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## *Jurisprudence of the Federal Shariat Court on Employer-Employee Relationship: A Critical Analysis*

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### ABSTRACT

*The Federal Shariat Court (FSC) Pakistan, as a constitutional court, has contributed towards the Islamization of laws, though, employment laws have not yet attracted its due attention for certain reasons. Flexible nature of employer-employee contractual relationship in Shari'ah, customary market practices, lack of workers' awareness regarding their rights, long-lasting court proceedings and restricted jurisdiction of the FSC have compelled workers hesitate to opt for litigation. In fact, there have been found some fruitful employment relations laws but, in practice, there still have been found malpractices and exploitative misconducts that have been inherited from the British colonial era. Such practices include; Peshgi (obtaining debt in cash or kind in advance for future employment), jamadāri (supervisory body to ensure and monitor employment of those who have taken Peshgi) and forced labour. The Islamic Ideology Council shall convince and motivate the law-makers to incorporate provisions in respect of some of the religious rights and practices that have not been given due attention in the existing employment regime for instance; 'Iddat and monthly periods, breast feeding and proper arrangements for performing the five times prayers. This paper is meant to explore the FSC's approach while examining and deciding questions of repugnancy and interpretation in respect of certain ambiguous provisions of major employment laws. A critical analysis of lacunas has also been undertaken in the light of general principles of Shari'ah.*



### Introduction

Islamic provisions have always been remained an integral part of the Constitution of Pakistan throughout its developmental stages, though, there has been found no legal forum for its enforcement until the Federal Sharī'at Court (FSC) was created in 1980.<sup>1</sup> The FSC is a constitutional court that was found primarily<sup>2</sup> for undertaking the process of Islamization of the existing laws by adopting procedure of examining the challenged law or a provision and to determine its repugnancy in regard to the injunctions of Islam. The court is vested with an extraordinary jurisdiction that promote progressive construction of Sharī'ah as it operates alongside with English law courts in the country.<sup>3</sup> In a petition, the Supreme Court of Pakistan (SC) ruled that besides FSC no other court had the power to invalidate laws on the basis of Islamic injunctions.<sup>4</sup> Keeping in view the important role of the court, contribution on one hand is viewed of immense value while on the other hand its restrictive jurisdiction has paved way to validation of the British Era's legislation including employer-employee relations laws. Usually, sanctity of contractual relationship and obligations are not bothered unless it violates any explicit provision of the major sources of Islamic law.<sup>5</sup> This approach of the court in examining laws may be understood from the alarming ratio of dismissal of petitions that are brought before it. According to a researcher, more than seventy per cent of the petitions that were filed for being repugnant to the injunctions of Islam were dismissed, hence, they were given certificate of being Islamized.<sup>6</sup> By thoroughly going through the judgements of the FSC, it is apparently perceived that as other courts have not shown interest in employment related matters, in the same way the court has never tried workers' petitions on its motion. Some of the cases that were brought before the court by virtue of their being exploitative towards the working class, were either not dealt with zeal or not fairly presented by petitioners except where they were found in complete contradiction.

### Employer-Employee Relationship from Fiqh Perspective

As per Sharī'ah rules, relationship of employer and employee takes place by the conclusion of Ijrah contract<sup>7</sup> for employment that has been validated exceptionally like the contract of Salam.<sup>8</sup> Fuqahā deals the contractual relationship under the contract of Ijrah, Al-Ashkhā / Al-<sup>l</sup>mā (employment of men for rendering services) which has been derived from Qurān, Sunnah, Ijmā (consensus) and Istehsān (juristic preference).<sup>9</sup> Parties to the contract (Al-<sup>l</sup>qidān) may either be individuals or as a group<sup>10</sup> or agents on behalf of corporations.<sup>11</sup> In case they are natural persons, they shall be of sound mind, therefore, a child who could not differentiate between right and wrong or an intoxicated man in a situation where he lacks full conscious is also disqualified for concluding a contract.<sup>12</sup> Knowledge and

nature of the work and specification thereto as well as the outcome in the shape of benefits shall be agreed upon clearly between the contracting parties otherwise it may lead to confusions which, ultimately, invalidate the contract.<sup>13</sup> No doubt that healthy employer-employee relationship is the key to success for a peaceful work place,<sup>14</sup> though, Islamic approach towards this relationship has been considered on different footings than that of man-made laws. As a complete code of life, Sharī'ah, does not view it as a matter of right to be snatched as man-made laws do but it emphasizes on certain universal principles to be ensured in this respect which include humane treatment of subordinates, brotherhood, sympathy, cooperation, equity, motivation for work along with the prevailing customs.<sup>15</sup>

The Fuqaha did not feel any need to codify the Islamic concept of employer-employee relationship for the reason that there was not need of collective employment as it was introduced after the industrial Revolution, however, they have described certain general principles which may be taken as guidelines in this respect. In order to protect interests of both the parties, there have been drawn certain general Islamic principles which have been termed as Islamic Work Ethics.

Islam considers both the contracting parties as contributors in building the earth, therefore, their relationship is viewed on strongly established foundations of justice and fairness in order to save workers from exploitation in the hands of greedy employers.<sup>16</sup> It stresses that justice shall always prevail by whatever means possible. An Ayah lays down these words: "O you, who believe! Stand out firmly for justice, as witness to Allāh, even as against yourselves or your parents or your kin and whether it be against rich or poor, for Allāh protects both".<sup>17</sup> Another Ayah emphasizes on the unique criteria for equality of humans irrespective of religion, gender or race. "O Mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honorable of you in the Sight of Allāh is (the believer) who has *Taqwā* (piety and righteousness). Verily, Allāh is all-knowing, all aware".<sup>18</sup>

In a tradition, while referring to the consequences of injustice the Prophet (peace be upon him) said: "Injustice is darkness in the hereafter".<sup>19</sup> Once, some of the companions wanted suspension of Hadd (fixed Islamic Punishment), the Prophet (peace be upon him) became angry and said: "If my daughter Fa'ima had been guilty (of theft), I would have cut her hand off".<sup>20</sup>

