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Impacts of Limited Jurisdiction of Federal Shariat Court on the Islamization of Laws in Pakistan: A Critical Analysis in the Light of Case Laws

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Abstract

This research paper aims to define the distinguished character, significance and role of the Federal Shariat Court and its impact on the process of Islamization of laws in Pakistan. The paper also attempts to examine the nature of authority and power of the Court in the context of the Pakistani judicial system. The main emphasis of the paper at hand is to discuss and ascertain the constitutional limitations placed on the Court's jurisdiction and their ambiguous nature. The difference in interpretations of the constitutionally excluded laws from the Court's jurisdiction, the extent of their scope and their impact on the jurisdictional sphere of the Federal Shariat Court is conversed. The equivocal and unexplained terminology of such restricted laws has strong effect on the diversity of decisions of the Courts in this regard; leading to occasional extension and restraint of the jurisdictional sphere of Federal Shariat Court. Besides, the main function of the Court i.e. the Islamization of laws is highly impeded not only through these constitutional exclusions but also through unjustifiable methods of overruling and pendency. A noteworthy question arises here that is true Islamization possible with such a narrow jurisdictional scope of the only institution vested with this role and in spite of exclusion of such commonly and widely experienced areas of law?

Keywords

Federal Shariat Court, Jurisdiction, Islamization, Muslim Personal Law, Council of Islamic Ideology

Introduction

Incorporated in the Pakistan's 1973 Constitution under chapter 3A, the Federal Shariat Court was instituted by the President's Order No.1 of 1980.¹ The Court was formed with the intention to uphold the purpose of the Constitution's Article 227; which in congruence with the Islamic teachings, explicitly directs not only to bring the currently operative laws in consonance with the injunctions of Islam, but also prohibits enactment of any laws repugnant to them. Article 203D of the Constitution conferred upon the Federal Shariat Court the power of examining and

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¹ Federal Shariat Court of Pakistan, "Establishment", Accessed at: <http://www.federalshariatcourt.gov.pk/en/establishment/>, Accessed on: January 25, 2019.

deciding whether the provisions of law are in contradiction to the injunctions of the Holy Quran and Sunnah or not. However, Article 203B clause (c) while defining the term “law” for the jurisdiction of the said court has excluded the Constitution, Muslim Personal Law and Procedural laws from its domain. Initially, the Fiscal laws were also ousted from Federal Shariat Court’s jurisdiction, but the bar theoretically was to be removed after ten years of the commencement of the concerned chapter.

The research paper at hand attempts to discuss the theoretical and practical status of the Federal Shariat Court, nature of its authority and the impacts of its powers on the notion of Islamization of laws in the Pakistani Legal System. The questions that this research work endeavours to discuss are: What is the basic purpose of the establishment of the Federal Shariat Court? What are the Court’s actual jurisdictional limits? Does the FSC hold an imperative role in the process of Islamization? Does the said Court have superseding power over the High Courts and the Supreme Court regarding the matters of scrutinizing repugnancy in certain laws? Are the decisions of the FSC binding upon the Subordinate and the High Courts? What is the extent of the power that this Court practically has regarding the examination of the laws of Pakistan in the light of *Shari’ah*? Has the FSC attempted to deal with the laws that are ousted from its jurisdiction? Is the exiled jurisdiction of the FSC well defined and are the interpreters agreed on the outlined jurisdictional scope? Are the excluded law regimes significant enough to impact the progression of Islamization? Does the limited jurisdiction of the Federal Shariat Court have any obstructive effects on the progression of the Islamization of the Pakistani Legal System?

These are the questions around the ambit of which the research work shall revolve. The methodology of this research work shall be qualitative, theoretical, and comprehensive. Moreover, it shall incorporate the study of case laws as well.

Status and Position of the Federal Shariat Court

Formally established in the year 1980², the FSC i.e. the Constitutional Court to articulate Islamic laws, was vested with the collective hereditary powers that were previously exercised by the four Shariat Benches which were located separately in the four

² Through Constitutional (Amendment) Order 1980 (P.O. No.1 of 1980).

provincial High Courts of Pakistan³ and were established by General Zia ul Haq in 1979.⁴ The scrutinizing power⁵ of examining the laws, whether or not they are in contradiction with the injunctions of Islam, may be exercised by the Court on itself or on request of any citizen.

Apart from this original jurisdiction of the FSC, it is also constitutionally bestowed with the appellate jurisdiction against any decision of the Criminal courts relevant to the *Hudūd* cases.⁶ Besides, it is also conferred with the revisional power to call by itself for the record of any matter, order, finding, sentence or proceeding dealt by the Sessions Courts regarding the enforcement of *Hudūd*; for examining its correctness and legality and may direct any suspension, release or execution accordingly.⁷ These powers enable the Court to not only entertain the appeals concerning the *hudūd* cases but also to supervise and administer the judicial proceedings of the subordinate courts in this regard.⁸ An appeal by those aggrieved by the decision of this Court, can be filed in the Supreme Court⁹ where it would be heard by the Shariat Appellate Bench (SAB), which is a special bench constituted for the purpose of dealing with the appeals against the decisions of FSC at the highest legal forum. Additionally, the Federal Shariat Court under Article 203 E (9) also possesses an exceptional power of reviewing its own decisions.

