



RESEARCH PAPER

Formation and Working of Federal Shari'at Court in Pakistan

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PAPER INFO

ABSTRACT

Received:

January 07, 2018

Accepted:

June 19, 2018

Online:

June 30, 2018

Keywords:

Islamisation in Pakistan, Islamization of law, Federal Shari'at Court

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Pakistan was created in the name of Islam with the ideology that future constitution of the country would enable the Muslims of the sub-continent to live their lives according to the teachings of Islam. Article 2-A of the present Constitution states that "The principles and provisions set out in the Objectives Resolution are a substantive part of the Constitution". Article 227 further ensures that "All existing laws shall be brought in conformity with the injunctions of Islam as laid down in the Qur'an and the Sunnah of the Prophet (Peace be upon Him)". At present Federal Shari'at Court (FSC) has been given the responsibility to decide and examine the question whether or not any law and provision of law is repugnant to the injunctions of Islam as laid down in the Qur'an and the Sunnah. This research deals with the organization and functioning of FSC and its role in the Islamization of legislation.

Introduction

Pakistan was established on August 14, 1947, and there were many causes which initiated Pakistan Movement *i.e.* social, political, economic and cultural but the most prominent among all of them was the religion. On 12 March 1949, the Objectives Resolution was accepted by the first Legislative Assembly which ensured the Muslims of Pakistan that they would be given a chance to live individually and collectively according to Islam. The Objectives Resolution was

incorporated in the 1973 Constitution during Zia rule. A Council of Islamic Ideology (CII) was established for Islamisation of legislation but its role was just advisory and some of its recommendations were legislatively approved. However, in July 1977 general Zia paid attention towards Islamization of Law in the country. He reconstituted the CII, and other institutions and departments, for the attainment of this objective. In order to expedite the Islamization and public participation in this process, a constitutional amendment was made in 1979, setting up *Shari'at* Benches in each high courts and Appellate *Shari'at* Bench in Supreme Court (SC). In spite of all these efforts the goal was not achieved thus the Federal *Shari'at* Court (FSC) was formed on 27 May 1980 with eight judges and a chief justice. Later on, three *Ulema* were also inducted as judges. The jurisdiction exercisable by the *Shari'at* Benches was conferred upon the FSC and more than 100 pending cases were transferred to it which was decided by it till 1981.

Formation and Working of Federal Shari'at Court

Shari'at Benches and Appellate Shari'at Benches

As mentioned before that in 1977 government wanted to implement Islamic laws in the country. The CII was not enabled to achieve this goal in specified time. Therefore *Shari'at* Benches were formed in High Courts of all four Provinces of Pakistan through a Constitutional amendment. (Hussain) A *Shari'at* Appellate Bench was also created in the Supreme Court of Pakistan. These benches were authorized to give decision on petitions made before them "in respect of existing laws, whether and if so how far and in what respect they or any of their provisions were against the *Qur'an* and the *Sunnah*" (Shaikh, 2012). Its duty was to scrutinize and decide whether or not any law or provision of law is repugnant to Islam (The 1973 constitution, 2016). However, the following areas "(Constitution, Muslim personal law, any law relating to the procedure of any court or Tribunal, any fiscal law or any law related to the levy and collection of taxes and fees on banking or insurance practices and procedures for 10 years from 25th June, 1980)" are out of the jurisdiction of these *Shari'at* benches (Annual Report of FSC, 2002). These benches were formed on the recommendation of CII (Major Achievements, 2016). The Court's orders concerning dismissal of un-Islamic laws was executable not advisory.

Formation of Federal Shari'at Court

Despite of formation of Shari'at Benches the process of Islamization was very slow as the High Court and Supreme Court had their other cases to deal with. So, FSC was formed as an institution specified to accomplish the goal of Islamisation of Law Islam in the country (Annual report of FSC, 2002).

The FSC was established by virtue of the President's Order No.1 of 1980 as incorporated in the Constitution of Pakistan, 1973 under Chapter 3-A. The court is a unique institution with no parallel in the entire Muslim world. It is backed by powerful provisions of the Constitution (Establishment, 2017).

The number and merit of judges of the FSC is also mentioned in the Constitution.

According to the Constitution it shall have eight Muslim judges including the Chief justice. The chief justice should be a person who is or has been qualified to be a judge of SC. Of the other judges not more than four shall be persons each one of whom is or has been qualified to be, a judge of a high court. Later on three *Ulema* were included as judges in the court (Azam).