Indeed, good behavior can change a foe into friend.<sup>21</sup> It is a unique characteristic which has been emphasized by the Islamic teachings. An Ayah says: "The best among you in the sight of Allāh is the best of you in conduct".<sup>22</sup> Another Ayah says: "...Speak good words to people..."<sup>23</sup> Sharī'ah motivates an employer to set a good example for the employed by considering them as Allah's family in order to make himself nobles in the sight of Allāh (SWA) as the prophet (peace be upon him) says:

“All creations are the family of Allāh and who well behave with the family of Allāh is most likeable to Allāh”.<sup>24</sup>

Sharī‘ah considers all Muslims as an integral human body that when an organ is in need of other organs, they promptly attend to it. In a famous tradition relationship of Muslims with each other has been described in these words: “The example of the believers’ love, affection, and mercy for one another is like that of the body: when one of its organs ails, the rest of the body responds and watches over it by contracting fever”.<sup>25</sup> Employer and employee are considered as an integral unit in order to achieve the greater goals of the work place. In order to co-operate others means to benefit others in a friendly-manner which is a great task in the sight of Allāh, as the prophet (peace be upon him) says: “The believer is friendly and befriended, for there is no goodness in one who is neither friendly, nor befriended. The best among people are those who are most beneficial to people”<sup>26</sup> while another tradition says: “Allāh is not merciful to those who are not merciful to the people”.<sup>27</sup> It is a unique characteristic of Islāmic society that all affairs of individuals as well as of the state are required to be conducted through mutual consultation. It has been assigned great value and respect to the opinions of those who are capable of giving sound and timing advice as Allah commands in golden words: “...And consult them in the conduct of affairs. And when you make a decision, put your trust in Allāh...”<sup>28</sup> Likewise, another Ayah enumerates attributes of the believers and says: “And those who answer the call of their Lord and establish prayer, and who conduct their affairs by consultation and spend out of what We have provided them”.<sup>29</sup> The Prophet (peace be upon him) has set an example for the *Ummah* (The Muslim Community) by regularly consulting his companions on all crucial matters before taking any important decision. On the occasion of the Battle *U Ḥud* (name of a mountain in Madīna) the Prophet (peace be upon him) acted upon the opinion of majority of the Muslims, though, it was contrary to his own opinion even than it was accepted.<sup>30</sup>

No doubt that the consultative decision making culture, if adopted by employers, will not merely improve the quality of decision making but it will also develop a strong bond of relationship between employer and his employees that will make employees feel themselves as a part of business of the employer and consequently his profit and loss as their own. Moreover, mutual consultation and workers participation in industrial affairs and decision-making process quashes selfishness as well as greediness from the work place.<sup>31</sup>

Fear of Allāh is the only motivational force that on one hand, encourage a Muslim for self-accountability for his actions<sup>32</sup> while on the other hand he becomes noblest among all other creatures in the sight of Allāh as Qurān says: “Verily, the most honorable person to Allāh among you is he who fears Him most”.<sup>33</sup> The first Khalīfa

(the Muslim Ruler), Abul Bakkar (RA) in his speech addressed Muslims while saying; "I have been appointed as a ruler over you although I am not the best among you....Obey me so long as I obey Allah and His Messenger. If I disobey them, then you have no obligation to follow me".<sup>34</sup>

A healthy employer-employee relationship is based on creating a trust-worthy environment where they avoid from misconceptions against each other unless there is solid evidence.<sup>35</sup> In order to avoid suspicions about others for it has bad consequences Qurān says: "O you who believe! Avoid much suspicion, in deeds some suspicions are sins. And spy not neither backbite one another. Would one of you like to eat the flesh of his dead brother? You would hate it (so hate backbiting). And fear Allāh, verily, Allah is the One Who accepts repentance, Most Merciful".<sup>36</sup> The prophet (peace be upon him), while highlighting the mischief of mistrust and backbiting and their impact on a Muslim society, once asked the Companions and said: "Do you know what backbiting is?" They replied, "Allah and His Messenger know best". He then said, "It is to say something about your brother that he would dislike". Someone asked him, "But what if what I say is true?" The Messenger of Allah said, "If what you say about him is true, you are backbiting him, but if it is not true then you have slandered him".<sup>37</sup>

### **Jurisdiction of The Federal Shari'at Court**

The FSC has been conferred with original jurisdiction to examine validity of any existing law or custom on the yardstick of injunctions of Islam. The jurisdiction may be exercised by the court on its own discretion or by filing a petition by any of the Federal or Provincial Governments or by a Pakistani citizen.<sup>38</sup> The court is also conferred with revisional and appellate jurisdiction in criminal cases pertaining to enforcement of Hudood.<sup>39</sup> In all cases other than Hudood, the Supreme Court of Pakistan (SC) has appellate jurisdiction against the decisions of the FSC,<sup>40</sup> for which there has been constituted a Shari'at appellate Bench.<sup>41</sup>

The FSC, originally was created to try Shari'at petitions while exercising its original jurisdiction. As far as the Hudood cases are concerned, initially, it was not entitled to review its own judgments, though, after it gave judgment in a renowned *Rajam* (punishment of stoning to death) petition titled *Hazoor Bakhsh vs State*<sup>42</sup>, it was bestowed with revisional jurisdiction.<sup>43</sup> In fact, the FSC tried the said case by exercise of its original jurisdiction where it declared that death by stoning was against the principles of Islam and that hundred lashes was the correct punishment for the offence of adultery.<sup>44</sup> Thus, the Hadd of *Rajam* was declared as *T'azir* punishment and not Hadd. Later on, the court was conferred upon the power of Review of its decisions<sup>45</sup>. Federation of Pakistan filed a Review Petition. The Court reviewed its previous judgment and held that sections 5 and 6 of the said Ordinance were not repugnant to the Injunctions of Islam.<sup>46</sup> The FSC has adopted an interesting

approach while dealing with relationship between employer and employee. The petitioner<sup>47</sup> challenged the legal provision for confining the medical facility to one wife of the employee despite Islam does not prohibit having more than one wife in an apparently unambiguous Qurʾānic verse.<sup>48</sup> The FSC, emphasizing on the contractual nature of relationship between employer and employee, held that the rule in question did not contradict any Islamic injunction. Strangely, this decision was subsequently overturned by the Shariʿat Appellate Bench of the Supreme Court by allowing medical facility to more than wives of Muslim employees.<sup>49</sup>