Further, the Constitution grants exclusive jurisdiction to the FSC to oversee the Islamization of the Pakistani Legal System by inflicting bar upon the Supreme Court, High Courts and all the other courts to exercise any jurisdiction, authority or power in any matter that solely falls within the ambit of the Federal Shariat Court and when only it has the exclusive jurisdiction to deal with such a matter¹⁰. Also, the High Court and all the subordinate Courts shall be bound by the decisions granted by the FSC while exercising its original jurisdiction.¹¹

³ Muhammad Munir, *Precedent in Pakistani Law* (Karachi: Oxford University Press, 2014), 175.

⁴ Constitutional (Amendment) Order 1979 (P.O.no. 3 of 1979).

⁵ Conferred by Article 203D of the Constitution to the Federal Shariat Court.

⁶ Article 203DD of the Constitution of Pakistan, 1973.

⁷ *Ibid.*

⁸ Charles H. Kennedy, "Repugnancy to Islam-Who Decides? Islam and Legal Reform in Pakistan", *International & Comparative Law Quarterly* 41:4 (1992), 769-787.

⁹ Article 203F of the Constitution of Pakistan, 1973.

¹⁰ Article 203G of the Constitution of Pakistan, 1973.

¹¹ Article 203GG of the Constitution of Pakistan, 1973.

The discussable issues here are to determine that whether it is compulsory for the High Court to follow the decisions of the FSC only when the latter is acting in its original jurisdiction or do the decisions given by it while employing its appellate jurisdiction also possess the binding force? Another issue being that whether the decisions of the FSC are compulsive upon the Supreme Court excluding the Shariat Appellate Bench or not?

The reference towards a prominent case titled *Hafiz Abdul Waheed v. Mrs. Asma Jahangir*¹² would be pertinent in clarifying the former issue to some extent. In this case, not only did the Lahore High Court declare that it was bound by the decision given by the Federal Shariat Court while exercising its appellate jurisdiction (referring to the decision made by FSC in *Muhammad Imtiaz v. The State*¹³), but the Supreme Court also upheld this practice of the Lahore High Court in deciding the above mentioned case¹⁴. One of the judges of the Full Bench of Supreme Court remarked in the decision of the appeal of *Hafiz Abdul Waheed v. Mrs. Asma Jahangir* that by virtue of Article 203GG, the subordinate and the High Courts are required and bound to follow the repeated pronouncements, sentence, judgement and order etc. of the FSC¹⁵. Thus it has been established that the decisions of the Federal Shariat Court given in its appellate jurisdiction are binding upon the High Courts and the Subordinate Courts with the same effect as its original jurisdiction decisions are.

As far as the latter issue of Supreme Court exclusive of SAB being bound by the verdicts of the FSC is concerned, the court in question has itself settled the controversy in *Zaheer Ud Din v. The State*¹⁶. The Supreme Court held that the unchallenged decisions of the Federal Shariat Court along with those challenged but maintained by the Shariat Appellate Bench would be binding on the Supreme Court even.¹⁷ Thus as stated before, the Supreme Court and the High Courts do not have jurisdiction in the exclusive matters of the Federal Shariat Court and thus they are also bound by the decisions given by the FSC in its exclusive jurisdiction. But the decisions of the FSC that have been overruled by the Shariat Appellate Bench shall be deemed to be abrogated, hence having no binding force.

¹² PLD 1997 Lahore 301.

¹³ PLD 1981 FSC 308

¹⁴ PLD 2004, SC 219.

¹⁵ Ibid, 230-233.

¹⁶ 1993 SCMR 1718.

¹⁷ Ibid, 1756.

Purpose and Significant Role of the Federal Shariat Court in Islamization of Laws

Being a constitutional court established to enunciate the Islamization process in Pakistan's Legal System, the Federal Shariat Court undoubtedly holds no parallel to its significant role. The Constitution itself has defined the purpose of its creation to be the yardstick of analyzing all the laws of Pakistan in the criterion of *Shari'ah*. Its purpose as stated earlier is mentioned in Article 203D to be bi-functional in the sense that it not only has the power to detect the incompatibilities of the existing laws with the Islamic rulings, but it also has the authority to propose the alternative *Shari'ah* compliant laws which could be incorporated through legislative amendments. No other institution has been endowed with this power and authority.

The jurisdiction and authority of the FSC in examining the laws in the light of the Holy Quran and Sunnah is unique, exclusive and momentous. There are a very few institutions in Pakistani legal System that could be linked with the notion of the procedure of Islamization; but unfortunately none of them except the Federal Shariat Court has any compulsive force and that is the reason why the exclusiveness, distinctive powers and principal role of this Court in the process of Islamization is acknowledged and emphasized to a very high extent.

