| Research Article |

The Juridical Contribution of the Federal *Sharī'at* Court (Fsc) In the Islamization of Laws in Pakistan: A Study of Leading Cases

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Abstract: *Islamization means making the laws in conformity with Islam, amending the existing laws in Pakistan and striking down the laws not in conformity with Islamic Law and Shariah. The constitution has enacted special provision for Islamization of Islam, especially Article 227 requires that laws in Pakistan shall be enacted and made in conformity with Islam. Federal Shariat Court (FSC) was made with the aim to protect and to promote the Islamization of laws in Pakistan. From the petition calling into the question Islamic status of the Law reforms Act, 1972 in 1979 till the petition challenging the vires of the Transgender Persons (Protection of Rights) Act, 2018 in 2020, FSC has played a crucial role in upholding Islamization of the Law in Pakistan. This paper will provide a case law analysis of 8 less popular leading judgments in order to elaborate the role of FSC in Islamization of Laws in Pakistan.*
Keywords: *Islamization of Laws in Pakistan, Riba, Land Reforms, Surrogacy, House Rent Allowance, Trust, Transgender*

Introduction

Islam is the universal *Deen* (Religion), it has answered all the question whether arrived or has to be arrived in future.[1] Pakistan is one of the five[2] states that came into being in the name of the religion.[3] Islam has played a key role in the formation of Pakistan.[4] It was made that the people of Pakistan may lead their lives according to Islam. United India was considered as one Nation, but the two-nation theory subsequently played its parts to get the Muslims of India get their own identity as one Nation. Pakistan is a state based on two nation theory thus providing a separate identity to Muslims.[5] In his early address after the very coming into being of Pakistan *Quaid-e-Azam Muhammad Ali Jinnah*, the founder of Pakistan, also emphasized on Islamic way of Life in Pakistan. In early years of the History of Pakistan, she has faced a number of difficulties. One of the key problems faced by Pakistan was the legislations.

It took a lot of time till 1956 that Pakistan was able to enact the first constitution. Laws of the Pakistan enacted in early days was following the Civil Law and not the Islamic Law, in most of the cases. There was no mechanism to turn a law down which was against the Injunction of Islam, Quran and Sunnah. Islamization or *Sharization* means making the Laws in line with Injunctions of Islam, taking steps to take to make the existing Laws in conformity with Islam and Striking down the laws which are totally against the Shariah or the Islamic Law.

In Pakistan this first attempt towards Islamization was the passing of objective resolution on October 12, 1949 but the recent turmoil in the Islamization of Law emerged in the 1970s when the then Martial Law Administrator and President of Pakistan *General Zia-ul-Haq* started an Islamization Program in 1979.[6] The very creation of the Federal *Shahriat* Court is also a fruit of the same.

The constitution of Islamic Republic of Pakistan, 1973 (the Constitution) also puts emphasis on the Islamization of the Laws. Special Islamic provisions were made part of the constitution.[7] The objective resolution, which was initially appended with the constitution subsequently made part of the constitution by insertion of Article 2A[8], envisages that

> "…Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set-out in the Holy Quran and the Sunnah;"

Similarly, Article 227 of the constitution puts a direct requirement on the legislature to enact and confirm laws with the provisions of Islam. It reads as follows;

> *"(I) All existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Quran and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions."*

The Federal Shariat Court is mandated to implement the provision enacted as article 227 and the principle of Islamization of Law enacted therein.

The Federal *Shariat* Court

The Federal *Shariat* Court (FSC), as mentioned above, was established by General Zia ul Haq in 1980 vide a presidential order. A new chapter i.e. Chapter 3A in Part VII of the Constitution titled "*Federal Shariat Court*" was added by "*the Constitution (Amdt) Order, 1980 (P.O. No. 1 of 1980).*"[9] Chapter 3A is comprising of the article from 203A to 203 J, and it only and only covers the affairs of the FSC. The main purpose of making the FSC is to check and validate whether the laws in Pakistan are consistent with the injunctions of Islam, the FSC is only of its kind institution and no other Islamic State has provided with any such court to check upon the varies of their laws.[10]

Article 203C constitutes a new constitutional court namely Federal Shariat Court. It provides that there shall be eight judges in the court. It is also provided that all the judges shall have to be Muslims. The merit and criteria for appointment of a judge of the FSC is also provided in article 203C. The appointment of judges shall be regulated by article 175A, which regulates the appointment of judges of the High Courts in Pakistan. FSC has been given precedence over the High courts in the Shariat matters. Article 203 GG provides that the decision of the FSC is binding in nature upon all the high courts in Pakistan and all the courts sub-ordinate to the high courts.

