

Inheritance Rights of Orphaned Grandchildren: A Straightforward Provision of Law?

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Abstract

This paper examines the various trends prevalent in Pakistani courts' interpretation and application of section 4 of the Muslim Family Laws Ordinance 1961. For this purpose, the entirety of published case law under the section was analysed to identify the emerging jurisprudential patterns. The research endorses the findings of scholars on the matter vis-à-vis the three divergent interpretations of the section, namely the 'textual interpretation', the 'loose interpretation', and the 'very loose construction', before the Supreme Court conclusively determined one of them as the 'correct' interpretation. Furthermore, the various mistaken positions in law regarding the section continue to feature heavily in litigation, including its supposed 'retrospective' effect, and the doubt over its standing as an applicable law due to the Federal Shariat Court's declaration that the section is repugnant to the injunctions of Islam. This controversy over the section being repugnant to the injunctions of Islam is unlikely to dissipate anytime soon; additionally, the crucial variations in its application, as exemplified by the dilemma of the widows, illustrate a possible deficiency in the established jurisprudence on the matter.

Introduction

Section 4 of the Muslim Family Laws Ordinance 1961 ("MFLO") has a controversial history in a country which has struggled to balance secular legislative enactments with religious injunctions. The controversy primarily stems from the nature of inheritance shares under the classic Islamic law. Under classic Islamic law, the grandchildren of a propositus would not inherit if their son or daughter is predeceased, because the 'closer' is said to 'exclude the remoter'.¹ The effect of such a principle, however, was seen to hamper the interests of the orphaned grandchildren, whom the legislature deemed worthy of protection. Therefore, in an attempt to remove such grandchildren's sufferings,² the legislature in Pakistan enacted section 4 of the MFLO. This provision incurred much displeasure from religious factions; the resultant petitions in the Shariat Bench of the Peshawar High Court (*Farishta v Federation of Pakistan*)³ challenged section 4 on the basis that it was repugnant to the injunctions of Islam as laid down in the Qur'an and Sunnah.

In *Farishta v Federation of Pakistan*, the Shariat Bench of the Peshawar High Court first had to determine whether it had jurisdiction over the matter, as 'Muslim Personal Law' was excluded from the review jurisdiction of the Shariat Courts.⁴ The Court – interpreting 'Muslim Personal Law' to mean only the law known as '*sharia*' and not any legislative enactments which "overrule that law"⁵ - held that it could exercise jurisdiction over the matter and declared section

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¹ Lucy Carroll, 'Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan' (1998) (5) (3) *Islamic Law and Society* 409, 413.

² *Mst. Bhaggay Bibi v Mst. Razia Bibi* 2005 SCMR 1595.

³ PLD 1980 Peshawar 47 (Shariat Bench).

⁴ (n 1) 439.

⁵ (n 1) 440.

4 to be repugnant to the injunctions of Islam.⁶ This decision was later overturned in *Federation of Pakistan v Mst. Farishta*⁷ by the Shariat Bench of the Supreme Court due to lack of jurisdiction; it was held that the term Muslim Personal Law had been used in a “broader sense” and included any statutory law applicable to Pakistani Muslims as Muslims.⁸ Therefore, in the aftermath of the decision of the Shariat Bench of the Supreme Court, the argument relating to the repugnancy of the said provision in a court of law “could not be regarded as good law”.⁹ This was the position till section 4 was challenged again in *Allah Rakha v Federation of Pakistan*.¹⁰

The challenge to the provision in *Allah Rakha* became possible because the Shariat Bench of the Supreme Court expanded the interpretation of the term ‘Muslim Personal Law’ yet again in *Dr. Mahmood-ur-Rehman Faisal v Government of Pakistan*.¹¹ In this case, the Shariat Bench of the Supreme Court held that the expression ‘Muslim Personal Law’ was to be interpreted in a manner which would “enlarge the scope of scrutiny of all codified and statute laws not strictly falling within the meaning of Muslim Personal Law.”¹² The Court went on to state that Muslim Personal Law referred to the “personal law of each sect of Muslims based on the interpretation of Qur’an and Sunnah by that sect” and that all other “codified or statute laws which apply to the general body of Muslims will not be immune from scrutiny by the Federal Shariat Court in exercise of its powers...”.¹³ This enhanced ambit of scrutiny, as adopted by the Court, allowed it to hear challenges such as the one posed to section 4 in the *Allah Rakha* case where the Federal Shariat Court deemed section 4 to be contrary to the injunctions of Islam; an appeal against this case remains pending before the Shariat Appellate Bench to this day.¹⁴ This matter is explained in further detail in the ‘Common Defenses’ section of this paper; nevertheless, the convoluted history of the various challenges to the provision serves to illustrate the aforementioned controversial nature of section 4 and forms a fitting introduction to any discussion of the same.