For instance, another significant institute i.e. the Council of Islamic Ideology is also created by the Constitution of Pakistan 1973¹⁸ for facilitating the purpose of Article 227 of the Constitution i.e. Islamization of the existing laws of the country. But the CII has not been conferred with any binding powers, rather its authority is merely of advisory nature and it can only put forth recommendations to the Parliament and the Provincial Assemblies.¹⁹ Thus it is evident that only the Federal Shariat Court has exclusive binding powers in this context hence making it a crucial institution for the true implementation of Islamic laws.

The abovementioned arguments depicting the exclusive nature of the Federal Shariat Court's jurisdiction and obstruction on other courts (though superior in hierarchy) to interfere in its matters reveals that the court was intended to be an independent judicial organ. Probably its independence was enthroned to protect it from the influences of other courts and to preserve the

¹⁸ Article 228 of the Constitution of Pakistan 1973.

¹⁹ Article 230 of the Constitution of Pakistan 1973.

sanctity of its decision.²⁰ The Court was formed with the purpose of granting it more autonomy as compared to the Shariat Benches of the High Courts and to make it a separate whole institution with special powers and self-governing jurisdiction. Article 203D of the Constitution directs the legislative authorities to amend the laws highlighted by the FSC to be repugnant to the Islamic law and if not done within the specified time shall automatically cease to have effect on expiry of such time. Therefore, this vital procedure of judicial scrutiny of the Pakistani laws on the touchstone of *Shari'ah*, the coercive substitution of laws and impulsive affectability of decisions of the FSC makes it a paramount apparatus for enabling Islamization of laws in the country.

Extent of Jurisdiction of the Federal Shariat Court

The Federal Shariat Court can exercise its conferred original and appellate jurisdictions either on its own motion (*suo moto*) or on the petition of any citizen of Pakistan or the Federal and Provincial governments. The court has come up with many remarkable decisions in its original and appellate jurisdictions in which it held certain statutory laws to be repugnant to the Islamic laws²¹.

The generally vested power of scrutinizing the laws by Article 203D is restricted by the clause (c) of the Article 203B of the 1973 Constitution. This provision ousts the jurisdiction of the Federal Shariat Court from certain significant legislative instruments. The clause defines law (that could be analyzed) for the FSC to be exclusive of the Constitution, Muslim Personal Law, Procedural and Fiscal laws (for ten years). These laws constitute an enormous portion of the Pakistani Legal System and thus numerous cases falling within the ambit of these ousted laws are attracted by the controversy of being un-Islamic. There are certain provisions in the aforementioned excluded laws that have been highly criticised for being contradictory to the Islamic laws, but there is no practical legal mechanism to bring them in conformity with the commandments of Quran and Sunnah; except for an amendment proposed and passed by the majority of both the houses of

²⁰ Shahbaz Ahmed Cheema, Federal Shariat Court as a Vehicle of Progressive Trends in Islamic Scholarship in Pakistan", *Al-Adwa* January-June 2013.

Available at SSRN:

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2388743.

²¹ Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan", *Islamic Studies* 47:4 (2008), 445-482.

Parliament along with President's assent, which is quite an unrealistic supposition keeping in view the complex and lengthy procedure of such amendment. Moreover, no such prominent amendment bill has been passed by the Parliament in history, favouring the Islamization of contradictory provisions.

The Constitution, Personal laws and Fiscal laws are the domains which commonly involve bulk of the population of Pakistan and being the laws of the Islamic Republic and a Muslim State, ought to be in complete consonance with the *Shari'ah* rulings. But the sole parameter of determining their Islamic status i.e. the Federal Shariat Court has been intercepted from examining them, hence exposing these law realms to induction of equivocal and controversial provisions. Various petitions regarding these laws have been filed in the Federal Shariat Court but it denied dealing them due to its expelled jurisdiction.

Instances of the Cases not entertained by the Federal Shariat Court due to its Restricted Jurisdiction

After the formation of a full fledged independent institute vested with the authority to scrutinize the laws of Pakistan on the benchmark of Islamic laws, the enthusiasm of Muslim citizens of the State had highly been boosted. They eagerly began loading the newly established court with numerous petitions alleging the un-Islamic nature of various laws. Almost more than 60 petitions were filed in the operative last months of the very first working year of the Court and accumulative of its preceding year, the petitions amounted to about 151²². The Court tried its best to exercise its functions and attain the purpose of its establishment, but the constitutional limitation on its jurisdiction put by Article 203B (c) was also to be observed, thus denial of service to many cases was essential.

²² Charles H. Kennedy, "Islamization of Real Estate: Pre-Emption and Land Reforms In Pakistan, 1978 – 1992", *Journal of Islamic Studies* 4:1 (1993), 71-83.