### **Jurisprudence of the Court in Examining Laws**

In petitions before the FSC, to determine a question of whether a law or a provision is in contravention of Shariʿah rules it adopts a different approach to quash or remove the repugnancy to the effect. It was held in a Shariʿah petition that the courts' jurisdiction under Article 203-D of the Constitution, generally, is to determine as to whether any rule, law or customary practice is violative of any Injunctions of Shariʿah as laid down by the Qurʾān and Sunnah of the Prophet (peace be upon him) irrespective of its merits and demerits.<sup>50</sup> The Supreme Court of Pakistan (SC), in a petition, also laid down methodology of FSC in examining and determining whether a law or a provision is repugnant to the Shariʿah rules. Firstly, it Specify a particular law or provision for the purpose of Shariʿah testing, secondly, it discover and specify Shariʿah's direct rulings that can be attracted to that particular law or provision under consideration. Thirdly, if there has been found no repugnancy with the direct text, though, it was repugnant to the deductions or derived principles of Islamic law, the court clarifies and states its authenticity to that extent. Lastly, after due comparison of the specified law or provision has been made with sufficient details of the relevant Islamic injunctions, the exact level of repugnancy is stated, if found any.<sup>51</sup>

In FSC Shariʿat Appellate Bench of the SC, an appeal was filed against a decision of the FSC, where various administrative matters were challenged before the court to be held in contravention of Islamic injunctions. Muhammad Taqi Usmani was of the opinion that neither the FSC nor the SC Shariʿat Appellate Bench has no jurisdiction over matters that are against the fundamental rights, traditions or public opinion, in case they are not in contradiction with the injunctions of Qurʾān and Sunnah.<sup>52</sup>

### **Procedure of the Court in Case of Repugnancy**

The FSC, during the process of examining a law or a provision, if found any repugnancy, it shall bring the same in the notice of the Federal Government<sup>53</sup> or Provincial Government,<sup>54</sup> as the case may be, and let them present their stance before the court to the particular law.<sup>55</sup> In case the court decided that a specific law or

provision is derogatory to the injunctions of Islam, it is constitutionally bound to explain reasons for such holding along with the extent to which the law is in contradiction with Shari'ah. Moreover, it shall also specify the day on which the decision shall take effect<sup>56</sup> with the condition that if the appeal period got expired or, in case of pending appeal before the Shari'at Appellate Bench, the disposal of such appeal.<sup>57</sup>

### **Employment-Related Petitions in Federal Shari'at Court: An Overview**

Contract of employment between employer and employee gives existence to a contractual relationship that creates certain rights and obligations of the parties. Explaining this point in a petition,<sup>58</sup> the FSC took the stance that as per Shari'ah, the employer-employee relationship is a flexible contractual relationship though employee has been ensured with some guarantees. Due to the employer's upper hand, he is required to ensure protection of certain rights that include; prompt payment of agreed upon wages, assignment of work in accordance with mental and physical health and strong adherence to other agreed upon terms and conditions of the contract of employment. While stressing on state's supervisory role, the court in a petition,<sup>59</sup> held that it has to play its due rule in maintaining peaceful employer-employee relations by paying attention towards ground realities. Various worker-friendly developmental initiatives shall be introduced so that both employer and employee could be educated in respect of their crucial role in economic growth. The court further, held that Islam is complete code of life and compare to west it does not recognize master-servant relationship rather it encourages and promotes a system where all Muslims are considered brothers. The basis for treatment of employees and subordinates is the marvelous Islamic concept of *Mu'akhāt* (Islamic brotherhood) for promoting of a dignified and respectful work environment.

### **Federal Shari'at Court's Examination of the Existing Employment Laws**

As far as Pakistan's employment relations system is concerned, there exist many legislative enactments that cover employer-employee relations from the point when a contract of employment takes place till retirement. For the purpose of this research, those laws are to be considered, from among the industrial laws, that cover most of the important aspects of employment relations.

### **Bonded Labour System (Abolition) Act, 1992**

The FSC, in a petition, examined various provisions of the Bonded Labour System (Abolition) Act which were challenged before the court to be declared as repugnant to the injunctions of the Qur'an and Sunnah. They are hereby discussed in the light of the court's judgement.

**Advance (Peshgi)<sup>60</sup> and Jamadāri<sup>61</sup>**

The definition of the *Peshgī* and the abolition of *Jamadārī* system were challenged before the court for they were in contradiction with the terms of employment contract between creditor and debtor as Islam emphasizes on the fulfilment of contractual promises. It was argued that *peshgi* amounts are received by workers under a valid and lawful contract while the *Jamadārī*<sup>62</sup> system shall intact for the interest of brick kiln owners to ensure performance of the workers. Therefore, both provisions shall be declared as repugnant to the injunctions of Sharī'ah.<sup>63</sup> The court held that the *Peshgī* given to brick kiln workers is an exploitative tool of taking surplus work with nominal or without payment of wages. As a matter of fact, such workers are illiterate and no contract has been concluded that contain terms and conditions of employment. Therefore, the National Press frequently reports incidents of unlawful detention of workers by the owners of the brick kiln in order to extract force labour on account of *Peshgī*.<sup>64</sup> The petition was dismissed by the court on the ground that there has been found no repugnancy in the challenged provisions of the Act.

