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A Note from the Editors

We are pleased to present the fourth volume of the LUMS Law Journal. This Journal aims to provide a platform for legal scholarship in Pakistan by encouraging reflection and research on the most relevant legal issues of the day. Collaboration between scholars, practicing lawyers and students has led to the fruition of Volume 4, which contains seven articles, five case notes, two legislative reviews and one book review.

Dr. Muhammad Munir sheds light on the contentious relationship between ulama and the state law in Pakistan. Dr. Munir analyses the role of the ulama in the Pakistani judicial system by examining the case law related to khul‘ to demonstrate the extent to which ulama can challenge the authority of the state. In his article, Dr. Muhammad Mushtaq Ahmad analyses the methodology of the Council of Islamic Ideology and highlights its failure to develop a comprehensive and internally coherent legal theory. Dr. Shahbaz Ahmad Cheema scrutinizes the context in which Mulla’s Principles of Mahomedan Law was written. His article also examines the way courts in Pakistan have made use of Anglo-Mohammeden laws contained in this book.

Lack of comprehensive laws governing child custody in Pakistan often compromise a child’s wellbeing, as Dr. Mudasra Sabreen shows through her evaluation of the Guardians and Wards Act 1890. She reviews the proposed reforms to this issue, against the backdrop of previous legislation and inconsistent case law pertaining to child custody. In his article, Muhammad Wajid Munir introduces the concept of environmental justice. Pakistani judiciary has a crucial role to play in the implementation of the Public Trust Doctrine, which is critically studied through case law and legislative tests.

Sana Naeem and Asad Ullah Khan identify the need for progressive, gendered improvements to Islamic family law by probing into the contractual nature of a marriage in Islam, and what the monetization of marital obligations means for women in particular. Restricting its analysis to cases of khul‘, their article discusses the implications of the ‘economics of marriage’. In light of ethnic, sociological and theological tensions in Pakistan, Dr. Kashif Mahmood considers whether Pakistani courts have adopted an approach centered on human rights. The article inspects the attitude of the judiciary during periods of disturbance, and the way it has altered discourse on civil and personal liberties.

In the first case note, Kamran Adil outlines the effects the Mustafa Impex case had on Pakistani judicial landscape. The author discusses impact of the judgment on federal and provincial governments from a legal, political, and
sociological point of view. Nimra Arshad’s case note on *Khalida Shamim Akhtar v Ghulam Jaffar* focuses on the right of inheritance of a widow of a Shia husband under Islamic inheritance law. This case note highlights the role of judiciary in protecting and promoting women’s right to property under Islamic inheritance law. Naima Qamar and Siraat Younas conduct a parallel analysis of *KESC v NIRC* and *Pakistan Workers Federation v Government of Pakistan* to explain how the validity of the Industrial Relations Act 2012 was challenged after the 18th Amendment. Ayesha Ahmed’s case note on *Farooq Siddiqui v Mst. Farzana Naheed* delves into the issue of assisted reproduction in Pakistan. This case note presents a comparative analysis of the stances taken by different Muslim countries and Islamic schools of thought. The last case note, written by Abdul Rafay Siddiqui on *Maulana Abdul Haque v Government of Balochistan*, assesses the domestic resolution of foreign investment disputes in Pakistan. This case note stresses on the need for Pakistani judiciary to have a grasp over international law in order to avoid international arbitrations.

Salman Ijaz peruses the features of Pakistan’s Draft Corporate Rehabilitation Act 2004 in the legislative review. This reform to corporate legislation attempts to incorporate part of the US Bankruptcy Code in Pakistan. The author analyzes the extent to which this has been possible. Sara Raza traces the difficulties the Hindu community had to face regarding marriage laws in her legislative review of the Hindu Marriage Act 2017. The plight of this minority community is extensively discussed in the context of Pakistan’s history and previous laws on Hindu marriage. Mustafa Khan reviews the book, *Rights of the Child in Islam*, authored by Dr. Muhammad Munir. This review is appreciative of the delicate and controversial issues that Dr. Munir discusses, and probes into the depth of analysis conducted.

We would like to extend our gratitude to the Chief Editor, Dr. Muhammad Zubair Abbasi, and the Co-Editor, Marva Khan for their guidance and supervision. We are also grateful to our Faulty members, Dr Muhammad Azeem, Dr. Faiza Ismail, and Ms. Rida Jamal; LUMS alumnus, Maham Naweed, Salman Ijaz, and Muhammad Mustafa Mirza for constantly providing constructive feedback and overseeing the work of student editors. We would like to acknowledge the support and encouragement of our Dean, Prof. Dr. Martin Lau, and the Vice Chancellor, Prof. Dr. Syed Sohail Hussain Naqvi.

The publication of Volume 4 of the LLJ was made possible due to the efforts of the members of the LLJ Editorial Committee. We especially thank our
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sub-editors, Abdul Wahab Niaz, Eesha Arshad Khan, and Sara Raza, for their hard work in reviewing and editing the submissions.

Our aim, as always, remains to encourage scholarship and discourse on Pakistani law, and we always welcome aid in pursuing this endeavor. If you wish to provide us feedback, or make recommendations or suggestions, please write to us at submissions.llj@lums.edu.pk. The Student Editors
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This article focuses on the issue of whether the authority of the State of Pakistan can be challenged by ‘ulama, who though uneasy with some legal developments, have pledged their loyalty to the State of Pakistan through their covenant, provided their desired criterion was agreed. It showcases the debate about the tussle between ‘ulama and the state from the case law study of khul’ in which the judiciary has put its weight towards state law depriving ‘ulama from their desired space. The article attempts to prove that the authority of the State of Pakistan is legitimate under Islamic law; that all appointments including judicial appointments in Pakistan are legitimate; that decisions given by judges are binding and implementable; that decisions of the superior Courts, i.e., High Courts, Federal Shariat Court, and the Supreme Court, which are based on ijtihad exercised by these Courts rather than the opinions of fuqaha, are binding; that the muftis and ‘ulama in Pakistan cannot issue fatwas against such decisions; and that such rulings might amount to challenging the state’s authority.

Introduction

According to a newspaper report, on 28 June 2011, a woman, Maryam Khatoon, in village Thoha in tehsil Talagang near Rawalpindi, Pakistan was married to Shaukat Ali in 2008. Two years later the differences emerged and the wife demanded khul’ which the Family Court granted. She intended to marry another man. The village’s cleric, however, refused to solemnize the nikah and the woman had to solemnize her nikah at a local court in Talagang city. On 24 June 2011, three clerics from the village issued a fatwa (religious ruling) from the loudspeakers of a mosque declaring the new couple to have committed adultery and thereby liable to death (wajibul qatal). The local police registered a case against the three clerics. However, even if the...
‘ulama had not attempted to take law into their hands, they would have certainly opposed the granting of *khul*’ by the court as the ‘ulama throughout Pakistan are against the dissolution of marriage through *khul*’ without the consent of the husband by the courts.

This paper focuses on a number of core issues emerging out of this issue. These issues include: first, though ‘ulama have legitimate right as per constitution that they can raise their voice against legal initiatives, their own covenants do not allow them to go out of the system to challenge it; second, the practice adopted by renowned scholars in past from their own school of thought confirms that they should follow the system established by the Muslim state irrespective of their resentment on certain issues; third, under Islamic law ‘ulama and muftis are not supposed to issue *fatwa* that are against the decisions of the courts such as in the case of *khul*’; and finally, any such *fatwa* would amount to challenging the authority of the state and would be against the covenant agreed upon by all the ‘ulama.

The paper also discusses the status of the decisions of the courts in Pakistan when these are not based on the opinions of jurists of a particular school of thought, rather in which judges have exercised *ijtihad*. In addition, what is the status of judgments when rulers and judges are not spiritual and pious persons? To answer these questions, the role of ‘ulama in the struggle for Pakistan and after the creation of the State of Pakistan must be highlighted. Moreover, the Islamicity of our legal system needs some attention for which evidence has to be provided to prove our case. To answer the questions posed above, we take the perspective of Islamic law, according to the opinions of Hanafi jurists (*fuqaha*) whose opinions are adhered to in Pakistan and quoted by the *muftis* to support their views regarding other issues.

**The Role of ‘Ulama in the Independence Movement**

The independence movement for Pakistan had divided the Deobandi ‘ulama into two groups: the Thanawi group, which supported the struggle and participated in it, and the Madani group which opposed the partition of India and the creation of a separate homeland for Muslims.² Once Pakistan was

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² The ‘ulama were split into two main parties: The Jamiat Ulama-i-Hind supported the Indian National Congress Party whereas The Jamiat–ul-Ulama-i-Islam supported the Pakistan Movement. Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Oxford University Press 2004) 32-37; KM Chaudhary and N. Irshad,
created, the Thanawi group as well as the followers of the Madani group in the newly born Pakistan declared their loyalty to Pakistan. The new State of Pakistan had to adopt pre-independence laws. The Indian Independence Act 1947 was enacted by the British Parliament, which provided for the partition of India and the establishment of two independent dominions to be known as India and Pakistan, with effect from 15 August 1947. Section 18(3) of the Act provided:

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Save as otherwise provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall as for as applicable and with the necessary adaptations, continue law of each of the new Dominions and the several parts thereof until other provision is made by laws of the legislature of the Dominion in question or by any other legislature or other authority having power in that behalf.
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Adaptations were made to the existing pre-colonial laws under the Pakistan (Adaptation of Existing Laws) Order 1947 and the Adaptation of Central Acts and Ordinances Order 1949.

All Pakistani Constitutions from 1956 till the present Constitution of 1973 included articles providing for the continuance of existing laws. Article 224(a) of the 1956 Constitution, Article 225(1) of 1962 Constitution, and Article 280(1) of the 1972 Interim Constitution all provide for continuation of pre-existing laws.³ Article 268(1) of the present 1973 Constitution provides:

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Except as provided by this Article, all existing laws shall subject to the Constitution, continue in force so far as
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applicable and with the necessary adaptations until altered, repealed or amended by the appropriate Legislature.\(^4\)

Continuation of existing laws also applies to the periods of Martial Law, each of which was governed by a Laws (Continuance in Force) Order or something similar. Such laws were promulgated in 1958, 1969, 1977, and 1999 and provided for the continuation of laws during the Martial Law period.\(^5\)

**‘Ulama Endorsing the Authority of the New State and its Judiciary**

**‘Ulama and the New State**

‘\(ulama\) in the new State did not have a big role to play. During the colonial period, the role of even the top ‘\(ulama\) was that of a \(mufti\) who issued \(fatawa\). However, before the East India Company penetrated into and subsequently replaced the Islamic character of the Mughal legal system in the areas under the Company’s control, ‘\(ulama\) used to be appointed as \(qadis\) (judges) in the vast state and used to decide both criminal and civil cases.\(^6\) But in 1772, their role was changed and they could only advise the Company’s judges in cases involving Islamic law. This role was later abolished and ‘\(ulama\) were confined to seminaries and mosques where they could give rulings (\(fatawa\)) when sought by people. The natural result of this treatment at the hands of the colonials was the creation of hostile attitude of ‘\(ulama\) towards the colonialists which continued till the creation of Pakistan. One issue that was prominent in the writings and \(fatawa\) of the ‘\(ulama\) during the late colonial period was the absence of Muslim \(qadis\) (judges) in the sub-continent. The ‘\(ulama\) and the \(muftis\) of that time emphasized too much on the link between the dissolution of marriage and the presence of Muslim judges so much so that they used to advise people to go to princely Muslim states within India for such petty issues.

Let us examine two \(fatawa\), issued by the illustrious Darul uloom Deoband regarding \(faskh\) (dissolution of marriage by the court):

\(^4\) **Constitution of the Islamic Republic of Pakistan** (Ministry of Law, Justice and Human Rights, 2004). It should be noted that the title of the chapter regarding adaptations of previous laws is ‘transitional’.


\(^6\) Under the 1772 plan, English judges, called Collectors, were advised in the case of Muslims, by a \(Qazi\) and in the case of Hindus, by a Pundit. For details, see ibid.
1. Question: Hinda was given by her uncle in marriage to Zayd while she was a minor. Upon reaching the age of majority, she expressed her displeasure with the marriage and, in the presence of a few men, expressed her refusal to accept it. Has her marriage contract become annulled because of this refusal, or not?

Answer: According to the Durr al-mukhtar [of al-Haskafi] and al-Shami [Ibn ‘Abidin’s Hashiyat Rad al-mukhtar], Hinda does have the right to have her marriage annulled immediately after attaining the age of majority. However, without the judgment of a qadi (qadi shar‘i), her marriage contract will not be annulled. The Durr al-mukhtar requires ‘the qadi’s verdict for annulment’; and, as al-Shami has it, ‘if she chooses annulment, [then] that cannot take place without a judicial decision’. Consequently, since at this time there is no Islamic qadi, the marriage contract in question will not be annulled; for Hinda cannot annul her marriage contract on her own, and she cannot marry anyone else unless her husband has divorced her.  

2. Question: A woman used to have her regular menstrual cycles, but for a year these cycles have ceased. Her husband has divorced her. How long should her waiting period (‘idda) last? Will it be reckoned by months or by menstrual cycles? If the latter, then must she wait till the time she has despaired of further menstruation? The woman is extremely poor and lacks any means of financial support. Explain and be rewarded!

