Federal Shariat Court as a Vehicle of Progressive Trends in Islamic Scholarship in Pakistan

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Introduction:
Pakistan secured independence from the British Colonial government in 1947. From the early days of its independence, there has been a contested debate whether Pakistan should be declared as an Islamic country or not. This debate was very much there when its first Constituent Assembly adopted the Objectives Resolution in March 7th 1949.(1) Pakistan, in its different constitutions, has unequivocally pronounced its allegiance to Islam, e.g., Article 2 of the present Constitution, 1973, declares that Islam shall be the state’s religion.(2) Moreover, the state has been constitutionally obliged to take measures to create such an atmosphere where its Muslim citizens would live according to dictates of their religion.(3)

Many institutions were established to carry out the task of Islamization in the country, e.g., Islamic Research Institute, Council of Islamic Ideology.(4) The main job of these institutions was to do research on issues pertaining to Islam and then present that to the legislative assemblies for enactment. The final authority to codify the same lied with the legislative assemblies; hence the role of such institutions was merely advisory in nature.(5) This particular downside of such institutions was one of the main considerations for establishment of the Federal Shariat Court (hereafter referred to as FSC).

The paper intends to explore the role of the FSC to highlight that it has contributed to progressive trends in Islamic scholarship. For the purpose of analysis, I have selected few judgments of the FSC. For the sake of clarity, the paper does not argue that the FSC has never contributed to traditionalist constructions of Islam or led to woman unfriendly implications rather the point at issue is that always aligning it with traditionalism or retrogressivism is a wrong way of approaching the contributions of this institution. There is another spectrum to view the role of the FSC based on another set of facts which this paper will present.

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The paper is divided into two main sections in addition to this introduction and a conclusion. The next section will briefly trace the origin of the FSC along with its powers. This section will be followed by another more detailed one which would showcase some decisions of the FSC to substantiate the main thesis of this paper.

**Origin and Powers of the FSC:**

After the implementation of Martial law by late General Zia-ul-Haq in 1977, it was quite unsurprising for many in the country that he would employ Islamic card to satisfy the sentiments of the opposition alliance, namely Pakistan National Alliance. The alliance was constituted to contest election in the country against Zulfiqar Ali Bhutto’s Pakistan Peoples Party. But the alliance was defeated in the general election in 1977 and converted its political struggle into a religious movement named Tahrik Nizam-i-Mustafa.(6) It was this background when General Zia usurped the power after deposing Zulfiqar Ali Bhutto. Thus he had little option not to ride on the same sentimental waves caused by the opposition alliance’s movement.(7)

In 1979, General Zia constituted the Shariat Benches at all High Courts in different provinces. These benches were assigned the same task which was allocated to the FSC after its establishment. The FSC was established in 1980 as an independent court rather than as an annexure to already existing High Courts.(8) Probably the establishment of an independent FSC was meant to protect it from being influenced from other benches of the same High Court and give more sanctity to its decision. The purpose was to provide it more autonomy than it would have exercised as Shariat Benches of the High Courts. This view is strengthened when we analyze the powers of the FSC. According to Article 203GG (9) of the Constitution of 1973 the decisions of the FSC are binding on all courts subordinate to it in addition to the High Courts.

Article 203D lays down the original jurisdiction of the FSC.(10) The FSC is constitutionally required to pronounce those laws of the country as null and void which are inconsistent with the Quran and Sunnah of the Prophet. These laws would then be replaced by the respective legislative assemblies within a specified time; and if that is not done within the prescribed period then the impugned law would cease to be law of the country.(11) Article 203D also states that if the law declared to be unislamic
is not replaced by the respective legislative assembly within the specified time then the decision of the FSC will become an enforceable law. This process of judicial scrutiny of the laws on touchstone of Islam and thereafter their coercive substitution is an innovative idea. Hirschl has coined a new terminology for such a constitutional arrangement where religion is promoted and streamlined through the modern apparatus of constitution particularly courts.(12)

This constitutional process is one of the reasons that the institution of FSC is criticized. The critics are of the view that one particular institution should not be vested with such an effective power to override the collective will of the legislature manifested in form of laws. Moreover, it is not a judicial function to go beyond any law to question its vires. The principal role of the judiciary is to implement the laws enacted by the parliament: whereas this institution is decorated with powers which in true spirit of any constitutional dispensation must be exercised by elected representatives.

