# The Role of the Federal Sharī'at Court in the Islamization of Family Laws in Pakistan

*Dr. Muhamad Akbar Khan*[*]
*Dr. Mohammad Moti ur Rehman*[*]

*The Federal Sharī'at Court, FSC in the Islamic Republic of Pakistan has been empowered by the Constitution of the country to examine that whether or not a certain law is in contradiction with the limits set by Islam. This function falls within the exclusive domain of the court and no other court in the country is vested with such powers that makes this court a unique one in the recent judicial history. While exercising the powers vested in it, the FSC has examined various laws related to different areas including family issues. This paper attempts to analyze the role played by the FSC in Islamizing family laws in the country such as in interpretation of the word "Muslim Personal Law", under the Muslim Family Laws Ordinance, 1961, issues which give rise to criminal liability e.g. marriage during 'Iddat period, Marriage between fornicators during pregnancy, the issue of paternity of child, the issue of conversion to Islam and its effects on earlier marriage, Permission of guardian for Nikāh, the shortest period of pregnancy, Khīyār al-Bulūgh, admission of Nikāh during trial, the issue of triple Talāq, marriage under duress and other issues that are settled by the FSC have been thoroughly analyzed. The paper has been concluded with the impression that the FSC is a unique court in the judicial history and it has played a significant role in introduction of Islamic laws in Pakistan and offered solid interpretations to various laws in order to reduce the absurdity in these laws. It has critically evaluated a considerable number of laws and directed the Government to Islamize the laws in the light of the Judgments of the Court that resulted in the Islamization of a large number of laws in the country.*

**Key Words:** *Sharī'at, Nikāh, Talāq, Khīyār al-Bulūgh, Islamization*

## Introduction and Historical Background

The former President of Pakistan late General Ziaul Haq, while promulgating the *Hudūd* laws in 1979, also promulgated the Constitution (Amendment) Order 1979 to take effect on 10 February 1979. Under this order, Sharī'at Benches were established in each High Court while an appellate Sharī'at Bench was created at the Supreme Court of Pakistan in Islamabad. The Sharī'at Benches were empowered to strike down existing as well as future laws, except the constitutional provisions, provisions of Islamic family law, or a law determining the procedures of a Court or a tribunal, any tax-related law or any law pertaining to the collection of revenue, if they were not in accordance with the limits prescribed by Islam. While doing so Sharī'at Benches, apart from declaring any existing or future law to be Islamic or un-Islamic could be re-shaped in order to make it in agreement with the relevant injunctions of Qur'ān and *Sunnah* for implementation by the Government. On May 27, 1980, the four Sharī'at Benches established in the High Courts were substituted by FSC at the

[*] **Assistant Professor, Faculty of Sharī'ah & Law, International Islamic University, Islamabad.**
[*] **Senior Advisor, Federal Sharī'at Court, Islamabad.**

Capital of Pakistan; Islamabad.[1] This Court comprised of Eight Judges, five regular judges and three *'Ulemā* judges who must be experts in Islamic law. [2]

**Jurisdiction, Powers and Functions of the Court**

The FSC has the authority to study and determine the question if any law or provision thereof is contrary to the prescribed limits of Islam as laid down in the Holy Qur'ān and *Sunnah* of the Holy Prophet.[3] Where the Court scrutinizes any law or provision of law and determines that such law or a provision thereof is against the limits of Islamic law, the Court shall notify the Federal or Provincial Government by specifying the specific provisions that are contrary to the Islamic law and would also provide such Government an opportunity to present its viewpoint on the said provisions.

When the court determines that any law or a provision thereof is against the injunctions of Islam it will provide reasons for holding such opinion and would also provide the extent to which such law or provision is contrary to the injunctions of Islam. The court would also state the date from which its decision would be effective. However, it is important to note that such decision could only take effect when the period for preferring an appeal to Supreme Court has lapsed.

**Revisional and other Jurisdiction of the Court**

The court was also vested with the appellate and revisional jurisdiction in the decisions of courts regarding any law pertaining to the implementation of *Hudūd*. The constitution states:

"(1) the Court may call for and examine the record of any case decided by any criminal court under any law relating to the enforcement of *Hudūd* for the purpose of 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, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

(2) In any case the record of which has been called for by the Court, the Court may pass such order as it may deem fit and may enhance the sentence:

Provided that nothing in this Article shall be deemed to authorize the Court to convert a finding of acquittal into one of conviction and no order under this Article shall be made to the prejudice of the accused unless he has had an opportunity of being heard in his own defense.

(3) The Court shall have such other jurisdiction as may be conferred on it by or under any law." [4]

**Procedure for Filing Appeal in the Supreme Court**

An appeal can be lodged in the apex court (SC) against FSC's decision. Such appeals shall be heard by Sharī'at Appellate Bench of the Supreme Court. This Bench comprises of three Muslim Justices of the Supreme Court along with two *'Ulemā* who are appointed by the President as ad-hoc members.[5]

**Methodology of the Court in interpreting injunctions of the Holy Qur'ān and *Sunnah* of the Holy Prophet (SAWS)**

It would be appropriate to highlight the principles laid down by the court itself while interpreting the Constitutional provision "Injunctions of Islam, as laid down in the Holy Qur'ān and *Sunnah* of the Holy Prophet, hereinafter referred to as the injunctions of Islam." Important question before the Court was whether domain of the Court is Qur'ān and *Sunnah* only or the Court may get help from other sources too? During the examination of *Sharī'at* petitions in which some parts of the existing laws had been challenged, the court built the following methodology:

1) to find in the first instance the relevant verse or verses in the Holy Qur'ān regarding the Question in issue;

2) to find in the relevant *Hadīth* (tradition of the Holy Prophet (SAWS);

3) to discover the intent of the Qur'ānic verses from the tradition of the Holy Prophet (SAWS);

4) to ascertain the opinion of and the views adopted by all jurists of renown 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; and

5). to discover and apply, as a last resort, any other opinion which should, no doubt, be in harmony with the Holy Qur'ān and the *Sunnah*. [6]

This court also declared that it is the consensus of the Great Imams that there are four sources of Muslim Laws and these will be taken into consideration while interpreting the injunctions of Islam. These are: Holy Qur'ān, *Sunnah* of the Holy Prophet (SAWS); Ijmā (Consensus); and *Qiyās* (Reason by analogy). It may, however, be kept in mind that the Court has also taken into consideration the principles of Islamic Jurisprudence as laid down by the great jurists. As the Court in their judgments discussed that Imam Abū Hanifa opined that doctrine of *Istihsān* is another valid source of Muslim Law, Similarly Mālikīs have enunciated *Maslahah al-Mursalah* (public interest) as a source of Muslim Law compatible with the doctrine of *Istihsān*, According to "*Islamic 'Usūl al-Fiqh*" to find a solution of a problem or resolve a question the above source of Islam have to be resorted to in the order of priority. It must, however, be always kept in mind that all other sources of Muslim laws are subordinate to the Injunction of Qur'an and *Sunnah* reliance on "*Istihsān*" and *Qiyās* or for that matter on *Ijmā* cannot be placed so as to transgress the limitations imposed by the Holy Qur'an and *Sunnah*. The following *Hadīth* aptly provides the above principle:- "The Holy Prophet sent Mu'adh to Yaman, He asked, "How would you judge"? He said, "I shall judge according to that which is in the Book of Allah?" He asked, "If it is not in the Book of Allah?" He said "Then according to the *Sunnah* of the Holy Prophet (SAWS)"? He asked, "If it is not in the *Sunnah* of the Holy Prophet (SAWS)?" He said, "I shall use my own independent judgment." He (the Holy Prophet) said "all praise be to Allah who has brought into conformity the messenger with the Holy Prophet (SAWS)."[7]