Answer: One learns from the chapter on ‘idda in the Durr al-mukhtar and Radd al-mukhtar that, according to the Hanafis [scholars], it would be necessary to wait until the time that the woman has despaired of further menstruating by reason of age (sinn-i iyas). According to the Maliki [jurists], however, the waiting period is nine months; or, according to a more authoritative opinion [within the Maliki school], it is one year after divorce. Acting on this opinion is permitted in case of necessity. [However, I] say that the following matters ought to be considered before [this view can be adopted].

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7 Muhammad Amin ibn ‘Abidin’s, Rad al-muhtar ‘ala al-durr al-mukhtar sharh Tanvir al-absar (Muhammad Subhi Hallaq and Aamir Husain (eds), Dar al-Fikr, 1421 AH) 3:68. ‘Al-Shami’ (the Syrian) is a common way by which ‘ulama in the subcontinent referred to Ibn ‘Abidin and his famous work Rad al-muhtar.

First, she should receive medical treatment; only if such treatment does not restore her menstrual cycles should the [Maliki] opinion be followed; the ‘necessity’ [for adopting that opinion] is based on this [unsuccessful treatment]. Second, in order to act on this [Maliki] opinion, the decision of a [Muslim] qadi is required. A Muslim judge, even if appointed by an infidel king, is acceptable as a shari‘i qadi. Consequently, a petition should be given to the government to empower a Muslim judge to decide on this matter; that Muslim qadi may then allow the woman to remarry after having passed her waiting period, as laid down in this fatwa. This is the way to act [on this matter]. Thirdly, in case, the waiting period had begun according to this [Maliki] opinion, and her menstrual cycle happens to start before the end of this year, then the waiting period would be observed from the time of the [commencement of the] menstrual period. And Allah knows best. 9 Dhu‘l-qa‘d, 1325 A. H. [14 December 1907].

The point to note is that the muftis who issued these fatawa (plural of fatwa) considered the practice of Islamic law dysfunctional in British India and small issues such as the determination of the ‘waiting period’ or the dissolution of marriage through the option of puberty could not be resolved without a Muslim qadi. Another important point is that according to the second fatwa, if the judge were a Muslim, then, even if the appointing authority was itself non-Muslim, the former’s decision should be valid. Writing in 1933 the main proponent of the Dissolution of Muslim Marriages Act 1939 (DMMA), Mawlana Ashraf ‘Ali Thanawi stated that it is mandatory for the judge who has to decide the issue of dissolution of marriage between a Muslim husband and his wife that he himself should be a Muslim. He mentions that the decision of a Muslim judge in such matters would be binding even if the ruler is a non-Muslim. ‘[However], where there is no Muslim judge or it is not allowed to take the case to the court of a Muslim judge or when the Muslim judge is not allowed to rule according to Islamic law, husband’s divorce of the wife seems the only option for the dissolution of marriage as per the Hanafi fiqh’. A legal circumvention given by him in situations of dire necessity is that ‘when there is no

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10 Zaman (n 2) 27.
11 (n 9) 2: 487f, 492.
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(Muslim) judge then the Maliki school of thought allows that the people of the street should constitute a village council (panchayat) of at least three practicing learned Muslim members who should investigate the matter and decide it as per Islamic law and this decision would be considered as the decision of a (Muslim) judge'. Since these men have to decide the matter according to Islamic law as interpreted by the Maliki school of thought, they have to have great knowledge of Islamic law. In other words, they have to be clergies, ‘ulama or muftis, as only they would have good knowledge of Islamic law. Zaman argues that muftis sometimes suggested that the person seeking to dissolve an undesirable marriage might have to go to principalities outside British India such as the Muslim ruled principality of Bhopal, which still had qadis; but in the meanwhile they insisted that ‘the stipulations of the legal texts were to be unrelentingly followed in the most literal sense’.

The leaders of the new State of Pakistan had a secular education and no religious knowledge; yet they were backed by an important group of religious scholars – the Thanawi group, which exercised influence over Muhammad Ali Jinnah – the founder of the new Muslim State. The combined efforts of ‘ulama resulted in the passing of the ‘Objectives Resolution’ by the first Constituent Assembly in 1948, which has been made, with slight changes, the preamble to the 1956, 1962, and 1973 Constitutions. The most important part of the Objectives Resolution, for the purpose of this discussion, is:

Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him, is a sacred trust.

This paragraph leaves no doubt that the authority exercised by the people of Pakistan was delegated to the State of Pakistan by God Almighty, which was to be exercised within the limits prescribed by the Almighty

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14 Ibid, 63.
15 Zaman (n 2) 27.
16 Ibid.
17 A full account of the life and promises of Jinnah is beyond the scope of this work.
18 The Preamble was made an integral part of the 1973 Constitution by the Revival of Constitution Order 1985 (P. O. No. 14 of 1985).
Himself. Subsequently, all legislation and its interpretation by the courts, administrative orders, regulations, adjudications, has to conform to *shar’ia*.

Paragraph four of the Objectives Resolution has further strengthened the obligations of the State. It states: ‘wherein the Principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed’. Paragraph five also explains some of the goals to be achieved by the State; it states: ‘wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy Qur’an and the Sunnah.

However, these are lofty goals as this was the language of the Resolution to serve as guidance for the framers of the Constitution for the new Muslim State. Moreover, the language of paragraph five is not mandatory. The fact that the Resolution was made only a preamble and not an integral part of the three Constitutions indicates that the Constitutions themselves were not dictated by it and many of the provisions in all the three Constitutions were not fully based on Islamic law. In addition, the fact that the present Constitution was adopted in 1973 and the Preamble was made its integral part only in 1985, implies that the framers’ discussions were not based on the Resolution. It is very important to note that the Resolution was the brain child of the then top ‘ulama, who were also members of the first Constituent Assembly, and the 1973 Constitution was fully backed by the mainstream ‘ulama. Under the 1973 Constitution, Islam is the state religion.\(^{20}\) The President, who is the head of state, and the Prime Minister – the head of government – have to take an oath of being good Muslims.\(^{21}\)

In 1951, a convention was held in Karachi from 21 to 24 January which brought together ‘ulama of all schools of thought – both Sunni and Shi’a. They agreed on a declaration called, the ‘Basic Principles of the Islamic State’. The Convention was attended by thirty-one ‘ulama and all their decisions were unanimous.\(^{22}\) According to the declaration, the real ruler and lawgiver is Allah, ‘the law of the land is to be based on the Qur’an and the Sunnah, and no law shall be enacted nor any administrative order issued,

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\(^{21}\) Ibid sch. 3.

\(^{22}\) For the full text of the document, see Khurshid Ahmad (trs), *Islamic Law and Constitution* (Islamic Publications Ltd 1997) 332-336. The text is also reproduced in Muhammad Taqi ‘Uthmani, *Nifaz-i shari’at awr us-ke masa’il* (Maktaba-i Dar al-‘Ulm 1413 A.H.) 19-23.
in contravention of the Qur’an and the Sunnah’. The State shall provide for the basic needs of the people, including food, clothing, housing, medical care, and education, and ensure to its citizens security of life, property and honour, freedom of religion and belief, freedom of worship, freedom of person, freedom of expression, freedom of movement, freedom of association as given to them by Islamic law. The ‘recognized’ Islamic sects are to enjoy religious freedom within the limits of the law, and matters pertaining to laws of personal status are to be decided according to their respective schools of law. What is important to note is that ‘ulama themselves are aware of the fact that as far as the opinions of fuqaha (jurists) are concerned, they should be confined to matters of personal status only.

The above provisions are almost all accommodated in the 1973 Constitution. The Constitution makes the Qur’an and the Sunnah as the two primary sources of Islamic law in terms of cases that come under the jurisdiction of the Federal Shariat Court by way of Article 203D as well as through the preamble.

One of the oft-quoted provisions of the Constitution is Article 227(1) which states that ‘[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur’an and [the] Sunnah, in this part [i.e., Part IX of the Constitution] referred to as the Injunctions of Islam, and [that] no law shall be enacted which is repugnant to such Injunctions’. This is, however, a lofty proclamation because the operation of this Article is limited to the provisions of Article 227(2) which states that ‘[e]ffect shall be given to the provisions of clause (1) [Article 227(1)] only in the manner provided in this Part’, i.e., only through the limited roles and responsibilities of the Council of Islamic Ideology. Interestingly, an explanation to Article 227, sub-article 1 says that ‘[I]n the application of this clause to the personal law of any Muslim sect, the expression ‘Qur’an and Sunnah’ shall mean the Qur’an and [the] Sunnah as interpreted by that sect’. This is in essence the same stipulation as recommended by the ‘ulama themselves in their recommendations in 1951. Perhaps this is the

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23 22-Point Declaration, art. 2. An explanatory note was attached to this article which states that already enforced laws which are against the Qur’an and the Sunnah ‘shall be gradually, within a specified period, repealed or amended in conformity with Islamic law’.
24 Ibid, art. 7.
25 Ibid, art. 9.
26 Also see paragraphs one, four, and five of the preamble to the 1973 Constitution, which is an integral part of the Constitution from 1985.
27 However, it is important to note that recommendations of the Council of Islamic Ideology are not mandatory and the Council only has an advisory role under Article 230 of the Constitution.
reason why \textit{‘ulama} agreed on the Constitution of 1973 when it was passed by the Parliament. The text of the convention of the \textit{‘ulama} is better known as \textit{‘the 22 points of the \textit{‘ulama}’} as the points on which they agreed were 22, but the document is considered as the pledge of loyalty by the \textit{‘ulama} of different backgrounds to the then newly created State of Pakistan.

The \textit{‘ulama} have always participated in political process in Pakistan. Prominent \textit{‘ulama} have continuously been elected to the Senate and National/Provincial Assemblies. Moreover, they have fully participated in the working of the Council of Islamic Ideology – a constitutional body which advises the Federal and Provincial Governments regarding the repugnancy of proposed legislations.\textsuperscript{28} In addition, the efforts of the \textit{‘ulama} led to the creation of the Federal Shariat Court, which is mandated to declare whether laws – except Muslim personal law, constitutional law and procedural law – are in conformity with the Injunctions of Islam, was the most significant step towards the Islamization of the remaining laws in Pakistan.\textsuperscript{29}

The crux of the above discussion is that Pakistan is a Muslim country with Islam as its religion and the authority of the state’s functionaries is based on the Constitution, which is not against Islamic law. The head of state, head of government, ministers, judges, and even the majority of Muslims in this state may not be very good practicing Muslims (ahl al-\textit{‘adalat}). But the question is whether the authority of the state of Pakistan ruled by bad Muslims or where the government is controlled by bad Muslims, is binding on Muslims? And whether the authority of a Muslim government, which has come to power even illegally, is binding on Muslims? Are the judgments of the courts in such a state binding on Muslims? And is the judgment of a judge based on his \textit{ijtihad} binding on Muslims? These are some of the important questions that we shall try to answer in the following section.

\textbf{Status of Decisions of the Courts in Pakistan}

To answer the questions posited above, reliance is placed on the opinions of classical jurists of the Hanafi school as they are considered most important to the Hanafi \textit{‘ulama} in Pakistan. According to Muhammad Amin ibn ‘Abidin (d. 1252/1836) – the 19\textsuperscript{th} century Hanafi scholar, whose opinions are

\begin{itemize}
  \item[28] The Constitution of Islamic Republic of Pakistan 1973, art. 228.
  \item[29] The Federal Shariat Court was established in 1980 by the Constitutional Amendment Order, 1980 (P. O. No. 1 of 1980) \textit{w.e.f.} 26\textsuperscript{th} May, 1980. An entire chapter 3A which comprises Articles 203A to 203J was added to the Constitution. It replaced the Shariat Benches in the High Courts that existed prior to it since 1979.
\end{itemize}
frequently quoted and are most popular among the Hanafi ‘ulama of the subcontinent, ‘[i]f a usurper took over power [of the Muslim State] by force without the consent of ahl al-hill-i-wa al-‘qad (men of deep knowledge and opinion), and if he fulfills the other conditions, then it is obligatory for the Muslims to obey him’.\(^\text{30}\) He further argues that ‘piety is not a condition [to be the Head of a Muslim State], therefore, it (such a government by a non-pious Muslim) is allowed; although it is not preferred that a fasiq (sinful) [Imam] could be followed [by Muslims]. And if a pious person was chosen but later on he became sinful, he shall not be removed’;\(^\text{31}\) ‘[A]nd Muslims shall not rebel against his rule’.\(^\text{32}\) According to Marghinani, appointment by a cruel [Muslim] ruler is as lawful as a good ruler’.\(^\text{33}\) As a matter of fact, shortly after the period of the rightly guided Caliphs, the Ummayad rulers were not considered ‘ahl al-‘adl’, except ‘Umar ibn ‘Abdul ‘Aziz (d.101/719), but the Muslims followed their edicts. Moreover, Muslims have rarely been ruled by pious rulers but the people never rejected their authority.