Research Wing

The administration of the FSC consists of

- 1, Registrar
2. Additional Registrar,
3. Deputy Registrars,
4. Assistant Registrars
5. Superintendent.

It also has a Research Branch, consisting of assistant staff, Research Advisor and Senior Research Advisor (Establishment, 2017).

The Research Branch helps the court by submitting comprehensive research notes to the Judges at the time of hearing and writing the judgments. First of all *Shari'at* petition is examined by the Senior Advisor to determine whether the "questioned law or provision falls within the purview of the court's jurisdiction (Establishment, 2017).

Juris Consults

The Board of Juris Consults of the court has *Ulema* from different school of thoughts .the court seeks their advice at the time of need (Establishment, 2017).

Functions of the Court

Article 227 explains the functions of the FSC.

“All the present laws should be brought in conformity with the instructions of Islam”.

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 203-D enables the FSC to act in *Suo Moto* action, this article which was incorporated in the Constitution of 1973 by an amendment in 1982. According to Article 203-DD the court can demand and investigate the record of any case relating to enforcement of *Haddood*, which was previously decided by a criminal court (The Constitution of Islamic Republic of Pakistan, 1973).

The record should be examined by the FSC, either for satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed by, and as to the regularity of any proceedings of, such court and may, when calling for such record the court has the authority to direct the suspension of the execution of any sentence and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record (The Constitution of Islamic Republic of Pakistan, 1973).

The appellate jurisdiction of the FSC has been applied in cases that are listed under the *Haddood* Laws. Unless it is confirmed by the FSC, no *Hadd* punishment can be executed. Article 203-E, Clause (9) authorizes the court to review any decision given by it (The Constitution of Islamic Republic of Pakistan, 1973). “Its decision is binding on High Court and Courts Subordinate to it.” Article 203-GG states that “Subject to Articles 203-D and 203-F, any decision of the FSC in the exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all courts subordinate to a High court” (The Constitution of Islamic Republic of Pakistan, 1973).

Methodology of the Court

The procedure of the FSC is in the following steps:

1. To find in the first instance the relevant verse or verses in the *Qur'an* regarding the question in issue
2. To find out the relevant *Hadith*, (sayings of the Prophet (Peace be upon Him))
3. To discover the intent of the *Qur'anic* verse from the traditions of the Prophet (Peace be upon Him)
4. To ascertain the opinion of and views adopted by renown jurists on that matter and to examine their reasoning in order

to determine their harmony with the present day requirements or if possible to modulate them to the demand of the modern age

5. To discover and apply, as a last resort, any other option which should, no doubt, be in harmony with the *Qur'an* and the *Sunnah* (Wafaqi Sharai' 'adalat, 1983).

Procedure for appointment of Judges

The President of Pakistan has the authority to appoint the Judges of FSC. The judge selected for appointment should be amongst the retired or serving judges of the Supreme Court or a High Court or from amongst those who is qualified to become a judge of the High Court (Annual Report of FSC, 2002). The appointment of FSC judges is by the Judicial Commissions as stated by the Constitution. The judicial commission consists of:

- The Chief Justice of the SC of Pakistan as Chairman
- In addition to four senior most Judges of the SC
- Former Chief Justice or a retired judge of the SC
- Attorney General of Pakistan
- The Federal Minister of Law and Justice
- Chief Justice of FSC
- Most senior judge of the FSC (The Constitution of Islamic Republic of Pakistan, 1973).

In case of appointment of Chief Justice the name of the most senior judge was excluded from the Commission. His name is referred to Parliamentary Committee having eight members from government and the opposition parties. This Committee has to analyze the referred name in two weeks. The name is referred to the PM after approval, who forwards it to the President for appointment. If Parliamentary Committee rejects the referred person by three-fourth majority the PM will refer it back to the Commission, and the Commission will nominate someone else(Federal Shari'at Court, 2017).

According to article 203-C the FSC have eight Judges including the Chief Justice in April 1981, three *Ulema* were also included as judges of the FSC by a Presidential Ordinance. They all can hold office for only three years. President can extend the time period (The Constitution of Islamic Republic of Pakistan, 1973). Administrative staff of the FSC contains 250 members (Federal Shari'at Court, 2017).

Procedure Rules of FSC

According to the Article 203 J the procedure rules of the FSC are decided by the court itself (The Constitution of Islamic Republic of Pakistan, 1973). Some of its important procedural rules were mentioned below.