The Court while discussing the necessity of *ijtihād* also warned that *"Ijtihād"* cannot be so liberalized as to even remotely violate any Qur'ānic Injunctions or *Sunnah* of the Holy Prophet (SAWS) which *Sunnah* is, in fact, the best *Tafsīr*-explanation of the Holy Qur'ān itself. Departing from above principle of *"Ijtihād"* would obviously lead the '*Ummah* to degenerative process and must at all costs be deprecated and discouraged. Legal maxim of *Sharī'a* in the above connection is: "Where there is a decisive and clear cut text, there no question of *Ijtihād* arises." [8]

The FSC is authorized to undertake the examination of any matter *Suo Moto*, with a view to seeing whether or not it is in harmony with the Qur'ān and *Sunnah*.[9]And the Court examined thousands of laws.

In one judgment, the Court declared that in case an act is committed which is crime under the injunctions of Islam but the existing law is silent, even then the act is considered a crime and the criminal be punished under *Sharī 'ah* Law.[10]

The FSC has examined numerous laws to ascertain whether and to what extent these laws are in violation of the Islamic injunctions. Under the provisions of the Constitution, all High Courts and courts that are subordinate to the High Courts have to follow the decision of the FSC. So much so, that FSC's judgments have binding authority on the Supreme Court of Pakistan, except when such decisions are challenged in the *Sharī 'at* Appellate Bench of the Supreme Court.[11]

**Examination of Family Laws**

FSC examined various laws relating to family issues by exercising its original jurisdiction or the important issues raised before the Court while hearing criminal appeals involved *Nikāh* and *Talāq* etc. and its impacts on the crime. But before we proceed further it is necessary to discuss the interpretation of word "Muslim Personal Law" exempted from the jurisdiction of the Court in the light of the decisions of FSC and *Sharī 'at* Appellate Bench of the apex court of Pakistan.

**Interpretation of the word Muslim Personal Law**

The Constitution itself defined the word "Law" in article 203B ( c) which says that the "law to be examined and decided, *inter-alia*, includes any custom or usage having the force of law but does not include the Constitution, Muslim Personal Law and any law relating to the procedure of any Court or tribunal." In view of this bar, therefore, laws or provisions of law pertaining to various aspects of Muslim Family Law does not come within the jurisdiction of this Court. That is why laws dealing with Muslim Personal Law whenever challenged before this Court were always dismissed in *limine* for want of jurisdiction. The following petitions were filed and decided in the following manner:

a) Mst. Farishta instituted a petition in the Peshawar High Court for the first time challenging the validity of section 4 of the Muslim Family Laws Ordinance,1961 MFLO, 1961. Peshawar High Court's Sharī'at Bench vide

judgment reported as Mst. Farishta v. Federation of Pakistan, held that s. 4 of MFLO 1961 was against the Islamic Injunctions.[12]

b) Appeal against this judgment was filed before the Sharī'at Bench of the Supreme Court of Pakistan which set aside the said judgment on the ground that section 4 of the Ordinance comes within the purview of the Muslim Personal Laws hence examination of the same was beyond the jurisdiction of the Sharī'at Bench of the Peshawar High Court. [13] This view held the filed for a considerable long time.

c) Constitution was again amended by President's Order No.1, dated 25th of June, 1980 and Chapter 3-A was added to it where under the FSC was constituted. A number of Sharī'at Petitions were filed before the FSC. These were decided by a single judgment titled *Dr.Mahmood-ur-Rehman Faisal V. Secretary, Ministry of Justice, Law and Parliamentary Affair and others*. These petitions were dismissed. The FSC observed, "On the expiry of the period of 10 years the fiscal laws have now come within the jurisdiction of this Court but Muslim personal Law still remains outside the pale of authority of this Court and so the *Zakāt* and *'Ushr* Ordinance of 1980, which falls within the definition of Muslim Personal Law, is outside the jurisdiction of this Court." [14]

d) Against the above mentioned decision appeal was taken to the Sharī'at Appellate Bench of the Supreme Court of Pakistan. This Bench decided the appeal on 13th of June, 1993 in the case titled "Dr.Mahmood-ur-Rehman Faisal V. Government of Pakistan". Hon'ble Sharī'at Apppellate Bench differed with its earlier view in Mst. Farishta's case. The bench reinterpreted 'Muslim Personal Law' and said, "The expression "Muslim Personal Law" used in Article 203-B(c), therefore, in our view means the personal law of each Muslim sect based on the interpretation of Qur'ān and *Sunnah* of Holy Prophet (Peace be upon Him) by that sect. Therefore, any law which is considered as personal law by a sect of Muslims, based on its own interpretation of Holy Qur'ān and *Sunnah* cannot be scrutinized by the FSC under the Constitution as it would fall within the scope of "Muslim Personal Law". All other laws which are applicable to Muslims can be scrutinized by the FSC as per its power under Article 203-D of the Constitution. Mere fact that a particular law is applicable to only Muslim population of the country, in our view, would not place it in the category of "Muslim Personal Law" as enshrined in Article 203-B (c) of the Constitution.[15]

It may be concluded that the position of law that obtains and prevails is that provision of codified laws/statutes covering the general Muslim population of the country would be open to question before the FSC so as to examine their validity on the yardstick of Injunctions of Islam and only Muslim Personal Laws relating to particular sect cannot be questioned before it.

Thereafter, in view of the dictum laid down in the above judgment, the FSC started examining and deciding the Sharī'at Petitions pertaining to Muslim Personal Law, when it considered, prima-facie, that the impugned statute law was applicable to the general body of Muslims and not merely based on the

interpretation of Holy Qur'ān and *Sunnah* of the Holy Prophet (SAWS) by any particular sect. As the Muslim Family Laws Ordinance 1961 is the basic and fundamental statute in family laws, therefore, the Court discussed it in much detail. A large number of petitions questioning numerous provisions of MFLO 1961 being contrary to the Injunctions of Islam were filed before this Court and the Court delivered its Judgment on the said provisions in 2000 while judgment on section 8 is delivered separately.

**Brief history of the legislation of this Law**

To comprehend fully the importance of the subject of this Ordinance it appears appropriate to give some historical background. In the early fifties, a sizeable segment of the society and in particular the female sector had mental reservation regarding the conduct towards women by a patriarchal society. The all Pakistan Women's Association, a body which claimed to represent the women point of view was in the forefront in claiming legislation to protect their rights and had in fact started agitation. To alleviate the situation, the incumbent Government established a Commission to deliberate on the various facets of the demand and provide suggestions regarding the family system. Initially it was comprised: *Khalīfa Shujā-'ud-Dīn, Dr.Khalifa 'Abdul Hakim, Maulana Ehtishamul Haq, Mr.Enayat-ur-Rehman, Begum Shah Nawaz, Begum Anwar G. Ahmad and Begum Shahmusunnihar Mahmood. Maluana Ehtisham-ul-Haq* was the only 'Alim Member of the Commission. The Commission's mandate was to formulate a report on issues such as matters relating to marriage and divorce registration, the mode of exercise of rights by either spouse by means of formal judicial structures or otherwise, cases relating to maintenance and the establishment of specific courts to deal expeditiously with cases pertaining to women rights.