According to Hanafis, ‘al-‘adalat’ (probity) is not a condition for judgeship; it is only preferred. Ibn ‘Abidin does not agree with those who argue that a ‘fasiq’ (sinful) cannot be a qadi and says that ‘[I]f this was applied in our times, no one will be eligible to be a qadi’.\(^\text{34}\) He argues that the judgment of any person appointed by the Sultan [head of State] is binding even if he be ignorant and ‘fasiq’.\(^\text{35}\) What about the decision of a qadi who himself is not only un-educated about the rules of Islamic law, but is also a bad Muslim (fasiq)? According to Hanafis, decisions of such a qadi are binding and must be implemented. Now, in the context of the State of Pakistan where the rulers are not considered to be ‘ahl al-‘adl and are not well-versed in Shari‘ah rather they are ignorant of Shari‘ah; should the orders given by them in the administration of justice or otherwise be considered legal under Islamic law? There is no doubt that the authority of the State of Pakistan is binding on all the citizens, Muslims and non-Muslims, under Islamic law.\(^\text{36}\)

\(^{30}\) Ibn ‘Abidin (n 7) 2:241. 
\(^{31}\) Ibid. 
\(^{32}\) Ibid. 
\(^{34}\) Ibn ‘Abidin (n 7) 8:25. 
\(^{35}\) Ibid. 
\(^{36}\) See also the verdict of 42 top muftis who met for two days in 1954 in Multan to get consensus on the issue of moon-sighting (ro’yat al-hilal). They duly presumed the legitimacy of the authority of the State of Pakistan and issued a collective verdict regarding the same. For collective fatwa, see Mufti Rashid Ahmad Ludyanwi, Ahsanul Fatawa (Qur’an Mahal 1379 A.H.) 348-363. There was a consensus among the muftis that Pakistan
The doctors of Islamic law (of the Hanafi School) have discussed in details many of the situations that are now unfolding in Pakistan. The situation in the case mentioned in the introduction of this paper is that the court gives its decision before the muftis give their fatwa; whereas Hanafi jurists have discussed the situation where if a person gets a fatwa or legal verdict from a mufti and then gets a court decision regarding the same issue which is different from the fatwa of the mufti, it has been held that he is bound by the decision of the court and not the ruling of the mufti. Imam Kasani states:

Where the qadi renders a judgment that opposes the opinion of the plaintiff or the defendant, then, that is understood according to the agreement and disagreement we have mentioned. The issue of the mugallid (lit. imitator; a layman who follows a school of thought) is the same when he has been asked to issue a fatwa by someone in an incident and then the matter is brought to the qadi, who renders a judgment opposed to the opinion of the mufti. The judgment of the qadi is to be followed by this person and he is to give up the opinion of the mufti, because the opinion of the mufti stands rejected due to the judgment of the qadi.\(^{37}\)

About the execution of the judgment of the qadi in a matter subject to ijtihad, Kasani further argues that:

As for the issue where they (the parties) are those who are qualified to perform ijtihad and their opinion is different from the opinion of the qadi, then, the summary statement about the issue is this: The judgment of the qadi is executed, without dispute, against the defendant in an issue that is subject to ijtihad, irrespective of the defendant being a layman (muqallid) or a faqih (jurist) qualified to undertake ijtihad, whose opinion on the issue is different from the opinion of the qadi.\(^{38}\)

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38 Ibid 42. According to Sarkhasi, ‘if the husband (in a dispute between him and his wife) is himself a mujtahid but the qadi ruled against his [the husband] ijtihad, so if he thought that
Imam Sarkhasi is even more specific on this issue. He asserts that ‘the fatwa of a mufti cannot be against the decision of a qadi and if a qadi decided against the fatwa [of a mufti] he [the mufti] is bound by the decision of the qadi’.

On this account, if the three muftis in the above case would get judgments of the courts regarding khul, these would be binding on them and had to be executed according to Sarkhasi and Kasani.

I asked a fatwa from the muftis of the famous darul ifta of the prominent Darul ‘uloom in Karachi which is headed by Mufti Rafi‘ Uthmani – the elder brother of Mufti Muhammad Taqi Uthmani who has severally criticized the decision of the Supreme Court which ruled that the consent of the husband is not necessary for the validity of khul by the courts. The important questions and their answers are given below:

1. Question: ‘It is true that in Pakistan the Head of State, the Prime Minister, Ministers, Advisors, and Secretaries do not understand Islamic law and are not practicing Muslims. Should their decisions be obeyed and implemented as those coming from ‘Olul Amr’? Should their appointments, especially judicial appointments and decisions given by such judges be valid, binding, and implemented?’

   Answer: ‘The Head of State or other Government Officials are still considered as ‘Olul Amr’ even if they are ignorant of Islamic law and are not practicing Muslims and their obedience is obligatory in permissible things and as long as they do not given any order that is against the Shari’a, their orders (that are beneficial for the people) will be implemented’.

   This is about the orders of the rulers but the mufti has carefully avoided in his answer the questions whether their judicial appointments will be valid and binding and whether the decisions given by such judges will be valid and

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40 The questions were sent through email on 3 July 2011 when I was writing the first draft of this article but the answer was given through email on 13 February, 2012. See the Annex.

41 See the Annex.
binding. However, he has given two references in support of his view. In one reference, he has cited a passage from *al-Fatawa al-‘Alamgiriyya* (also known as *al-Fatawa al-Hindiyya*) which is about the validity and implementation of the decisions of judges appointed by sinful rulers who are ignorant of Shari‘a. The passage is given below:

> It is allowed to appoint a sinful person [as a judge] and his decisions are implemented if these are not against the Shari‘a, however, it is not recommended to appoint a sinful person [as a judge]. Same is in *Al-Bada‘i* [*Al-Bada‘i wa Al-Sana‘i* by Kasani]. And if appointed when he was pious but he became sinful (later), he deserves removal [from judg shipped] but should not be removed because of this [sinfulness] and this is according to most of the scholars. And it is obligatory for the *Sultan* [the Muslim Authority] to remove him [such a judge] as is in *Al-Fusul Al-‘Imadiyya*.42

The passage seems self-contradictory but one interpretation could be that he does not stand removed because of his sinfulness. That is, the decisions he gave while in the state of sinfulness would all be considered valid. But it is obligatory for the *Sultan* (the Muslim Authority) to remove him. But until the *Sultan* does so, he should not be considered ‘removed’. Another interpretation could be that according to the majority of Hanafi scholars, such a judge should not be removed, whereas in the opinion of others (which is a minority view within the school) he should be removed.

The second question and its answer are omitted in this discussion and can be seen in the Annex to this work. The third question is about a person who himself does not obey a decision of the courts in Pakistan and even instigates other people to disobey it even when the decision is not against the Qur’an and the Sunnah. The whole question is given below:

3. **Question:** What is the ruling of Islamic law about a person who instigates other people to disobey a court’s decision, which is against his school of thought but is not against the Qur’an and the Sunnah?

   **Answer:** If a decision is not against the Qur’an and the Sunnah, then instigating people against it because it is not based on a particular school of thought is not lawful.

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However, if that decision is against the school of thought that is followed by the majority in that country, then attempt should be made to change it [that decision] within the legal boundaries.\footnote{See the Annex.}

What is problematic is that if a decision is not against the Injunctions of Islam as laid down in the Qur’an and the Sunnah of the Prophet Muhammad (PBUH) but is not based on the schools of thought then why should it be changed through legislation? Is it not amounting to forcing others to follow a particular school of thought?

**Analysis of Two Important Cases on \textit{Khul’}**

Let us examine the two prominent decisions about \textit{khul’}, which brought a revolution in providing a remedy to helpless women in Pakistan. In two successive decisions: \textit{Balqis Fatima}\footnote{Mst. Balqis Fatima v Najm-ul-Iram Qureshi PLD 1959 Lahore 566.} and \textit{Khurshid Bibi},\footnote{Mst. Khurshid Bibi v Muhammad Amin PLD 1967 SC 97.} by the Lahore High Court and the Supreme Court of Pakistan respectively, it was held that \textit{khul’} is available as of right and the consent of the husband is not necessary for the dissolution of marriage through \textit{khul’}. This was against the established opinions of the jurists of three Sunni schools, i.e. Hanafi, Shafi’i, and Hanbali schools of thought.\footnote{For details of the opinions of \textit{fuqaha} regarding the consent of husband in \textit{khul’}, see Muhammad Munir, ‘The Law of Khul’ in Islamic Law and the Legal System of Pakistan’ (2015) 2 \textit{LUMS Law Journal} 33-63.} Surprisingly, jurists of these schools mention the famous \textit{hadith} in which Habibah binth Sahl, the wife of Thabit b. Qays b. Shamas, told the Prophet Muhammad (peace be upon him) about her hatred of her husband and the Prophet (peace be upon him) ordered Thabit to let her free,\footnote{Muhammad Ismail al-Bukhari, \textit{al-Jami` al-Sahih} (People’s Edition n.d.) \textit{hadith} no. 4971.} but do not base their rulings regarding \textit{khul’} on it. In all the versions of the \textit{hadith}, the husband remains passive and had no role and the Prophet (peace be upon him) told him to let her free (\textit{farriqha}) or divorce her (\textit{talliqha}). The husband is not asked whether he agrees to it or not, yet \textit{fuqaha} unanimously gave the husband a decisive role. \textit{Balqis Fatima}’s case was decided by a Full Bench of the Lahore High Court whereas \textit{Khurshid Bibi}’s case was decided by a larger Bench of five judges of the Supreme Court. The judges in both cases discussed the opinions of \textit{fuqaha}, but ruled that they are not bound by them. Instead, they based their rulings on the above mentioned \textit{hadith} and the explicit words of the verse 2:229. Thus, they resorted to the wording of the Qur’an and the \textit{hadith} and
not to the opinions of the *fuqaha*. In other words, they based their decisions on the Qur’an and the Sunnah of the Prophet (PBUH). But this was exactly what the previous constitutions as well as the present constitution allowed the judges to do. In addition, this is exactly what a judge should be doing under Islamic law. Sarkhasi has categorically stated that:

He [the *qadi*] is supposed to give his decisions according to the Book of Allah [the Qur’an] but if there is a case in which he does not find a specific rule in the Qur’an, then he should give decision in that case according to what has reached him from the *Sunnah* of the Prophet (PBUH), if he does not find a rule within it [the Sunnah], he should look at the precedents of the companions of the Prophet (PBUH) and decide… and the crux of this matter is that if he found the opinion from one of the well-known companions (may Allah be pleased with them all) of the Prophet (PBUH) he should base his decision on it and should not resort to *qiyas* (analogy) before that.48

**The Federal Shariat Court Endorses Statutory Law on *Khul’***

The Federal Shariat Court (‘FSC’) in *Saleem Ahmed v Federation of Pakistan*49 ruled that section 10(4) of the Family Courts Act 1964 (‘FCA’) as amended 2002, which is the statutory law of *khul’* in Pakistan, is not against the injunctions of Islam. The relevant provision is reproduced below:

> 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 fails, shall pass decree for dissolution of marriage forthwith and ‘shall also restore to the husband the Haq Mehr [sic] received by the wife in consideration of marriage at the time of marriage.50

Some of the petitioners had requested the FSC to stay proceedings of *khul’* before the Family Courts which were refused. The FSC sent a questionnaire

48 (n 38) 16: 88.
50 Family Courts Act 1964 as amended in 2002, s. 10 (4). The new provision was added in 2002.
to its juris-consults. The questions are reproduced here. First, who is the addressee in the Qur’anic verse: which reads ‘if you fear that they both will not observe the limit of Allah’ (2:229): the Qadi, Ul-ul-amr (authorities), or the spouses? Second, in the case of Thabit and Habibah/Jamila in what capacity the Holy Prophet asked Thabit to release Jamila from marriage bond?\footnote{51} Whether the Holy Prophet acted in his capacity as a qadi, or as a head of the State or as a Messenger of God?\footnote{52}

The petitioners supported their arguments by the Qur’anic verses\footnote{53} and the relevant hadith literature about khul’. The crux of their arguments was that a Qazi [qadi] before whom prayer for dissolution of marriage is made is not authorized to decree in her favour if the husband is unwilling to accept the offer. Secondly, under section 10(4) the court is bound to pass a decree in case reconciliation fails at pre-trial stage without recording the evidence in the matter which is against the injunctions of the Qur’an and the Sunnah of the Prophet (PBUH). Some petitioners also produced various fatwas to the effect that khul’ can be effected without the consent of the husband. The FSC rejected the arguments of the petitioners, their interpretation of Qur’anic verses and ahadith, the fatwas produced by them.

The FSC categorically stated that unless there is a clear specific ‘Nass’ [definitive proof] of the Holy Qur’an and [the] Sunnah of the Holy Prophet صلى الله عليه وسلم (prohibiting or enjoining commission or omission of any particular act, the FSC cannot declare any law or provision of law as repugnant to the Injunctions of Islam. The FSC expressly ruled that the impugned provision of law was examined and was not found to be in conflict

\footnote{51} The courts in Pakistan are of the opinion that Thabit had two wives, i.e., Jamila and Habibah. The FSC has mentioned the same. In hadith literature Habibah as well as Jamilah are mentioned but as we have mentioned elsewhere her name was Habibah bint Sahl and her nickname was Jamila. See PLD 2014 FSC 43, [21]; (n 46).