In Case of Petitions

According to procedure rule 10-13, the petitions presented for hearing were first examined by a bench. The petitioner, his counsel or juris consult is presented before the bench for hearing. After hearing and examination of petition and documents attached to it the bench announces acceptance or rejection of petition (also declaring reasons for rejection). then notices are issued to all concerned persons for regular hearing. If assistance of a religious scholar is necessary and he is unable to appear in court is written opinion is demanded. Absence or death of a petitioner cannot overrule a petition (Procedure Rules, 2016).

In Case of *Sou-moto* Decisions

According to rule 15

“The Court enlists the laws to examine whether they or any of their provisions are repugnant to the instructions of Islam. A notice is to be issued inviting bar associations, religious organizations and institutions, juris consults and other persons and general public their views on the issue under consideration. The views should have reference from the *Qur’an*, the traditions of the Prophet (Peace be upon Him) and the juristic opinions (Procedure Rules, 2016).”

In Case of Appeals

According to rule 18

“An appeal shall be presented to the Court within sixty days from the date of the announcement of judgement. If the appeal form is not according to the procedure rules, it shall be returned until filled properly according to the rules, except if the appeal is received from High Court or lower Court, or from an accused who is confined in jail and is not represented by a counsel. In such cases the additional documents may be demanded (Procedure Rules, 2016).”

Appeal from Jail

Rule 21 says that the Superintendent can appeal for an accused confined in jail. The Superintendent will determine whether the appellant should be represented at State expense. According to Rule 22-A Rules of appeal would also apply on revision and review petition (Procedure Rules, 2016).

Defense Counsel at State Expense

According to rule 23

“Where in an appeal, revision, review or reference, an accused is not represented by a counsel; the Court may appoint a counsel for his defense at State expense” (Procedure Rules, 2016).

Applications for Bail

According to rule 27 bail application shall be treated as urgent and shall be present before a Bench on the next day of its submission” (Procedure Rules, 2016).

Decision of the Court

Rule 30 states that Court shall announce its decision publically (Procedure Rules, 2016).

Review of Decisions

Rule 31-A According to clause (9) of Article 203-E, “the Court may, on its own motion or on an application made to it, review any decision given or order made by it” and “No decision given or order made by the Court in a petition, appeal or reference shall be reviewed unless a notice is given to all the persons who were party in such petition, appeal or reference, as the case may be”. Rule 31-F and G says that “if court has an opinion that the application has no valid ground for review it can reject it without hearing the applicant or his counsel or juris consult and no second application can be made in this respect.” (Procedure Rules, 2016)

Inherent Powers of the FSC

Rule 71 states that:

“Nothing in these rules shall be deemed to limit or otherwise effect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or the prevent abuse of the process of the Court.” (Procedure Rules, 2016)

Rule 72 states that

“Where at any stage of the proceedings in the Court there has been a failure to comply with these Rules, the failure shall be treated as an irregularity and shall not nullify the proceedings or the judgment.” (Procedure Rules, 2016)

Jurisdiction of the FSC

The court exercises its *suo-moto* jurisdiction to examine the federal and provincial laws. The court issues notices to invite public participation in its procedure (Annual Report of FSC, 2002). According to Article 203-G the matters which are included in the jurisdiction of FSC, High

Court and Supreme Court cannot exercise any authority upon them (Muhammad Munir, 47, 2008).

The CII has already inspected federal laws from Pakistan Penal Code no I to VIII, the FSC started its task from IX up to XIX. It examined 512 laws. 55 provisions were found in these laws which were against Islam. 999 provincial laws were examined and 212 were declared un-Islamic (Annual Report of FSC, 2002).

Powers and Procedure of the Court

1. To fulfill its duties, the court has authority of the Civil Court under the Code of Civil Procedure (Act V of 1908) regarding the following issues.

- a) Call for the presence of any person and examining him on oath.
- b) The court can command to discover and produce any document.
- c) The court can receive evidence on affidavits.
- d) The court can issue commissions to examine the witnesses or documents.

2) The court can conduct its proceedings and regulate its procedure as it seems appropriate.

3) The court can punish its own contempt like High Court.

4) A legal practitioner will represent a party for any case in the court according to clause (1) of Article 203-D, he must be a Muslim and has been an advocate of a High Court for at least five years or an advocate of the SC or a jurist consult nominated by the party. However, he must not be a part of board of jurist consults upheld by the court.