The Commission held its first meeting on 5th of October, 1955 when matters of procedure etc. were considered and its Secretary was assigned the duty of framing a questionnaire but shortly thereafter the Commission's President, Dr.Khalīfa Shujā-'ud-Dīn passed away due to cardiac arrest which led to suspension of proceedings of the Commission. However, within a short span ex-Chief Justice of Pakistan, Mian Abdul Rashid, was appointed in place of late Dr.Khalīfa Shujā-'ud-Dīn as the President. The new President pointed out that the preparation of the questionnaire being a very important step should be undertaken by the Commission itself rather than entrusting it to the Secretary. Ultimately a questionnaire both in Urdu and English was prepared and its translation in *Bengali* was entrusted to Begum Shamsunnihar Mahmood. The Commission thereafter circulated the questionnaire to elicit public opinion.

After due deliberations the Commission issued its report, vide Notification dated 11th of June, 1956, which was published in the official Gazette on June 20, 1956. The only dissent on the report came from the 'Alim Member, Mawlana Ehtishamul Haq, who gave his own note of dissent. After the issuing of the report various recommendations of the Commission were incorporated in the MFLO, 1961.

The Ordinance came under severe criticism by ‘Ulemā of various schools of thought who rose in revolt and issued a general statement declaring the Ordinance to be contradictory to express commandments of the Holy Qur’an and the *Sunnah* of the Holy Prophet (SAWS). However, the law has continued to remain in force till date though it has always remained controversial.

Sharī‘at Petitions were filed in the Court to examine and declare various provision of the Ordinance contrary to the injunctions of Islam. The important sections were; 4, 5, 6 and7. It is appropriate to reproduce text of these sections so that we may be able to discuss it as per the decision of the Court:

**Section 4. Succession**.

“In the event of the death of any son or daughter of the porositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall per stripes receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive.”

Appearance of this provision on the statute book was the result of the recommendations of the Commission on Marriage and Family Laws 1956. It was based on the “*so-called* *Ijtihād*” which caused confusion in the law of inheritance envisaged for the Muslim Society by mandate of the Holy Qur’ān. The Commission in this respect framed a question as under:--

“Is there any sanction in the Holy Qur’ān or any authoritative *Hadīth* whereby the children of a predeceased son or daughter are excluded from inheriting property?”

There is a very short discussion on this issue in the Commission Report. The Commission agreed that there wasn’t any limitation in the Holy Qur’ān nor any authoritative *Hadīth* under which the children of predeceased (son or daughter) could be barred from inheriting property of their grandfather. According to the Report, the exclusion of such children from inheriting the property of their grandfather was based on a custom that was prevalent in Arabs in *Jāhilīat*. It also based this theory on the implied meaning of numerous injunctions in the Holy Qur’ān that greatly emphasize on the protection and welfare of the orphans and their property. A law that deprives children of a predeceased son form getting the property of their grandfather through inheritance would be against the spirit of the Holy Qur’ān. Maulana Ehteshamul Haq stated that all four Imams have agreed that the son of predeceased son or daughter would be excluded from inheritance. He elaborated his views in a dissent note. [16]

The court cited verses of the Holy Qur’ān and discussed all the aspects in detail in the light of the *Tafsīr* of the great scholars and the Laws derived from these verses and the rules explained in the *Sunnah* of the Holy Prophet (SAWS) and the arguments submitted by the parties and heard arguments of the jurist-consults laid certain rules and concluded that:

1. It is well-settled even as regards the man-made law that if in any such law there is manner and mode prescribed for doing anything in a particular manner it has to be done in the same manner only and not in other manner.

2. It is also well-settled that doing of anything in a manner other than specifically provided for will be wholly illegal and will have no effect whatsoever.
3. It is the fundamental principle of interpretation that where two provision in a law are irreconcilable the latter shall prevail but all efforts should be made to keep both the provisions intact if a reconciliation of the two can be reached.
4. The court observed that the direction of creating a will on account of latter revelation (4:11) by including the parents as heirs is abridged to the extent of will in favour of the parents alone but the creation of the will as regards others including the next of kins who are not heirs remains intact in the mandatory form in which it was revealed.
The court also observed that execution of a will to secure the interests of orphan grandchildren out of an estate of grandparents to the extent of 1/3rd would be very plausible solution to meet the socio-economic problem in this regard.
The court directed that the provision contained in *section 4* of the MFLO, 1961, is against the Islamic Injunctions and directed the President of Pakistan to take necessary action to make the said provisions harmonious with the Islamic Injunctions and that the last date for amendments was 31st day of March 2000.
**Section 5. Registration of Marriage**.
"(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provision of this Ordinance.
(2) For the purpose of registration of marriage under the Ordinance, the Union Council shall grant license to one or more persons, to be called *Nikāh* Registrars, but in no case shall more than one *Nikāh* Registrar be licensed for any one Ward.
(3) Every marriage not solemnized by the *Nikāh* Registrar shall, for the purpose of registration under this Ordinance, be reported to him by the person who has solemnized such marriage.
4) Whoever contravenes the provision of subsection (3) shall be punishable with simple imprisonment for a term which may extend to three months or with fine which may extend to one thousand rupees, or with both.
5) The form of Nikāhnama, the registers to be maintained by *Nikāh* Registrars, the records to be preserved by Union Council, the manner in which marriage shall be registered and copies of Nikāhnama shall be supplied to the parties, and the fees to be charged therefore, shall be such as may be prescribed.
6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under subsection (5), or obtain a copy of any entry therein."
The court examined this section in detail and heard parties to the petition and the Juris consults and finally decided that this section in not contrary to any Injunction of Islam. The court noted that registration of marriage (under section 5) will be an effective check on the litigation, as in many cases, on the pretext of non-registration, the marriage and/or paternity of children is denied thereby depriving the wife or the children from their lawful share in inheritance. The

initiative endeavored to be preventive to reduce litigation. Thus, it cannot be called as contrary to the Islamic Injunctions. The non-registration of *Nikāh* does not invalidate marriage/*Nikāh* itself, if otherwise *Nikāh* has been performed in accordance with the requirements of Islamic Sharī'ah. The Court recommended that the Government should clarify this position in the provision itself.

**Section 6. Polygamy.**

According to this section:

(1) "No man, during the subsistence of an existing marriage, shall except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance."

(2) "An application for permission under subsection (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee and shall state the reasons for the proposed marriage, and whether the consent of existing wife or wives has been obtained thereto."

(3) "On receipt of the application under subsection (2) the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant subject to such conditions, if any, as may be deemed fit, the permission applied for."

(4) "In deciding the application the Arbitration Council shall record its reasons for the decision and party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee prefer an application for revision (to the Collector) concerned and his decision shall be final and shall not be called in question in any Court."

(5) "Any man who contracts another marriage without the permission of the Arbitration Council shall—

(a) Pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid shall be recoverable as arrears of land revenue; and

(b) On conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both."

