



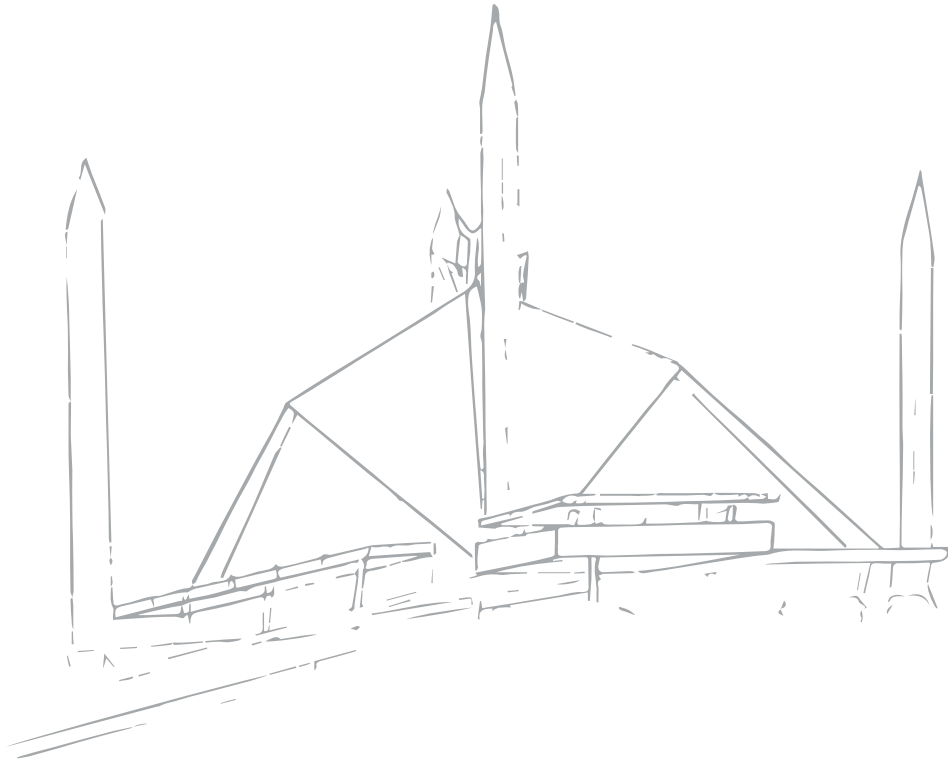
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## Islamization of Laws in Pakistan, Federal Shariat Court and Contemporary Challenges

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### Abstract

*The structure of the state of Pakistan is based on Islamic ideology. Islam is the state religion under article 2 of the constitution of Islamic republic of Pakistan, (1973). There are significant attempts and efforts made for Islamization of laws, such as, the adoption of Objective Resolution, (1949). The bulk of the provisions of Islamic law regulate individuals as well as collective lives of the people. However, there are certain challenges. Islamization is urgent need of the Pakistani Muslims. An implementation and enforcement of the provisions of Islamic laws in true sense is essential for further progress in Pakistan. The role of the constitutional institutions for Islamization is significant for consideration having certain challenges in implementation. In this context, this paper specifically discusses the role of constitutional institution, the Federal Shari'at Court (FSC). It argues that the FSC has, more or less, contributed for Islamization of laws in Pakistan and there are certain challenges in terms of its application. It analyses the judgments of the FSC and describes its powers and procedural challenges for Islamization of laws. It further highlights the jurisdiction of the FSC and pendency of the cases in Shari'at Appellate Bench is questionable. The paper concludes that although legislature and in particular FSC have contributed for Islamization of laws and for constitutional development but still implementation of laws and Court decisions is a big challenge.*

**Keywords:** Constitutional institutions, Islamization of laws in Pakistan, Challenges, FSC.

### 1. Introduction

Under article 2-A of the Constitution of Islamic Republic of Pakistan, 1973, Islam is the Religion of the State. The basic