\footnote{52} To this list may be added other capacities of the Prophet (PBUH) such as a social or political leader. The third question is not that important. In this the FSC asked its juris-consults to evaluate the views of contemporary ‘ulama who are of the view that the court is not empowered to dissolve the marriage without consent of the husband while on the other hand the august Supreme Court of Pakistan, Maulana Maududi and some Egyptian scholars have divergent views. The FSC should be aware that the contemporary ‘ulama are not alone in holding this view and that the Maliki jurists have the same view on this point. For details, see (n 46).

\footnote{53} The main verses on which reliance was placed are: 2:228, 2:229, 2: 231, 4: 434, and the famous hadith of Habibah bint Sahl – the wife of Thabit b. Qays b. Shamas Al-Ansari. The petitioners had not paid due attention to the hadith, however, because the husband, i.e., Thabit had only a passive role in the episode as he is ordered by the Prophet to divorce Habibah or let her go. The Prophet never asked his consent whether he accepts the ruling or whether he wants to divorce her or not.
with any specific injunction contained in the Holy Qur’an and [the] Sunnah of the Holy Prophet (صلى الله عليه وسلم). According to the Qur’anic teachings, the husband is supposed to divorce his wife when the two cannot live within the bounds set by God but if the husband does not divorce his wife and is bent on harming her and does not accept any compensation, then ‘what should be the course of action for the wife?’, the court asked. The court further argued, ‘What would she do if reconciliation fails and the husband proves adamant not to dissolve the marriage?’ The FSC argued that the Qur’an has repeatedly stressed the husband to keep the wife with kindness; to keep them in good fellowship or let them go with grace; to retain them in kindness or set them free with kindness; not to retain them (women) for injury and not to exceed the limits; and treat them with grace and kindness.

The court put women on equal footing when it observed: ‘obviously Islam does not intend to force a wife to live a miserable life, in a hateful unhappy union, for ever. If she is unhappy and reconciliation fails, she should be entitled to get relief whatsoever’. Another noticeable observation of the court is that how could the jurisdiction of the courts be ousted in case of khul’? If the courts can decide all matters including dissolution of marriage on other grounds, ‘one wonders why they are not authorized to decide the case of Khula [khul’], if a husband does not at all agree to the divorce of his wife and all the reconciliatory efforts fail’. The court summed up the discussion in this way: ‘there is no specific verse or authentic Ahadith that provides a bar to the exercise of jurisdiction by a competent Qazi [qadi] to decree the case of Khula [khul’] agitated before him by a wife after reconciliation fails’.

Certain points to note on the basis of Islamic law and after reading this judgment are: first, it is undeniable that there is a split among the

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54 The court put these and other questions to all the advocates and scholars but their answers did not satisfy the court.
55 The Qur’an, 2:229.
56 The Qur’an, 2:231.
57 Ibid.
58 The Qur’an, 4:19.
59 The court relied on verse 2:228 which state: ‘Women shall have rights similar to the right against them, according to what is equitable’.
61 (n 49), 62-63.
Muslim jurists regarding the issue of the consent of the husband on *khul’*, that is, the majority of *fuqaha* consider the consent of the husband necessary for *khul’* to be granted by the courts but the Maliki jurists do not consider the consent of the husband as necessary; second, in matters of difference of opinion among the jurists, the state is the final authority and no one can challenge the authority of the state once it has taken a position and legislated on such matters; finally, no jurist is allowed to challenge or disagree with the decision of a court even if that is against his school of thought or against his *ijtihad*. Consequently, any *mufti* or jurist or *mawlavi* or cleric or religious leader in Pakistan cannot and should not challenge state’s laws on issues such as *khul’* and neither should they issue a *fatwa* about it. Any such challenge or *fatwa* should be declared as strictly prohibited and punishable by state’s authority. Therefore, the government of Pakistan is requested to pass legislation to this effect.

The FSC has put an end to the controversy about the Islamicity of Section 10(4) of the Family Courts Act 1964. But the question remains whether our ‘*ulama* would whole-heartedly accept the judgment of the FSC, the constitutionality of which they appreciate and which they have credited for Islamisation of laws in Pakistan? Moreover, the harsh critic of *khul’* cases by the courts – Mufti Muhammad Taqi ‘Uthmani – who has been a judge of the FSC and the Shariat Appellate Bench of the Supreme Court of Pakistan, should have no objection to this ruling as it is coming from the FSC.62 Let us hope that our ‘*ulama* accept the decision of the FSC and thereby the authority of the State as well. However, at the time of writing this work the decision in the case was being appealed against to the Shariat Appellate Bench of the Supreme Court.63

**Conclusion**

To sum up the above discussion, ‘*ulama* played a significant role in the judicial system under the Muslim rule in the sub-continent; but this role was eroded by the British colonialists who confined ‘*ulama* and the *muftis* to a private role. ‘*Ulama* did not support the Pakistan movement unanimously but later on tried to play some role in shaping the framing of the Constitution. They agreed on certain recommendations for the place of Islam in the


63 Appeal against this judgment were filed by Muhay ud Bukhari, Civil Shariat Appeal No. 1 of 2009 and Syed Matanat Muazzam Bukhari, Civil Shariat Appeal No. 2 of 2009.
constitution which was more or less accommodated by the framers of the Constitution. The creation of the FSC was a turning point in the process of the Islamization of laws and since 1980 ‘ulama have become more vocal.

According to Hanafi jurists, even a sinful person can be a ruler and his judicial appointments shall be accepted and decisions given by such judges are valid and binding. In addition, the decision of a judge which is against the opinion of the litigant is still binding on him. Even if the decision is against the *ijtihad* of the *mujtahid*, who is also a litigant, it is still binding on him.

It is not allowed under Islamic law to instigate others when a decision is against a particular school of thought, but is not against the Qur’an and the Sunnah of the Prophet (peace be upon him). Therefore, any instigation by ‘*ulama* against cases decided by courts in Pakistan regarding *khul*‘ is not allowed under Islamic law and would amount to challenging the authority of the state or running a parallel judicial system. Loyalty to the state is a citizen’s obligation, regardless of the nature of rulers and judges, and whether their decisions are based on a particular school of thought or are based on their *ijtihad*. 
Section 10 of the Family Courts Act 1964 as amended in 2002
Section 10: 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 précis 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 effect 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 fails, shall pass decree for dissolution of marriage forthwith and ‘shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage’.

Translation of the Fatwa
Dear Mufti Sahib,

Assalamalaikum,

I send you these questions for your answers on what Islamic law says about them. They are all concerned with the same problem.

It is well known that in Pakistan, the head of state, the prime minister, advisors and secretaries are generally not familiar with the shariah. Many such people are also not practicing Muslims. Would the decisions of such people still be binding upon the general public in Pakistan since they are the People of Authority (olul ‘amr)? Would the designation of such people on different positions of power such as judges in courts and the decisions given by such judges be valid and implemented?

The second question concerns the schools of law. The judges of the Supreme Court or the High Courts in Pakistan sometimes, instead of following any particular school of law, either choose one from among the different opinions of a school on a problem on the basis of the principle of takhyir; or,
following the principle of *talfiq*, combine opinions from different schools of Islamic law. Yet sometimes they practice *ijtihad* through rendering decisions by considering the texts of the Qur’an and the Sunnah directly. Would such kind of a decision, rendered by the unanimous or majority opinion of a bench of judges be binding on the general public?

The third question is about the person who, declaring such decisions to be against Islam, denies their validity and incites the public to oppose them even when these decisions do not oppose any explicit text of the Qur’an or the Sunnah. Sometimes, such a decision may be in accord with the opinion of another school of law not followed by such a person; or while not an opinion of any school of law at all, is still not against the texts of the Qur’an and the Sunnah.

**Response**

Glory to God and Blessings upon the Prophet (God bless him).

1. Even if the head of state or the other holders of office are ignorant of the shariah and are not practicing Muslims, they would still be considered among the People of Authority (*olul amr*). It follows that obedience to them is binding in matters which are permissible according to the shariah. And for as long as they do not issue an order which goes against the shariah, their decisions which are meant for the well-being of the people would all be legally valid and implemented.

It is in *al-Fatawa al-Hindiya* (volume 3, page 308):

> The designation of a *fasiq* is permissible and his decisions will stand implemented so long as he does not transgress the bounds of the shariah. But a *fasiq* should not be made a judge. Such is written in the *Badai*. And if such a person is designated as a judge and he thereafter becomes a *fasiq*, he would become deserving of being removed (from the position); but he is not removed (automatically) thereby. This is the position taken generally by scholars. And it would be obligatory upon the sultan to remove him. Such is written in *al-Fusul al-‘Imadiyyah*.

It is in *al-Bahr al-Raiq* (volume 18, page 141):

> (His saying: because obedience to the People of Authority is obligatory) ‘Allama al-Biri says at the end of his commentary
on *al-Ashbah wa al-Nazair*, while discussing the conditions of the imamate: then, when the oath of allegiance (bai‘ah) from the *ahl al-hil wa al-agd* has been rendered, he (the contender/candidate) becomes the *imam*. It is (then) obligatory to be obedient to him—as is given in the *khizana al-akmal* and the commentary of *al-Jawahir*. It is obligatory to be obedient to him in what the religion permits, which is what is beneficial to the general public; as the ‘*imarah* of the Dar al-Islam and Muslims in accordance with the Qur’an, the Sunnah and *Ijma*.

2. If the government does not bind the judge it designates to decide according any particular school of law, and such a judge—while deciding cases—does not adhere to any particular school of law or decides according to the opinion of a *faqih* other than the four imams, his decision will stand implemented. However, someone who is not a mujtahid should not decide cases on his own; and since the *talfiq* and *takhyir* mentioned in the question has not been clarified, we are unable to say anything concerning them at this point.

It is in *al-Bahr al-Raiq* (volume 17, page 472):

It is in the *Umdah al-Fatwa* that it is permissible for the judge to decide according to an opinion which has been left over (not preferred). And the case for when he decides in an area subject to *ijtihad* is similar. And the same is found in *al-Sirajiyah*. And in the *Maal al-Fatwa* it has been decided in opposition to the school of law (not understood properly). Abu Hanifa said it would be implemented, while Abu Yusuf said it will not be implemented. It has been described that the decision of the *muqallid* judge, when he decides according to a school of law he himself does not follow, will stand implemented. And similar would be the case when he decides according to a weak narration or opinion because of the indeterminateness (*itlaaq*) of their opinion that the weak opinion is strengthened by the adjudication of the judge. And what this (indeterminate opinion) has been restricted in the *al-Fatah al-qadir* with that this would stand true for problems subject to *ijtihad* is established (only) by some texts. It is for this reason that it has been said in the *Quniah al-Qadi* that the *muqallid qadi*, when he decides against the position of his school of law, the decision will not stand implemented.
It is in the *Tanqih al-Fatawah al-Hamidiyyah* (volume 2, page 184):

And they have clarified that the judge is an agent of the Sultan in his adjudication and his representative; so that if his adjudicating powers have been restricted to a place, or time, or (kind of) persons, or (kinds of) cases, they would be restricted and not otherwise. And the judges in our time have been ordered to adjudicate according to the sound narrations of the school of law of our master, Abu Hanifa, God have mercy on him. And they mention in the *rasm al-Mufti* that the decision of the *muqallid* against his school is not implemented by default. Therefore, it is mandatory to appoint a Hanbali or a Maliki judge, who may decide accordingly which should be executed by the Hanafi judge.

It is in the *Hashiyah* of Ibn Abidin (volume 5, page 408):

And he said in the *al-Nahr* and proclaimed in *al-Bahr* that when the *muqallid* adjudicates according to a school other than his own, or according to a weak narration or opinion, the decision will stand implemented. And the best opinion is that mentioned in the *al-Bazzaziyyah* that if the judge is not a *mujtahid* and (yet) decides according to a *fatwa* against his school, the decision would stand implemented and no one but himself can nullify it. Such is narrated from Muhammad. According the opinion of Abu Yusuf, (even) he cannot render it void. What is mentioned in *al-Fatah al-qadir* should be followed in the Hanafi school. And it can be said about the opinion in *al-Bazzaziyyah* that it is one of the opinions of Sahibayn and that they had forgotten their previous opinion which is mentioned above, that is, the decision of a judge who is a *mujtahid* is not implementable if it is against his school of thought, therefore, the decision of a judge who is *muqallid* shall not be implemented in the first place.

3. If the decision is not against the Qur’an and the Sunnah, then, it is not proper to incite the people against it merely because of its being against a particular school. However, if the decision is against the school of the vast majority of Muslims of a country, efforts should be made within the permissible bounds of law to get it changed.

It is in the *Usul al-Fatawa wa Adabuhu* by Taqi Usmani (page 234):
(Adjudication outside of the four schools) All these problems are proof of the position that the implementation of decisions is not limited to the four schools; rather, they’ll stand implemented if they accord with an accepted mujtahid; with the condition that such an opinion is established through a sound method.

God knows the best.