It is pertinent to note that this section does not declare successive marriage illegal and merely provides a procedure for the subsequent marriages and penalty for violation. The purpose of this provision is reformatory only, as it only gives corrective measure for prevention of injustice to the existing wife/ wives.

No doubt that a Muslim male is allowed to have more than one woman as wife with a ceiling of 4, at a point of time as the ultimate, but verse No.4:3 gives this permission subject to condition of " عدل " and the Holy Qur'ān has laid

emphasis in the same verse on the gravity and hardship of the condition which Allah Himself says is very difficult to be fulfilled.

Section 6 of the Ordinance in does not place any restriction on polygamy. It only requires that the condition of " عدل " must be met by the person who intends to have more than one wife. The provision for constituting an Arbitration Council, therefore, cannot in itself be said to be repugnant to the Injunctions of Holy Qur'ān as only a procedure has been prescribed how the Qur'ānic Verse will be observed in its totality with reference to the condition of " عدل " placed in the verse itself.

The Court observed that *Nikāh* is a social contract of every high status and conjoins a couple and the spouses in a sacred association, with mutual rights and obligations, to be performed in a spirit of love and affection that should last life long, as envisaged by verses No.30:21, 2:228 and 4:19. Therefore, anything, big or small, that may provide a cause for a breach in mutual love and trust is viewed seriously by Islamic Injunctions. In such situation the Holy Qur'ān enjoins upon all Muslims to take appropriate measures to save this scared union from disruption. Reference in this connection may be made to verse No.4:35. Since one of the reasons for such disputes may be intention of the husband to contract subsequent marriage of his choice, an Arbitration Council may be required to settle the dispute. However the Arbitration Council is not empowered to make unlawful anything declared lawful by Islam nor could do vice versa. However, it may be reiterated that the status of polygamy in Islam is no more or no less than that of a permissible "مباح" act and has never been considered a command"واجب", and therefore, like any other matter made lawful in principle may become forbidden or restricted if it involves unlawful things or leads to unlawful consequences such as injustice. Misuse of the permission granted by Almighty Allah could be checked by devising suitable mechanisms to do away with or at least lessen the instances of injustice that is prevalent in the society. The Arbitration Council can play an effective role in this regard. The Council has the mandate to look into the disputes arising between husband and his existing wife/wives with respect to another marriage and after considering the age, physical health, financial position and other attending factors, settle their disputes. However, the Court recommended that the Arbitration Council should play its role when an existing wife or her parents institute a complaint. Purpose is to safeguard the privileges of the existing wife/wives and interests of her/their children. The wife is, thus deemed as the best judge of her cause who or her parents are entitled to initiate the proceedings, if her husband intends to contract another marriage. The Court also observed that since a *Nikāh* validly performed with a wife, whether first or fourth, necessarily entails various consequences including those related to dower, maintenance, inheritance, legitimacy of children etc. non-registration of the *Nikāh*, thus, performed could not only be a source of litigation between the parties but would also lead to a lot of injustice to such wife/wives.

Finally the Court held that subject to its observations and recommendations the provisions of MFLO, 1961, are not violative of the Injunctions of Islam.

**Section 7. Talāq.**

"(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *Talāq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of subsection (1) shall punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

(3) Save as provided in subsection (5), a *Talāq* unless revoked earlier expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under subsection(1) the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

5) If the wife be pregnant at the time *Talāq* is pronounced, *Talāq* shall not be effective until the period mentioned in subsection (3) or the pregnancy, whichever be later, ends.

6) Nothing shall debar a wife whose marriage has been terminated by *Talāq* effective under this section from remarrying the same husband, without an interning marriage with a third person, unless such terminations for the third time so effective."

The court held that subsection (3) as presently framed does not conform to the requirements of Injunctions of Qur'ān. The period of **'***Iddat* can be clearly derived from the verses: 4:35, 33:49, and 65:1, 2 and 4. Of the Holy Qur'ān and these cater for situations of all types that may arise in the event of *Talāq*. It may be pertinently observed that the matter of **'***Iddat* is of great importance as can be seen from *Ayah* No.1 of *Surah al-Talaq*. There is emphasis laid that the period of **'***Iddat* should be computed specifically and accurately and for each situation that may arise specifical period has been prescribed. The Court discussed kinds of **'***Iddat* in detail:

1) in case of a marriage which has not been consummated there is no period of *Talāq* as laid down by verse No.49 of *Surah al-Ahzāb*.

2) When *Talāq* is pronounced during of pregnancy, the **'***Iddat* ends immediately when child is delivered, which may well be within one minute of the pronouncement of *Talāq* as mentioned in *Ayah* 4 of *Surah al-Talāq*. Now keeping in view this time of 90 days in such cases as well is clearly against not only of the Injunctions of Islam but is also a matter of grave hardship to the divorcee. Islam is the protector of every human and is the first religion that granted every imaginable right that could be conferred on a woman. Fixation of period of 90 days of **'***Iddat* in all cases including those referred to above abridges the rights of woman as bestowed upon them by Qur'ān and, therefore, does not merit to be retained in the present from. The Court also expressed its

concern that time of **'***Iddat* starts from the date when *Talāq* was pronounced and not from the day of receipt of notice by the Chairman. There is a possibility that the husband may not provide notice of *Talāq* as required by section 7 with malice for a long period, and thus, by virtue of subsection (3) keep the woman in suspended animation and cause her torture by keeping her bound, although according to the Qur'ānic Injunctions she would stand released to the bond and under no obligation towards him. This will certainly jeopardize the rights of the woman who, by virtue of this provision, can be exposed to the hazard of litigation by an unscrupulous husband if she marries after the expiry of **'***Iddat* as enjoined by Holy Qur'ān but before the expiry of period prescribed by subsection (3) (ibid). Such a situation of uncertainty entailing peril to a party should not be allowed to continue.

The court also discussed that subsection (5) of section 7 appears to be an unwanted provision as it prescribes a period which is not in consonance with the period of **'***Iddat* prescribed by the Qur'ānic Injunctions. There is no need to have subsection (5) as a separate provision because a comprehensive subsection (3) providing all period of **'***Iddat* as may be enjoined upon a Muslim woman when *Talāq* is pronounced by her husband, should be succinctly provided in one and the same subsection. Finally it was held by the Court that section 7 of the MFLO, 1961 cannot be declared void in its entirety. However, the provisions stated in subsections (3) and subsection (5) of section 7 is contrary to the injunctions of Islam. The Court directed the President of the Islamic Republic of Pakistan to take necessary measures to make the law in consonant with the Islamic Injunctions. The above provision ceased to be applicable on 31st day of March, 2000. [17]

**Section 8. Dissolution of marriage otherwise than by Talāq**:

This section was challenged by Khawar Iqbal in Sharī'at petition No.5/I/2005. The impugned section reads as under:-

"Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talāq*, the provisions of section 7 shall *mutatis mutandis* and so far as applicable, apply."