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ideology of the Pakistan is based on "Injunctions of Islam". Pakistan was declared as Islamic Republic in 1956 based on Objective Resolutions of 1949. The foundation of Pakistan is based on Islamic ideology. Islam is the Religion of peace and prosperity and has unique characteristics and features. Under Constitution, citizens of State are required to live their lives in an Islamic way.<sup>1</sup>

All Constitutions of Pakistan endorse that "Islam is the State Religion". All Constitutions maintained that Islamic ideology is the key element and day to day matters and affairs of Pakistan revolve around it.<sup>2</sup> Despite a declared Islamic Republic, Islamization began in the 1970s under Zulfikar Ali Bhutto and later during the rule of General Zia-ul-Haq in the 1980s. *Hudood* Laws were formulated and implemented during Zia's regime. In terms of Constitutional institutions in Pakistan, the Council of Islamic Ideology (CII) and Federal Shariat Court (FSC) are prominent. The role of CII is advisory whereas FSC has its jurisdiction, powers and functions and mandate to make judgments on Islamic laws. This paper is specific to the case of FSC as it is a constitutional body. The methodology adopted in this paper is analytical.

## 2. Federal Shariat Court (FSC) in Pakistan: An Overview

### 2.1. Composition and Structure

During the era of General Zia, the FSC was established by incorporating provisions in the Chapter 3-A of the Constitution.<sup>3</sup> During his tenure, the apparent purpose of such institutions was Islamization of Laws. In this respect, the FSC was assigned a function to "examine any law or provision of law whether the same was repugnant to the injunctions of Islam as laid down in the Holy Qur'an and the *Sunnah*".

According to Article 203-C (2) of the Constitution, 1973 the composition of FSC includes "not more than eight Muslim Judges

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<sup>1</sup> Manzooruddin Ahmed, "Islamic Aspects of the new constitution of Pakistan", *Islamic studies*, Vo.2: No.2, pp. 249-286.

<sup>2</sup> Farhan Mujahid Chak, *Islam and Pakistan's Political Culture* (New York: Routledge, 2015).

<sup>3</sup> President Constitution (Amendment) Order no: 1 of 1980) PLD 1980 Central Statutes p.8, 9.

including the Chief Justice (CJ)". The qualification of CJ of FSC is described as "the Chief Justice of the Federal Shariat Court shall be a person who is, or has been or is qualified to be a judge of the Supreme Court or who is or has been or is qualified to be a judge of a High Court". "Four out of eight other Judges of the FSC include persons who are or have been qualified to be a judge of High Court". The remaining three persons include *Ulamā'* and they must be qualified as who are well versed in Islamic Law. It is important to note that the term of the Judges of the FSC is three years. The President has to play important role for appointment of the Judges of the FSC under article 203C. The President has to appoint Judges of the FSC "on the advice of the Prime Minister and all judges must be qualified".<sup>4</sup>

The CJ of the FSC has to take oath before the President of Pakistan. The format of oath is set out in Third Schedule of the Constitution, 1973. "The CJ of the FSC is entitled to the same salary, allowances and other privileges as are given to a Judge of the Supreme Court under Article 203 C (9)". "A Judge of the FSC is entitled to the same salary, allowances and other privileges which are given to a Judge of a High Court. The principal seat of the FSC is at Islamabad but the Court can sit at other place in Pakistan as the Chief Justice with the approval of the President may consider appropriate".

## 2.2. Jurisdiction and Powers of the FSC

"The FSC is a constitutional organ of the state. It has original, appellate and revisional Jurisdiction. It has exclusive jurisdiction to determine, upon petition by any citizen or the federal or provincial governments or on its own motion (*sue motto*), whether a law is conforming or not to the injunctions of Islam. The FSC has original and appellate jurisdiction. The Court has exclusive jurisdiction to hear appeals from the decision of criminal courts under any law relating to enforcement of *Hudūd* Laws".