The strength of above-referred arguments of the critics of the FSC is derived from strict theory of separation of powers. According to judicial pronouncements of the superior courts in Pakistan the constitutional arrangements in the country does not adhere to the theory of separation of powers in letter and spirit rather the Pakistani constitutional scheme should be properly termed as tri-chotomy of powers among different pillars of the state.(13) In this constitutional scheme, every pillar of the state is required to observe what has been assigned to it by the constitution irrespective of the fact that the same does not fit well within the pure theory.

There are two important narratives of the FSC which give impression as if this institution was established with ulterior motives to downgrade the status of women. The First narrative is linked to the process of Islamization in the country initiated by General Zia. It is contended that he carried out this process to serve his political purposes and to provide legitimacy to his usurpation of power from democratically elected government of Zulfiqar Ali Bhutto.(14) As the FSC was established by him then there must be something in this initiative which would have strengthened his regime. This narrative is not entirely unconvincing as General Zia was interested to prolong his government, but simply viewing the FSC’s role as an extension of his politically motivated process of Islamization may lead to a distorted picture.
Another narrative is based upon the analysis of cases of coercive sexual relationship. The courts in these cases have time and again converted the allegation of rape by a victim woman into a confession of consensual sexual relationship if she fails to prove the element of coercion.(15) Decisions of this nature by the FSC are problematic and difficult to vindicate on any ground. Both of these narratives along with the constitutional objection of bestowing the legislative powers upon the FSC are prevalent and dominant perspectives on the role and efficiency of this institution. Without challenging the veracity of these, this paper intends to present an altogether different perspective so that the reader may keep in view a full-fledged picture before making his opinion.

**The FSC’s Contribution to Progressive Interpretations of Islam:**

This section will catalogue those decisions of the FSC which are progressive and reformist in nature. As a limited space is available here, I will enlist two categories of cases. The earlier part of this section deals with the cases relating to family and women in a relatively detailed manner while the later part briefly refers to the cases pertaining to administration of justice. The reason for exploring the former category of cases in a detailed manner is that most often than not the negative portrayal of the FSC is imbedded on gender related issues. Let us now analyze the cases to bring forth the progressive trends fostered by the FSC.

There are Muslim scholars who are of the view that women cannot be appointed as judges or hold political offices as the same would go against the general import of the concept of *qawama* as enunciated in the Quranic verse 4:34. (16) In Ansar Burney’s case,(17) which was decided by the then Chief Justice Aftab Hussain of the FSC along with two other judges, it was laid down that women can be appointed as judges and magistrate. The appointment of women as judges was challenged in this landmark case on four grounds: that their work as judges violate the requirements of *purdah* /veiling; judicial function was never assigned to any woman in the period of the Prophet Muhammad and his companions; woman’s evidence is half than that of man, and they do not fulfill the requirements of a judge as enunciated by Islam.(18)

The court observed that if the evidence of two women is equivalent to one man in certain cases the same would not lead to the conclusion that two women must sit as judges in a case which is heard by a male judge.
Because if this argument is extended to its logical conclusion then one judge cannot adjudicate in the cases of *Hudood* and *Qisas* as the number of witnesses required in these cases is either four or two male witnesses.\(^{(19)}\)

The contention relating to veiling was refuted by references to interpretations of various Hadiths and opinions of different Imams.\(^{(20)}\)

With respect to the argument that women were never appointed to this office during the period of the Prophet and companions, the court held that the original principle is permissibility if there is no explicit prohibition in the Quran and Sunnah.\(^{(21)}\) Thus when it has not been prohibited by the Quran and Sunnah to appoint them as judges then mere non-appointment by these holy personalities would not have any legally binding effect.

In this case, the petitioner’s exclusive reliance was upon the verse of *qawama* and a famous Hadith that a nation cannot attain worldly as well as spiritual success if it is governed by a woman.\(^{(22)}\) To arrive at an appropriate appreciation of concept of *qawama*, the court analyzed numerous commentaries of the Quran, its lexical constructions and conceptual foundation of suzerainty of man over woman in different civilizations. The court then construes this concept in terms of responsibility of a husband towards his wife and relates it to a famous saying of the Prophet that everyone is responsible in his/her respective domain.\(^{(23)}\) The court concludes that the concept of *qawama* cannot be interpreted to “give any particular triumph to the husband over the wife”.\(^{(24)}\)

The court argues that the opinions of some Imams for not favoring the appointment of women as judges might be influenced by the circumstances of their age that it was difficult for women to maintain decorum of the courts. But in our age when there are laws, e.g. law of contempt, to maintain the prestige of courts there is no need to be scared in this respect.\(^{(25)}\) The women were consulted and their evidences were acted upon by the Prophet and companions, hence the argument proffered on behalf of the petitioner that they lack in intelligence is unfounded.\(^{(26)}\) The court did not find any merit in the petition as to appointment of women judges, hence dismissed.