Despite the relatively straightforward phrasing of section 4, it has been interpreted in multiple ways. This paper is an attempt at discovering the many judicial trends which have emerged in the application of this provision. By referring to the entirety of case law on the subject, from the very enactment of this provision till present day, I aim to highlight the different interpretations of section 4 which have emerged, the governing principles as established by the Courts, and the deviations from said interpretations and principles. I also aim to illustrate common defences employed against the application of section 4 in seemingly obvious cases and attempt to postulate a theory which encompasses both the achievements of section 4 and the likely future of the litigation concerning this controversial provision.

⁶ Ibid.

⁷ PLD 1981 SC 120 (Shariat Bench).

⁸ (n 1).

⁹ *Talea Bibi v Mst. Saleem Akhtar* 1989 MLD 929.

¹⁰ PLD 2000 SC 1.

¹¹ PLD 1994 SC 607 (Shariat Bench); decided 13 June 1993.

¹² Ibid 619.

¹³ Ibid 620, 621.

¹⁴ Lucy Carroll, ‘The Pakistan Federal Shariat Court, Section 4 of the Muslim Family Laws Ordinance, and the Orphaned Grandchild’ (2002) (9) (1) *Islamic Law and Society* 70, 80.

The Three Conflicting Interpretations

Before proceeding, it is imperative to quote the exact provision of section 4 of MFLO, which reads as follows:

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

Broadly, the interpretation of section 4 has followed three trends, as described by Lucy Carroll in her seminal work on the subject.¹⁵ Initially, courts used what was labeled the ‘textual approach’; section 4 was applied in relatively straightforward fashion in, for example, *Mst. Zarina Jan v Mst. Akbar Jan*,¹⁶ where the grandchild of the propositus (whose mother was predeceased), after being denied a share in the inheritance, appealed, and was provided his share per section 4.¹⁷ The ‘textual approach’ was the default interpretation in the first two decades after the promulgation of the MFLO till the ‘loose interpretation’ of section 4 was introduced by the Lahore High Court.¹⁸ An elaboration of this ‘loose interpretation’ was provided in the case of *Kamal Khan v Mst. Zainab*, where the Lahore High Court held that:

The law provides that the parent of such a grandchild will be deemed to be alive for the purpose of succession. It cannot, however, be assumed that the law ever intended to give a share to the grandchild more than what would have been his due if the parent was actually alive when the succession opened ... *Mst. Zainab* being the only surviving child [of the predeceased Rajoo] she cannot get more than one-half of the estate of Rajoo and the remaining half must revert to the collaterals.¹⁹

This approach, in essence, took the predeceased child to have come back to life at the time of the death of the propositus, only to die again; effectively, it ensured that the inheritance which would have devolved on the predeceased child would not now be solely inherited by the children of the predeceased son or daughter. Instead, all legal heirs of the predeceased child would now inherit from his/her share and not just the children of such predeceased child. This does not appear to be in conformity with the written expression as enshrined in section 4 but the reasoning for this interpretation lies in the aforementioned excerpt from the *Kamal Khan v Mst. Zainab* judgment. In essence, the courts wanted to protect the orphaned grandchildren but believed that they should not receive a share beyond what they would have received otherwise, at the expense of other legal heirs of the predeceased child. The ‘loose interpretation’ was taken up by Supreme Court in *Mst. Zainab v Kamal Khan*²⁰ and is now held to be the correct approach to apply section 4. According to Lucy Carroll, the courts rewrote section 4 in the following terms:

¹⁵ (n 1) 409, 447.

¹⁶ PLD 1975 Peshawar 252.