Rashid Sa’eed

*Dar al-Ifta, Jamiah, Dar al-Ulum Karachi*
Original Text of the Fatwa

from Muhammad Munir muhammadmunir@iuu.edu.pk
to Darul ifta Darul uloom

date 3 July 2011 18:16
Re: Away from the net Re: fatwa about the authority of the State of Pakistan

Dear Sir/

I am writing to you on behalf of a group of ulema who have been discussing the issue of fatwas and fatwa agents. We are concerned about the unauthorized distribution of fatwas through social media and the internet. We believe that fatwas should be issued by the authorized authorities and should not be disseminated without their approval.

We appreciate your efforts in discouraging the use of social media and the internet for the dissemination of fatwas. However, we would like to request your assistance in ensuring that the fatwas issued by the authorized authorities are not misused or misinterpreted.

We would like to request your support in this matter and we hope to receive your prompt response.

Thank you for your attention to this matter.

Yours sincerely,
Muhammad Munir

P.S. Enclosed are some fatwas that have been misused on the internet.

[Attachments]

Best regards,
Muhammad Munir
Challenging State Authority or Running a Parallel Judicial System? ‘Ulama versus the Judiciary in Pakistan

الجواب هما: ومضنيًا

(1) "لذا يوجد خلاف بين الإسلام والمذاهب في تخليص قضية الخلاف، حيث يجد على بعض المذاهب أن يحترم الإسلام دينه، ويزعج عليه، يرى أن يكون البلد والدولة متعارضة مع الإسلام.

الفتاوى الحنفية - (ج 3 ص 307)

لا يوجد تقييد في القانون، فإنه قد يجيز فيها حجة الشرع لكن لا ينبغي أن يغلق في التشريع، وفي هذا العدل، فليس بالكثير، ولكن لا يجوز به ويهب أحد عامة المشافي ويجس على السلطان أن يعمل كما في التعديل.

البحر القرآن - (ج 18 ص 146)

(2) "وقد حكم في هذا في خلاف الفقهاء، فهناك من الفقهاء يحكمون على الإسلام، وهم من همهم في تشريع الإسلام، في تشريع الشريعة.

(3) "لكننا نقول أن الفقهاء أكبرهم في قضايا العلم، من فقهاء العلم.

البحر الإخواني - (ج 17 ص 67)

وفي عادة الفقهاء، إذا قضى على كُل مُسْبِق عَن حُكُم وَكَأْسُهُ، فَهُوَ. والعامة، في هذا وهذا هو دليل على حقيقة نبأ، وغالب كره نفس لا يمتنع، فلأن.

تُحيَّر أن الفقهاء المقلدون إذا قضى عادة غير يحدد ويكافح، فإنه يسائل، ويستنكر توضيح بعض الناس.

وأما فيه في نقص التقدير من أن هذا إذا ما هو في المجهول، ثابت في بعض الحالات.

ولذا قال في الفقهاء المقلدون، فهُم ليس بخصو، فهم لا يفظ.
وقال: "هؤلاء الذين يعلمون أن القاضي يحكم على الناس في الحكمة وتثبت عليه فإذا خصص قضايا، يحكم على مكان أو مكان أو مكان أو مكان، واعترف بالمشهد، واعترف بالمشهد، واعترف بالمشهد، واعترف بالمشهد، واعترف بالمشهد. ولقد ذكرنا في رسول الله صلى الله عليه وسلم أن الملك لا يجد قضايا عليه إلا في النظير، علماً أنه ليس بالقضاء القاضي، بل يكون فيه من نزوة قاضي حنفي، فك ما يحكم بذلك في هذه الحقنة.

حاشية ابن غنيم - ج 5 / ص 308 (4)

وقال: "إن الهواء وادي في البحر أن المكلف إذا قضى بالعدل فهو يحكم عليه، أو يحكم عليه، أو يحكم عليه. وفرج ما كسب به ما في الجزية إذا لم يكن القاضي تجهاه، وفرج بال릅وت على خلاف مشهد رضاه، وليس له رضاه، ولله نصبه كما عن محمد. وقيل: "النادي ليس له رضاه إله ما في النجاح، يحرك أن يكون عليه في المشهد وما في الجزية حصول على رضاه. فما إذا جرى الأمر أن هذا دليل مروأة الناس عليها، وقد مر عليها في النجاح، لا يندد فالمكلف أولى أنه ما في الظهر راي، ما يرى.

(3) أخبر فكر بشكك إلى مطارنة يحدر في حكم قاضي ملك في مطالبة بينه وبين منف. وهو في هذا كله غ lạ إلى حكمة. وفرج ما كسب به ما في الجزية إذا لم يكن القاضي تجهاه، وفرج بالروروت على خلاف مشهد رضاه، وليس له رضاه، ولله نصبه كما عن محمد. وقيل: "النادي ليس له رضاه إله ما في النجاح، يحرك أن يكون عليه في المشهد وما في الجزية حصول على رضاه. فما إذا جرى الأمر أن هذا دليل مروأة الناس عليها، وقد مر عليها في النجاح، لا يندد فالمكلف أولى أنه ما في الظهر راي، ما يرى.

(2) مصطلح: "القضاء القاضي حنفي الإخباري - ص 345".

(4) القاضي، يحكم عليه، وفرج ما كسب به ما في الجزية إذا لم يكن القاضي تجهاه، وفرج بالروروت على خلاف مشهد رضاه، وليس له رضاه، ولله نصبه كما عن محمد. وقيل: "النادي ليس له رضاه إله ما في النجاح، يحرك أن يكون عليه في المشهد وما في الجزية حصول على رضاه. فما إذا جرى الأمر أن هذا دليل مروأة الناس عليها، وقد مر عليها في النجاح، لا يندد فالمكلف أولى أنه ما في الظهر راي، ما يرى.

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(6) مصطلح: "القضاء القاضي حنفي الإخباري - ص 345".

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(12) مصطلح: "القضاء القاضي حنفي الإخباري - ص 345".

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Discovering the Law without a Coherent Legal Theory: The Case of the Council of Islamic Ideology

Muhammad Mushtaq Ahmad*

In the post-colonial world, scholars – Muslim and non-Muslim – have generally found it better to mix up the views of the jurists belonging to various schools of Islamic law under – the presumption that the various schools of Islamic law followed a ‘common legal theory’ and differed in minor details only. This paper highlights the problems in the methodology of modern scholars, and for this purpose focuses on the Council of Islamic Ideology, the constitutional body for making recommendations to the Parliament for the purpose of Islamization of laws. It shows that while criticizing the works of the Muslim jurists on Islamic criminal law, the Council has not been able to develop a comprehensive and internally coherent legal theory, and has instead relied on a mix of principles of various schools joined haphazardly without resolving internal inconsistencies. It concludes that the modern critics of Islamic criminal law, by breaking their links with valid legal sources, are left with reason as their sole guide in addressing legal problems – an extremely pure form of naturalism that deems reason as a complete source of law and accords too much room to discretion and ‘independent’ reasoning.

Introduction

The first significant constitutional document passed by Pakistan’s first Constituent Assembly in March 1949 was titled the Objectives Resolution. This Resolution determined that Pakistan was going to be an Islamic State. The Constitution of 1956 retained the Objectives Resolution as its preamble and promised to bring the existing laws into conformity with the ‘injunctions of Islam as laid down in the Holy Qur’an and [the] Sunnah.’ For this purpose, the Constitution envisaged a Commission, but the Commission could not start its functioning before the Constitution was abrogated in 1958.

* Associate Professor and Chairman, Department of Law, International Islamic University, Islamabad (mushtaqahmad@iiu.edu.pk).

1 Constitution of the Islamic Republic of Pakistan 1956, art. 198.

2 Ibid.
The Constitution of 1962 reiterated the promise of Islamizing the laws\(^3\) and established the ‘Advisory Council of Islamic Ideology’ for this purpose.\(^4\) The Constitution of 1973 retained this scheme of the things but renamed the Council as the Council of Islamic Ideology.\(^5\) It also fixed the time period of seven years for the Council to prepare the final report about the Islamicity of the existing Pakistani laws.\(^6\) The Council was also to prepare interim reports annually till the preparation of the final report.\(^7\) However, the Council started playing an active role only after the 1977 coup when the Martial Law regime re-constituted the Council so that it would help the regime in pursuing its agenda of Islamization of laws and economy. Since then, the Council has been preparing annual reports, but these reports have been kept ‘confidential’ and are only submitted to the concerned officials and departments.

Perhaps for the first time the Council deviated from this norm of confidentiality in 2006, when it first uploaded on its website its Interim Report and then the Final Report on reforms in the *hudud*\(^8\) laws. In this Report, the Council gave some details about its methodology for deriving and extending the rules of Islamic law. Some significant aspects of this methodology are examined in this paper.

### The Council of Islamic Ideology and Issues of Legal Theory

The Council has been formed for the purpose of examining the existing laws for repugnancy with the ‘injunctions of Islam as laid down in the Holy Quran and [the] Sunnah.’ The question is: how does the Council perform this function? Moreover, did the Council develop a legal theory of its own? In other words, has the Council identified the ‘sources’ of law which it consults

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\(^3\) Constitution of the Islamic Republic of Pakistan 1962, art. 198.

\(^4\) Ibid, art. 199-207.

\(^5\) Constitution of the Islamic Republic of Pakistan 1973, art. 228. The Council prepares annual reports of its recommendations and places them before the Parliament which seldom gives any importance to these reports. In 2006, the Council first prepared an interim report before the Parliament passed the Protection of Women (Criminal Laws Amendment) Act and that report bears the names of Muhammad Khalid Masud and Inam-ur-Rahman. Later, after the said Act was passed, it prepared its Final Report which now only bears the name of Muhammad Khalid Masud. It is available on the website of the Council: www.cii.gov.pk/publications/h.report.pdf (last visited: 17 August 2014). All references in this paper are from this Final Report.


\(^7\) Ibid.

\(^8\) As per the generally accepted norms of transliteration, the word ‘hudood’ should be properly transliterated as ‘*hudud*’. Hence, the present paper generally follows the norms of transliteration, except where other sources have been quoted which use the spelling ‘hudood’, such as the ‘Hudood Ordinances’ or the CII Report.
for deriving a rule of Islamic law? Has it determined the order of priority of these sources and their mutual relationship? Has it developed some ‘principles of interpretation’? These are some of the significant questions for any legal theory as far as Islamic law is concerned. This section examines these questions.

**Defining the ‘Injunctions of Islam’**

First of all, it remains to be settled what exactly is meant by the term ‘injunctions of Islam’. The Constitution does not define this phrase and no superior court has ever considered defining this term. The Council, while commenting in its Annual Report of 1986 on the ‘Shari’at Bill’ passed by the Senate, defined shari’at as: ‘Shari’at means the injunctions of Islam as laid down in the Holy Quran and Sunnah’. Still, the Report does not offer any definition of the ‘injunctions of Islam’. It, however, adds an explanation to the definition of ‘shari’at’:

The following sources may be referred to for the exposition of the injunctions of Islam:

a) The Sunnah of the Rightly Guided Caliphs;
b) The Acts of the Companions of the Prophet;
c) The consensus of Muslim; and
d) The expositions and opinions of the jurists.  

Another question to be considered is whether the Council is bound by its own previous decisions? In other words, does the Council consider its previous reports as legally binding precedents? The answer to this question is surely in the negative. This is supported by the fact that Council has many a times changed its recommendations on the same issue. For instance, in 2006 it prepared a report for amending or repealing the Hodood Ordinances, even though the draft of these Ordinances was prepared by the Council itself in 1978. Such being the case, it becomes all the more essential that a definition

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10 Ibid. It is worth noting that almost the same definition and explanation has been reproduced in the Enforcement of the Shariat Act, 1991. Thus, explanation to Section 2 of the Enforcement of the Shariat (Act X of 1991) Act 1991, says: ‘While interpreting and explaining the Shari’ah the recognized principles of interpretation and explanation of the Holy Qur’an and Sunnah shall be followed and the expositions and opinions of recognized jurists of Islam belonging to prevalent Islamic schools of jurisprudence may be taken into consideration’. Significantly, the same Act was re-legislated by the Provincial Assembly of NWFP [now KP] in 2003 when the alliance of the religious parties Muttahida Majlis-e-Amal (MMA) was in power.
for the term ‘Injunctions of Islam’ be put forward. It is suggested here that the standard definition of the *hukm shar‘i*\(^{11}\) given by the jurists may be used for this purpose.