This judgment is one of the best expositions of Islamic law on equality of rights of men and women. This case has been cited by Mashood Baderin in his celebrated book on human rights in Islam to buttress his argument for eligibility of women to hold political offices including judicial
responsibility. (27) On the one hand, this decision has exposed the bias underlying some traditional constructions of certain passages of the Quran and sayings of the Prophet, and on the other, it has categorically affirmed that women are as capable and competent in light of Islamic Jurisprudence as men considered to be.

Once again in Mian Hammad Murtaza Vs Federation of Pakistan, (28) the issue of competency of women for appointment as judges in matters of family laws was contested. The court while referring to Ansar Burney’s case states that it has attained finality as the appeal against the decision of the FSC in the Shariat Appellate Bench of the Supreme Court was dismissed as time barred. Thus this court cannot be approached to get into a settled controversy one again.

Age of majority is another gender related issue. It has been a contentious issue in Islamic law; whether physical maturity/puberty should be regarded as criterion for majority or there is any possibility to hold that a certain age can also be regarded as such. Whatever criterion is set for majority it would have many implications for women and their rights in Islamic law. According to many scholars, the basic yardstick in majority is puberty as there is no set mechanism to ascertain mental maturity. In certain instances age has also been treated as a criterion. As a whole the age has not been very favorably held to be representative of one’s majority. (29) The FSC in Muhammad Fayyaz and others Vs Federation of Pakistan (30) has dealt with this issue. The petitioner in this case contested that Sec. 3 of Majority Act (31) is repugnant to injunctions of Islam. The Sec 3 states that a child will be presumed to have attained majority in age of 18 years and if a guardian has been appointed with respect to a child then his age of majority will be 21 years. Relying upon the opinions of Muslim jurists, the petitioner was of the view that a child attains puberty much earlier than 18/21 years. The court did not agree to the contentions of the petitioner and held the said Sec. to valid in light of Islamic injunctions. The court in its judgment has pronounced that it has great regard for opinions of the learned scholars, but the same cannot substitute the Quran and Sunnah. The latter sources have not laid down any criterion for majority and the favorable treatment of puberty as a criterion has not been substantiated by them. The court concludes that it is in interest of litigants that there should be some
ascertainable criterion for majority instead of leaving this issue to be settled in each and every case on the basis of puberty of the parties.

In another attempt to protect and promote the rights of women, the FSC ordered that women should be appointed as vice chancellors to Woman University. In 1985 an ordinance was issued for establishment of Women University. This ordinance did not categorically state that women should be preferably appointed as its vice chancellors. The FSC in exercise of its suo moto jurisdiction ordered the government that a clause should be inserted in the ordinance to make it sure that maximum effort should be made to appoint a woman as vice chancellor of the university.

If there is any discrimination among citizens on the basis of gender then that is something which must be remedied. The law dealing with matters of citizenship was enacted in 1951 and known as Pakistan Citizenship Act. This law granted a right of citizenship to a foreign woman if she married a Pakistani husband under Sec. 10. The same sort of privilege was not accorded to a Pakistani woman in the law. In news clipping it was reported that a Pakistani wife could not get citizenship for her foreign husband. The same news item was converted by the FSC into suo moto petition to analyze whether this discriminatory provision was against the principle of equality and fairness enshrined in injunctions of Islam. The FSC’s decision was subsequently reported as In Re: Gender Equality. This is another important decision of the FSC which brings forth its gender sensitive posture.

The FSC issued notices to different government departments to present their stance as to discriminatory treatment of Pakistani woman marrying a foreign husband. Numerous objections were raised by them. Crux of these objections is as under: in our society, status of a foreign husband is not equivalent to a foreign wife; equal treatment to both would contribute to already worsened problem of unemployment; and this facility might have been exploited by enemies for their nefarious purposes, etc.