#### **Bonded Labour System<sup>65</sup>**

The customary bonded labour, a form of forced labour, system was challenged before the FSC on the ground that brick kiln workers agree upon rendering services in future for advance remuneration in the form of debt. The court after thoroughly examining the relevant provisions, concluded by quoting opinions of Imam Abu Hanifa and his two disciples; Imam Abu Yousuf and Imam Ahmad as described by Al-Murghinani. According to Abu Hanifa a brick kiln worker is entitled to wages when he finishes his work while the two disciples held that his right of wages does not establish unless he collects and build up the bricks so that they may be considered secured.<sup>66</sup> The court, in regard to forced labour held that it is repugnant to the injunctions of Islam as Imam ibn Hajar Al-Asqalānī stated that extracting work from a worker irrespective of the customary wages is like converting a free man into slavery. Various Ahadith were quoted by the court that emphasizes on protection of workers' rights as one of the traditions says that shortly before the death the prophet advised: "always keep prayers in your mind and of the rights of the people who are your dependents".<sup>67</sup>

#### **The Standing Orders Ordinance, 1968**

The Standing Orders Ordinance is one of the primary laws that, on one hand, provides guideline for terms and conditions of employment contract, while on the other hand, it regulates workers welfare schemes from the point of conclusion of the contact of employment till the age of retirement. It is extended to those industrial establishments where twenty or more workers are employed<sup>68</sup> as well as the brick

kiln workers.<sup>69</sup> There are certain provisions of the Ordinance that have been discussed by the FSC in various petitions.

### **Classification of Workers**

Under the Ordinance industrial workers have been classified into various categories<sup>70</sup> on the basis of the nature of their employment that defines their legal rights and obligations. In a petition, while examining division of employees, the FSC held that there is felt no harm if the classification of industrial workers is based on reasonableness and intelligibility.<sup>71</sup> Likewise, an ex-justice of the SC Shari'at Appellate Bench, explained that none of the injunctions of Qur'an and Sunnah injunctions indicated absolute rules in this respect but it has been left open to the needs of the society.<sup>72</sup>

As far as the classical Islamic Jurists are concerned, they have simply classified works into broad categories<sup>73</sup> of *Ajir-e-Khās* (personal employee) and *Ajir-e-Mushtarak* (common employee). The division determines their respective rights and obligations towards each of the parties to an employment contract,<sup>74</sup> in accordance with their mental and physical capacities.<sup>75</sup> Islamic scholars have defined *Ajir-e-Khās* as a worker who presents his services to certain employer for an agreed upon period of time<sup>76</sup> or he is a person who lets himself for service of his employer.<sup>77</sup> In simple words he is a worker who serves an individual<sup>78</sup> that gives him the right to receive his due wages within a specified time period.<sup>79</sup> *Ajir-e-Mushtarak* has been defined as a professional worker who provides services to the general public for furnishing a specified task such as tailor, laundry man<sup>80</sup> and mason.<sup>81</sup>

### **Restriction on Closure of Business Place**

In a petition, the FSC, while examining the important provisions of the Standing Orders Ordinance, held that the Ordinance provided certain terms and conditions that shall be considered while an employment contract is concluded between employer and employee. The court is of the opinion that like other provisions of the Ordinance, Order. 11-A favours employer's right to close his own business place.<sup>82</sup> By going through the wording of the Section, it could easily be realized that Order 11-A is violative of article 18 of the Constitution.<sup>83</sup> The text of the section is described in these words:

*"...no employer shall [terminate employment of more than fifty percent of the workmen or] close down the whole of the establishment without prior permission of the Labour Court in this behalf, except in the event of fire, catastrophe, stoppage of power supply, epidemics or civil commotion".*

The section clearly mentions that an employer is strictly prohibited either to terminate more than half of his employees or close down his business place except with the prior permission of the Labour Court or in the events of natural calamities,<sup>84</sup>

which is violative and contradictory to the constitutional right of freedom of business.

### **The Industrial Relations Act, 2012<sup>85</sup>**

Industrial relations of employer and employee are regulated under the Industrial Relations Act (IRA)<sup>86</sup> which is considered one of the principal legislations that protects workers under the Constitutional cover of the right of freedom of association.<sup>87</sup> Workers as well as employers have been provided with freedom to be organized for protection of their respective rights that are ensured under the employment contract. Procedure of resolving industrial disputes through amicable means is one of the characteristics of the Act. The IRA, also provides rules in respect of workers' representation in the affairs of management. A comprehensive procedure of registration of a trade union and association with a registrar has been provided under the Act.<sup>88</sup>

There are certain provisions of the IRA which have been examined in various FSC's judgements in order to clarify their compliance with Islamic injunctions.

### **Industrial Unionism**

Employers and employees right to organize for the first time, in Pakistan, was recognized under the Industrial Relation Ordinance, 1969. The ordinance went through various developmental stages till the current IRA, 2012. The FSC, like other employment laws, examined the Act and held that objection cannot be sustained in respect of trade union formation for so long as it does not endanger the community's interest.<sup>89</sup> Contrary to the court's opinion, as per Sharī'a'h rules contractual relationship of the parties to an employment contract is considered as that of contributors in building the earth. Therefore, their relationship is not that of master-servant or superior and inferior but it is based on unique and strong foundations of equality, justice and fairness so that to ensure protection of workers from exploitation in the hands of greedy employers.<sup>90</sup>

### **Strike and Lock-out**

The IRA, 2012 ensures the right of workers and employers alike to go on strike<sup>91</sup> or lock-out<sup>92</sup>, as the case may be, in the event failure of bilateral negotiations between employer and employees in order to settle an industrial dispute through amicable means.<sup>93</sup> The FSC appreciated stoppage of work by workers to go on strike, provided that it shall be in accordance with the provisions of the IRA.<sup>94</sup>