¹⁷ Ibid.

¹⁸ (n 1) 422.

¹⁹ PLD 1983 Lahore 546.

²⁰ PLD 1990 SC 1051.

In the event of the death of any son or daughter of the propositus before the opening of succession, such predeceased child shall be allotted a notional share equivalent to what he or she, as the case may be, would have received if alive. This notional share shall then be distributed among the heirs of the predeceased child, as if that child had died immediately after his or her parent.²¹

However, before the Supreme Court endorsed the Lahore High Court's approach, the Sindh High Court, in *Muhammad Fikree v Fikree Development Corporation Ltd.* declared that the orphaned grandchildren would only inherit in cases where they were to be excluded from inheritance altogether otherwise.²² This reluctance to apply the Ordinance in cases where the grandchildren are already inheriting has been labeled a 'very loose construction'.²³ Lucy Carroll argues the Court appears to have rewritten section 4 as the following:

In the event of the death of any son or daughter of the propositus before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, if they would otherwise be totally excluded from any share in the estate of their grandparent, shall per stirpes receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.²⁴

Nevertheless, this particular interpretation has not been applied elsewhere and no High Court or Supreme Court case has ever been decided on similar grounds. For all intents and purposes, the 'loose construction' of the *Kamal Khan* case is the one in vogue, predominantly believed to be the correct interpretation of the statute.²⁵

Before proceeding, it is imperative to discuss the relevant Supreme Court precedent with regards to the dominant application of section 4. The Supreme Court upheld the decision of the Lahore High Court (as rendered by the latter in *Kamal Khan v Mst. Zainab*²⁶) by demonstrating how it was in line with the principles laid down in Islamic law of inheritance. The Supreme Court first quoted the relevant portion from the Lahore High Court's *Kamal Khan v Mst Zainab* judgment, where the Lahore High Court – making a distinction between the terms per stripes and per capita - held that:

Per stripes referred to in Section 4 is the antithesis of per capita. This means a share in the stock or the root of the family as against per capita which means share per head...The principle of succession in such cases will not be inheritance per capita but per stripes i.e. in accordance with the root or stock to which the grandchild belongs and will only get the share to which the grandchild is entitled through his parent. In the event of there being a single surviving grandchild, the principle of per stripes is pushed to the background but

²¹ (n 1) 424.

²² PLD 1988 Karachi 446.

²³ (n 1) 424.

²⁴ Ibid, 425.

²⁵ It has been employed in many cases since, with some examples of the 'loose construction' cases being *Muhammad Ibrahim R v Abdul Rehman* (2001 CLC 13), *Mian Mazhar Ali v Tahir Sarfraz* (PLD 2011 Lahore 23), and *Mst. Saira Yousaf v Sher Muhammad* (2012 CLC 1593).

²⁶ (n 19).

cannot be employed to support a principle which militates against the Islamic law of inheritance.²⁷

Therefore, the Supreme Court reasoned that the legislature did not intend to increase the Islamic shares already specified for the grandchildren. It conclusively held that “the contention that the appellant would inherit the entire share of her father being the sole surviving grandchild, is against the principles of Muslim law of inheritance” because of the aforementioned legislative intent, which, according to the Court, could not be contemplated to override the Islamic law of inheritance.²⁸ Section 4 was deemed to operate only to safeguard the interests of the predeceased children’s children but could not deprive other heirs of the predeceased of their due shares.²⁹

The case of *Ghulam Haider v Mst. Nizam Khatoon*,³⁰ further explains the application of section 4 *vis-à-vis* the rights of the widow of a predeceased son to inherit after the death of the propositus. Based on the rule established in *Kamal Khan v Mst. Zainab* and *Mst. Zainab v Kamal Khan*,³¹ the Lahore High Court explicitly stated that the widow of a predeceased son would be excluded from the inheritance of the propositus (i.e., the predeceased son’s father). *Haji Muhammad Hanif v Muhammad Ibrahim*³² is an example of a dispute of a similar nature, where the same dictum was upheld. However, in *Mian Mazhar Ali v Tahir Sarfraz*,³³ an interesting contrast can be observed, as the Lahore High Court held that the widower of the predeceased daughter of the propositus will also have the share in the inheritance. The principle cited to justify this decision was the aforementioned ‘loose construction’, taken from the *Mst. Zainab v Kamal Khan*³⁴ precedent and remains a crucial distinction as to the variance in rights of the widow – when compared to the widower – of a predeceased child *vis-à-vis* their inheritance at the demise of the propositus (i.e., the parent of the predeceased child).