As far as functions of the FSC are concerned, apart from a revisional court in the Hudood Cases, it is primarily a court which enjoys the original jurisdiction as mandated in the Article 227 of the constitution.

Article 203D provides with the powers and determine the function of the court. It provides the court with the power to decide the question that whether a provision of a law or a law itself is in line with injunctions of Quran and Sunnah or not. It can act Suo motto or upon application of a party. It has been required in this article that if the court is of the considered view that the provision in question is repugnant to injunctions of Islam, and it declares so, the court shall record the reasons and shall also record the extent of repugnancy.

Article 203-B (c) Chapter 3-A is about, the organization and functions of the FSC, it authorizes the FSC to decide "*whether or not any law or provision of law is repugnant to Islam*". Article 203D (3) requires the president and the Governor (s) to take steps to make the laws in conformity with injunctions of Islam, if the court declare a law or provision against the injunctions of Islam.

Role of Federal Shariat Court in Islamization

The aim of formation of the FSC was to implement the article 227 of the constitution. Art 227 requires that laws are to be made and amend in the line with the injunctions of Islam and the FSC performs the same role. It is the well-known saying in the legal community that "*the judge speaks through judgments*" thus applying the maxim the role of the FSC can be examined by analysis of the judgments rendered by the FSC whereby the shariah status of different laws and provisions has been determined by the FSC.

In the foregoing para, an attempt is made to analyze the leading cases in connection with Islamization of Laws in Pakistan.

A. The Land Reforms Act Case

Hafiz Muhammad Ameen versus the Islamic Republic of Pakistan[11] which is reported as PLD 1981 FSC 23 was decided by the FSC on 13th December 1980. It is pertinent to note here down that this decision of the FSC was then assailed in the Shariat Appellate Bench of the Supreme Court (SAB) is recognized as one of the famous case laws about Land Reforms namely *Qazalbash Waqf* and others versus Chief Land Commissioner, Punjab, Lahore and others.[12]A total of 67 *Shariat* Petitions were taken up by a 5-member bench of the FSC. The bench was chaired by Mr. Justice Salahuddin Ahmed, while Justices Agha Ali Hyder, Aftab Hussain, Zakaullah Lodha and Karimullah Durani were the other 4 members. The main order was authored by Mr. Justice Aftab Hussain. 2 other judges i.e. the Chairman and Mr. Justice Zakaullah Lodha totally agreed with the order and ratio authored by him while Mr. Justice Agha Ali Hyder agreed with the main judgment except the point of jurisdiction of the *Shariat* Appellate Bench of Peshawar High Court. Mr. Justice Karimullah Durani disagreed the main order as to the exclusion of the laws protected under constitution from the jurisdiction of the FSC. The petition was overall dismissed by a majority, as order of the court.*Shariat* Petition No. 2 and 66 other petitions primarily challenged the Martial Law Regulation No. 115, Land Reforms Act, 1977 on the ground that the same were not in conformity with Quran and sunnah hence repugnant to Injunctions of Islam. Some

other provisions of different laws on the similar subject and ground were also subject of some of the petitions i.e. The Punjab Pre-Emption Act, Land Acquisition (Housing) Act, 1973, Development of Cities Act 1960 and the Capital Development Authority Act, 1960 etc.

As discussed earlier the main judgement was authored by Mr. Justice Aftab Hussian. He formulated 14 points for determination, but the main point was regarding the reduction of ceiling of 100 acres of land by the way of the Land Reforms Act, 1977. It was prayed by the petitioners that this very ceiling and the provision of the act is against the injunctions of Islam. The main issues were issue of ceiling of land.

It was view of the FSC that the Article 253 of the Constitution empowers Parliament to make laws that set a limit on the amount of property an individual can own. It also declares void any law that allows individuals to hold property above a specified limit. This provision reflects the Constitution's commitment to eradicate social evils such as the *Jagirdari* system and to promote social justice and economic prosperity.