Ambiguity on the meaning of the ‘injunctions of Islam’ has resulted in the Council’s (as well as the Courts’) arguing directly from the Qur’an and the Sunnah and trying to reinvent the wheel.\(^{12}\) For instance, in *Hazoor Bakhsh v The State*,\(^{13}\) the Federal Shariat Court embarked on demolishing the whole edifice of criminal law as developed by the jurists and tried to lay its foundations on an altogether different basis. This attempt has also resulted in creating laws that face serious problems of analytical inconsistency. Thus, in *Rashida Patel v The Federation of Pakistan*,\(^{14}\) even though the Federal Shariat Court declared that *zina bil jabr* (rape) was a form of *hirabah*, not *zina*, yet it did not settle the question of punishment for this offence. It is for this reason that Ghazali asserts that the first source of law which the *mujtahid* should consult is *ijma‘* because if the issue is already settled by consensus of the jurists there is no room for re-opening it.\(^{15}\)

### Salient Features of the Council’s ‘Legal Theory’

A student of Islamic legal theory will be eager to find answers to some significant questions, such as: what stance has the Council taken on issues such as the interrelation of the Qur’an and the Sunnah,\(^{16}\) the authenticity and

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\(^{11}\) *Hukm*: Rule; injunction; prescription. The word *hukm* has a wider meaning than that implied by most of the words of English deemed its equivalent. Technically, it means a communication from Allah, the Exalted, related to the acts of the subjects through a demand or option, or through a declaration. According to this definition, the word *hukm* includes obligation-creating laws, declaratory laws, and even those that may be based upon positive decrees or on custom. Thus, the meaning is much wider than the “command of the sovereign” contemplated by John Austin for positive law. See: Sadr al-Shari‘ah ‘Ubaydullah b. Mas‘ud al-Bukhari, *al-Tawdih fi Hall Ghawamid al-Tanqih* (Dar al-Kutub al-‘Ilmiyyah, n.d.) 2:122; Abu Hafs Sami b. al-‘Arabi (ed), *Irshad al-Fuhul ila Tahqiq al-Haqq min ‘Ilm al-Usul* (Dar al-Fadilah, 1421/2000) 1:71-77.

\(^{12}\) An example of this in the context of family law is the creation of the device of “judicial khula” which is neither divorce nor dissolution in the sense the two terms are used by the Muslim jurists. For a detailed criticism on this device see: Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Advanced Legal Studies Institute, 2012) 94-97.

\(^{13}\) *Hazoor Bakhsh v The State* PLD 1983 FSC 1.

\(^{14}\) *Rashida Patel v The Federation of Pakistan* PLD 1989 FSC 95.


\(^{16}\) For instance, does the *Sunnah* abrogate the Qur’an or not? Can a *khabar wahid* (individual narration about a saying, act or approval of the Prophet) restrict the implications of the general word of the Qur’an? What is meant by abrogation and restriction?
use of *khabar wahid*, the meaning and scope of *naskh* (abrogation), restricting a general word (*takhsis al-‘amm)*, or construing the absolute word as conditional one (*taqyid al-mutlaq*) and so forth? If the Council wants to avoid the problem of analytical inconsistency, which mars many of its recommendations in almost every one of its reports, the most crucial task for it, after it has decided on a definition of the injunctions of Islam, is to formulate principles both for the extraction of these injunctions from the Qur’an and the *Sunnah*, and for deciding how the conflicts between these injunctions and positive laws are to be resolved.

The Council, in its interim report, has elaborated some features of its legal theory in the following words:

"Shari‘ah foundations means the Qur’an and *Sunnah*, which are the sources for finding the laws. The methods of *qiyas* and *ijtihad* are employed to find a law in the light of these sources when a law is not given in the Qur’an and *Sunnah*. The legal position of a law deduced on the basis of *qiyas* and *ijtihad* varies, depending on whether they agree or differ on the validity of a deduced law. The weakness and the strength of this validity are categorized accordingly into *fard*, *wajib* and *Sunnah*.*

This exposition has several serious problems. First of all, the use of *ijtihad* is not limited to cases where the rule is not found in the texts of the Qur’an and the Sunnah; *ijtihad* is also used for interpreting and elaborating the rules found in the texts. Secondly, how can one have recourse to *ijtihad* or *qiyas* in case the rule is not found in the Qur’an and the Sunnah, when the Council has already declared that only these two constitute the sources for Islamic laws? The meaning of *ijtihad* as the use of ‘personal opinion’ by the

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17 The Hanafi theory requires that the restricting evidence must be definitive like the general word, while the Shafi‘i theory deems the general word probable and thus allow its restriction through a probable evidence. See for details: Abu ‘l-Wafa’ al-Afghani (ed), *Tamhid al-Fusul fi ’l-Usul* (hereinafter, *Usul al-Sarakhsi*) (Dar al-Kutub al-‘Ilmiyyah, 1414/1993), 1:132-151.

18 As the absolute (*mutlaq*) and the restricted (*mugayyad*) both are forms of the specific (*khass*) evidence, the Hanafi theory disallows construing the absolute as restricted, unless definitely proved so. As opposed to this, the Shafi‘i theory presumes that the absolute shall be construed in the light of the restricted, unless proved otherwise. See for the arguments of both sides: *Usul al-Sarakhsi*, 1:266-270 and Ghazali, *al-Mustasfa*, 2:70-72.


20 In the parlance of Islamic law, this is called *bayan*. See *Usul al-Sarakhsi*, 2:26-53; Ghazali, *al-Mustasfa*, 1:238-244.
mujtahid would not be acceptable, for it would amount to giving him the status of the lawgiver.\textsuperscript{21} Thirdly, the strength or weakness of a rule derived on the basis of qiyas does not depend on the agreement or disagreement of the mujtahidin but on the strength of the two premises on which a qiyas is based: the first premise pertains to the ratio or active cause (‘illah) of the rule and the second one is concerned whether the same ratio is found in the new case. Hence, if the two premises are definitive (qat‘i), the qiyas will also be definitive; and if any one of these premises is probable (zanni), the qiyas will also be probable.\textsuperscript{22} Finally, the categorization of the obligation-creating rules (hukm taklifi) into fard, wajib or Sunnah, is not brought about by the weakness or strength of the qiyas or ijtihad which is used to derive the rule, but on the definitive or probable nature of the authority (dalil) and the binding or non-binding nature of the command. Moreover, this categorization is not limited to laws derived by qiyas and ijtihad only, but applies to laws clearly given in the texts as well.\textsuperscript{23}

**Conflation or Choosing Principles from Various Schools**

Following the general trend of the modern Muslim scholars, the Council has generally accepted the proposition of ‘common legal theory’, it has generally preferred to pick and choose from the various schools those principles which suited the call for ‘reason’ and ‘discretion’. Here, four important principles of the legal theory of the Council – if it can be called a legal theory – are analyzed, namely, al-ibahah al-asliyyah (the presumption of permissibility), qiyas (analogy),istihsan (generally equated with ‘equity’) and maslahah (generally translated as ‘public interest’).\textsuperscript{24} The purpose is to show that these principles are of little help in creating room for discretion. Hence, these critics are compelled to abandon even these principles and instead rely on naturalist argument of the use of discretion based on reason.

**The Presumption of Permissibility**

\textsuperscript{21} On Lawgiver (al-Shari‘), see: Shawkani, *Irshad al-Fuhul*, 1:78-83. It was to avoid this error that the jurists decided, as a principle, that for exercising analogy, an exact match must be found in the texts called the maqis ‘alayh (that with which the analogy is being made). Similarly, it has been decided, as a principle, that for all the different modes of ijtihad, the basis must also be present in the Qur’an and the Sunnah. Ghazali, *al-Mustasfa*, 2:149.

\textsuperscript{22} Shawkani, *Irshad al-Fuhul*,1:71-77.


\textsuperscript{24} See the discussion on on ‘source material’ used by the Council: *Final Report on Reforms in the Hudood Laws*, 14.
The general practice of the courts as well as of the Council, as candidly shown in its Report, has been to treat everything permissible if no explicit text of the Qur’an or the Sunnah is found prohibiting it.\(^{25}\) The fact remains that something may not be against the explicit text, yet it may be conflicting with the general principles and the purposes (maqasid) of Islamic law. The presumption of permissibility – expressed by the jurists as ‘the original rule for all things is permissibility’\(^{26}\) – does not have enough strength for becoming the basis of new legislation, or for changing the structure of the established norms of Islamic law.

First, this presumption is not widely accepted by the jurists. The celebrated Shafi‘i jurist Jalal al-Din al-Suyuti asserts that the Hanafis apply the presumption of prohibition, instead of permissibility.\(^{27}\) The reason for this is that the Hanafis resort to the general principles of law when they come across something about which the texts are apparently silent. Still when they do mention this presumption as a hypothetical possibility, they consider it as having been derived from the following verse: ‘It is He Who hath created for you all things that are on earth’.\(^{28}\)

Second, the large number of exceptions to this presumption renders it impossible to consider it as a general principle. Thus, the jurists unanimously agree that the presumption about rituals is of prohibition.\(^{29}\) The same is true of forming sexual relationship with a woman,\(^{30}\) taking of a human life\(^ {31}\) and eating the meat of a slaughtered animal.\(^{32}\) Similarly, many other prohibitions have greatly limited the scope of this presumption of permissibility.

Third, one may argue further that since Adam, peace be upon him, in addition to being the Father of all mankind, was a prophet, human beings have had recourse to revelation ever since the very beginning. It follows that

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\(^{25}\) The Federal Shariat Court in *Ansar Burney v The Government of Pakistan* PLD 1983 FSC 73, declared on the basis of the presumption of permissibility that a woman could become a judge in all cases. The Court did not even bother to consider the question that eligibility for a post requires positive evidence from the law and it cannot be decided on the absence of negative evidence.


\(^{27}\) Ibid.

\(^{28}\) *Qur’an* 2:29.

\(^{29}\) Suyuti, *al-Ashbah wa ‘l-Naza’ir*, 66.

\(^{30}\) Ibid.


\(^{32}\) Ibid.
some things must necessarily have been prohibited from the very start.\textsuperscript{33} Hence, the presumption that in the absence of any text everything is permissible is not tenable.

If one still insists on accepting this presumption as a general principle, the question remains as to whether it is a good tool for Islamizing Pakistani law?\textsuperscript{34}

\textit{Qiyas (Analogy)}

Critiques on the \textit{hudud} laws have been accompanied by suggestions coming forward from some ‘experts’ of the need for \textit{qiyas} and personal opinion. Some commentators, for example, have declared that the \textit{nisab}\textsuperscript{35} for the \textit{hadd} of \textit{sariqah} (theft) is very meager and that the amount should be raised.\textsuperscript{36} Then there are those who have tried to fit in rules from other areas of law into the \textit{hudud}.\textsuperscript{37} Many such examples are found even in the \textit{CII Final Report}.\textsuperscript{38} Hence, it may not be out of place to discuss the position of the Muslim jurists on the use of analogy in cases of \textit{hudud}.

As a starting point, the Hanafi jurists do not apply \textit{qiyas} to each and every legal issue. For instance, the number of \textit{sijdah} (kneeling prostration) in every unit (\textit{rak'ah}) of prayer being two, this fact cannot be subjected to \textit{qiyas} so that the number of \textit{ruku‘} (standing prostration) should be made two as well. Like these rituals, the \textit{hudud} concern what are called the rights of God (\textit{huquq Allah})\textsuperscript{39} which are not to be subjected to personal opinion or \textit{qiyas}.

\textsuperscript{33} Usul al-Sarakhsi, 2:20.
\textsuperscript{34} Some ‘legal experts’ are of the view that only 5\% of the laws in Pakistan need to be Islamized and there is nothing un-Islamic about the rest. This is, again, equating non-repugnancy with conformity. Is that really the case? See for a criticism on this view: Imran Ahsan Khan Nyazee, \textit{Theories of Islamic Law: The Methodology of Ijtihad} (Islamic Research Institute, 1994), 293-30; \textit{idem}, \textit{Islamic Jurisprudence} (Islamic Research Institute, 2000) 239-240, 325-353.
\textsuperscript{35} \textit{Nisab}: ‘The minimum scale provided for an area of the law’. For \textit{zakah} and theft, for example, it is a minimum amount of wealth that imposes liability.
\textsuperscript{37} Ibid, 111-115.
\textsuperscript{39} The concept of the Right of God signifies the immutable sphere of Islamic law. (See for details: \textit{Usul al-Sarakhsi}, 2:289-90.) At times, the concept is also used for ‘God-given’ rights to individuals because they are also ‘inalienable’. (Nyazee, \textit{Theories of Islamic Law}, 115-116. See for more details: Imran Ahsan Khan Nyazee, ‘Islamic Law and Human Rights’ (2003) \textit{Islamabad Law Review} 13-63.) However, in the context of \textit{hudud} and \textit{ta’zir}, this concept primarily signifies that no human authority can suspend this punishment. There are
Thus, the Companions of the Prophet (peace be on him) disagreed among themselves regarding the punishment for sodomy. Abu Hanifah inferred from this difference of opinion that the Companions did not hold sodomy as *zina* for if they regarded it as *zina*, they would not have differed concerning its punishment. Sarakhsi explains the principle of Abu Hanifah in the following manner:

The Companions agreed that this act [sodomy] is not *zina* as they were cognizant of the text for *zina* and yet they disagreed as to what punishment this act made the perpetrator liable to. It is established that they would not practice *ijtihad* in the presence of a text. This proves their agreement on sodomy not being *zina* and inapplicability of the *hadd* of *zina* to it. Hence, this act is a crime which does not have a prescribed punishment in the *shari'ah*. However, it is certain that it does call for punishment. The question as to what should be the punishment falls within the ambit of *siyasah* which is to be left to the discretion of the ruler. If he holds an opinion regarding this matter, he is entitled by the *shari'ah* to implement it.40

Similarly, punishments cannot be established by *qiyas* alone; there has to be a text, as creating an offence on the basis of analogy in the absence of a text amounts to *ex post facto* creation of the offence.41 Neither may rules be gleaned from the other areas of law and superimposed on the *hudud* using *qiyas*. Sarakhsi has given some important principles here:

Punishment cannot be established by *qiyas*; there has to be a text.42

There is no place for *qiyas* in determining the amounts in *hudud*. Nothing can be added by *qiyas* to [what is given in] the text.43

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41 This is a necessary corollary of ‘the principle of legality’ – *nulla peona sine lege* (no punishment without law). See for a detailed discussion: Nyazee, *General Principles of Criminal Law*, 75-83.