The court heard this petition and placed legal and Islamic questions of general public importance arise for determination in the light of Qur'ān and *Sunnah* and finally dismissed this petition for the reason that the Muslim Schools of thought are not unanimous in respect of *Talāq al-Tafwīd*, therefore, the matter falls under the "**Muslim Personal Law**" which does not come within the ambit of the Court as defined under Article 203B(c) of the Constitution. The court held that this Sharī'at Petition is not maintainable and being misconceived is, therefore, dismissed in limine. [18]

**Section 10 of the Family Court Act, 1964**

Muhammad Suleman Yahya and others challenged sub-section (4) to *section 10* of the Family Court Act, 1964, on the basis that it is against the injunctions of

Islam as laid down in the Holy Qur'ān and *Sunnah* of the Holy Prophet (صلِی اللہ علیہ وسلم).

Section 10 of the said Act is reproduced as:

**"Pre-trial Proceedings.** (1) When the written statement is filed, the Court shall fix an early date for pre-trial hearing of the case.

(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the pieces of evidence and documents filed by the parties and shall also, if it so deems fit hear the parties, and their counsel.

(3) At the pre-trial, the court shall ascertain the points at issue between the parties and attempt to affect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for [recording] of evidence.

Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation falls, shall pass decree for dissolution of marriage forthwith and "shall also restore to the husband the Haq-e-Mehr received by the wife in consideration of marriage at the time of marriage."

The Court prepared a questionnaire and sent it to the jurist-consults. The said questionnaire reads as under:-

1. In the Qur'ānic verse: which reads "If you fear that they both will not observe the limit of Allah" (2.229) who is the addressee: The Qāzī, 'Ulul-'amr or the spouses?
2. In the case of Thābit bin Qais and Jamila, the Holy Prophet asked Thābit Ibn Qais to dissolve the marriage in lieu of the garden granted to Jamila. In which capacity the Holy Prophet asked Thābit to release Jamila from marriage bond. Whether this order passed by the Holy Prophet amounts to a court verdict in his capacity as being *Qādī al-Qudāt*, or as head of the State or as a Messenger of Allah?
3. How can you evaluate the views of contemporary *'Ulemā* who are of the view that the Court does not have the jurisdiction to dissolve the marriage without permission of the husband while on the other hand the august Supreme Court of Pakistan, *Mawlanā Abū 'l A'lä Mawdūdī* and some Egyptian scholars have divergent views?

The petitioners got various *Fatawas* from religious institutions in support of their contentions. The court summed up the gist of these *Fatawa* in the following words:-

"*Khul'a"* can be granted at the instance of the wife only with the consent of her husband, per terms mutually agreed upon. The Qādī has no authority to order dissolution of marriage by way of *Khul'a* if the husband does not agree to it".

They also placed reliance on the verses 2:228, 2:237 4:434 and on the famous *Ahādīth* regarding the cases of *"Khul'a"* asked for by Jamila and Habiba from Thābit Ibn Qais, during the period of Holy Prophet (صلی اللہ علیہ وسلم).

Translation of the *Ahādīth* which were produced before the Court in support of their claim is:

1. "It is reported from Ibn 'Abbas (RA) that the wife of Thābit Ibn Qais came to the Messenger of Allah and said "O Messenger of Allah, I do not reproach Thābit in respect of character or religion but I do not want to be guilty of infidelity in Islam". So the Messenger of Allah said to her. "Would you give him back his garden?" She said "Yes". The Messenger of Allah said "Accept the garden and give her one *Talāq*" [19] and in another version (also in Bukhārī,) "Will you give back his garden to him?" She said, "Yes". So she returned it to him and he (the Messenger of Allah) ordered him and he separated her."

2. (After reciting the narrators) Habiba, daughter of Sohail, was the wife of Thābit Ibn Qais Ibn Shams and he was a short-stature and ugly man. She said, "O Messenger of Allah. By God, if I did not fear God, I would have spat at his face when he comes to me." The Messenger of Allah said, "Will you return his garden to him? "She said, "Yes", so she returned his garden to him and the Prophet of Allah separated them. [20]

3. Muhammad bin-Sirin used to say that *"Khul'a"* is not possible, except before the Sultan. (From Saeed Ibn Jabir Tabaī).

Ibn Hazm said *"Khul'a"* will take place only when the husband first tries to advise the woman, if she accepts the advice well and good, otherwise, he might beat her. If she accepts, well, otherwise, both will go to the Sultan (i.e. persons in authority including *Qādī* or Court). The Sultan will then appoint one *Hakam* from her family and another from his. Each of the *Hakams* will convey what he has heard from his client to the Sultan. Then if the Sultan comes to the conclusion that they should separate, he will separate them and if he forms the opinion that they should live together, he will order accordingly[21].

The Court after discussing the concept of *Khul'a* based on the consent of husband considered the other aspect of the issue that if the husband refuses to release her from his marital tie by not accepting any compensation even and also declines to divorce her, what should be the course of action for the wife? The Court put various questions regarding consequences of the disagreement of husband for grant of *Khul'a* to almost all the advocates and scholars but no satisfactory solution was suggested even.

The Holy Quran and *Sunnah* of the Holy Prophet have repeatedly stressed the husband's obligation to keep the wife with kindness or let them go with grace. [22]

The Holy Quran also said: "Women shall have rights similar to the right against them, according to what is equitable" [23]

Islamic State is bound to implement them through suitable legislation so that it is ensured that none of the spouses is harmed or treated unjustly.

The court examined the words used in the *Ahādīth* pertaining to *Khul'a* that in both the cases the words used by the Holy Prophet (صلى الله عليه وسلم) are; طَلّقها تطليقه (Divorce her), فَارقها (separate here), خَلِ سبيلها (leave her) امرالطلاقَ (he ordered him to divorce her) and فَفَرق بينهما(He separated them). [24]

The Court finally concluded that there is no specific verse or authentic *Ahādith* that bars the jurisdiction of a competent *Qādī* to decree the case of *Khul'a* agitated before him by a wife after the failure of reconciliation between the parties. The verses and *Ahādith* relied upon by the petitioners neither specifically relate to the issue of *Khul'a* nor to the lack of authority of a *Qādī* duly authorized by an Islamic State to resolve the disputes between husband and wife. The interpretation of the said Verses and *Ahādith* is also not unanimous. The Court did not declare the impugned law as repugnant to the injunctions of Islam. [25]

Syeda Wiqarul Nisa in Sharī'at Petition No.14/I/2013, challenged the following provision of this section on the grounds that it is used as tool to exploit women and to force them to demand *Khul'a* or create situation for them to resort to *Khul'a* . The proviso is:

"……and shall also restore to the husband the Haq-e-Mehr received by the wife in consideration of marriage."

The petitioner prayed to declare this proviso as repugnant to the Injunctions of Islam.

This petition is withdrawn by the petitioner with the permission to file fresh but till now no fresh petition is filed.

The following laws were also challenged before the Court and were disposed of:

1. Dissolution of Muslim Marriages Act 1939,
2. Child Marriage Restraint Act 1929,
3. The Parsi Marriage and Divorce Act 1936.

Presently the issues of surrogacy, *Talāq Tafwīd* and return of dowry in case dissolution by court are pending.

**Issues pertaining to Family Laws Raised in Criminal Appeals**

This honorable Court also laid down important rules while deciding Criminal appeals wherein issues pertaining to family laws like the invalidity of contract of marriage during **'***iddat* period, Marriage with divorced wife's sister during her**'**, Minimum period of **'***Iddat* and minimum period of pregnancy, prohibition of marriage of a Muslim woman with a non-Muslim , non-registration of marriage does not affect the validity of marriage, status of consent of *Walī* in *nikāh* and the issue of dissolution through courts has also been examined. We will take these issues in a little detail.