The Land Reforms Ordinance 1972 and the Land Reforms Act 1977 were enacted on the mandate of Article 253 and similar provisions in earlier constitutions. These laws set a ceiling for individual land holdings and were intended to limit feudalism, eliminate absentee land ownership, prevent resource concentration, and maximize land productivity.

The FSC, by a majority of four to one, ruled that it had no authority to declare the land reform provisions repugnant to Islamic injunctions. The protection afforded by these provisions was ensured through various provisions of the Interim Constitution of 1972 and the present Constitution.

In addition, the Constitution contains articles such as Articles 8 and 24 which exempt certain laws from invalidity if they conflict with fundamental rights. The Land Reform Acts are mentioned in the First Schedule which exempts them from the principle of inconsistency. Article 24 states that the compulsory acquisition rules do not apply to existing laws or laws made under Article 253.

The FSC concluded that it could not declare the land reform provisions repugnant to Islamic injunctions as this would indirectly challenge the constitutional articles. The majority opinion emphasized that what cannot be done directly cannot be done indirectly and reaffirmed the FSC's jurisdictional limitations.

In addition, Aftab Hussain J. noted that there are many scholars representing different schools of thought who adhere to the Constitution. This is a strong indication that the power used for statutory limitation of property under Article 253 is not contrary to Islamic injunctions. In addition, reference was made to the Islamic *Manshoorr* (manifesto) of the All Pakistan Jamiat-ul-Ulama-e-Islam. This manifesto suggests that the government can impose restrictions on land ownership to eliminate social evils and promote social justice and economic well-being of the people.

However, if there is any conflict that can be resolved between the two provisions, he is of the opinion that it can be done in terms of the Latin maxim "*leges posteriores priores contrarias abrogant*". The latest law cancels the previous contrary law.

This case, as mentioned above, was subject to the jurisdiction of the Shariat Appellate Bench (SAB) of the Supreme Court of Pakistan as the Qazalbash Case supra the SAB held that no provision of the Land Reforms Act was away from the jurisdiction of the FSC.

As far as the repugnancy of the relevant provisions is concerned the FSC as well as the SAB

declared the same in conformity with injunctions of Islam. Justice Naseem Hassan Shah of the Supreme Court commented that

> *"…being of the opinion that on the merits of the case the view of the majority of the Federal Shari'at Court that the impugned laws are not repugnant to the Injunctions of Islam, is correct I would dismiss these appeals..."*

In conclusion, the FSC dismissed the petitions mainly on the ground of lack of jurisdiction, but they also discussed the Islamic side of the Land reforms act and declared that the government can restrict the ceiling to its own will.[13]

The Hafiz Muhammad Amin case was the leading case in the Islamization of the Land Reforms Rules. Though the FSC upheld the Shariah Status of the rules by not touching such merits but declaring it under the umbrella of the constitution yet it was the first instance when such a case was challenged in SAB and the FSC`s status was more clarified by the Supreme Court.

B. Appointment of Female Judges

Mr. Ansar Burney filed *Shariat* Petition No. 4-K of 1982 praying before the FSC and challenged the appointment of female judges in the Lowers Courts i.e. Magistrate and prayed to declare the same against the injunctions of Islam etc mainly on the four ground namely;

i. Discharge of duties without proper *Pardah;*

ii. Neither the Holy Prophet (PBUH) not his companions had ever trusted the duty of *Qaza* to a female;

iii. The quantum of evidence and quantum of inheritance of a woman is half of a man thus judgment of a woman is also equal to half of a man; and

iv. A woman does not meet the qualification to be a *Qazi* in Muhammadan Jurisprudence.

The petition was filed mainly against Federation of Pakistan thus the judgment of the FSC titled as "Ansar Burney versus the Federation of Pakistan and others" and it is reported as PLD 1983 FSC 73[14] it was decided on 10.08.1982 by the three-member beech of the FSC comprising of the Chief Justice Aftab Hussain and Justices Zahoor ul Haq and Malik Ghulam Ali. The court delivered the unanimous decision and dismissed the petitions.