"The enactment of law is the responsibility of the Parliament and necessary amendments proposed by the FSC are the

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<sup>4</sup> *Al-Jehad Trust V. Federation of Pakistan*, PLD 1997, SC 84.

responsibility of the executive. If the government fails to amend the impugned law within a specified period, the impugned law or its provision to the extent to which it is held to be so repugnant by the FSC, ceases to have effect on the day on which the decision of the FSC takes effect". The status of the FSC judgments does not remain only *fatwā* (juristic opinion) but transforms into orders that have binding force in this way. The FSC has asserted its right to *ijtihad*. The FSC *ijtihad*s generally are in favor of human and family rights.<sup>5</sup> The cases are independently judged by the Judges of the FSC on case to case basis. The FSC highlights the necessity of resorting to *ijtihad*.<sup>6</sup> There is no institutionalized *taqlid* (imitation) as far as the FSC is concerned. As stated in a FSC verdict, the term 'Injunctions of Islam' "employed in the Constitution has not been defined nor its scope determined, therefore, if there is any repugnancy of any law to the Qur'an and the *Sunnah*, it is left open to be identified and construed by the FSC under its power under Article 203-D (2) of the Constitution".<sup>7</sup>

"Article 203-DD of the constitution confers exclusive revisional jurisdiction on the FSC. The revisional powers of the FSC extends to calling for and examining the record of any case decided by any criminal court under any *Hudūd* laws for the purpose of satisfying itself as to the correctness or legality of any finding, sentence or order passed by it and when calling for such record it may direct that execution of any sentence be suspended". "Clause 9 of article 203-E confers power on the FSC to review its own judgment, decision or order. There is no condition and no limitation on the exercise of this power of review". "Article 203-J empowers the FSC to make rules for carrying out the purposes of the chapter 3-A. Such rules made by the court, be notified in the official Gazette".

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<sup>5</sup> Ihsan Yilmaz, "Pakistan Federal Shariat Court's Collective *Ijtihad* on Gender Equality, Women's Rights and the Right to Family Life", *Islam and Christian-Muslim Relations*, Vol. 25, No. 2, (2014), pp. 181-192.

<sup>6</sup> Sue Motto No.1/K of 2006, 12-13.

<sup>7</sup> Sue Motto No.1/K of 2006, 2007.

### 2.3. Constitutional appeal from FSC to Shariat Appellate Bench (SAB)

According to A. 203F appeal is provided before the Shariat Appellate Bench (SAB) of the Supreme Court against final decision of the FSC within sixty days. "The Federal Government or a Provincial Government can prefer appeal within six months of such decision. The SAB consists of three Muslim judges of the Supreme Court and not more than two *Ulamā'* to be appointed by the President (on advice of the Prime Minister) to attend sitting of the Bench as ad hoc members of the SAB".

### 3. The Role of FSC for Islamization of Laws

While examining laws, the FSC has stated that "the judges should not strictly adhere to the literal meaning of the verse but should consider the spirit of the Qur'an, taking the Qur'an into account in its entirety". The FSC stated that: "Qur'an and *Hadīth* shall have to be interpreted in the light of the evolution of human society and its demands at a particular stage of time... such process should not defeat the intent and purpose for which the Holy Qur'an stands."<sup>8</sup> This position of FSC has played a significant role in judgments on issues of marriage and women's rights. For example, the FSC has declared that requirement of marriage registration is in accordance with the Injunctions of Islam.<sup>9</sup> Although conservative sections in Pakistan pressured the FSC to declare marriage registration a violation of Islamic law and thus of the Pakistani Constitution, the FSC, however, "found this statutory requirement in accordance with the Islamic law since it clarifies an individual's marital status and prevents the denial of women and children's legal rights".<sup>10</sup>

The FSC has also played its important role for interpreting the provisions of the Muslim Family Laws Ordinance (MFLO) of 1961. It has also tried to avoid misuse of the provisions of MFLO.<sup>11</sup> Under the MFLO, the husband must "submit a written notice of

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<sup>8</sup> *Muhammad Riaz v. Federal Government of Pakistan*, PLD 1980 FSC 1, 47.

<sup>9</sup> *Ibid.*, at 51.