**Invalidity of marriage with a third person during '*iddat* period**

A woman got exparte decree from the court and contracted marriage with a third person during her **'***iddat* period, The Federal Sharī'at Court held that this marriage is invalid and both the parties are liable for *ta'zīr* punishment under section 10(2) of Offence of *Zina* (Enforcement of *Hudūd* )Ordinance 1979.

The benefit of section 5 can be extended only that they may not be awarded *Hadd* punishment but cannot escape *ta'zīr* punishment. The court also held that during **'***iddat* period the divorced wife remains under *nikāh* of the first husband and hence, if she contracted marriage with another person, means that she has

contracted marriage with two persons at the same time which is prohibited by Islam.[26]

**Marriage between fornicators during pregnancy and the nasāb of the child.**

The court declared that Marriage between fornicators during pregnancy is valid. The Court relied upon the verdict of Hanafī Fiqh in this regard that according to the Hanafīs, it is lawful for a man to contract a marriage with woman who is pregnant by fornication with somebody else, though connubial intercourse is forbidden until she is delivered. The Court in its Judgment in *Mst. Sakina etc. v. The State*, discussed the opinion of the jurists and preferred the opinion of Abu Hanifa and Muhammad. The court also discussed the opinion of Imam Abu Yusuf who holds that such a union is invalid, but the fatwa is with Abu Hanīfa and Muhammad. The Shāfi**'**ī , Malikīs Hanbalīs hold the same doctrine as Abū Yūsuf.

Principle: "Where a woman is pregnant by fornication with the same who marries her, the marriage is lawful, and connubial intercourse is not forbidden between them. On this there is consensus. The Shāfi'ī and Shī'as agree with Hanafīs on this point, and Abū Yūsuf holds the same opinions as Abū Hanīfa and Muhammad.

"And the *nasāb* of the child born of the womb of the woman would be established in the man if it is born at six months or more from the date of marriage". "But if born within six months its *nasāb* would not be established, and it will not inherit to the husband or its mother, unless he says that it is his child and does not add that it is his by fornication. In that case, *nasāb* will be established. This is according to the *Khanīah* (Fatwa-e-Qāzī Khan). If he says it is by *Zinā*, *nasāb* will not be established. But if he does not mention *Zina* distinctly, *nasāb* will be established, for in this there is the possibility of the pregnancy having taken place from a previous marriage (between him and the woman) or from an invalid contract; and as the conduct of a Muslim should always be attributed to proper motives, so possibly there might have been a prior contract."

Shi'a Rule regarding marriage with a Pregnant Women.

The Court also discussed the opinion of Shī'a jurists that there seems to be some difference of opinion regarding the validity of a marriage contracted by a man with a woman who is pregnant by adulterous intercourse with another. According to Fazil-ul-Kashani there ought to be no marriage, until the woman is delivered. The weight of authority, however, is in favour of the lawfulness of the union. The Jawahir al-Kalām says: "If a married woman became pregnant by fornication, after which her husband divorced her, in such a case her *'iddat* would be according to the ordinary probation as if she had not committed fornication and was not pregnant thereby. For what has been stated as to the *'Iddat* of a pregnant woman lasting until her delivery does not apply to pregnancy by fornication. In this case the ordinary probation should be calculated. And no difference is found on this point. If such a woman were to marry another person after the ordinary *'*

*'Iddat* it would be lawful; and no difference is found thereon, for the delivery is not the period of probation for a woman pregnant by fornication. Similarly, if a woman, who has no husband, is pregnant by *Zina*, there is no difference (i.e. all are agreed) as to the validity of her marriage (during such pregnancy) with a person other that the adulterer.

Principle:

Similarly, it is stated in the *Hadīth*, that if a woman is pregnant by *Zina*, there is no *'Iddat* for her, and she can lawfully intermarry with another before delivery.

In the *Mafatīh* also it is laid down that, the accepted doctrine is there is no *'Iddat* for an adulterous whether she be pregnant or not by fornication and if she be pregnant it is lawful for her to marry before delivery.

At the same time, in order to keep the *Nasāb* pure it is recommended that a man should not marry a woman who is pregnant by fornication with another until she is delivered. [27]

**Admission of marriage by both the spouses**

Both the appellant clearly admitted their marriage with each other, the court after hearing arguments of the parties discussed the issue in detail that this is a settled rule of Islamic law that if husband and wife both admitted their marriage with each other, this is a sufficient proof of their marriage and no need to produce witnesses in the Court. It is written in Fatawa-e-Qādī Khan. النكاح يثبت بتصادق الزوجين 'Allama Ibn 'Abidīn explained this rule that the Judge will decide the case in accordance with their admission. [28].

The court also declared that provision of section 91 of evidence Act 1872 relating to written proofs do not apply to case of registration of marriage. It is also a settled rule that there should be presence of at least two witnesses at the time of contract of marriage. However during litigation, if the witnesses were not produced before the court, while spouses admitted their marriage this is considered sufficient proof of marriage. [29].

**Marriage with divorced wife Sister during her *'Iddat* period**

A woman remains under *Nikāh* /marriage bond after *Talāq* till the completion of her **'***Iddat* period. The Holy Quran says:

*"O Prophet! When ye do divorce women, divorce them at their prescribed periods, and count (accurately) , their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness, those are limits set by Allah: and any who transgresses the limits of Allah, does verily wrong his (own) soul: thou knowest not if perchance Allah will bring about thereafter some new situation.*"[30]

In this verse divorced wife is directed not to go out of the house of her husband during **'***Iddat* period and husband is bound to provide her maintenance. In case the divorce is not *Bain or Mughallaẓ*, the husband can revoke it. And if any one of the spouses dies during **'***Iddat* period the other spouse can get his / her share of inheritance from the *Taraka* of the other one. The jurists agreed that two sisters at the same time cannot become under marriage of one person. Similarly

if one is divorced, her sister cannot marry him during **'***Iddat* period of her divorced sister. Some text from the fiqh books are as under.

If one divorced his wife with Bā'in Talāq or revokable *Talāq*. It is not permissible for him to marry her sister till ***'****Iddat* of her divorced wife complete. The Court concluded from the above texts that when the divorced sister is under ***'****Iddat* period, marriage is not permissible with the other sister. And if a person committed this sin, whether he will be awarded *Hadd* punishment or *Ta'zīr*? Some of the jurists are of the opinion that he should be awarded *Hadd* punishment. According to Hanafī jurists the criminal is liable to be awarded sever *Ta'zīr* punishment. [31]

**Conversion to Islam affects the earlier marriage**

A person converted to Islam by reciting Kalima-e-Shahadat affects his /her earlier marriage with a non-Muslim. The Court in a case entitled as Mst. Zarina Vs The State held that the marriage is dissolved and on account of her subsequent marriage with Muslim, she is not guilty of any offence. If the conversion is legal and if there is no statutory restriction then the court is bound to give legal effect to its consequences. The effect of conversion to Islam upon the character and status of the person so converted is that the convert renounces all his religious and personal law and immediately adopts the Muslim religion and personal law and is completely cut off from the past. He/she accepts a new mode of life and enters a new domain where his/her deeds, words and actions are governed by the law of his/her new religion and his/her future in all respects of life becomes amendable to Muslim Law. It has been laid down in the Holy Qur'ān:

"*Do not marry unbelieving women (idolaters), until they believe: A slave woman who believes is better than an unbelieving woman, even though she allures you. Nor marry (your girls) to unbelievers until they believe: A man slave who believes is better than an unbeliever, even though he allures you. Unbelievers do (but) beckon you to the Fire. But Allah beckons by His Grace to the Garden (of bliss) and forgiveness, and makes His Signs clear to mankind: That they may celebrate His praise*." [32]

As regards the right to dissolve marriage performed before conversion to Islam, the Holy Qur'ān provides as follows:-

"*O ye who believe! When there come to you believing women refugees, examine (and test) them: Allah knows best as to their Faith: if ye ascertain that they are Believers, then send them not back to the Unbelievers. They are not lawful (wives) for the Unbelievers, nor are the (Unbelievers) lawful (husbands) for them*." [33]

The court held that by conversion to Islam the earlier marriage is dissolved and the subsequent marriage is declared as valid and no offence of *Zina* is committed. Appeal accepted. [34]

A Division Bench of this Court in Cr. Rev. No. 77/L of 1987 entitled as Sardar Maseeh Vs Haider Maseeh and three others, where the similar question was involved this Court has held: [35]

"قران وسنت اوراجماع امت سے یہ بات طے شدہ ہے کہ اگر کوئی عورت اسلام لے آئے تو اس کا نکاح بہر حال اس کے غیر مسلم شوہر سے ختم ہو جاتا ہے۔"

**Permission of Walī for Nikāh**

FSC held that when an adult girl contracts *Nikāh,* then such *Nikāh* cannot be deemed as invalid for for want of permission of *Walī.* And as a result no offence of Zina is committed. The Court allowed appeal and acquitted the accused. The Court also elucidated the issue to end the controversy and held that the sufficiency of the consent of a woman to her *Nikāh* is evident from the word[36]. ﴿حَتّٰي تَنْكِحَ زَوْجًا غَيْرَه﴾ The verse is about the result of divorce that "And if he hath divorced her (the third time), then she is not lawful unto him thereafter until she marries another husband" The word تَنْكِحَ denotes marriage by the woman herself. Similarly in verse 232 of the same surah is the order "not to place difficulties in the way of their marrying their husbands" ﴿فَلَا تَعْضُلُوْهُنَّ اَنْ يَّنْكِحْنَ اَزْوَاجَهُنَّ﴾The word يَّنْكِحْنَ also refers to their sweet will in matters of marriage. "*And if he hath divorced her (the third time) then is not lawful into him thereafter until she hath wedded another husband. Then if he (the other husband) divorce her it is no sin for both of them that they come together again."*[37]

In Hadith collection there are several traditions which show that the consent of an adult virgin for her *Nikāh* validates the marriage and that such consent may be given by a girl even remaining silent.

The Court observed that the trail court has ignored the principle that assuming that the *Nikāh* of a woman without *Walī* is invalid, despite this, if a man and woman marry in good faith and believe themselves so married, the benefit of doubt should go to them. It is established that in such a case they cannot be subjected to *Hadd* (vide section 5 of the Ordinance). There is no reason why the principle of benefit of doubt which is the prevailing principle of Criminal Law in Islam should not be extended in case of *Ta'zīr*. The Court therefore, allowed the appeal and acquitted the appellants.[38]

**The shortest period of Pregnancy**

The court derived a rule from the injunctions of the Holy Qur'ān that the shortest period for pregnancy is six months and for this purpose legal marriage contract must be in existence. As per the Islamic Law, the parentage legitimacy is dependent on the matrimonial relation of the spouses being in conformity with the Islamic provisions. Furthermore, the parentage of a child is deemed as recognized even in uncertain cases. For instance, in case of doubt in the act (*Shubha fil Fi'l*) or in case if doubt is in the marriage contract *(Shuba fil 'Aqd*) though the marital relationship shall be held to be *Fāsid* the children born of the said wedlock shall be held to be legitimate. [39]

The establishment of parentage is based on the Prophet's saying: "*The issue belongs to the bed and for the adulterer there is the stoning."*

It is thus meant that a legal marriage contract must be in existence when a child is conceived. Islamic law leans favorably towards holding of the children to be

of legitimate parentage so that they may be recognized as legitimate children and no combustion or immorality may spread in the society. On this basis the irregular (*fāsid*) marriage contracts and co-habitation in doubt (*Wati bil-shubha* وطئ بالشبهة ) are also considered as good grounds for the proof of parentage. As regards the shortest period of pregnancy we may cite below two Qur'ānic verses:- "And his carrying and his weaning is (in) thirty months", [40]"And his weaning is in two years."[41]

The above two verses read together go to show that the total period of pregnancy and child's weaning is of thirty months and the period of child's weaning by woman if of two years. In other words, the sucking period for the child is for twenty four months and rest of the six months are indicated as the shortest period of pregnancy. [42]

**Khīyār al-Bulūgh**

Under the principle of *Khīyār al-bulūg*, a woman who *Nikāh* was contracted when she was a minor has the right to renounce it after she attains puberty. However, it is important that such woman should exercise this right immediately after attaining puberty, as in case of a delay on her part she would lose this rights.[43] In a criminal case titled as Lal v. Government of Pakistan, this Honorable Court declared that puberty of a female is determined on signs of puberty not on her age prescribed by the law. In this case the abductee female is of the age 13/14 years but according to medical report she is adult because her menstruation periods started which is a confirmed sign of puberty according to the Injunctions of Islam. Therefore the abductee at that time was adult, correctly signed the Nikāhnama and had not committed any crime of *Zina*. Accused were acquitted.[44]

**Admission of Nikāh during Trial**

Case was registered against the accused under Section 10 (2) of Offence of *Zina* Ordinance. The female accused took stated in the trial court that her co-accused committed *Zina bil-jabr* with her, but subsequently in appeal as well as before the FSC, she retracted her earlier statement, by maintaining that the co-accused was her legally wedded husband. This stance of the female accused was acknowledged as correct by the male co-accused and he also acknowledged the minor girl born to female accused as his daughter. Statement of both the parties accepted and the accused were acquitted in circumstances. [45]

**Combining step-daughter and her step-mother in marriage**

Combining step-daughter and her step-mother in marriage at same time is lawful and does not fall within prohibition that a man cannot have at same time two wives who are so related to each other that if either of them had been a male they cannot have lawfully married each other. The Muslim Jurists in majority opinion have held that it is lawful and the Court accepted this opinion.[46]

**Pre-marital and extra marital liaisons between men and women prohibited**

Conduct of female's vis-à-vis their contact with men in Islam. Allah and His Prophet (SAW) abhor any liaison between men and women except between

legally wedded spouses or between ones in the prohibited degree and of course the children and ones who are too old. Logical conclusion would be obviously those pre-marital and extra marital liaisons between men and women stand prohibited and banished in and Islamic set-up. Thus any Courtship of romantic affair between a man and women other than between the ones married to each other are not permitted in Islam. Making secret love affairs and taking paramours is a conduct condemned and prohibited by Allah.[47]

