Consequently, through its jurisdictional maneuvering, the FSC has rendered ineffective the spirit behind shifting such authority from sole prerogative of the parliament to that of a non-elected judicial body (i.e., FSC). The cause that was intended to be achieved through the establishment of FSC has been lost by the very institution itself!