Excluded Jurisdiction of the FSC for the Scrutiny of Constitutional and Procedural Laws

One of its earlier cases was *Mr. B. Z. Kaikaus v Federal Government of Pakistan*²³. In this case, the FSC itself declared that not only the Constitution is ousted from the original jurisdiction of the Court but the Court is also not capable to deal with any such rulings that are enacted for the implementation or bringing into operation any provision of the Constitution. Besides, inspecting the enactments which have been made to discharge various constitutional obligations do not fall into jurisdiction of the Federal Shariat Court.²⁴

In *Nusrat Baig Mirza Vs. Government of Pakistan*²⁵, the Court reproduced the remarks of one of its previous judgements dated 14th June, 1989 stating that the provisions of the Constitution are immune from being challenged in this Court. Likewise, in *Hammad Saifullah Vs. Federal Government*²⁶, the Federal Shariat Court explicitly declared that the Constitution of Pakistan does not come within the definition of 'Law' for this court and has specifically been saved from the scrutiny of the Federal Shariat Court. It was outlined that the FSC has been conferred with its restricted jurisdiction by the Constitution and no Court can exercise any jurisdiction except that is conferred to it by the Constitution or any other law²⁷. To elaborate the matter, the Court further stated in the same decision that the Constitution being ousted from the jurisdiction of this Court, falls outside its sphere of activity and circumference of jurisdiction. It was also asserted that the clarification made by Article 203B(c) regarding the interpretation of the term 'law' for this Court is sufficient to prove the distinction between the Constitution and ordinary law in the perspective of the Federal Shariat Court.²⁸

There are certain other instances in which the Federal Shariat Court has itself declared its non-jurisdiction regarding the fundamental rights and other provisions of the Constitution.²⁹ The Court has also declined the exercise of its jurisdiction for dealing

²³ PLD 1981 FSC 01

²⁴ PLD 1981 FSC 01.

²⁵ PLD 1992 FSC 412.

²⁶ PLD 1992 FSC 376.

²⁷ Sub-Article (2) of Article 175 of the Constitution of Pakistan

²⁸ Remarks of Justice Tanzil-Ur-Rahman in the judgement of *Hammad Saifullah Vs. Federal Government* (PLD 1992 FSC 376).

²⁹ See *A.B. Awan Vs. Government of Pakistan* (PLD 1983 FSC 23) and *Salahuddin Khan Vs. Federal Government of Pakistan* (PLD 1983 FSC 26).

with procedural laws in *Muhammad Riaz vs. The State*³⁰ and various other cases, under Article 203B (c). Although, earlier in the same year in another case *Gul Hassan Khan v. Government of Pakistan and Another*³¹, the High Court's Shariat Bench had stated that the Code of Criminal Procedure and similar substantive laws are not ousted from the Shariat Court's jurisdiction, because they are not related to the procedure of any Court or tribunal; rather they are the provisions of substantive law. Thus the Court had claimed its jurisdiction in provisions of Substantive law though relevant to the law's procedure. But this term "Procedure of any Court" has often been used by many legal practitioners to object the jurisdiction of the Court in this regard. Its ambiguity however has been impeding the scrutiny of all forms of procedural laws in the light of Islamic rulings.

Various Interpretations of the phrase "Muslim Personal Law" and their impact on the scope of Federal Shariat Court's Jurisdiction

Perhaps, the most contentious ousted area to deal with has been the "Muslim Personal Law", because the efforts to define this difficult legal expression have further been complicated by various religious, political and legal issues. Further, the issues of Zakat and Ushur are also entailed in the ambit of Muslim Personal law and are also ousted. The verdicts of the Honourable Judges have curtailed and at times stretched the Federal Shariat Court's jurisdiction according to their distinctive interpretations of the term 'Muslim Personal Law' referred to in Clause (c) of Article 203-B. Due to this discrepancy of interpretation, the said laws can yet not be examined properly or if they are inspected and repugnancy is detected, elimination of this repugnancy cannot be operated.

Few instances of the cases discussing the jurisdiction of the Shariat Courts along with Federal Shariat Court with regard to the Muslim Personal laws are essential to be conversed about, as the FSC is an advanced and complex form of all the Shariat Courts. There are various cases in which the Honourable judges have attempted to define "Muslim Personal Law" with regard to its involvement in the scope of Shariat Court's jurisdiction. In 1979, for example, in the case of *Farishta vs. Federation of Pakistan*, a woman brought a case in the Shariat Judicial System in which she

³⁰ *Muhammad Riaz Vs. The State* (PLD 1980 FSC 1).

³¹ PLD 1980 Peshawar 1

challenged the MFLO's rules related to succession.³² She had argued that Section 4 of the Muslim Family Ordinance 1961 was in conflict with the Islamic laws of inheritance. The case swiftly raised the question whether Article 203-B's exclusion of "Muslim Personal Law" from the FSC's Article 203-D jurisdiction forbade it from examining the Islamic credentials of the MFLO or not. The matter that was considered to be the fundamental issue in this case with reference to the existence of the Shariat Court's jurisdiction, was highlighted to be that whether the Muslim Family Law Ordinance was to be included into the expression "Muslim Personal Law" or not? It was obvious that if MFLO was included in this expression, then the Court would have no jurisdiction. The Court put forth many interesting arguments in support of its declaration that adjudicating such matters was not out of the scope of Shariat Court if the legislation deals with such law in a manner that does not involve the Shariat. They considered the term "Muslim Personal Law" to be synonymous to the conception of "Shariat Law of Muslims" and Section 4 of MFLO not being a provision of 'Shariat' is not included in Muslim Personal Law. Hence, the provision was not immune from scrutiny by the Shariat Court/Bench.