The court pointed out that, as per the opinion of Muslim jurists, the right to go on strike or lock-out is not an absolute right. The workers of producing essential commodities may be compelled to work on customary wages if they protest for

unreasonably high wages. However, if an employer was found guilty of exploiting workers by not paying them their dues, he shall also be forced to satisfy workers. In fact, Islam is always in favour of co-operative and peaceful industrial environment.<sup>95</sup> In case an employer was found guilty of workers' exploitation, the workers' co-operation for formation of a union shall be encouraged so that they may ensure any industrial dispute to be resolved through amicable means. The right of strike and lock-out shall be deemed, in such a situation, a means of settling disputes in a certain work place. There shall always be efforts on priority basis to ensure settlement of differences through peacefully co-operative means.<sup>96</sup>

### ***Ikrāh (compulsion)***

The FSC in a petition examined reasons behind the behavior of some greedy employer who take advantage of the prevailing unemployment condition due to which a worker may be victim of *Ikrāh* or compulsion in respect of terms and conditions of the employment contract. The undue advantage may subject workers suffer and as a result, they are paid nominal wages. It is the reason that Muslim jurists encourage state's interference for fixation of minimum level of wages under the doctrine of "*Tasīr*" that was initially introduced in respect of fixation of rates of commodities, though, it may also be made applicable to workers' wages<sup>97</sup> while keeping in view certain important factors such as; the customary market practices, nature of the work and efforts made and time that is spent in undertaking the assigned task.<sup>98</sup>

### **Provisions that need to be incorporated in the Employment Laws**

The contribution of the FSC is remarkable in criminal and Hudood cases; the same efforts are needed in respect of some basic rights to be incorporated to the employment relations jurisprudence. The current industrial regime lacks to provide for certain natural as well as religious obligations related to women workers that are to be observed by a in the event of husband's death or divorce. Sharī'ah bounds widow to observe a period of four months and ten days while staying at her husband home.<sup>99</sup> In order to ensure this fundamental right to women it shall be incorporated to the Constitution as well as to the relevant laws. By virtue of the Constitutional provisions, it is the State's responsibility to facilitate its majority Muslim subjects perform religious practices conveniently. As per Sharī'ah rules, believers shall be enabled to observe *Dīn* (religion) in their day to day life for it is considered their utmost priority<sup>100</sup> for which they have been sent to this mortal world.<sup>101</sup> Under the current industrial law regime, no provisions have been found that promote performance of religious practices. Keeping in view this point, the FSC in a petition, held that it is the government's duty to incorporate provisions in respect of construction of mosque or prayer halls so that the worker may observe

prayers during duty hours.<sup>102</sup> Under the current regime of industrial relations, no provision is clearly found that protect the natural as well as religious right of a mother and her child in respect of breast feeding. No law specifies intervals for this respective purpose which is in contradiction of the relevant Islamic teachings which entitles an infant to be given milk by his mother till two years period.<sup>103</sup>

### **Critical Analysis of the Judgments of Federal Sharī'at Court in Respect of Employment Laws**

The extra-ordinary discretion the FSC in examining the existing Pakistani laws is an effective tool in gradually undertaking the Islamization of the prevailing legal system. However, the court's approach towards employer-employee relationship could be termed as "flexible" which is considerably based on the policy of "non-interference" towards the current industrial regime that impliedly favours the colonial era's legislation. According to a research, seventy per cent of the petitions are dismissed by the court on the ground that the provisions are not explicitly repugnant to the injunctions of Islam.<sup>104</sup>

The FSC strictly takes cognizance of the employment matters if it finds a law or custom that totally in contradiction to the injunctions of Sharī'ah as in the cases of bonded and forced labour of brick kiln workers. The court, therefore declared the *Peshgī* (advance) and *Jamadārī* systems to be completely repugnant to the Islamic teachings. However, in a petition<sup>105</sup> the court ignored to extend medical facility to the petitioner's second wife though it was proved before the court that a man is allowed to marry up to four wives. However, the SC's Appellate Bench nullified decision of the FSC and extended the facility to the second wife accordingly.<sup>106</sup> The court seems, in some crucially important employment matters, may have exercised its discretion even if the petitioner was not able to prove his stance. General Islamic principles pertaining to justice and equity could have been made applicable in the case of classifications of workers and industrial unionism that normally leads to work place disputes. Narrowly scoped employment laws resulted almost ninety per cent of the working force to fall victim of these arbitrary customary practices. Likewise, the Islamic ideology Council may also play its role by recommending incorporation of provisions to the law-makers in respect of *Iddat*, breast feeding intervals and construction of prayer places. There are other provisions where the FSC took the stance that there has been found no repugnancy as in case of Order 11-A of the Standing Orders Ordinance, 1968 which was declared to be employer-friendly. This non-repugnancy approach gives rise to an issue that it has now become the less debatable part of the court's judgments. In simple words this approach is likely to impose status quo in this sort of matters.<sup>107</sup>

### **Conclusion**

The FSC's jurisdiction in respect of examining the existing employment Pakistani laws appears to have been drawn extraordinarily while in practice, it proved to be very restrictive. An ex-justice of the SC Appellate Bench, Taqi Usmani, has pointed out that it is not duty of the court to examine a law or a provision on the basis of equity, fairness, logic or public opinion rather it had to see just one point and that is to see if the law under consideration is contrary to the injunctions of Islam. Holding this view point, certain customary practices prevailing in the brick kiln industry have been declared to be in contradiction of Islamic injunctions such as bonded labour, *Peshgī* and *Jamadārī* system. In regard to most of the petitions before the FSC, it is apparently perceived that the court has adopted a flexible approach based on non-interference in the employment related matters. As an evidence, the court has never tried workers' petitions on *suo moto* grounds. Various petitions that were brought before the court by virtue of their being exploitative towards the working class, were either not dealt with zeal or not fairly presented by petitioners. It is high time for the Islamic Ideology Council and the FSC to prove, through their recommendations and judgments that they are worker-friendly, whereupon both the institutions could maintain their distinctive constitutional status. Both the institutions could play their due role by protecting constitutional rights while applying general Islamic principles of brotherhood, justice, equality and equity etc. in order to improve the current abject condition of working class.