Errors by the Trial Courts

Despite the law laid down by Supreme Court *vis-à-vis* the ‘loose’ interpretation of section 4, the Trial Courts have often erred in applying the correct interpretation of the provision, which has often been corrected by the Appellate Courts later. Two trends are seen in such mistaken applications.

The first and the more common one relates to trial courts applying section 4 in its textual sense. For example, in *Ghulam Haider v Mst. Nizam Khatoon*, the lower court had not given the actual residuaries of the predeceased son a share in the inheritance, instead declaring the entire share of the predeceased son to belong to his children. The Lahore High Court, in its appellate jurisdiction, applied the correct interpretation, thus providing residuaries a share of the

²⁷ (n 19) 548.

²⁸ (n 20) 1057.

²⁹ Ibid.

³⁰ 2002 YLR 3245.

³¹ (n 19).

³² 2005 MLD 1.

³³ PLD 2011 Lahore 23.

³⁴ (n 19).

predeceased son's inheritance.³⁵ Similar facts were observed in *Muhammad Yousaf v Mst. Bilqees Begum*, where the Lahore High Court stepped in again to ensure that the entire inheritance does not devolve upon the orphaned grandchildren.³⁶ At other times, the Trial Courts' mistaken applications – literalist or otherwise - were corrected by the Appellate Courts, with the respective High Courts approving the Appellate Court's correct interpretation. *Mst. Aqsa Sabir v Dr. Sajjad Hussain*³⁷ and *Abdul Haleem v Habibullah Khan*³⁸ are examples of such scenarios.

The second mistaken application by trial courts, albeit rare, relates to the application of classic Sunni principles of inheritance law instead of a correct application of section 4. An example in this regard is *Zainul Hassan Mian v Khuwand Naka*,³⁹ where the Trial Court judge in Swat decided that, because the father of plaintiff/respondents had died before the death of their grandfather, no share from the propositus's inheritance would accrue upon the plaintiff/respondents (paragraph 4 of the judgment). This approach, though in line with classic principles of Sunni inheritance law, is clearly at odds with the dictum laid down by the Apex Court of this country and hence was addressed when the matter went to the District Court in appeal.

Application of Section 4 – Some Governing Principles

Beyond the various interpretations of section 4, some ancillary questions related to devolution of inheritance to orphaned grandchildren have also been addressed by the courts. These questions include the determination of exact quantities of shares of the grandchildren (to avoid confusion with standard shares per Sunni inheritance law), the determination of when succession opens, and the limitation of section 4 to only the orphaned grandchildren and not orphans in general through any other relation.

In *Abdul Ghafoor v Mst. Anwar*,⁴⁰ a unique question arose regarding the shares which were supposed to devolve upon the orphaned granddaughter. The petitioners claimed that, as collaterals of the predeceased, they deserved half of the inheritance (which was to devolve from the share of the predeceased) because the predeceased son's daughter would get her share per

³⁵ 2002 YLR 3245.

³⁶ 2006 YLR 889.

³⁷ 2015 MLD 652. The Civil Court Judge in Mansehra employed the 'literalist' interpretation of section 4 to conclude that the children of the propositus would receive the entirety of the share which would have devolved upon the predeceased son. The Appellate Court of Mansehra reversed the decision on appeal, employing the 'loose construction' which the Supreme Court has held to be the correct method of applying section 4. The High Court upheld this decision of the Appellate Court; emphasis was – once again – laid on how the intent of the legislature, in drafting section 4, could not have been to override the classical principles of Islamic law of inheritance (paragraph 12 of the judgment).

³⁸ 2017 CLC 1331. The Trial Court in Lakki Marwat declared section 4 to be repugnant to the injunctions of Islam, taking the Federal Shariat Court's decision in the *Allah Rakha* case to be binding precedent to this effect (discussed later in the paper). This erroneous statement of law was corrected by the Appellate Court of Lakki Marwat; furthermore, the correct shares, per the 'loose construction' approach endorsed by the Supreme Court, were awarded to the respondents/plaintiffs.