<sup>10</sup> *Allah Rakha v. Federation of Pakistan*, PLD 2000 FSC 1, at 48-51.

<sup>11</sup> *Ibid.*, at 61-62.

the *ṭalāq* to the state and a copy to the wife. Nevertheless, many husbands do not submit this document and if the former wife remarries, they deny the divorce and accuse the former wife with *zinā*".<sup>12</sup> The FSC underlined that as "the protector of rights of all human beings" and as "the first religion which has conferred all possible rights that could be bestowed upon a woman".<sup>13</sup>

The FSC ruled in the favor of daughter in disputes between fathers and daughters in relation to consent of *Walī* for a valid marriage. The FSC has ruled out that consent of the daughter is not a necessary element for validity of marriage. However, Scholars differ on this point.<sup>14</sup> "The FSC has also become more vigilant about countering the abuse of the *Hudūd* laws by disgruntled parents, resentful former spouses, political rivals and the police. The FSC has even stated that a woman can never be guilty of *zinā* if she complains of rape at any stage".<sup>15</sup>

In terms of equality between husband and wife, the FSC has ruled out that husband and woman have their rights and responsibilities for protection of a marriage bond. The FSC has condemned and declared discrimination as invalid if it occurs between the spouses. One question is that Does Islam recognize any right of women as husband has in terms of Divorce? The FSC has held that Divorce is purely the right of husband according to Islamic law. However, it does not mean that Islam is unequal with women. The right of women in the form of *Khula* in a Marriage contract has been recognized by Islam. Discrimination at all levels especially with women is prohibited.<sup>16</sup> In a similar petition concerning gender's equality the question was that can appointment of women be made as a Judge? The FSC has ruled out that Islam does not promote discrimination on the basis of sex or on the basis of gender's equality rather Islam condemns discrimination. Man is not superior to woman. The Court held

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<sup>12</sup> Muhammad Khalid Masud, *Role of the Council of Islamic Ideology in the Islamisation of Laws in Pakistan*, (Adelaide: University of South Australia, 2015), pp. 12-45.

<sup>13</sup> *Ibid*, at 62.

<sup>14</sup> *Muhammad Imtiaz and another v The State*, PLD 1981 FSC 308; *Noor Khan v Haq Nawaz*, PLD 1982 FSC 42.

<sup>15</sup> *Safia Bibi v. State*, PLD 1985 FSC 120.

<sup>16</sup> *Saleem Ahmad v Government of Pakistan*, PLD 2014 FSC 43.

that woman was not appointed as Judge in the era of Prophet Muhammad (P.B.U.H). In this case, the FSC has taken into consideration various opinions of the Scholars and other decisions. The Court has also referred to the Qur'ānic verses and held that Islam does not promote discrimination and Islam is the religion that places women and man on equal footings. Both have equal property rights, legal rights and economic independence. The Court has referred to the various Qur'ānic verses and *Hadiths* on the subject. The Court held that man is supporter and protector of the family. Husband is maintainer and protector of the wife. In no case, the woman is inferior or lower to man. Both have responsibilities in relation to preservation and protection of family as is one of the *Maqāsid* (Objectives) of the *Shari'ah*. In this case, the FSC has declared that appointment of woman as a judge is not expressly prohibited by Islam and dismissed the petition.<sup>17</sup>

While taking into consideration the question that can woman become Head of State or Judge, in a petition that was based on Grand Mufti of Saudi Arabia's *fatwā*, the FSC has referred to the Qur'ānic verse 28 of the Chapter 2 that elaborates the similar rights of man and woman and kindness. The Court has also referred to the Ansar Burney case in which dismissal was made on the same petition. In this respect, the FSC has also referred to constitutional provisions.<sup>18</sup> When Section 10 of Citizenship Act was challenged, the FSC has reviewed the relevant legislation and ruled out that foreign husband cannot take citizenship only on the basis of marriage with Pakistani woman. In other words, denial has been made to a foreign husband.<sup>19</sup> The court held that: "We are of the view that section 10 of the Citizenship Act is discriminatory, negates gender equality and is in violation of Articles 2-A and 25 of the Constitution of Islamic Republic of Pakistan and also against international commitments of Pakistan and most importantly is repugnant to Holy Qur'ān and the *Sunnah*".<sup>20</sup> These case laws show that the FSC has played vital role for Islamization of laws in Pakistan.