**Irregular marriage is not a void marriage**

The definition of marriage does not say that an irregular marriage is *not a marriage* or that irregular marriage means a *void* marriage. Irregular connotes that some regularities laid down have not been performed but the failure to perform some regularities cannot be taken to mean that marriage had not been entered into at all and was void *ab initio*. Mere irregularities in anything cannot be taken to mean illegalities. Irregularity is always curable while illegality stands on a different footing. [48]

**Time of Execution after Triple Talāq Deed**

Deed of *Talāq* executed by husband and three *Talāqs* pronounced by him on date of execution of deed, would fully and clearly dissolve marriage by *Mubarrat* from date of execution of deed. Withdrawal of notice of *Talāq* given by husband before expiry of 90 days would not alter legal position of marriage having been dissolved from date of execution of deed of *Talāq*. Resultantly remarriage by wife after dissolution of her previous through *Talāq* deed, would not make wife and her second husband liable for *Zina*. Conviction/sentence recorded against wife and her second husband on case registered in FIR by previous husband. Set aside by FSC on appeal by convicts.[49]

**Marriage under duress**

In case of marriage under duress and without consent, no concession can be given to accused that he was under any bona fide mistake that abductee was his lawfully wedded wife. Co-habitation in such case would be commission of zina.[50]

## Conclusion

It is concluded that FSC is a unique court in the judicial history. It played important role in introduction of Islamic laws in Pakistan. It has examined considerable number of laws and directed the Government to Islamize the laws in the light of the Judgments of the Court and a large number of laws have been so Islamized. The Court also reviewed its judgment when it was so necessary. FSC has examined sections 4,5,6,7 and 8 of Muslim Family Laws Ordinance 1961 and declared provision of section 4 and 7 as repugnant to the injunctions of Islam while the sections 5 and 6 were not found repugnant. Section 8 is beyond the Jurisdiction of the Court. The following laws were also challenged before the Court and were disposed of: 'Dissolution of Muslim Marriages Act, 1939', 'Child Marriage Restraint Act, 1929', and 'The Parsi Marriage and Divorce Act, 1936'.

This Court has no jurisdiction to hear any kind of petition pertaining to personal grievances of any individual. However in exercise of appellate and revisional jurisdictions, while interpreting *Hudūd* laws, the Court has also laid down important rules relating to family issues like the invalidity of contract of marriage during *'iddat* period. It was also declared that this is punishable under *Ta'zīr* not *Hadd*. Marriage with divorced wife's sister during her *'Iddat* is prohibited in Islam and the criminal is liable for *ta'zīr* punishment. Minimum period of *'Iddat* and minimum period of pregnancy have also been settled by the court. Marriage of a Muslim woman with a non-Muslim is prohibited. If any one of the non-Muslim spouses embraced Islam while the other refused to become a Muslim, the Court declared that a Muslim female is not allowed to remain wife of a non-Muslim male even he may belongs from the people of the book, not compliance with the requirement registration of marriage does not affect validity of marriage. The issue of dissolution through courts has also been examined.

## References

[1]For the purposes of the performance of its functions, the Court has the powers of a civil court trying a suit under the Code of Civil Procedure; 1908.The president of Islamic Republic of Pakistan in accordance with Constitution has approved Fedreral Sharī'at Court (Procedure) Rules 1981 for the court. This Procedure Rules consists of seventy two rules, eight forms and four appendixes. The important feature of these Rules is that petitions are entertained they cannot be rejected solely because of absence or death of the petitioners or legal representatives or jurist-consults. Rule 15 of Fedreral Sharī'at Court (Procedure) Rules 1981.

[2] Chapter 3A was inserted in the Constitution through a Constitution (Amendment) Order in 1980(P.O.No.1 of 1980).

[3] Article 203 D of the Constitution of Islamic Republic of Pakistan 1973, subs. By the Constitution (Amdt.)Order,1980

[4] Article 203 DD of the Constitution.

[5] Article 203-F of the Constitution.

[6] Mohammad Riaz, etc versus Federal Government PLD 1980 FSC1para no. 16

[7] *Tirmīzī*, Vol. IV, p.556, Hadīth No.1342.

[8] *Mujalla al-Ahkām al-'Adlīa*, section 14. (Allah Rakka and others VsFederation of Pakistan PLD 2000 FSC1at pp.2-3).

[9] Article 203 D of the Constitution.

[10] PLD 1988 FSC 58.

[11] 1993 SCMR1756.

[12] PLD1980 Peshawar 47.

[13] PLD 1981 SC 120.

[14] PLD 1991 FSC 35.

[15] PLD 1991 FSC 35.

[16] The Gazette of Pakistan Extraordinary dated 20th June 1956, Notification, dated 11th of June 1956 at p.1222.

[17] PLD 2000 FSC1. Appeal against this Judgment is filed before the Shariat appellate bench of the Supreme Court which is pending for the last sixteen years./

[18] Khawar Iqbal Vs Federation of Pakistan PLD 2014 FSC 43.

[19] *Bukhārī* Book.II, p.794 printed 1357 at Nur Muhammadi Asha Almat'abi, Delhi.
[20] *Ibn-i-Maja* vol.1, p.263.
[21] *Almohallah Ibn-Hazam*, vol.X, page237.
[22] Qur'ān: 2: 229; 2:231 and 4:19.
[23] Qur'ān: 2: 228.
[24] Mawdūdī, Syed Abū 'l-A'lā, *Huqūq al-Zawjain*, pp.58-80; Umar Ahmad Usmani, *Fiqh al-Qur'ān* by Mawlānā, vol.3, pp. 398-417.
[25] Muhammad Suleman Yahya and others v. Fedration of Pakistan PLD 2014 FSC43. Appeal against this Judgment is pending in the Sharī'at Appellate bench Supreme Court of Pakistan.
[26] Kundan Mai v. sarkar PLD 1988FSC89.
[27] Ibn 'Abidin, *Rad al-Muhtār* vol.3, p.13.
[28] Mst.Sakina etc. v. The State (PLD 1981 320.
[29] Arif Hussain Vs. State 1982 FSCP 46.
[30] Qur'ān: 65:1.
[31] *Fatawā 'Alamgīriya* 2:166, *Mabsūt* 9:85, Kanz al-Daqīq 3:179,180.
[32] Qur'ān: 2:221.
[33] Qur'ān: 60:10.
[34] Mst.Zarina v. The State PLD1989FSC105.
[35] Sardar Maseeh v. Haider Maseeh and three others PLD1989FSC179.
[36] Qur'an: 2:231.
[37] Qur'an: 2:229.
[38] Muhammad Imtiāz and others v. the State PLD1981 FSC308.
[39] Tanzīl ur Rehmān, *Majmu'a Quwanīn Islam*, Karachi 1965, vol.1, pp 147-51.
[40] Qur'ān: 46: 15.
[41] Qur'ān: 30: 14.
[42] Shamsul Haq v. Nazima shaheen PLJ1992 FSC 497at p.500.
[43] PLD 1995 FSC 1.
[44] Lal v. Government of Pakistan (PLD 1988 FSC 15).
[45] (2000 P.Cr.L.J. 815).
[46] 1997 SD 37(FSC) at p.40.
[47] 1997 SD 453 at pp.474-487.
[48] Sanaullah v. The State 1997 SD 650.
[49] Muhammad Siddique v. The State 1997 SD 687.
[50] Hassan Muhammad v. The State 1997 SD 789.