³⁹ 1998 MLD 1857.

⁴⁰ 1985 CLC 818.

Muhammedan Law i.e., 1/2 instead of inheriting everything her father would have. As per the ‘loose interpretation’ of the Lahore High Court, this would have been a correct statement to make on behalf of the petitioners. However, because this case arose before the Supreme Court had declared the ‘loose interpretation’ to be correct, the Court, citing *Mst. Zarina Jan v Mst. Akbar Jan*,⁴¹ stuck to a textual approach. Hence, the daughter was deemed to be the owner of the entire share that her predeceased father would have inherited had the latter been alive at the time succession opened. In his judgment, Justice Inayat Elahi Khan held that:

If the intention of the law was to exclude a female child of the predeceased father from inheriting his entire share, nothing was easier for the law-maker than to have said so ... the language used in the section is clear enough to enable the plaintiff to inherit the entire share which would have devolved upon the father had he been alive at the time of succession... In view of the clear and unequivocal language used in the section, the plain and ordinary sense of the words is to be adhered to, irrespective of the consequences that may follow.⁴²

This straightforward interpretation makes for an interesting reading when compared with rival interpretations, with the latter seemingly purporting an understanding of section 4 which may not seem intuitively obvious.

The opening of succession is another thorny issue which the courts have had to grapple with, and the same are perhaps not helped by the fact that ‘retrospective application’ is often cited as a defence to the application of section 4. The classic position in Sunni inheritance law, and backed up in numerous cases, is that succession only opens at the death of the propositus. Unlike Hindu law, the right to inheritance does not accrue upon one’s birth under Islamic law. However, the many haggles regarding properties in Pakistan mean that what one owns is not always in one’s possession at the time of one’s death. Such situations create an enormous confusion: when does succession open under Islamic law of inheritance for a property in which propositus has no ownership at the time of death (but such ownership is proven later)? This question needed to be answered in *Muhammad Nadir Khan v Government of Sindh*, where the propositus had died in 1960, before the promulgation of the MFLO, but had ownership rights in properties which did not accrue till 1996.⁴³ The orphaned grandchildren of the propositus would, usually, be denied inheritance if he died before the promulgation of the MFLO. However, using the definition of *milk* (‘ownership’) under classical Sunni texts such as ‘*Ainul Hidaya*’, the Court declared that succession will not open till a property in which the propositus had rights in was not ready to be disposed of; thus, succession would only open in case of all the requirements of ownership/proprietary rights being fulfilled.⁴⁴ Hence, the death of the propositus could not be the only factor considered when deciding succession; in certain scenarios – as contemplated and explained by the aforementioned judgment – succession may be deferred till a right in a certain property right accrues.

⁴¹ PLD 1975 Peshawar 252.

⁴² (n 40).

⁴³ PLD 2007 Karachi 197.

⁴⁴ *Ibid*, 212-213.

The third governing principle which courts had to deal with recently relates to an analogous interpretation of section 4. In the very unique case of *Syed Shabi-ul-Hassan Khusro v Asad Mustafa*, the appellant was a son of the predeceased sister of the propositus, who demanded a share in the inheritance.⁴⁵ The court was quick to establish that section 4 only deals with the children of the predeceased children and not with those of predeceased collaterals.⁴⁶ However, it is important to bear in mind the very reason behind promulgating section 4 before dismissing a claim such as that of the appellant's in *Shabi-ul-Hassan Khusro*: section 4 was supposed to protect orphaned grandchildren from the harsh realities of a cruel world where they may not have the financial means to sustain themselves. If moral concern for orphaned children can allow for classical Islamic law to be replaced, why can such legislation not be analogously extended to provide for orphaned children of predeceased collaterals? One argument could be that they should not be given an analogous right in inheritance because such children of the pre-deceased collaterals are not as vulnerable as the orphaned grandchildren as they might inherit from other relatives such as their grandparents.