It was furthered with logic that if such an adoption by a statute is made valid due to its being out of the Court's authority, then questioning its validity with reference to the injunctions of Islam would become impossible. The Court also came up with a very appealing argument that if this proposition of ousted jurisdiction may be accepted for the Family laws, then it is apprehended that a future legislation might validate same sex marriages and grant succession and divorce rights to such spouses as well. Hence, it was concluded that anything that would be against Muslim Personal Law (Shariat) would not become a part of it by the mere fact that the legislation added it. The Court declared that the bracketed word of 'Shariat' is to be self-understood along with Muslim Personal Law and hence the term is to be construed as the divine laws of Muslim Person. Therefore, it was proclaimed by the Court, that being its constitutional duty to swipe out the *Shari'at* non-compliant laws, it shall exercise its jurisdiction and thus the Court declared Section 4 of MFLO repugnant to Islamic Inheritance laws and ordered its immediate repulsion.³³

³² Farishta vs. Federation of Pakistan [PLD 1980 Pesh. 47 (Shariat)].

³³ Farishta vs. Federation of Pakistan [PLD 1980 Pesh. 47 (Shariat)].

An appeal against this decision was filed in the Supreme Court's Shariat Appellate Bench.³⁴ The bench overruled the decision of the Shariat Court on the grounds of its non-jurisdiction to deal with this Ordinance and its realm. The Bench held that the findings and interpretation of the Shariat Bench of High Court regarding the term 'Muslim Personal Law' are incorrect in the peculiar context of Article 203-B³⁵. After presenting two possible meanings of the term, the Shariat Appellate bench asserted that the actual meaning of "Muslim Personal Law" inserted in Article 203-B was to be, "All the special statutory laws of Pakistan which are applicable only on the Muslim community of the State and are different from other general laws of the State which are applicable to all the classes and individuals generally in Pakistan". Thus, the expression 'Muslim Personal Law' used in Article 203B(c) amounts to that special portion of the Civil law of Pakistan which is authorised to be exclusively applicable on the Muslim residents of the State only, as their personal and special law. The Court rebutted the arguments of High Court's bench by stating that for Islamization of laws, the Shariat Benches and the Federal Shariat Court were empowered to find out whether the existing laws were in conflict with the Divine laws or not. So if the Muslim Personal laws are interpreted in the manner in which the High Court's Shariat Bench did, i.e. in sense of Divine law, it makes no sense because the Shariat or the Divine law itself is the touchstone to scrutinize the laws. How could the yardstick for testing other laws be subject to being tested itself? Thus the interpretation of the High Court in this context is unacceptable and illogical.³⁶

The Shariat Appellate Bench of the Supreme Court settled in the *Farishta Case* that the Article 227 of the Constitution is to be enforced by the Council of Islamic Ideology, whereas the Courts are to enforce Article 203B. Thus the sphere and scope of the CII is very broad while the scope and jurisdiction of the Courts is restricted and limited. According to the learned judges of the Supreme Court Shariat Appellate Bench, examination of the "Muslim Personal Law" dealing with the matters of marriage, divorce, succession, dower etc. is excluded from the Court's purview. There is however no such exclusion from the purview of the CII. Consequently, a harmony of interpretation was presented by the Court to be that both the Articles should be allowed to

³⁴ Shariat Appeal No. 2-P of 1980, decided on 20th January 1981 (On appeal from the judgement and order of the Shariat Bench of the Peshawar High Court, dated 1-10-1979).

³⁵ PLD 1981 Supreme Court 120

³⁶ Ibid.

operate in their particular spheres. So, the proposed manner to achieve this distinction of jurisdictional powers and to apply the true purpose of exclusion of “Muslim Personal Law” in the context, was that all the laws whether statutory or those implemented under sanction of a statute, which are applicable to Muslims in their capacity of being Muslims, must be left to be dealt by the CII and the Courts must not interfere in dealing with these matters. The Court drew out the conclusion that the excluding phrase means the special legislated or codified laws applied on Muslims residents and which govern their person; it therefore does not mean the pure religious laws of Muslims.³⁷

The Court clearly rejected the reasons presented by the High Court’s Shariat Bench and stated that Section 4 of the MFLO being a special statutory provision applicable only on a particular class of the State i.e. the Muslims, amounts to the personal law for the Muslims and thus its scrutiny according to Article 203B is ousted from the jurisdiction of the Shariat Courts.

These were the different interpretations given by two superior Shariat Courts in their decisions of one and the same case, thus first claiming its jurisdiction to deal with the matter and later declaring its exclusion respectively.