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## References &amp; Notes

- <sup>1</sup> Shaikh, Shahzado, Historiographic Glimpses of Federal Sharī'at Court of Pakistan,<sup>1</sup> at: [www.federalSharī'atcourt.gov.pk](http://www.federalSharī'atcourt.gov.pk) (accessed: 13 September, 2020).
- <sup>2</sup> Art. 203-C (1), the Constitution of the Islamic Republic of Pakistan, 1973.
- <sup>3</sup> Cheema, Shahbaz Ahmad, Non-Repugnancy Decisions of the Federal Sharī'at Court of Pakistan: An Analysis of Politico-legal Ramifications, 1.
- <sup>4</sup> Hakim Khan v. Government of Pakistan PLD 1992 SC 595, 617.
- <sup>5</sup> Cheema, Shahbaz Ahmad, Non-Repugnancy Decisions of the Federal Sharī'at Court of Pakistan: An Analysis of Politico-legal Ramifications, 10.
- <sup>6</sup> Ibid,17.
- <sup>7</sup> Ijrah contract has been exceptionally allowed like the contract of Salam where subject matter of the contract does not exist. As per the general rules of Sharī'ah, subject matter of the contract must exist in the time of transaction otherwise, it will *prima facie* be considered invalid.
- <sup>8</sup> Salam is a sale contract whereby seller promises to ensure supply of specific goods to the buyer in future for an exchange of prompt price. For more details see Al-Sarakhsī, Muḥammad Ibn Aḥmad (d.483 a.h), Al-Mabḥūṭ al-Maḥḥīrī, Beirut, vol:12, 124.
- <sup>9</sup> Al-Kaṣṣī, Al-ud-Dīn, Abu Bakkar Ibn Masood (d. 511 a.h), Badai Wa Al-San'ī fi Tartīb Al-Shar'ī, Dār-ul-Kutub Al-Ilmiyyah, vol: 4, Book: Al-Ijrah, 173-174.
- <sup>10</sup> Al-Majallāh Al-Ahkām Al-'Adliyyah, Art. 570 lays down that a party to 'Ijrah contract may be a group of people or the whole village.
- <sup>11</sup> Nyazee, Imrān Aḥsan Khan discussed the issue of 'fictitious person' from Islāmic perspective in his book "Outlines of Islāmic Jurisprudence", Ed. 6<sup>th</sup> (2016) on pages: 125-126. He is of the view that it is inappropriate to say that the idea of fictitious person is an innovative concept as it existed in the Fuqahā's period but they did not recognize it as a legal person. The logic behind this approach was that *Dhimmah* (competence in respect of rights and obligations) is an 'Ahad (covenant) with the creator and the fictitious person is not able to enter such a relationship because its capacity is deficient as it cannot observe religious duties such as payment of *zakah*. It is therefore, recommended that the modern scholars shall consider the issue on legal grounds in order to make it Sharī'ah-compliant.
- <sup>12</sup> 'Ali Al-Qurrah, Mabḥūṭ al-Razī' fī al-'Uqūd, vol. 1, 342-374.
- <sup>13</sup> Al-Zuhailī, Wahba "Al-Fiqh-al-Islāmi Wa Adillatuh", Edi. 2005, Dārul Fikr, vol: 5, 3809.
- <sup>14</sup> Subramanian, Kalpathy (2017), Employer Employee Relationship and Impact on Organization Structure and Strategy, International Journal of Innovative Trends in Engineering (IJITE), 27. 43 -2017,42.
- <sup>15</sup> Al-Zuhailī, Wahba "Al-Fiqh-al-Islāmi Wa Adillatuh", Dārul Fikr, vol: 4, 70.
- <sup>16</sup> Al-Bannī, Islām and the Trade Union Movement, Cairo (Arabic version).
- <sup>17</sup> Al-Qur'ān: 4:135.
- <sup>18</sup> Ibid: 49:13.

- <sup>19</sup> Al-Qashīrī, Abul Hasan, Muslim ibn Al-Hajjīj, Al-Nishīborī (d.261 a.h), Sahīh Al-Muslim, Dar Ihya Al-Turath Al-Arabi, Beirut ch: prohibition of cruelty, ḥadīth no: 2579.
- <sup>20</sup> Al-Bukhārī, Muhammad ibn Ismāīl (d. 256 a.h), Sahīh-ul-Bukhārī, ch: Implementation of Hudood on dignified and common alike, Dār Tuq Al-Najāt, vol: 8, Hadith no. 6787, 160.
- <sup>21</sup> Hoque and others, Leadership traits from Islamic perspectives. Bangladesh Journal of Islamic Thought, 87-108.
- <sup>22</sup> Al-Qurʿān.49:13.
- <sup>23</sup> Ibid: 2: 83.
- <sup>24</sup> Al-Tibrīnī, Abul Qasim, Muhammad ibn Sulaiman (d. 360 a.h), Al-Muʿjam Al-Awsaṭ, Dar-ul-Haramain, Cairo, Egypt, vol.5, Hadith no: 5541, 356.
- <sup>25</sup> Al-Shaibani, Abu Abdullah, Ahmad Ibn Muhammad ibn Hanbal (d.241 a.h), Musnad Ahmad ibn Hanbal, Hadith Noman Ibn Bashir, Muʿassasah Al-Risalah, vol. 30, Hadith no. 18416, 366.
- <sup>26</sup> Al-Tibrīnī, Abul Qasim, Muhammad ibn Sulaiman (d. 360 a.h), Al-Muʿjam Al-Awsaṭ, Hadith no: 5787. Hadith status according to Muhammad Nasir-ud-Dīn Albani: Hasan.
- <sup>27</sup> Al-Qashīrī, Abul Hasan, Muslim ibn Al-Hajjīj, Al-Nishīborī (d.261 a.h), Sahīh Al-Muslim, ch: Mercy of the prophet (peace be upon him) on children and family, vol.4, Hadith no: 2319.
- <sup>28</sup> Al-Qurʿān: 3:159.
- <sup>29</sup> Ibid: 42:38.
- <sup>30</sup> Al- Ghazālī, Muḥammad, Fiqh Al-Sūrah (Understanding the life of the Prophet Muhammad), International Islamic Publishing House, Riyadh Saudi Arabia. Bangash, Mafar (2000), The concepts of leader and leadership in Islam, at: <https://www.icitdigital.org/articles/the-concepts-of-leader-and-leadership-in-islam>, (accessed: 21 February, 2019).
- <sup>31</sup> Niḥām-ul-ḥaq, Islamic Management and Business, Ed. 1st, IIUC Studies, Dec-2011, Chittagong, Bangladesh: Noksha Publications, vol. 8, 46.
- <sup>32</sup> Ibid.
- <sup>33</sup> Al-Qurʿān: 49:13.
- <sup>34</sup> Al-Tabarī, Tarīkh-ur-Rusul wa Al- Mulook, ch:3, p. 210.
- <sup>35</sup> Sharfuddīn, Ibnomer, Muhamed (1987). Toward an Islamic administrative theory, The American Journal of Social Sciences, vol:4, 239.
- <sup>36</sup> Al-Qurʿān: 49: 12.
- <sup>37</sup> Al-Qashīrī, Abul Hasan, Muslim ibn Al-Hajjīj, Al-Nishīborī (d.261 a.h), Sahīh Al-Muslim, ch: prohibition of backbiting, vol: 4, ḥadīth no: 2589.
- <sup>38</sup> Art. 203D (1), The constitution of Islamic Republic of Pakistan, 1973.
- <sup>39</sup> Ibid. 203DD (1).
- <sup>40</sup> Ibid. 203F (1).
- <sup>41</sup> Ibid, art. 203-F (5).