43 Ibid, 16:132.
Obligatory amounts cannot be determined by personal opinion. As there is no text available to us [here], the best course to follow is to relegate the matter to the *ijtihad* of the ruler.\(^{44}\)

Similarly, the *nisab* also cannot be determined by personal opinion or *qiyas* but has to be based on the text. However, where no text is present, the ruler may determine it.\(^{45}\) In the same way, no condition may be added to or retracted from the *hudud* on the strength of one’s personal opinion.

**Istihsan (Juristic Preference)**

The term *Istihsan* in Islamic law should not be confused with ‘equity’ of English jurisprudence.\(^{46}\) Historically, English ‘common law’ was based on traditional customs and, as it was not made to change in order to meet the demands of newer ages, it stagnated and was unable to satisfy the public demand for justice. People increasingly felt that the law was inadequate for their needs.\(^{47}\) People began petitioning the king. The king, being the ‘Fountain of Justice,’ would redress the grievance using his own ‘discretionary sense of justice.’ As more people turned to the king for justice, he delegated the authority of the use of discretion to the Lord Chancellor who would administer justice on the king’s behalf. As the burden mounted still further, special courts had to be constituted in different regions of the realm. These came to be known as ‘Chancery Courts’, and later ‘Equity Courts’. The continual practices of these courts led to the development of their own special principles which were referred to as ‘principles of equity’. These included many novel principles and ways of doing things. The important fact to keep in mind here is that the reason for the formation of these courts was the periodic stagnation of common law.

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\(^{44}\) Ibid, 10:60.

\(^{45}\) Ibid, 2:189.


\(^{47}\) In many cases they would claim a right but the law would not recognize it and where it did recognize it, no adequate remedy was available to avail the right. Sometimes, where the law did furnish some remedy, it would not be to the satisfaction of the claimants. The law had simply ceased to be in touch with the times and made it appear increasingly unjust to the people. See for details: Graham Virgo, *Principles of Equity and Trusts* (Oxford University Press, 2012).
Islamic law, on the other hand, never faced such problems. Equating *qiyas* with common law and *Istihsan* with equity implies that the jurists deviated from the established rule of Islamic law, thinking it was too stringent, and instead came up with a ‘better’, more just rule, using the principles of natural justice; and that this process was called *Istihsan* because it was an improvement upon the original rule. If this is true, then Shafi’i jurists were right to condemn it and assert: ‘Whoever practices *Istihsan* assumes the role of the Lawgiver’.48

The Hanafis, who accept *Istihsan* as a valid means of extracting legal rules, consider it a mechanism for ensuring harmony and analytical consistency within the law. If something appears prohibited in the light of the general principles of law, but has been explicitly permitted by one of the texts, the Hanafis take the position that it is permissible as an exception to the general principle. They use the formula: ‘prohibited under *qiyas* but permissible under *istihsan*’ for this purpose. Exceptions to the general principles are made on the basis of the text, consensus, necessity or some other ‘concealed principle’ (*qiyas khafiyy*). Sarkhasi is worth quoting here:

This [*istihsan*] is the evidence coming in conflict with that apparent principle (*qiyas zahirī*) which comes into view without one’s having looked deep into the matter. Upon a closer inspection of the rule and the resembling principles, it becomes clear that the evidence that is conflicting with this apparent principle is stronger and it is obligatory to follow it. The one choosing the stronger of the two evidences cannot be said to be following his own personal caprices.49

Another important point made by Sarakhsi is that when the jurist uses *istihsan* and prefers the stronger rule, he *abandons* the weaker one and as such it is not permissible for him or his followers to follow the latter.50 He goes on to explain that when *Istihsan* is carried out on the basis of a concealed principle (*qiyas khafiyy*), the established rule does not amount to an exception but becomes a general principle in itself.51

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50 Ibid.
51 Ibid, 206.
Maslahah (Protecting the Objectives of the Law)

Contemporary scholars, including those who prepared the draft of the CII Report,\(^\text{52}\) have generally equated maslahah with the principle of ‘utility’ expounded by Jeremy Bentham (d. 1832),\(^\text{53}\) apparently because literally maslahah means ‘acquiring benefit or repelling harm (jalb al-manfa‘ah aw daf‘ al-madarrah)’.\(^\text{54}\) The technical meaning of maslahah by virtue of which it becomes an accepted principle of Islamic law has been explained by Ghazali in the following words:

As for maslahah, it is essentially an expression for acquiring benefit or repelling harm, but that is not what we mean by it because acquiring benefit or repelling harm represents human goals, that is, the welfare of human beings through the attainment of these goals. What we mean by maslahah, however, is the preservation of the objective of the law (almuhafazah ‘ala maqsud al-shar’).\(^\text{55}\)

Although Ghazali is considered the foremost expositor of the principle of maslahah, yet it may surprise many that he places maslahah in the category of al-usul al-mawhumah, that is, ‘uncertain principles’. He gives reasons for doing this:

This is among the uncertain principles and whoever considers it as a fifth source is mistaken. This is because we linked maslahah to the objectives of the law (maqasid al-shari‘ah), which are known by the Book [Qur’an], the Sunnah and consensus. Thus, a maslahah which cannot be linked to an objective derived from the Qur’an, the Sunnah or consensus, and is of those alien interests (al-masalih al-gharibah) which are not compatible with the propositions of the law (tasarrufat al-shar’), is void and abominable. Whoever uses such interests assumes the position of the Lawmaker, just as whoever presumes a rule on the basis of his personal

\(^{52}\text{ See, for instance, Final Report on Reforms in the Hudood Laws, 147.}\)

\(^{53}\text{ Bentham’s Of Laws in General greatly influenced his student John Austin and other legal philosophers. See for a detailed critical analysis of his views and particularly the way he uses the principle of utility in criminal law: H. L. A. Hart, Essays on Bentham: Studies in Jurisprudence and Political Theory (Clarendon Press, 1982).}\)

\(^{54}\text{ Ghazali, al-Mustasfa, 1:216.}\)

\(^{55}\text{ Ibid, 1:216-217.}\)
preference (istihsan) assumes the position of the Lawmaker.

Thus, from the perspective of compatibility with the objectives of Islamic law, maslahah may be divided into three categories: the one proved compatible (maslahah mu’tabarah), the one proved incompatible (maslahah mulghah), and the one which is neither proved compatible nor incompatible (maslahah gharibah).

The first of these, the ‘compatible interests’, are acknowledged by Islamic law either at the level of a specie (naw’) or at the level of a genus (jins). Ghazali explains that qiyaṣ is nothing but extending the law to a new case on the basis of an interest acknowledged at the level of specie. He further explains that the law can be extended to some new cases on the basis of an interest acknowledged at the level of genus, calling it maslahah mursalah, provided three conditions are fulfilled:

56 Shafi‘i rejected the principle of Istihsan considering it to be a way of following personal whims. As already explained above, the Hanafi principle of istihsan is absolutely different from this. Ghazali also acknowledges that the explanation of istihsan by the great Hanafi jurist Karkhi is acceptable to him asserting that if this is what is meant by istihsan he could only object to its title! (al-Mustasfa, 1:215-16.) Sarakhsi explains that even the title istihsan is not objectionable. (Usul al-Sarakhsi, 2:199-200)

57 Ghazali, al-Mustasfa, 1:222.

58 Ibid, 1:216.

59 The example given by Ghazali is that of the fatwa (legal verdict) given by a jurist to a rich person who had intentionally broken his fast and had sought the verdict about expiation. The jurist had told him that he was supposed to keep fast for sixty consecutive days, although the text of the tradition about expiation puts it on the third number in the priority list: manumission of a slave; feeding sixty needy people; fasting for sixty days. The argument forwarded by this jurist was that the purpose of expiation was to deter the lawbreaker from breaking it again and as the person was rich the first two forms of expiation could not achieve the purpose! Ghazali and other jurists deem this line of reasoning flawed and consider this presumed “Maslahah” as mulghah because it goes against the text (Ibid.). In other words, the Maslahah determined by God cannot be defeated by the Maslahah presumed by human beings.

60 Ghazali says that the example of this kind of Maslahah is difficult to find. Hence, he came up with the hypothetical example of a situation of war in which all Muslims were facing a definite death if they would not kill the few Muslims whom the invading enemy had taken as shields (Ibid, 1:218). It must be noted here that the choice is not between saving a few Muslims on the one hand or more Muslims on the other; rather, it is between saving a few Muslims or saving all. Thus, the choice was between juz’ (part) and kull (whole), not between qalil (few) and kathir (more). That is why Ghazali goes into great details in order to find out the Maslahah upheld by the Lawgiver in this situation (Ibid.).

61 Ghazali, al-Mustasfa, 1:222.

62 Ibid.
That the new principle does not conflict with any text (nass) or modifies its implications;

That the new principle does not conflict with the general propositions of the law, i.e., the existing principles and rules of the system; and
That the new principle is not alien (gharib) to the system, i.e., it finds a basis in the system.

An alien principle cannot be accommodated in the legal system, unless it fulfills three further conditions:

It is related to any of the five primary objectives of the law (darurat), i.e., it must aim at preserving and protecting religion, life, progeny, intellect or wealth;
It is definitive (qat‘i), i.e., it must certainly lead to the preservation and protection of the above-mentioned objectives; and
It is absolute (kulli) i.e. it must concern the whole of the Muslim ummah and not be limited to a certain group or individual.

Hence, it is impossible to pick at will concepts and principles from other legal systems and ‘transplant’ them in the Islamic legal system. The compatibility test is necessary.

These conditions clearly show the limits of personal opinion and discretion in Islamic law. This issue also leads us to examine in a little detail the approach of those advocating reason untied to legal text, a pure form of naturalism manifest in the work of many of the contemporary Muslim scholars, including those who drafted the Report of the Council.

The Naturalist Argument

The analysis in the previous Section establishes that modern Muslim scholars, including the drafters of the Council’s Report, have not followed

63 Ibid, 1:217.
64 Ibid, 1:218.
65 Ibid, 1:222. Ghazali then discusses various hypothetical examples to explain these three conditions. In each of these examples one of the conditions is missing. These examples are not only illustrative of the genius of that great jurist-cum-philosopher but also of the simplistic approach which many modern scholars have adopted towards this issue.
Discovering the Law without a Coherent Legal Theory: The Case of the Council of Islamic Ideology

the legal theory of a particular school, nor have they come up with a coherent theory of their own. They have, instead, chosen those principles from various schools which they consider helpful in giving more room to discretion. This section explains how this approach, directed at Islamic criminal law, draws from the ‘naturalist’ argument. It calls for considering ‘reason and nature’ (‘aql-o-fitrat) as the basis for ijtihad and, thus, wants to get rid of the stringent conditions laid down by the jurists.\(^{66}\) If accepted, this approach will demolish the whole edifice of the legal system developed by centuries of legal scholarship and will leave everything to the unbridled discretion of the modern ‘sovereign’ state.

**Commonsense, Nature and Ijtihad**

Those calling for reforms in Islamic law generally, and critics of Islamic criminal law particularly, come up with the ‘naturalist’ argument when they talk of ijtihad.\(^ {67}\) The call for the use of ‘commonsense’, ‘reason’ and ‘natural instincts’ for discovering the rules of Islamic law or for extending the law to the new cases is, in fact, based on the concept of natural law. Javed Ahmad Ghamidi (b. 1951), an exponent of this approach who headed the Council’s legal committee when it deliberated on reforming the hudud laws,\(^ {68}\) writes:

> The shari‘ah concerns itself only where reason has erred or is liable to err; such as the few laws relating to economics, politics, society and etiquettes. There are only five crimes of hudud and ta‘zir for which a fixed penalty has been determined. Everything else has been left to human reason.\(^ {69}\)

Defining the scope of ijtihad, Ghamidi says: ‘This [ijtihad] means that where the Qur’an and the Sunnah are silent, reason and nature (‘aql-o-fitrat) should be consulted. This is what is really meant by ijtihad’.\(^ {70}\) Amin Ahsan

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\(^ {67}\) Effects of this approach are found in the CII Report too. The concept of ‘natural law’ is summarized by H. L. A. Hart (d. 1992), well-known legal positivist, in these words: “there are certain principles of human conduct, awaiting discovery by human reason, with which man-made law must conform if it is to be valid.” *The Concept of Law* (Clarendon Press, 1961) 186.