The FSC was not convinced by these arguments and took a stance that unless there is anything in the Quran and Sunnah to support this kind of provision the same cannot be allowed to survive on the statutes of Pakistan. In addition to its repugnancy to Islamic injunctions, it also violates the equality provisions of the Constitution of Pakistan, 1973. During the course of its analysis, the FSC has pointed out that the Convention of Nationality
of Married Women does not confer any right to a wife to get her husband a nationality on the basis of her national status.(37) Thereafter, the court observes that Islam envisages something different from the above convention. The court concludes that a foreign husband would be entitled to nationality of his wife on the same pedestal on which a foreign wife is entitled to have nationality of her husband; though these enabling provisions would not take away the right and responsibility of the state to deny such right to those who might be a threat to national security.(38)

There is another important decision of the FSC on Muslim Family Laws Ordinance, 1961, which support the main argument of this paper. Let us first briefly state the history of this ordinance and then indulge into highlighting the main implications of the decision regarding gender issues.

The ordinance was enacted by late General Ayub Khan on the recommendations of a commission constituted to suggest changes in laws relating to Muslim family in 1955. The commission issued its recommendations in 1956, but they could not be enacted into legislation as they were vehemently criticized by the religious segments of the society. General Ayub took a bold step to codify them. Additionally, he and the subsequent governments in the country made conscious effort to provide security to this piece of legislation from judicial review on the basis of fundamental rights. The similar sort of security was also extended to this law from the FSC’s jurisdiction at the time of latter’s establishment.(39)

Thereafter, a furious judicial battle took place in the courts to bring this law to judicial scrutiny.(40)

At last the FSC assumed jurisdiction with respect to the Muslim Family Laws Ordinance in a case titled Allah Rakha Vs. Federation of Pakistan.(41) Quite astonishingly the decision of the FSC does not seem to be satisfying the traditionally religious segment of the society as the court has taken a firm stance to foster protection of women in family matters. One of the objections of some religious scholars directed against the process of registration of marriages provided in Sec.5 of the Muslim Family Laws Ordinance. They are of the view that there was not any provision in the Quran and Sunnah to make registration compulsory.(42) The court, while observing that non-registration per se does not invalidate a marriage if that is solemnized as per injunctions of Islam, suggested to the government that
punishment of non-registration should be enhanced to make compliance of this provision more effective. (43)

The procedure to regularize polygamous marriages in Sec. 6 has been another bone of contention. Some religious segments were against laying down any procedure for taking permission from the existing wife before getting into another contract of marriage. The court held that the procedural aspect of Sec. 6 is entirely reformative and should be amended in a way to make it more protective to wife’s interest. Hence, this procedure cannot set aside on the basis of any objection founded in the Quran and Sunnah. (44) In another contentious issue pertaining to Sec. 4 of the Muslim Family Laws Ordinance, the court suggested to the government to introduce a concept of mandatory will for orphaned grandchildren instead of giving them through process of inheritance. According to the court, this amendment on the one hand would not violate any Islamic injunction and on the other protect the rights of orphaned grandchildren. (45)

There is another important aspect in which the FSC has decisively contributed to emancipate women from unnecessary fetters put upon them by their unscrupulous family members. Some Sunni scholars are of the view that an adult virgin cannot get herself married without the consent of her guardians. This traditional stance had been taken as a plea by the families of those girls who get themselves married without their parents’ consent to register cases of illicit sexual relationship against them and their husbands. As judicial dispensation carried out in Pakistan, appeals against such cases are heard by the FSC. The FSC in such appeals affirmed the rights of adult virgin girls to marry by their own choice and hence the cases of this nature were quashed many times. (46)

In late 1990s, an adult virgin girl married to her teacher without her parent’s consent. The controversy regarding her competency to marriage was decided by Lahore High Court in two various petitions differently and ultimately, the matter was tabled before the Supreme Court of Pakistan. The Supreme Court relying on the decisions of the FSC concluded that an adult virgin has a right to marry by her own choice and the same cannot be taken away in any manner under the garb of guardian’s consent. (47) The Supreme Court held that the decisions of the FSC are binding on all courts including the High Courts and whenever a decision is rendered by any High Court disregarding any judgment of the FSC then such decision of the High Court is bad in law. (48) Thus the Supreme Court put this long drawn controversy to a gender sensitive conclusion and in this regard the decisions of the FSC came to its rescue.

The decisions analyzed above in this section relate to gender issues and one way or another protect and promote rights of women. As pointed out in the opening paragraph of this section, I will also be briefly referring to some other decisions pertaining to administration of justice and the
purpose is to underline that progressive trend of the FSC is not restricted to one particular dimension only.