The court observed that there is no prevalent bar on the appointment of a female judge and referred the popular maxim "every thing is permitted unless declared otherwise." In response to the assertions raised by the petitioner that there is no example from the era of the Holy Prophet (PBUH) and his companions the then Attorney General of Pakistan Mr. Shareef ud Din Pirzada relied upon Syed Sulaiman Nadvi`s popular book *Seerat e Aisha*[15]. He further argued that the Holy Quran in *Surah al Hujrat* has envisaged "Surely the most noble of you in the sight of Allah is the most righteous among you."[16]

Apart from these FSC examined books and views of prominent contemporary and classical scholars and it was held that there is not even a single case of the prohibition of the appointment of female judges in Islam thus there is no justification to impose condition on the woman to be a part of

the judicial system as a judge. The court unanimously dismissed the petition and thus declared the appointment of female judges as confirm with Islamic Law.

Ansar Burney key is a landmark judgement to the woman empowerment, it not only validated the appointment of the female judges but also clarified the minds of the society regarding the woman empowerment. The court mainly relied upon the popular rule of permissibility.

C. Islamization of the Prison Rules

The Prison Rules 1978 were challenged in the FSC by Dr. Aslam Khaki, a social activist, vide Shariat Petitions No. 61-I. 62-I of 1992 titled Dr. Muhammad Aslam Khaki vs the State reported as PLD 2010 FSC 1[17]. There were a total four petitions which were taken up by the 4 Member bench of FSC, the bench was comprising of the Chief Justice Dr. Fida Muhammad Khan, Justices Salahuddin Mirza, Muhammad Zafar Yasin and Syed Afzal Haider.

In this judgement, the FSC was to determine whether certain aspects and provisions of the Prison Rules 1978[18], the Prisons Act 1894[19] and the Cr.PC. 1898 were "repugnant to the injunctions of Islam" and contrary to the Constitution of Pakistan. The petitions were filed by individuals who complained about, inter alia, the unequal treatment of prisoners based on social class, the placement of women in the custody of male guards, and various injustices in the criminal interrogation process.

The FSC applied a three-step repugnancy test[20] which is as follows:

> *"Step 1: Determine whether the stated injunction of Islam covers the impugned provision of law or both are related.*
>
> *Step 2: Determine whether the provision of law being challenged and the injunction of Islam can be harmonized.*
>
> *Step 3: Determine whether the impugned provision of law can be given effect without violating "the letter or spirit" of the injunction of Islam."*

In addition, FSC emphasizes that the law cannot be repealed implicitly, but instead refers to Article 203D (2) of the constitution, which clearly explains the reasons and legal scope for repugnant laws against Islamic rules. very disgusting. As such, the FSC said the law should be struck down if it clearly violates clear Islamic rules. Because the jurisdiction of the FSC depends on whether the relevant law "examines" the principles of Islam, the Court devoted a significant portion of the analysis of its jurisdiction to first define the term "repugnancy".

To reach a conclusion, the FSC examined the plain dictionary meaning of the word "repugnancy," drawing upon several English and Urdu dictionaries, and cases from foreign jurisdictions. The Court adopted that:

> *"the word repugnancy according to law Dictionary English Urdu published recently by National Language Authority Pakistan (based upon the famous Black's Law Dictionary) means: Tanaqaz, Zid, Adum Mutabqat" all Urdu words for "extremely unpleasant or offensive."*

The court concluded that repugnant not necessarily means contrary but if a custom, usage, rule of provision is offensive, it be declared as repugnant to the injunctions of Islam. The court linked the concept with the *Maqasad e Shariah* as well. The court held that if prima facie such mischief surfces on bare reading of the provisions, it be declared against the *Maqasad e Shariah,* then such provision is against the injunctions of Islam. Theory of Conformity was also adopted by the FSC in this case. It adopted that *"that the impugned law and the injunction of Islam need not necessarily relate to the same subject."* The court, by application of theory, interpreted the term "repugnancy" and "injunctions of Islam" in broader sense thus it extended its jurisdiction to freely apply the provisions of Islam upon the impugned laws.

The petitions were accepted and the court declared the impugned provisions against the injunctions of Islam.

In this case, the FSC expanded its mandate by expanding the definition of "injunctions of Islam" and "repugnancy". Broadly interpreting the term, the Court confers jurisdiction over cases normally within the jurisdiction of the High Court[21] and given itself a power of the Judicial Review of the laws and provisions of statutes.