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<sup>17</sup> *Ansar Burney v. Federation of Pakistan*, PLD1983 FSC 73.

<sup>18</sup> Shariat Petition No.1-L of 2010, 7 October, 2010.

<sup>19</sup> Sue Motto No.1/K of 2006, at 23 and 24.

<sup>20</sup> *Ibid.*, at 16.



### 3.1. Analysis of Certain Judgments of the FSC

Article 203-G confers on the FSC the exclusive power and jurisdiction in respect of matters which fall within its jurisdiction i.e. matters enumerated in Articles "203-D, 203-DD and 203-E, except the matters which are brought to the Supreme Court in appeal before its SAB". In "*Mst Kishwar Sultana v. Municipal Corporation, Faisalabad*" the court held that: "the question regarding the repugnancy of any law to the injunction of Islam is in the exclusive Jurisdiction of the FSC and after that it falls within the Jurisdiction of SAB of the Supreme Court under Article 203-F of the Constitution".

In another important case of "*Muhammad Irshad Khan v. State*" court observed that: "jurisdiction of Superior Courts and Tribunals to entertain proceedings or exercise power of jurisdiction in respect of matters falling within powers and jurisdiction of FSC are barred under Article 203-G of the Constitution". Article 203-H explains the principles relating to "*proceedings pending in any court or tribunal*". Clause 3 of this Article places restrictions on the powers of "Federal Shariat Court or the Supreme Court" to the effect that while exercising their jurisdiction under chapter 3A part VII of the Constitution of 1973 they shall have no authority to grant any interim order or injunction in any proceeding.

The proceeding in any other court or tribunal shall continue unhampered and unhindered even though the point at issue before them is the same which is under examination before the FSC or SAB of the Supreme Court.<sup>21</sup> The approach adopted by FSC is progressive as noted by Shahbaz Cheema.<sup>22</sup> He noted that: "The FSC has more often than not tilted towards the upholding of the second interpretation of the phrase. Thus, the approach of the

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<sup>21</sup> Naeem Ullah Khan, "Constitutional Manacles on Superior Court's Jurisdiction and Recent Scenario on Public Interest Litigation in Pakistan", *South Asian Studies A Research Journal of South Asian Studies*, Vol. 33, No. 2, July - December, 2018, pp. 383 - 394.

<sup>22</sup> Shahbaz Ahmed Cheema, "The Federal Shariat Court's Role to determine the scope of 'Injunctions of Islam' and its implications", *Journal of Islamic State practices in International Law*, (2013), p.94-100.

court is not literal; it is progressive in scope and nature. The most important case on this point is *Pakistan v Public at Large*".<sup>23</sup>

"No one can deny the right of the FSC to come to its own conclusion, but it should also have taken into consideration the SAB's observation in *Pakistan v Public at Large*.<sup>24</sup> The SAB recommended that while determining the meaning of the 'injunctions of Islam' the FSC should seek opinions of learned persons in the field as well as institutions engaged in Islamic learning". In this respect it is argued that the FSC has to play its effective role for declaring inconsistent laws as repugnant to the injunctions of Islam; declaring consistent laws as valid under Islamic law and filling the gaps in laws by suggesting Islamic alternative.

#### 4. Contemporary Challenges

"In Pakistan, injustice, exploitation, intolerance, extremism, misconstrued interpretations of the religion are the symptoms of bad governance practices, inadequate education and lack of training of citizens, and a long neglect in the correct prioritization of policies". "These are big challenges and significant for consideration and solution. Pakistan has made substantial progress in achieving the realistic constitutional and legal structures; the successive governments have not been completely able to convert them in practice. In Pakistan, the enactment of law is the responsibility of Parliament and necessary amendments proposed by the FSC are the responsibility of the executive".