Deviations – The Widow's Dilemma

Having witnessed the jurisprudential contributions made by the learned judges with respect to certain principles governing the application of section 4, it is now time to look at a couple of notable deviations from set precedents. The two cases, *Haji Muhammad Hanif v Muhammad Ibrahim*⁴⁷ and *Qutab-ud-Din v Mst. Zubaida Khatoon*⁴⁸ discussed in this part relate to the share of a widow, due from the share of her predeceased husband who – via the Supreme Court's established interpretation – is to be presumed alive after the death of the propositus before dying again. In both cases, however, a textual approach to interpretation was used, with a categorical mention of how the widow of the predeceased son would not be entitled to inherit. In *Haji Muhammad Hanif*, the Judge held that:

... the object and rationale behind this provision (section 4) is to ameliorate the distress of those unfortunate children whose father and mother are snatched away by death in the lifetime of their grandfather ... the express and unambiguous phraseology and language of the provisions of law leave no doubt that the "children of such son" are only entitled to inherit and receive share which expression does not possibly within its ambit include the widow of "such son".⁴⁹

It is a grave misfortune that the textual interpretation of section 4 is not applied when male collaterals are the claimants, but it is only applied when the matter concerns the widows of the predeceased sons; such widows are themselves often in need of the same sort of protection from financial burdens which the legislature initially envisaged for helpless orphans.

⁴⁵ 2016 MLD 266.

⁴⁶ Ibid, 268-270.

⁴⁷ (n 32).

⁴⁸ 2009 CLC 1273.

⁴⁹ (n 32).

Common Defences

Before closing the discussion on section 4, it is pertinent to analyse two of the most common defences employed in cases where the application of section 4 appears to be a foregone conclusion. Firstly, as mentioned earlier, defendants often claim that the MFLO is being applied retrospectively. These claims have been raised in *Manzur Alimad v Abdul Khaliq*,⁵⁰ *Muhammad Ali v Muhammad Ramazan*,⁵¹ *Muhammad Sharif v Nawab Ali*,⁵² and a plethora of other cases. The settled point of law in this regard, as held in *Muhammad Rauf v Siddique Ali*⁵³ as well in as many cases before it, is that the ‘retrospective’ argument will only apply if the propositus died before the MFLO was promulgated. The death of the predeceased son – often cited by defendants erroneously as amounting to retrospective application – holds no merit in any consideration of enforcement of section 4. That is not to say that the ‘retrospective’ argument has never been accepted by the courts; *Muhammad Yaqub v Muhammad Ibrahim*,⁵⁴ *Mst. Sarwar Jan v Mukhtar Ahmad*,⁵⁵ and *Muhammad Murad v Allah Baksh*⁵⁶ are examples of its successful application because in these cases the propositus (grandfather) died before the promulgation of the MFLO in 1961.

The second defence most often utilised in section 4 cases is that it is “repugnant to the injunctions of Islam”, in light of the judgment in *Allah Rakha v Federation of Pakistan*.⁵⁷ In the *Allah Rakha* case, the Federal Shariat Court sought to determine whether “the grandsons/daughters of a propositus whose parents have died during the lifetime of the propositus are included in the list of those entitled to inheritance under the Qur’anic injunctions”.⁵⁸ The Court declared that the matter is unambiguously covered in the Qur’an and struck down section 4, deeming it “nugatory to the scheme of succession envisaged by the Qur’an.”⁵⁹ Having concluded that section 4 was contrary to the injunctions of Islam, the Federal Shariat Court declared that it would cease to be a law with effect from the last day of March 2000, leaving it to the parliament to devise new legislation providing relief to orphaned grandchildren.⁶⁰ However, an appeal against this decision has been pending before the Shariat Appellate Bench of the Supreme Court of Pakistan ever since; which means that the Federal Shariat Court decision will not take effect until this appeal before the Shariat Appellate Bench is disposed of.⁶¹

The lawyers, however, have still tried to rely upon the judgment in the *Allah Rakha* case to deprive orphaned grandchildren of their right in the inheritance of their grandparents. The superior courts have dismissed this contention by arguing that the Shariat Appellate Bench has

⁵⁰ 1989 SCMR 1329.

⁵¹ 2002 SCMR 426.

⁵² 2002 CLC 285.