D. The Martial Law orders and the Trust Case

The three-member bench of the FSC headed by the Chief Justice Agha Rafiq Ahmed Khan, and comprising of Justices Afzal Haider, Shahzado Shaikh decided the Shariat Petition No. 1/K of 2002 filed on 15.03.2002 challenging the martial Law orders whereby the Name of the People Trust was renamed. Ms. Benzair Bhutto filed the said Shariat Petition in 2002 but it remained dormant and was taken up in 2007. The petition was titled as "Benazir Bhutto and another versus Federation of Pakistan through Finance Secretary" and it is reported as PLD 2010 FSC 229.[22]

The petitioner`s plea was that all 4 martial law orders pertaining to the renaming and administration of the People`s Trust are against the injunctions of Islam.

The judgment written by Syed Afzal Haider relied upon the Ayat No. 58 of the Surah Al-Nisa[23] and concluded that this ayat requires that;

1. The property of the trust shall be reverted to the original owners;
2. The affairs of the administration of the government and the affairs of the government shall be entrusted to those who are who capable of handling the authority;
3. The authority shall be used fairly and justly; and
4. Biasness shall not be part of the performance of the authority.

Apart from this Ayat the FSC also examined a bunch of other verses from the Holy Quran covering the subject of covenants, trusts and property. Similarly, the FSC held that the right of appeal shall be provided to every individual, the court relied upon Ayat No. 148 of Surah al-Nisa[24] and other verses on the same topic.

The court before discussing the status of the impugned orders Islamically discussed the sacredness of the covenants, the rights of appeal, the sama`t and baseerat of the Almighty Allah,[25] the rule of Law in Islam, principals of Legal Capacity, Adam Haraj[26], Taiseer[27], Takhfeef[28] etc.

Consequently, the court held that all steps taken, orders passed by a tribunal, court or authority including the Martial Law establishment under the impugned orders is repugnant to Islam and held further that Martial Law order No. 21, 26 of 1977 and president order No. 4 of 1978 and 6 of 1979 are not confirm with the injunctions of Islam and against the injunctions of Islam.

As far as the trust and the act is concerned the court held that the Zulifqar Ali Bhutto trust and Peoples Foundation trust (Renaming and Administration) (Amendment) order and other impugned order are violative of the Injunctions of Islam and five Maqasid-e-Shariah and various Articles including Arts. 2A, 4, 23 & 25 of the Constitution mainly because;

a. the trust's name was changed;
b. the objectives of the trust were changed;
c. the trustee was also changed and new administrative hierarchy was imposed;
d. all the trustee effected by the impugned orders were women;
e. the real rights of the trustee were high jacked without any legal authority and the *Mutwalies* were appointed on the wishes of a dictator.

Thus, the impugned martial Orders were consequently were held of no legal effect as these instruments suffered on account of infirmities.

This was the very first time that the shariah status of the Martial law orders was put to test before the FSC, though FSC was reluctant to lien into the vires of the Martial Law orders yet after a considerable delay it declared the status of impugned Martial Law orders against the injunctions of Islam.

E. Women Protection Act, 2006

On 22.12.2020, the three-member bench headed by the Chief Justice Agha Rafiq Ahmed Khan and comprising of other 2 members justices Syed Afzal Haider and Shahzado Shaikh heard three petitions mainly challenging the section 5, 6, and 7 of Protection of Women Act, 2006 (Act, 2006) by Mian Abdul Razaq Amir, Muhammad Aslam Ghumman and Abdul Latif Safi vide Shariat Petition No. 1-I/2007, 2-I/2007 and 1/I of 2010 respectively. The judgment was authored by Syed Afzal Haider and the same is titled as "Mian Abdul Razaq Amir versus the Federal Government" reported as PLD 2011 FSC 1[29]. The court appointed Dr. Tahir Mansoori and four other prominent Muslim scholars as juris consultant.

The court opened the judgment by quoting the translation of Ayat No. 44 to 47 of Surah al Maidah.[30]

After Preliminary arguments the court with the consensus of the parties framed as many as 11 issues i.e. a to k, regarding the following;

a. The scope of term Hudood as used in article 203DD of the constitution;
b. The scope and meaning of the judicial powers of the FSC as envisaged in the article 203DD of the constitution;
c. The nullification of article 203DD at the hands of the act, 2006;
d. The overriding effect section 11 and 26 of the Act, 2006 over the constitution and the Hudood Laws;

e. The effect of the judgment or order of subordinate court on the FSC;

f. The jurisdiction of FSC in relation to section 48 and 49 of the Control of Narcotics Substances Act, 1997;

g. The status of section 25 and 29 of the act, 2006 is relation to the Lian as provided in Islam, Hudood Ordinance 1979 and Dissolution of Muslim Marriages Act, 1939;

h. The Islamic status of the punishments and offences as provided in the act, 2006 and Hudood 1979;

i. The status of powers conferred to the FSC in the article 203D and 203DD;

j. Conclusion; and

k. Declaration of the court.