- <sup>42</sup> PLD 1981 FSC 145.
- <sup>43</sup> Art. 203DD, the Constitution of Pakistan, 1973.
- <sup>44</sup> PLD 1981 FSC 145.
- <sup>45</sup> Article 3 of the President's Order V of 1981 as the Constitution Amendment Order 1981, sub-Article (9) was added to Article 203-E of the Constitution of Republic of Pakistan, 1973.
- <sup>46</sup> PLD 1983 FSC 255.
- <sup>47</sup> PLD 1992 FSC 527, Ch. Irshad Ahmad v Federation of Pakistan.
- <sup>48</sup> Al-Qurʿān 4:3.
- <sup>49</sup> Irshad Ahmad v Federation of Pakistan PLD 1993 SC 464.
- <sup>50</sup> PLC (C.S.) 2009, 809 Shariʿat Petition No,38/L of 1992 26/5/2009 , Muhammad Rasheed Rashid VS Government of Pakistan, Ministry Of Finance, Islamabad.
- <sup>51</sup> PLD 1987 Supreme Court 304 , Pakistan And Other VS Public At Large And Other.
- <sup>52</sup> Usmani, Muhammad Taqi, (ex-justice of the FSC Shariʿat Appellate Bench), judgements of the Shariʿat Bench of SC of Pakistan, 303-304.
- <sup>53</sup> If the is pertaining in the Federal Legislative List (FLL).
- <sup>54</sup> In case the matter is not described under the FLL, the law is apparently under the authority of a Provincial Government as after the abolition of the Concurrent Legislative List (CLL) by virtue of the 18<sup>th</sup> Constitutional Amendment, now, all the matters that are not included in the FLL come under the Provincial Governments jurisdiction.
- <sup>55</sup> Art. 203-D, (1-A), the Constitution of the Islamic Republic of Pakistan, 1973.
- <sup>56</sup> Ibid, (2-a and b).
- <sup>57</sup> Ibid, proviso of Sub art. 2.
- <sup>58</sup> PLD 1983 Federal Shariʿat Court 17, M. Daryab Quraishi VS Chairman WAPDA.
- <sup>59</sup> PLD 1985 Federal Shariʿat Court 305.
- <sup>60</sup> Sec. 2 (a) of the Bonded Labour System (Abolition) Act, 1992 defines advance (peshgi) as: “an advance (peshgi), whether in cash or in kind, or partly in cash or partly in kind, made by one person (hereinafter referred to as the creditor) to another person (hereinafter referred to as the debtor”.
- <sup>61</sup> It was a supervisory system under which a man used to watch and dog those who were given *Peshgi* so that they shall be employed under the bonded labour system in order to satisfy their past debts.
- <sup>62</sup> The *Jamadārī* system was already declared as “abolished” by the SC of Pakistan by virtue of 1989 SCMR 139 before the Bonded Labour system (Abolition) Act was promulgated.
- <sup>63</sup> PLC 2006 (C.S.) 49, Syed Shabbir Hussain Kazmi And Others VS Government of Pakistan And Others.
- <sup>64</sup> Ibid.
- <sup>65</sup> Sec. 2 (e), the Bonded Labour (Abolition) Act, 1992 defines bonded labour system as: “ the system of forced, or partly forced, labour under which a debtor enters, or has, or is presumed to have, entered into an agreement with the creditor to the effect that,— (i) in

consideration of an advance (peshgi) obtained by him or by any of the members of his family [whether or not such advance (peshgi) is evidenced by any document] and in consideration of the interest, if any, due on such advance (peshgi), or (ii) in pursuance of any customary or social obligation, or (iii) for any economic consideration received by him or by any of the members of his family...”.

<sup>66</sup> PLC 2006 (C.S.) 49, Syed Shabbir Hussain Kazmi And Others VS Government Of Pakistan And Others.

<sup>67</sup> Ibid.

<sup>68</sup> Sec.1, sub sec. 1 (a), the Standing Orders Ordinance, 1968.

<sup>69</sup> PLD 2006 FSC 1, Shabbir Hussain Kazmi and others vs Government of Pakistan.

<sup>70</sup> Sec. 1 (a) of the Ordinance prescribes six categories of workers they are: (i) permanent, (ii) probationers, (iii) badlis, (iv) temporary, (v) Apprentices and (vi) contract workers.