⁵³ 2007 MLD 1798.

⁵⁴ 2002 CLC 819.

⁵⁵ 2012 PLD SC 217.

⁵⁶ 2006 MLD 286.

⁵⁷ PLD 2000 FSC 1.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ (n 14).

⁶¹ Ibid.

yet to decide the appeal in the *Allah Rakha* case. A number of notable judgments exist on this point, and in some cases (e.g., *Nizam Din v Faiz Muhammad*⁶² and *Rehman Ghani v Shahzad Khan*⁶³) the judges expressed their displeasure when such argument was presented before them. Nevertheless, in *Rashida Bibi v Maqbool Bagum*,⁶⁴ the district judge adjudicated the dispute upon the assumption that section 4 was repugnant to the injunctions of Islam. The High Court, however, applied section 4 and set aside the judgment of the district judge.

Conclusion

Section 4, though apparently simple, has been subjected to multiple, often conflicting, interpretations, and applications. At the heart of the matter lies the very crucial juxtaposition of faith and property, both of which are dear to Muslims in Pakistan. The purpose of this paper is to highlight the trends in judicial interpretation that have emerged through the litigation over this section. Two obvious conclusions result from the above discussion. Firstly, the debate over repugnancy of this section 4 to the injunctions of Islam is unlikely to dissipate until the Shariat Appellate Bench of the Supreme Court decides the appeal in the *Allah Rakha* case. As frustration mounts in the face of courts' insistence to not give credence to the 'repugnancy' argument, we shall see more litigants attempting to tamper with evidence and try to prove that deserving orphaned grandchildren are not righteous beneficiaries. Already, precedents to this effect exist where a court, not satisfied by the record presented, refused to grant supposed grandchildren shares in inheritance. *Sarbuland v Ashiq Ali*⁶⁵ and *Muhammad Ali Sabtain v Mst. Shahjahan Bibi*⁶⁶ are examples of such precedents where the question of inheritance boiled down to which side could prove their claim better via reliable documentary evidence. Secondly, the sensitive nature of the topic has exposed both the best and the worst of our judiciary: the best involves settling questions regarding the governing principles and applying correct legal ideas to new problems that emerge. The worst, however, is evidenced by constant fluctuations and the deviation from established principles, more than ever so in cases where the vulnerable, for

⁶² PLD 1998 Lahore 321.

⁶³ 2010 CLC 610.

⁶⁴ 2006 MLD 1138.

⁶⁵ 2000 CLC 795. In this case, there was a dispute over the timing of the death of the propositus. The petitioners claimed that he had perished nine years before the promulgation of the MFLO while the respondents argued that he had died after the promulgation of the same. Both parties could only furnish oral evidence and it was only the attested mutation which could confirm that the propositus had indeed been alive after the promulgation of the MFLO, thus allowing the respondents, in their status as children of the predeceased daughter of the propositus, to inherit from their grandfather's estate.

⁶⁶ 2004 YLR 1201. In this case, mutations and sale deeds which conferred inheritance on the children of predeceased son of the propositus (i.e., the respondents) were challenged by the petitioners. The dispute centered on whether the respondents' predeceased father was indeed a son of the propositus or not, and evidence such as birth entry of the predeceased son compared with the marriage of his parents etc. was presented by the petitioners' counsel in an attempt to prove the petitioners' case. The respondents relied on a pedigree table on the back of the impugned mutation, as drawn by the Revenue Officer, along with relevant birth entry data, to prove that the predeceased son was indeed the offspring of the propositus. The respondents eventually prevailed. The complications arising from the documentation proves the value of providing reliable evidence in a bid to attain one's rightful inheritance.

example, the widows in aforementioned examples, lose out.⁶⁷ Nevertheless, the fact that more often than not, enforcement leads to the well-being of orphaned grandchildren, who would be left worse off in the absence of the principle enshrined in section 4, is something which can most definitely be qualified as a benefit to society.

⁶⁷ This attitude of the courts while interpreting section 4 is in stark contrast with the overall pro-women stance that the judges have taken while interpreting and applying Islamic family law in Pakistan. For details, see MZ Abbasi and SA Cheema, *Family Laws in Pakistan* (Oxford University Press 2018) 516-21.