Later, in 1991, another petition *Dr. Mahmood-Ur-Rahman Faisal v. Secretary, Ministry of Justice, Law and Parliamentary Affairs, Islamabad*³⁸ was filed in the Federal Shariat Court challenging that a number of provisions of the Zakat and Ushur Ordinance 1980 are contradictory to the injunctions of Islam. Before the examination of the claims raised in the petition, the Court preferred to focus on the questions that whether the said Ordinance was a Muslim Personal Law and does it fall into the jurisdiction of the FSC or stands excluded under Article 203B of the Constitution? For answering the former question, the Court while referring to the remarks of the Honourable Judges in a Shariat Petition³⁹ and *Federation of Pakistan v. Hazoor Bukhsh and two others*⁴⁰ declared that as the Zakat and Ushur Ordinance, 1980 is exclusively applicable to the Muslim Citizens of Pakistan, so it falls into the ambit of the phrase “Muslim Personal Law”. Whereas, in answer of the latter question, the Court stated that in preview of the declaration that the said Ordinance falls in the

³⁷ Ibid.

³⁸ PLD 1991 Federal Shariat Court 35.

³⁹ Shariat Petition No. 4/I of 1981 (Mian Khalid Abdur Raouf v. President of Pakistan and another)

⁴⁰ PLD 1983 FSC 255

ambit of “Muslim Personal Law” it is clear that under Article 203-B, this law is immune to be examined by the FSC.

Again, to add to the ambiguity of the phrase “Muslim Personal Law” and its interpretation, the Honourable Shariat Appellate Bench of Supreme Court of Pakistan came up on June 13th, 1993 in the appeal against *Dr. Mahmood-Ur-Rahman Faisal v. The Government of Pakistan*⁴¹ with a completely different view than that of the decision of Supreme Court’s Shariat Appellate Bench in *Mst. Farishta’s Case* (PLD 1981 SC 120). The Court held that only by being a statutory or codified law that would be exclusively applicable on the Muslim Population of Pakistan; the law would not fall in the category or amount to “Muslim Personal Law”. The law to fall in this category has to be the personal law of a particular and specific sect of Muslims. It should be the law established due to the interpretation of the Holy Quran and Sunnah by that sect and based on that different interpretation of any such sect would the particular law be considered the “Muslim Personal Law”. Thus, according to the Supreme Court Appellate Bench, the Zakat and Ushur Ordinance was not excluded from the jurisdiction of the Federal Shariat Court and could be scrutinized by the Court under Article 203D⁴².

The Court further reasoned that the insertion of Article 203-B (c) into the Constitution was necessary to ensure protection of each sect of Muslims based on the interpretation of Holy Quran and Sunnah of Holy Prophet (PBUH) by that sect. As otherwise, it would lead to unresolvable conflicts and insoluble controversies between different sects of Muslim Ummah.⁴³ The Court also observed that Article 203-B must be construed in a manner that would give full effect to the process of Islamization of laws by keeping in view the purpose and spirit of the Constitution, which emphasizes on fuller Islamization of Pakistan’s legal system. Such interpretation would prove to be more harmonious with the spirit and letter of the constitution and its purpose. The apex Court of the State partially lifted the bar of jurisdiction inflicted upon the Federal Shariat Court with regard to the examination of sphere of “Muslim Personal Laws”. The judgement thus laid down the perception that the phrase “Muslim Personal Law” is liable to be interpreted in a manner that would result in enlargement of the scope of Federal Shariat Court in scrutinizing all the codified and

⁴¹ PLD 1994 SC 607 (SAB).

⁴² Ibid.

⁴³ Ibid at 620.

statute laws, that do not strictly fall into the meaning of “Muslim Personal Law”.⁴⁴

*Allah Rakha v. Federation of Pakistan*⁴⁵ is a momentous case in the history of the Federal Shariat Court. It entails almost 37 petitions raising objections on various provisions of the Muslim Personal Law, claiming them to be contrary to the Islamic Laws. The Honourable Court after discussing few previous cases relevant to the jurisdiction of the Federal Shariat Court in this regard affirmed that Article 227 (1) of the Constitution commands to bring all the laws in conformity with Islam and prevents the Legislature from enacting repugnant laws. The Court stated that the Constitutional Scheme of Islamization of laws could only be pursued by keeping the personal law of each sect of Muslims (i.e. the one based on difference of interpretation of Holy Quran and Sunnah) out of the examination jurisdiction of the FSC. But granting immunity from scrutiny of the FSC to all other statute and codified laws which are applicable to the general body of Muslims would hamper the actual spirit of Islamization; and is thus inferred that it could not be the intent of the Constitution.⁴⁶ But this interpretation was never enough to unify the practice and implementation of the court in this regard. There are codified Muslim Laws and their provisions, which are not administered according to the word and spirit of the Islamic Law, and are kept outside the FSC’s jurisdiction practically.⁴⁷ The declaration of certain sections of the Muslim Family Law Ordinance 1961 to be against the injunctions of Islam in the decision of this case was a remarkable step of the Federal Shariat Court towards Islamization of Family Laws. But its implementation has been obstructed through an appeal against it in the Supreme Court, which is pending till date despite the passage of about 19 years.⁴⁸ The decision cannot be enforced and loses its force and validity until it remains in pendency of a superior Court.