In response to these issues, the court heard the parties, juris consultant and held as follows;

1. In response to the issue a to c, the court examined as many as eight Quranic verses, six traditions of the Holy Prophet (PBUH) and concluded that all those acts which has been categorized by the Holy Quran and Sunnah of Prophet (PBUH) is Hudood. The court further held that there are following ten offences which fell within the ambit of hudood as defined supra:

i. Zina;
ii. Lawatat;
iii. Qazf;
iv. Shurb[31];
v. Sarqa;
vi. Haraba;[32]
vii. Irdad
viii. Baghawat;
ix. Qisas; and
x. Human Trafficking.

2. The court declared the section 11 of the Act, 2006 and restored the Hudood ordinances, it declared the section 11 against the hudood laws and injections of Islam while deciding the issue d.

3. While issue e was decided the court held that any order of the subordinate court and the high court passed in lieu of the Hudood ordinances is subject to jurisdiction of the FSC.

4. The court held that section 11 and 28 of the act 2006 are repugnant to the article 203DD of the constitution and have an overriding effect over the Hudood Laws thus were null and void. So was the fate of the sections 48 and 49 of the CNSA.

5. The court declared the section 25 of the act 2006 as repugnant to the injunctions of Islam, the Dissolution of Muslim Marriages Act and Hudood laws regarding the offence of Lian.

This case is a key step towards striking down the laws emerged from dictators. A number of provisions especially the section 5 to 8 and section 28 of the Act, 2006 was declared illegal and against

the injunctions of Islam.

F. House Rent Allowance of Husband and Wife

A Shariat petition No. 8/I of 2004 was filed by Professor Kazim Hussain challenging the office memorandum of Ministry of Housing and Works whereby the ministry declared that if the husband and wife are working at one station, only one of them will be given with the House Rent Allowance. The petition was filed against Government of Pakistan and got reported as PLD 2013 FSC 18[33]. The bench was headed by Chief Justice Dr. Muhammad Fida Khan who also pen down the judgment. Justice Rizwan Ali Dodani and Sheikh Ahmed Farooq were the other two judges of the bench.

The FSC mainly relied upon the verse No. 32 of Surah Al Nisa[34] which is translated as *"the men are entitled to what they earn and the women are to what they earn"* and as many as 4 others verses and held that men are entitled for their own earnings and women are to theirs. The court held that office memorandums or circulars which deprive any of the spouse of their rightful right of house rent are against the injunctions of Islam and directed all the government and autonomous bodies to amend such memos accordingly.

G. In Vitro Fertilization and Surrogacy

Dr. Farooq Siddiqi, a Pakistani American, contracted with Ms. Farzana Naheed to surrogate to him and his wife, as his wife was unable to give birth to a child. After Surrogacy procedure a girl Fatima Siddiqi was born. It is pertinent to know that to avoid the social conflict, a dummy marriage was also contracted between Dr. Farooq and Ms. Farzana. Subsequently, Ms. Farzana refused to hand over the daughter to Dr. and Mrs. Farooq.

Dr. Farooq filed a Shariat Petition No. 2/I of 2015 titled "Farooq Siddiqi versus Mst. Farzana Naheed" reported as PLD 2017 FSC 78[35]. A three-member bench of the FSC heard the case. The bench was headed by Riaz Ahmad Khan Chief Justice and Dr. Fida Muhammad Khan and Zahoor Ahmed Shinwari were member of the bench. Dr. Fida Muhammad Khan concurred with the judgment authored by the Chief Justice but also wrote his additional note.

The main question before the court was the shariah status of In vitro Fertilization and Surrogacy. Apart from counsels of the parties the court appointed Dr. Aslam Khaki and Dr. Yousaf Farooqi as Juris Consultant.