"If the government fails to amend the impugned law within a specified period, the impugned law or its provision to the extent to which it is held to be repugnant by the FSC ceases to have effect on the day on which the decision of the FSC takes effect". "In this way, the status of FSC judgments does not remain that of only a *fatwā* (juristic opinion), but they become orders that have binding force. Implementation of these orders of the FSC is a big Challenge". "The FSC's powers are restricted by Articles 203B-C,

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<sup>23</sup> *Pakistan v Public at Large*, PLD 1986 SC 240.

<sup>24</sup> *Ibid.*,

which exclude the Constitution, procedural law, Islamic personal status law and the MFLO from its judicial review. However, the FSC is both an official institution and also a court". However, "in the beginning, the Objectives' Resolution was adopted that contains all essential elements for framing a balanced constitution, meeting the needs of all citizens, irrespective of their caste, colour or creed". The adoption of Objective Resolution was significant as it includes Islamic provisions. As a result, it became part of the Constitution. Later, efforts were also made by other rulers for Islamization of laws in Pakistan.

However, the interpretation of norms of Islamic law in its true sense by the FSC is a big challenge. In this respect, reforms of the Judiciary and legal reforms are significant for consideration. Simplification of Judicial procedures and reducing delay in administration of justice is a big challenge. The determination of the qualification of Judges is essential for further progress. The other Challenges include: (i) application and enforcement; (ii) pendency of cases at the FSC; (iii) pendency of cases at SAB; (iv) Implementation of the Injunctions of Islam so on and so forth.

## **5. Conclusions and Recommendations**

From the preceding discussion it is concluded that In Pakistan the FSC is the institution which analyses provisions of law. The FSC is required to declare laws inconsistent or repugnant which are not Islamic or against the injunctions of Islam. The FSC may also suggest any changes in the existing legal framework that are against the norms of Islamic law. The FSC devotes to give an alternative by suggesting reforms in order to make conformity with Islamic laws. The FSC has original, appellate and revisional jurisdiction as embodied in Constitution, 1973. The FSC is composed of Judges and experts of Islamic law. The FSC has contributed for Islamization of laws and in no way the Islamic nature can be denied. For example, As noted by the Supreme Court in "*Wukula Mahaz Barai Tahafaz Dastoor Vs. Federation of Pakistan (P L D 1998 SC 1263)*" observed that "when an impugned Constitutional amendment is of such a nature, which tends to destroy any of the basic features of the Constitution without which the State could not have been run as was originally

mandated by the framers of the Constitution cannot be upheld as it destroy the basic feature of the Constitution”.

In another case of “*Pakistan Lawyer’s Forum V. Federation of Pakistan (PLD 2010 SC. 1165)*”, “the Supreme Court while deciding the constitutionality of 17<sup>th</sup> Amendment to the Constitution decided that”: “The Basic Structure Doctrine is acknowledged to be in existence in the Constitution however, there are limitations on the power of Parliament to make amendments. It had been afore said that this can’t be exercised by the judiciary however by the body politics of the country”. The Court concluded that “the theory of basic structure or salient features, insofar as Pakistan is concerned, has been used only as a doctrine to identify such features”. The approach adopted by the FSC is reformative as well as constructive in general having certain challenges, such as, pendency of cases at SAB and application and enforcement. Special efforts are required for further progress in this respect.

In terms of legislation, the parliament and relevant authorities are required to legislate effectively and formulate policies that are beneficial. There is need of exploration in the role of the FSC in order to clarify the existing situation. Special efforts and a balanced approach to that extent are required. The *Fatāwā* of unqualified religious persons or practitioners can be replaced by the balanced interpretations of Islamic provision. Instead, opinions of *Ulamā’* may be taken into consideration who are well versed with traditional as well as modern sciences. Such an effort would be useful for Islamization of Laws in Pakistan. The fundamental principles of Islam include the provisions of justice, dignity of man, equitable assesses and fair play etc may be followed in their true sense for smooth functioning of society.

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