Whatever interpretation the term “Muslim Personal Law” may hold, it somehow curtails the jurisdiction of the Federal Shariat Court. The term should either be expressly interpreted (in the constitution) in a way in which it renders maximum

⁴⁴ Shahzado Sheikh, *Jurisdiction of Shariah and Jurisdiction of Federal Shariat Court: Diagnostics and Dialectics* (Larkana: Mission Unto Light International, 2012), 18.

⁴⁵ PLD 2000 FSC 01

⁴⁶ Ibid.

⁴⁷ Shahzdo Shaikh, *Jurisdiction of Shariah and Jurisdiction of Federal Shariat Court: Diagnostics and Dialectics* (Larkana: Mission Unto Light International, 2012), 19.

⁴⁸ Hashaam Qaiser, “Restructuring the Law of Inheritance in Pakistan”, Retrieved at: courtingthelaw.com, Retrieved on: Januray 29th, 2019.

jurisdictional power to the Federal Shariat Court with regard to Islamization of Muslim Personal Laws or such exclusion must absolutely be removed from the restriction of the Court's powers and jurisdiction.

Can the Council of Islamic Ideology actually be a Remedy for the Wrongs done to the Muslim Personal Law with respect to the Islamic Law Repugnancy?

It is noteworthy that the Shariat Appellate Bench in the verdict of *Farishtha Case* offered a remedy against the apprehension of inclusion of un-Islamic laws in the realm of Muslim Personal Laws due to the ousted jurisdiction of the Shariat Courts. According to the Court, any wrong done to these laws in perspective of *Shari'ah* shall be remedied by the CII. But the fact is that the authority of the Council of Islamic Ideology is merely advisory and it is endowed with recommendation powers only. While performing its duties under Article 230 (4) of the 1973 Constitution, the CII has already referred a number of proposals and recommendations to both the houses of Parliament and the Provincial Assemblies to bring the existing laws in conformity with injunctions of Quran and Sunnah by removing or replacing the repugnant provisions), but none of them has been entertained yet. According to the Council's own record, there are almost 69 reports⁴⁹ in total (consisting proposals regarding various topics of law) that have been presented to the Government, both the houses of Parliament and Provincial Assemblies, but no response of any abiding procedure has been received till date.⁵⁰ This large number of pending recommendations and advices put forth by the CII since 1977 till date reveal the actual status, power and authority of the institute. Moreover, the Council is required to advice only when according to the provision of Article 229, a matter is referred to it by the aforesaid bodies. Additionally, nothing in Article 230 indicates that the Government, Provincial Assemblies or the Parliament are bound to obtain an advice from the CII before enacting a law.

So, claiming that any wrong done to such laws in Islamic perspective would be remedied by the Council is a mere delusion. It therefore, has to be re-asserted that in the contemporary era, the Federal Shariat Court is the only possible resort that could have

⁴⁹ See the file (in Urdu language), herein attached as Appendix A for viewing the recorded dates of proposals sent by the CII as advices.

⁵⁰ Council of Islamic Ideology, Government of Pakistan, "The Dates in which the Council has submitted its reports in the Parliament", Available at: <http://cii.gov.pk>, Retrieved on: January 28, 2019.

been approached to deal with such contradictions with true binding force; but its jurisdiction in this regard is constitutionally restrained.

The Status of the Lifted Bar on the Matters relevant to Fiscal Laws

Clause (c) of Article 203B of the Constitution initially excluded the fiscal laws of the Country as well from the scrutinizing powers of the Federal Shariat Court, but the provision directed to lift this excluding bar within 10 years of its commencement. Theoretically, the bar from the fiscal laws was lifted and the Federal Shariat Courts could exercise their power of examining such laws. But in fact, whenever the Courts attempted to invoke their jurisdiction in such cases, the Islamization in these matters was hurdled in one or the other way. One of the major instances is the *Dr. Mahmood-Ur-Rahman Faisal v. Secretary, Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan, Islamabad*.⁵¹ The Federal Shariat Court combined about 115 Shariat petitions challenging a substantial number of laws relevant to payment of Ribā. The Court affirmed that its jurisdiction to examine the fiscal laws was restored since June 26, 1990. Thus, it exercised its jurisdiction in disposing of the petitions and declared certain fiscal laws repugnant to Islamic injunctions along with direction to the Federal and Provincial Governments to bring those laws in conformity with the Islamic laws. The Court held that repugnant laws shall cease to have effect from July 1st, 1992. Amazingly, the Shariat Appellate Bench of the Supreme Court also upheld the decision of the Federal Shariat Court. But the Government was granted with several extensions to make adjustments in the Country's economic system. The proponents of Islamization couldn't take a sigh of relief well when the then Government of General Pervaiz Musharraf reconstituted the Supreme Court's Shariat Appellate Bench. He requested the newly established Bench to review the case and to the expectations of many, the bench suspended the case. It was remanded back to the Federal Shariat Court.⁵² Consequently, the remarkable efforts of the Federal Shariat Court in the Islamization of fiscal laws of Pakistan went in vain and the removal of the scrutiny bar was proved to be a mere mirage for the seekers of Islamization in the legal system of the State.