5) For g eligible to be jurist consult of the Court, the person shall be well-versed in *Shariah*.

6) A legal practitioner or jurist-consult when represents a party in the court shall illustrate and explain the instructions of Islam regarding the proceedings in addition to submitting his interpretation in written form.

7) Any person living in Pakistan or out of the country who is well versed in Islamic law can be called by the court for assistance in any case.

8) Article 203-D states that any petition or application made to the court is free of cost (The Constitution of Islamic Republic of Pakistan, 1973).

Registries of the Court

The principal seat of the FSC is at Islamabad, but it can hold its sessions at other places in the country if needed with the approval from the President (Wafaqi Sharai' 'adalat, 1984).

The four Bench Registries of the FSC at Lahore, Karachi, Peshawar and Quetta, in addition to the main Registry at Islamabad have been set up. These Bench Registries have been accommodated in the buildings of each Provincial High Court. Cases relating to the Provinces are filed and disposed of at these Registries by holding court sessions after short intervals (Objectives of Federal Shari'at Court, 2016).

Legal Challenges to FSC

Limited Jurisdiction

- The Constitution of Pakistan does not fall under its jurisdiction. It means FSC cannot object on Constitution.
- Muslim Personal Laws are also not included in its jurisdiction.
- It cannot discuss any law relating to procedure of any court or tribunal.
- It could not discuss any fiscal law or any law relating to the levy and collection of taxes and fees on banking or insurance practice and procedure, this was excluded from its jurisdiction only for ten years (Ahmed, 2002).

Power of Appellate Shari'at Bench of SC above FSC

Appeals can be filed in Appellate *Shari'at* Bench of SC against the any judgments of the FSC and heard by the five members Bench of the *Shari'at* Appellate Bench of the SC (The Constitution of Islamic Republic of Pakistan, 1973).

Article 203-F of the Constitution states that final decision of the FSC can be challenged before the SC of Pakistan within sixty days after the announcement of the decision. However, appeal on behalf of Federal or Provincial government can be filed within six months after the announcement of the judgment. Judgment of the respective court can be challenged in the SC regarding sentence to death or imprisonment for life or imprisonment for a time period more than fourteen years, or on revision, has enhanced a sentence as aforesaid, or punishment regarding contempt of the Court.

Any appeal to SC which is not included in the above mentioned decisions will be granted only if the SC considers it valid. The appeals shall be heard by the *Shari'at* Appellate bench consisting of three Muslim Judges of the SC, at least two *Ulema selected* by President after consultation with the Chief Justice and have the same privileges and authority as a judge of Supreme Court (The Constitution of Islamic Republic of Pakistan, 1973).

Conclusion

The struggle for the Islamization of law in Pakistan has a long history. This struggle resulted in the following important events from the time of independence till 2015:

1. Objectives Resolution of 1949
2. Islamic Provision of the Constitution of 1956
3. Islamic Provision of the Constitution of 1962
4. Islamic Provision of the Constitution of 1973
5. Formation of CII
6. Establishment of FSC

However, despite of the Islamic provisions present in all the three Constitutions, formation of CII -which has played an effective role in revising the several Federal and provincial laws and proposing amendments according to the teachings of Islam- and establishment of FSC, the goal of Islamization has not been achieved.

The FSC was established on the recommendation of the CII. Its role is not just advisory but the government has to do alternate legislation if it considers a law un-Islamic otherwise the law will cease to effect after a specific time. There is no parallel institution like it in the whole Islamic world. However, we do not find any similar institution like that in the whole Islamic history. The reason is that at the time of the Caliphs the legislation was done by the members of the *Shura* who were themselves competent in Islamic laws, so there is no need for such an institution. But today majority of our political representatives are even not educated facing scandals regarding their fake degrees, totally devoid of ability to reconcile between religion and demands of modern times in the context of legislation. This whole scenario gave rise to need of establishment of CII and FSC.

The FSC has not been given opportunity to play its role effectively and its judgments are effective only if they are regarding insignificant issues or if it is in accordance with the desire of the executive powers. The judgments which are innovative and landmark in process of Islamization of legislation are deliberately delayed by the FSC because of the pressure of the government and secular groups of the country. In case of Haddood Ordinance the said recommendations of the FSC regarding amendments in *Haddood* laws was not considered which resulted in Women Protection Bill. There is none of the judgment of the FSC, declaring a legislation to be repugnant to Islam but it was challenged by the government in the *Shari'at* Appellate Bench.

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