The court defined the Surrogacy in the following words;

> *"Surrogacy was a technique of assisted reproduction wherein woman bore and delivered child for other couples. Where a man was incapable of producing a child and the sperm was obtained from a third person that could not be called a case of Surrogacy for the simple reasons that the child did not belong to the father. Issue of Surrogacy arose when the woman was hired for carrying a child for a couple for some monetary or other consideration"*

The court relied upon verses 24 of *Surah al Nisa*[36], 5 to 7 of *Surah al Moominoon*[37] and 223 of *surah al Baqrah*[38]. The crux of these verses is that the child belongs to the father from whom sperm it is born and the it belongs to the mother from whom womb it is born.

The court held that a child born by the way of In vitro Fertilization (IVF) belong to the father from whom sperm it is born, similarly the court held that the mother of the child is the woman from whom womb child is born. The court declared the role of egg immaterial in determination of the parentage of the child and the FSC declared this process as the illegal and repugnant the injunctions of Islam but if the sperm of the husband is placed in the womb of his wife via IVF then the born child is legitimate and this process is legal and valid.

The court held that placing the sperm in the womb of a third person for consideration and payment of certain consideration is against the injunctions of Islam.

H. The Transgender Persons (Protection of Rights) Act 2018

The Transgender Persons (Protection of Rights) Act, 2018 (The Transgender Act) was passed as an aftermath of Dr. Aslam Khaki vs the Federation of Pakistan[39] whereby the Supreme Court of Pakistan directed NADRA to issue CNICs to the transgenders in Pakistan.

The transgender act was widely criticized by the society mainly on the ground that it allowed and legalized the self-perceived gender.[40] A total of 12 Shariat petitions were filed challenging the act and provisions. The petitioner Sector Muhammad Mushtaq and *Jamait Ulma e Islam*[41] challenged the act as whole. The two-member bench headed by the Acting Chief Justice Dr. Syed Muhammad Anwar and Khadim Hussain M. Shaikh. The judgment authored by Dr. Syed Muhammad Anwar was rendered in the Shariat Petition No. 5/I of 2020 titled as *"Hammad Hussain versus Federation of Pakistan".*

The FSC checked the varies of the judgement mainly on the following 4 questions;

i. Whether definition of the transgender Peron as defined in section 2 (1) (n) of the transgender act is confirm with the injunctions of Islam?
ii. Is there any difference between gender and sex in Islam?
iii. Whether gender expression and gender identity as defined in section 2(1)(e) and 2 (1)(f) is repugnant to injunctions of Islam?
iv. Whether a person is allowed to get him medically treated in sexual diseases?

The court mainly relied upon the tradition of the Holy Prophet (PBUH) which concludes that inheritance of a person be decided on the basis how that person urinate.[42]

The court took up the definition of transgender person and upheld the definition of Intersex, Eunuch and Khawaja Sara as in line with injunctions of Islam. The court relied upon the definitions available in English and Urdu dictionaries. The status of *Mukhanas* in Islam has also been discussed by the FSC. It was held that the in Islam the castration of male person is never permitted.

The court reviewed a number of verses and traditions of the Holy Prophet (PBUH) and held that in Islam there is no room for the expression "gender" in Islam but there are only two sexes in Islam.

The court observed that there is no room for the innermost feelings and self-perceived gender identity of a person. Gender identity and gender expression is that which has been biologically assigned to a person.

The court held that it is within *Maqasad e Shariah* that life of person be preserved. The court held that a person who has any kind of ailment is entitled to get himself treated.

In sum the court declared that the definition of the Transgender Person as defined in Section

2(1)(n)(iii) as transgender Man and transgender woman as repugnant to injunctions of Islam. It further declared that the section 2(1)(e) and 2(1) (f) are also against the injunctions of Islam. The court further declare that the section 4 permitting the self-perceived gender identity and section 7 allowing inherence on basis of self-perceived gender identity as against the injunctions of Islam.

Conclusion

Pakistan came into being in the name of Islam. All segments of the states were attempting since the very creation of Pakistan in 1947 for Islamization of Laws in Pakistan. Objective resolution of 1949 is the first attempt in this behalf.

Legislation has played its part for the Islamization of laws. Framing of the constitution and article 227 is itself an illustration of the fact but Zia era was the major turmoil in the Islamization of Laws. The FSC was created by a presidential order by General Zia ul Haq with an aim to implement article 227 of the constitution.