⁵¹ PLD 1992 FSC 1

⁵² Muhammad Munir, *Precedent in Pakistani Law* (Karachi: Oxford University Press, 2014), 193.

Not only the Federal Shariat Court, but the High Courts of the country are also confused regarding their jurisdiction in examining the Islamic status of the Fiscal laws. The Karachi High Court in a case took the stance that due to the prevailing uncertainty regarding its jurisdiction to strike down a law on the basis of Islam, it was impossible to invalidate the Court fee or other fiscal laws.⁵³ Similar view was taken by the Lahore High Court due to the hurdles and uncertainty in jurisdiction.⁵⁴

In the context of Islamization of Fiscal laws, how could one forget the efforts made by the Honourable judges in the famous *Ribā* case squandered? The Federal Shariat Court had declared interest un-Islamic and illegal by equating it to *Ribā*; while exercising its power to examine Islam repugnant laws.⁵⁵ In pursuance of its decision, the Federal Shariat Court had also directed the legislative and executive authorities to transform all the national, international, government and private transactions into a non-interest based system.

In reaction to this landmark decision, almost 67 appeals against it were filed by various banks, financial institutions and the Government in the Shariat Appellate Bench of the Supreme Court. Resultantly, the execution of the decision was stayed. The learned judges of the Shariat Appellate Bench upheld the Federal Shariat Court's ruling in an outstanding manner⁵⁶. The Shariat Appellate Bench consisting of eminent scholars came up with a detailed, comprehensive and significant judgment constituting to more than 1000 pages. The judgement was rich with arguments, logics and visible efforts. It declared every gain and increase over the principal amount of loan without material consideration (though it be in any contemporary form) to be *Ribā* and thus un-Islamic. The judgement specified the ceasing effect of various laws on different dates of the year 2000-2001. The bench had got the honour to make Pakistan the first Muslim country which officially declared the unbridled and modern bank interest system to be illegal and un-Islamic.

But this dream of replacing the interest-based banking system and inducing the Islamic finance in practice couldn't sustain long and on 24th June 2002, the United Bank Ltd. filed a review petition

⁵³ Martin Lau, "The Role of Islam in the Legal System of Pakistan" (Boston : Martinus Nijhoff Publishers, 2006), 110.

⁵⁴ Hameed Ahmad Ayaz v. Government of Pakistan (PLD 1997 Lah 434).

⁵⁵ Judgment passed in Shariat Petitions No. 42-I + 45-1 of 1991.

⁵⁶ Judgment passed by the Shariat Appellate Bench of Supreme Court in Shariat Appeals No. 11 to 19 of 1992.

against the abovementioned appeal.⁵⁷ The then Chief Justice of Pakistan overruled and set aside the decisions of both the Federal Shariat Court and the Shariat Appellate Bench of the Supreme Court and bizarre discussions of difference between prohibited conventional consumption loan and contemporary development loans, difference between classical prohibited Ribā and modern development loan, issues in current economic system, implementation impediments etc. were made. The cases were remitted by the Supreme Court to the Federal Shariat Court and their adjudication is still pending.

Thus, despite the theoretical inclusion of Fiscal laws in the scope of scrutiny of the Federal Shariat Court's jurisdiction, the practical implementation is highly obstructed through pending appeals, reviews after years of effort and time investment of judges of the Shariat Courts and other methods.

Conclusion

The Federal Shariat Court though is vested with exclusive and independent constitutional powers; its scope has been highly restricted through the Constitution itself. This limitation on the Federal Shariat Court's jurisdiction is intensely affecting its spirit of establishment and purpose of formation i.e. the Islamization of laws in Pakistan. The only institution endowed with significant binding powers of striking out the Islam repugnant laws and proposing Islam compliant laws in the Pakistani Legal System is the Federal Shariat Court. Moreover, the decisions of the Federal Shariat Court if unchallenged or challenged but maintained by the Shariat Appellate Bench of the Supreme Court are binding on the Supreme Court and all the Subordinate Courts of Pakistan. This not only depicts the distinguished and momentous role of the Court but also outlines its significance in the procedure of Islamization. If the Federal Shariat Court declares a law repugnant to the injunctions of Quran and Sunnah, not only does the law cease its effect in the legislative system of the State but also it becomes a binding precedent for the judicial system. Ousting the Federal Shariat Court's jurisdiction and powers from various important areas of laws is surely hampering the process of Islamization, as practically no other body is entitled to remedy the wrongs, if any done, to these excluded realms. The constitutional restriction on the powers of the Federal Shariat Court (and its interpretations) to scrutinize the laws excluded in Article 203B (c), is causing menace by making it vulnerable to the induction of

⁵⁷ Civil Shariat Review Petition No. 1 of 2000

laws which are either contradictory to the true Shariah rulings or are equivocal. Is true Islamization possible with such a narrow jurisdictional scope and by exclusion of such significant and commonly experienced areas of law from scrutiny? Removal of this bar and expansion of the Court's scope would yield obvious positive results of Islamization on a larger magnitude.