In a case titled Dr Mahmood ur Rahman Vs. Federation of Pakistan(49) it was held by the FSC that charging court fee as per market value of a subject matter is against the injunctions of Islam. In this case the petitioner challenged various laws on the ground of repugnancy to Islam and the court directed to the respective governments to amend all such provisions in the laws. In another case(50) dealing with an important issue of administration of justice, i.e. period of limitation, it was observed by the FSC that there is nothing in the Quran and Sunnah to proscribe period of limitations for different sorts of remedies.

In Dr Abdul Malik Irfani Vs. Federation of Pakistan,(51) the petitioner challenged some sections of Law Report Act 1875 which were amended by Act of 11 of 1990. These sections lay down that no judgment should be published without permission of the court which has pronounced it. It is worthwhile to point out here that this law was initially introduced the notion of precedent on a firm basis by facilitating systematic publication of law reports in the Indian Subcontinent. After going through the record and arguments of councils, the court dismissed the petition as it did not find in the law anything repugnant to Islam.

Conclusion:

The FSC was established by General Zia as part of his efforts to Islamize the country. It was provided a firm foundation by engrafting an exclusive chapter 3A into the Constitution. The most criticized aspect of the FSC has been to declare the laws enacted by various legislative assemblies as null and void if they are found to be inconsistent with the Quran and Sunnah. This criticism is channeled through many mediums, e.g. constitutional theory, patriarchal structure of Islamic resurgence and discriminatory application of Islamic laws against women. To some extent, the manner in which the FSC has discharged its judicial function, it has substantiated the objections. But this is not the whole truth about role and contribution of the FSC; it has time again pronounced such judgments which are progressive in nature though grounded in Islamic perspective. The paper has analyzed some decisions of this sort and argued that over-emphasis on negative portrayal may distort its genuine contributions. Though the paper has analyzed more cases related to gender issues, the same trend is also discernable in other kinds of decisions as highlighted with reference to a few cases pertaining to administration of justice. All the judgments analyzed in the paper were meant to be and has brought to forth that the FSC has been a vehicle for fostering progressive trends in Islamic scholarship. As a whole, the FSC’s role in domain of Islamic scholarship is bound to challenge the authority hitherto exercised exclusively by traditional religious segments of the society.
References

4. For activities of the Council see http://www.cii.gov.pk (Last accessed on 11/03/13).
8. President’s Order No. 1 of 1980.
9. Article 203GG says that “subject to Article 203D and 203F, any decision of the Court 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”.
10. The Article states that the court can “examine and decide the question whether or not any law or provision of law is repugnant to the injunctions of Islam, as laid down in the Holy Quran and Sunnah of the Holy Prophet”.
18. Ibid, at p.2
19. Ibid, at p.3
20. Ibid, at pp.7-8
21. Ibid, at p.3
22. Ibid, at p.5
23. Ibid, at p.13
24. Ibid, at p.15
25. Ibid, at p.25
26. Ibid, at p.27-29
28. Shariat Petition No. 1/L of 2010. This judgement is published and avalaible at PLD 2011 FSC 117.
30 Shariat Petition No. 6/I of 2004
31 IX of 1875
32 The Women’s University Ordinance, 1985 (Ordinance No. XXIX of 1985).
33 Suo Moto No. 132/87
34 Suo Moto No. 1/K of 2006
35 PLD 2008 FSC 1. The decision of the court can be accessed online at the following link
   (Last accessed on 13/03/13).
36 Suo Moto No. 1/K of 2006, at pp.4-5
37 Ibid, at p. 24
38 Ibid, at pp. 25-26
40 This battle was initiated by Mst. Farishta Vs. Federation of Pakistan (PLD 1980 Pesh 47) and culminated into the pronouncement of Dr Mehmood ur Rahman Faisal Vs. Federation of Pakistan (PLD 1994 SC 607).
41 PLD 2000 FSC 01
42 Ibid, at p. 50.
43 Ibid, at p. 51.
44 Ibid, at p. 57.
46 Muhammad Imtiaz and another Vs. The State (PLD 1981 FSC 308); Arif Hussain & Mst Azra Parveen Vs. The State (PLD 1982 FSC 42); Muhammad Ramzan Vs. The State (PLD 1984 FSC 93); Muhammad Yaqoob and another Vs. The State (1985 PCr.LJ 1064).
47 Hafiz Abdul Waheed Vs. Asma Jehangir (PLD 2004 SC 219)
48 Ibid, at pp.236-237.
49 PLD 1992 FSC 195
50 PLD 1989 FSC 143
51 NLR 1993 S.D. 231 (2)