It is very much clear that the role of FSC is never less than any other institution. It is very much clear from Hafiz Muhammad Ameen case supra that the jurisdiction of the FSC was though defined by the SAB yet the Islamic status of the Land Reforms was thoroughly discussed by the FSC and the same was upheld by the SAB.

Similarly, the women empowerment was much a confusion, and the appointment of the female judges was considered as illegal but the FSC clarified the perplexation and validated the appointment of female judges. Contra, the FSC declared the provision of Protection of woman act, 2006 repugnant to Islam and declare it so and tried to make the law confirm with Islam. House rent allowance of the spouses was validated by declaring the memorandum of ministry against the injunctions of Islam. Defining the true definition of transgender person is also a remarkable attempt of the FSC to Islamize the laws in Pakistan. Especially, declaring the martial law orders against the peoples trust illegal and repugnant to Islam was an ultimate attempt towards Islamization of Laws in Pakistan.

From the above discussion it can safely be concluded that the Federal *Shariat* Court of Pakistan is an only judicial institution of the world mandated to Judicially review the laws and make these laws in accordance with injunctions of Islam. The role of FSC in Islamization of laws in Pakistan can never be neglected.

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[2] Four other states are i) Vatican City, ii) Saudi Arabia, iii) Maldives and iv Israel.

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[6] *The Islamization of Pakistan, 1979-2009* (Washington D.C.: The Middle East Institute, n.d.) page number required. Also provide a weblink if available.
[7] Part XI of the constitution of Islamic Republic of Pakistan is titled as "Islamic Provisions" comprising of the article 227-231.
[8] Inserted by the Revival of the Constitution of 1973 Order, 1985 (P.O. No. 14 of 1985)
[9] General Muhammad Zia ul Haq as martial law administrator and president of Pakistan issued a number of Presidential orders and the martial law regulations. These orders and regulations have subsequently been validated through insertion of Article 270 A by the way of Eighth Constitutional Amendment in 1985.
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[12] *Qazalbash Waqf and others v Chief Land Commissioner, Punjab, Lahore and others* (1999) PLD SC 99 (Pakistan)
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15 Syed Sulaiman Nadvi, *Seerat e Hazrat Ayesha (R.A)* (Idara Islamiat, 2017).
[16] Qu`ran Surah Al-Hujurat (The compartment of chamber) 49:13.
[17] Dr. Muhammad Aslam Khaki vs the State (2010) PLD FSC 1 (Pakistan)
[18] Shariat Petition No. 61-I/92, 62-I/92 and 12-I/1999 assailed the Prison Rules, 1978
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[21] Ibid
[22] Benazir Bhutto and another versus Federation of Pakistan through Finance Secretary (2010) PLD FSC 229 (Pakistan)
[23] Qu`ran Surah al Nisa (the Women) 4:58
[24] Ibid 4:148
[25] The characteristic of the Almighty Allah that he sees and hears everything. This principal was discussed under the ibid Verse.
[26] English: Removal of Hardship, available in Qu`ran Surah Al-Ma'idah (The Table) 5:6
[27] English: Ease, derived from Qu`ran Sura Al Baqra (The Cow) 2:184
[28] English: Reduction of Burden, derived from Qu`ran Surah al Nisa (the Women) 4:28
[29] *Mian Abdul Razaq Amir versus the Federal Government* (2011) PLD 1 FSC (Pakistan)
[30] Qu`ran Surah Al-Ma'idah (The Table) 5:44 to 47

[31] English: Narcotics
[32] There is difference between Sarqa and Haraba. Sarqa is equvillant to theft as defined in section 379 of Pakistan Penal code, 1860, while Haraba is Robbery and Dacoity etc.
[33] Professor Kazim Hussain v Government of Pakistan (2013) PLD FSC 18 (Pakistan)
[34] Qu`ran Surah al Nisa (the Women) 4:32
[35] Farooq Siddiqi versus Mst. Farzana Naheed (2017) PLD FSC 78 (Pakistan)
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[38] Qu`ran Surah Al Baqra (The Cow) 2:223
[39] *Dr. Aslam Khaki v the Federation of Pakistan* (2013) PLD SC 188 (Pakistan)
[40] See note 1.
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