<sup>71</sup> PLD 1989 FSC 31, Abdul Majid Qureshi vs Islamic Republic of Pakistan.

<sup>72</sup> Muhammad Taqi Usmani (ex-justice of the FSC Shari'at Appellate Bench), judgements of the Shari'at Bench of SC of Pakistan, 314-315.

<sup>73</sup> Al-Sarakhsī, Muḥammad Ibn Aḥmad (d.483 a.h), Al-Mabsūṭ Durr Al-Muḥrif, Beirut, Book: Ijarāt, vol: 15, 80.

<sup>74</sup> Al-Kaṣṣīni, Al-ud-Dīn, Abu Bakkar Ibn Masood (d. 549 a.h), Badai Wa Al-San'i fi Tartīb Al-Shar'i, Darul Kutub Al-ilmīyah, ch: Meaning and conditions of ijarah, vol:4, 174.

<sup>75</sup> Ibid, Ed. 2<sup>nd</sup> (1986), vol: 4, 210.

<sup>76</sup> Al-Sarakhsī, Muḥammad Ibn Aḥmad (d.483 a.h), Al-Mabsūṭ Durr Al-Muḥrif, Beirut, , vol.15, 80. Mansoor ibn Yunus Al-Hanbali (d.1051 a.h) *Kashaf Al-Qanna an Matni Al-Iqn'a*, ch: Al-Ajeer, vol: 4, 32.

<sup>77</sup> Ibn Qudāma, Abo Muhammad Mawfiq Al-dīn, *Al-Mughnī*, vol: 5, 341.

<sup>78</sup> Al-Kaṣṣīni, Al-ud-Dīn, Abu Bakkar Ibn Masood (d. 549 a.h), Badai Wa Al-San'i fi Tartīb Al-Shar'i, Ed. 2<sup>nd</sup> (1986), vol: 4, 174.

<sup>79</sup> Al-Murghinani, Ali ibn Abi Bakar , *Al- hidayah fi Sharh Bidaya Al-Mubtadi*, vol: 3, 230.

<sup>80</sup> Ibid, 244.

<sup>81</sup> Al-Hanbali, Mansoor ibn Yunus (d.1051 a.h) *Kashaf Al-Qanna an Matni Al-Iqn'a*, vol.4,26.

<sup>82</sup> PLD 1985 Federal Shari'at Court 305

<sup>83</sup> Art.18 of the constitution of Islamic Republic of Pakistan lays down freedom of trade, business or profession in these words: “Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business”.

<sup>84</sup> Mahmood, Abdul Ghani, Industrial Relations in Pakistan at a Crossroad, Pakistan Law House,92-93.

<sup>85</sup> The IRA, 2012 is Federal Government legislation.

<sup>86</sup> The initial draft of the Industrial Relations Act was adopted by Pakistan with title: “the Industrial Relations Ordinance, 1969”. After the 18<sup>th</sup> Constitutional Amendment was passed in 2010 the Concurrent Legislative List stood abolished. The Federal as well as the Provincial governments have enacted their own IR Acts.

<sup>87</sup> Art. 17, “freedom of association”, the Constitution of Islamic Republic of Pakistan, 1973.

<sup>88</sup> Ss.6-10, the IRA, 2012.

<sup>89</sup> PLD 1985 Federal Sharīʿat Court 305.

<sup>90</sup> Al-Bannā , *Islam and the Trade Union Movement*, Cairo (Arabic version).

<sup>91</sup> In case where workers stop work and stage a demonstration that is called strike.

<sup>92</sup> In case an industrial dispute fails to be resolved through peaceful means and employer, consequently, close the business place, it is called lock-out.

<sup>93</sup> Furqan Mohamed, “*Protecting Pakistani Laborers Post-Eighteenth Amendment: Recognizing Rights after the Devolution of Power*”, *Loyola University Chicago International Law Review*, vol. 9, Issue.2 Spring/summer 2012, 274.

<sup>94</sup> PLD 1985 Federal Sharīʿat Court 305.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> PLD 1985 Federal Sharīʿat Court 193.

<sup>98</sup> Basyoni, Saeed Abul Fotooh Muhammad, *Al-Hurriyyah Al-Iqtis’adiyyah fīAl-Islam Wa Atharuhā fīAl-Tanmiyah*, Dār-ul-Wafa Al-Mansoorah, Edi: 1<sup>st</sup>, 380.

<sup>99</sup> Azzuhaili, Wahba “Al-Fiqh-ul-Islami Wa Adillatohoo, Darul Fikr, Damascus, vol. 9, 7198-7202.

<sup>100</sup> In the view of Fuqahā like Imam Ghazali and others: the first among the objectives of Sharīʿah is preservation of “*dīn*” (religion).

<sup>101</sup> Al-Qurʿān: 51: 56. The Ayah says: “And I did not create the Jinns and the human beings except for the purpose that they should worship Me”. Translation by Mufti Muhammad Taqi Usmani

<sup>102</sup> PLD 1983 Federal Sharīʿat Court, 18 (2).

<sup>103</sup> Al-Qurʿān: 2:233. The Ayah says: “Mothers may breastfeed their children two complete years...”.

<sup>104</sup> Cheema, Shahbaz Ahmad, *Non-Repugnancy Decisions of the Federal Sharīʿat Court of Pakistan: An Analysis of Politico-legal Ramifications*,17. at: <file:///C:/Users/core%20m/Downloads/SSRN-id3469246.pdf>, (accessed: 14 September, 2020).

<sup>105</sup> PLD 1992 FSC 527, Ch. Irshad Ahmad v Federation of Pakistan.

<sup>106</sup> Irshad Ahmad v Federation of Pakistan, PLD 1993 SC 464.

<sup>107</sup> Shahbaz Ahmad Cheema, *Non-Repugnancy Decisions of the Federal Sharīʿat Court of Pakistan: An Analysis of Politico-legal Ramifications*, 3.