\(^ {70}\) Ibid, 44 (Emphasis added).
Islahi (d 1997), teacher of Ghamidi, better known for his peculiar thesis of coherence in the Qur’an (nazm-i-Qur’an), explaining his position that ‘the most obvious realities of nature’ (badihiyyat-i-fitrat) are part of the Divine law, says:

[The verse of the Qur’an] ‘You may approach them [your wives] in the manner as Allah commanded you’ (Al-Quran 2:222), makes it clear that all the most obvious realities of nature fall within the commands of Allah and form part of the shari’ah, even though these have not been expressly stated. For example, we have not been ordered to take our food through our mouths and neither through our noses or eyes, but this is something that has been decreed by Allah as He has fashioned us in such a way. One going against this [not expressly stated] ordinance, goes against Allah’s clear, or rather most manifest, law and will be liable to His punishment. We have called it as ‘most manifest’ because Allah has left such matters solely to our nature, which is needless of any guidance respecting them.

This is exactly how the ‘religious’ naturalists approach this issue.

Religious Naturalists and the ‘Neo-Mu‘tazilah’

John Austin (d. 1859), the famous English jurist of the nineteenth century, sums up the thesis of the proponents of this view:

Of the divine laws, or the laws of God, some are revealed or proclaimed, and others are unrevealed. Such of the laws of God as are unrevealed are not infrequently denoted by following names and phrases: ‘the law of nature’ ‘Natural Law’; ‘the law manifested to man by the light of nature or reason’… Paley and other divines have proved it beyond a

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72 Amin Ahsan Islahi, Tadabbur-i-Qur’an (Faran Foundation, 2001), 1:526 (Emphasis added).

73 For detailed analysis of the views of the famous Christian theologian Thomas Aquinas (d. 1274) about natural law being part of the Divine law, see: N. Kretzmann and E. Stump (eds.), The Cambridge Companion to Aquinas (Cambridge University Press, 1993).
doubt, that it was not the purpose of revelation to disclose the whole of these duties. Some we could not know, without the help of revelation; and these the revealed law has stated distinctly and precisely. The rest we may know, if we will, by the light of nature and reason; and these the revealed law supposes or assumes. It passes them over in silence, or with a brief and incidental notice.⁷⁴

The Mu’тazilah in the early Islamic history approached Islamic law in a similar way, asserting that goodness or badness is an inherent quality of acts which can be discovered by reason.⁷⁵ The ‘neo-Mu’тazilah’, as they should be called, have the same view. Thus, Islahi asserts: ‘It would be incorrect to think that difference between the good or evil of a thing is merely an acquired characteristic, and does not have any reasonable, ethical or natural grounds. To consider such is nothing less than sophism’.⁷⁶

The vast majority of Muslim scholars, however, have historically supported the opposing view; that the good or evil of something is not to be determined by reason but through the dictates of the shari’ah; as reason is liable to err in recognizing good and evil, it cannot be taken as a standard.⁷⁷ Even if it is admitted that reason can identify the goodness or badness of an act, the question remains: how does a declaration of reason in a particular case acquire the status of law? To put it in the shari’ah terminology, how does it become a hukm shar‘i. It is for this reason that jurists explicitly defined the hukm shar‘i as the address of the Lawgiver.⁷⁸

The same debate is found among Western legal philosophers. The positivists take the view that the ‘positive law’ is valid and binding irrespective of the moral considerations about its goodness or badness, while the naturalists take the view that an immoral law is no law as it violates the superior natural law.⁷⁹ For Oliver Wendell Holmes, the famous judge of the US Supreme Court, arguing on the basis of the dictates of nature is nothing but ‘ominous brooding in the sky’.⁸⁰

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⁷⁶ Islahi, Taddabur-i-Quran, 3:194.
⁷⁸ Shawkani, Irshad al-Fahul, 1:71-77.
⁸⁰ Nyazee, Islamic Jurisprudence, 87.
Where the Law is Silent

A question arises here: if the naturalist argument is rejected, how are the gaps in the law to be filled? How is the law extended to novel cases? Muslim jurists discuss an interesting aspect of this issue by framing the question: what was the rule for various acts before the advent of the revelation? Ghazali asserts that at that stage acts were legally neither permissible nor prohibited. This is because permissibility and prohibition both are forms of ḥukm sharʿi, which requires the address from the Lawgiver.\(^{81}\) Hence, the rule, according to Ghazali, was tawāqquf, i.e. waiting for revelation. After the advent of revelation, it alone is the standard for determining the goodness or badness of an act.\(^{82}\) But what is to be done for matters where the shariʿah outwardly seems silent? Obviously, tawāqquf is no more the option.

Ronald Dworkin (d. 2014), the famous American jurist, calls such issues as hard cases. These are cases where the law is apparently silent or where the rule apparently violates an established principle of law.\(^{83}\) Dworkin has shown, with considerable force, that for hard cases, the judge relies on the general principles of law rather than his own discretion.\(^{84}\) The same is the approach of Hanafi jurists. Nyazee, explaining the position of Hanafi jurists, asserts: ‘Once revelation has come, such laws may only be discovered in the light of revelation, because revelation does not pass them over in silence; it indicates them through general principles’.\(^{85}\) For covering new cases, newer principles can be formulated, provided it is done in accordance with the standard procedure for ensuring the compatibility of the new principles with the existing legal norms. This is what the Hanafi methodology is all about.\(^{86}\)

Conclusions

Critics of Islamic criminal law have generally relied on the naturalist argument presuming that human reason may singly be used as a source for

\(^{81}\) Ghazali, al-Mustasfa, 1:66-67.
\(^{82}\) Ibid, 67 and 76.
\(^{84}\) The issue has implications for the debate whether the judges make the law or merely discover it. See for a detailed discussion: Muhammad Munir, Are Judges Makers or Discoverers of the Law: Theories of Adjudication and Stare Deci ses with Special Reference to Pakistan 11 (2013) Annual Journal of the International Islamic University Islamabad 7-39.
\(^{85}\) Nyazee, Islamic Jurisprudence, 85 (Emphasis added).
\(^{86}\) See for details about the methodology of Hanafi jurists: Nyazee, Theories of Islamic Law, 147-176 and 189-230.
judging the goodness or badness of an act. While this approach may have led to moral criticism of the positive laws in the West, it has certainly caused serious problems for those who believe in the divinity of Islamic law, as it results in a conflict between reason and revelation. Critics have also found it better to take help from some principles of the various schools of Islamic law which in their opinion created room for discretion. They have also been trying to distinguish between ‘shari‘ah’, which is Divine, and ‘fiqh’ which is human effort, and then asserting that ‘very few’ issues have been touched by revelation, which has left the rest of the issues to reason. Thus marginalizing and undermining the rich legal heritage of fourteen hundred years, these critics have called for what amounts to demolishing the whole legal edifice of Islamic law. Serious students of Islamic law need to elaborate the approach of the jurists who negate the basic presumptions of the ‘neo-Mu‘tazilah’.
Mulla’s *Principles of Mahomedan Law* in Pakistani Courts: Undoing/Unraveling the Colonial Enterprise?

Dr. Shahbaz Ahmad Cheema*

Sir Dinshah Fardunjhi Mulla’s *magnum opus* the *Principles of Mahomedan Law* is a famous and frequently cited book on Muslim personal law in Pakistan. It was authored in British India and was immersed into the context which shaped it in numerous ways. It unfolds a window to understand the processes embryonic in the formation of Anglo-Muhammadan law during British colonial era of Indian subcontinent. In addition to exploring the nexus of Mulla’s book with its context, this paper surveys how it is treated by the courts in Pakistan. The courts generally turn towards Mulla’s book for ascertaining the point of view of Muslim personal law as it is the most concise, handy, and easy to use reference material on the subject sanctified by chain of precedents dating back to British India. In addition to the deference accorded to the book by the courts, one comes across those cases where the courts have gone beyond the dictums expounded by Mulla. These cases are not in plenty, but they appear to be an inchoate step towards undoing/unraveling the colonial enterprise underlying the construction of Anglo-Muhammadan law. The complicated relationship between Pakistani courts and Mulla has been readjusting over the years, but still it is difficult to attribute it any precise caption.

**Introduction**

Pakistan is constitutionally proclaimed as an Islamic republic.¹ It guarantees its Muslim citizens an environment which would facilitate them to follow the Islamic dictates and precepts.² The state promises to make efforts to bring its laws in conformity to the Islamic law. Various institutions have been set up with different levels of assignments to meet this constitutional mandate.³ In this legally supportive environment, the courts in Pakistan deal with and apply Muslim personal law to Muslim citizens. This legal domain was

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* Assistant Professor, Punjab University Law College, University of the Punjab, Lahore.
3 Islamic Research Institute, Federal Shariat Court, and Council of Islamic Ideology.
supposedly left untouched by the colonial government in British India,\(^4\) and hence, in the application of Muslim personal law, the Pakistani courts after independence started following the same legal structures and precedents which were in vogue in the colonial period. This continuity is witnessed by the similarity of source/reference material employed by the courts of both pre-and post-colonial era.\(^5\)

This source material was prepared and translated either under the auspices of the colonial government of British India itself or an enabling environment was created which facilitated its production and circulation.\(^6\) Sir Dinshah Fardunji Mulla’s famous book titled *Principles of Mahomedan Law* was an illustration of the enabling environment orchestrated by the colonial enterprise. There was a complex relationship between the source material of Islamic law and the context which led to the creation and proliferation of the former. The material was prepared by the colonial enterprise to camouflage herself as if she was nothing else than a continuity of the dislodged regime of Mughals and to acquire legitimacy to decide in those matters which were closely linked to the religious texts.\(^7\) Despite occasional dissenting opinions, the source material prepared in that era progressively attained the status of an authentic version of Islamic law which could not have been accomplished without generous support of the colonial enterprise.\(^8\)

With particular reference to Mulla’s book, this paper analyses how and in what manner the Pakistani courts are following and moving beyond the cognitive structures and institutions established by the colonial enterprise for the administration of Muhammadan law. The paper is comprised of three parts: the first part describes the mechanics of the colonial enterprise in British India that formulated Anglo-Muhammadan law as a distinct genre. The second part confines itself to the introduction of Mulla’s *locus classicus* *Principles of Mahomedan Law* explaining how it was an embodiment of the colonial enterprise’s legal architecture for the application of Muhammadan law to the Muslims. The last part discusses the relationship between Mulla’s book and the Pakistani judiciary with an aim to explore how the latter is


\(^6\) Ibid.


\(^8\) (n 5).
bringing those aspects of Muslim personal law which were eclipsed or suppressed by the colonial formation of Anglo-Muhammadan law.

**Anglo-Muhammadan Law and the Colonial Enterprise**

Anderson is of the view that Anglo-Muhammadan law was a by-product of multiple patent and latent processes which had been carried out during the colonial government of British India. According to him, this genre of law was constructed by amalgamating various ingredients such as ‘legal assumptions … law officers, translations, textbooks, codifications, and new legal technologies’. He further elaborated these ingredients to highlight some mechanics of the colonial enterprise. A prominent legal assumption of the earlier period of the colonial era was that the Muslims were one monolithic entity. The native law officers (i.e., *Qazis*) were appointed to assist the colonial judges, but their assistance was often sought and then applied to real facts in a mechanical manner without paying attention to constructive discretion and genuine difference of opinion. The entire process of the translation of the religious texts under the auspices of the British Raj was aimed at presenting them in a simplified manner to make them comprehensible to the judges of the Raj. The process of codification restricted the applicability of Islamic law to the domain of personal law and that too under the legal regime inspired and trained by the principles of English and common law. Moreover, the process of codification armed the colonial enterprise to intervene in any field of law including the personal law which it did when this intervention suited its purposes or sensibilities.

Anisur Rahman has specifically highlighted two factors which significantly influenced the administration of Muslim personal law in British India; the abolishment of the institution of *Qazi* in 1864 and the detachment of Muslim personal law from the general law of the land and the latter’s codification in the second half of 19th century. Prior to the codification of general laws, Islamic law was applied in this domain, though its application was not meticulously methodological and uniform throughout the country. The first factor arrogated to the British judges an unstructured discretion to construe the Muslim personal law without soliciting the opinions of *Qazis* and inject wherever possible their own legal doctrines and constructive

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9 (n 4) 10.
10 Anisur Rahman, ‘Islamic Law and Colonial Encounter: On the Discourse of ‘Mohammedan Law’ in British India’ (SSRN, 1 July 2012) 11
techniques. On the other, the process of codification of general laws replacing Islamic law and confining the applicability of Islamic law to the field of personal law divorced the latter from an organic whole and left it at the mercy of those who were not trained to apply it.

Elisha Giunchi\(^\text{12}\) in her comprehensive analysis of the constructive processes of *Shari’a* under British India highlighted that fluidity and flexibility which had been the hallmark of the legal structures and institutions prior to the colonial enterprise in Indian subcontinent were irreparably destroyed in search of authenticity and certainty. The traces of such destruction are even noticeable in the legal system of post-colonial Pakistan. The author pointed out that the initiative of translating the religious texts by the colonial enterprise was not without political motives and aspirations. This process provided the maneuvering space to the translators to simplify the complex and layered opinions of the Muslim scholars and to downplay those features and dimensions of the juristic opinions which did not conform to their sensibilities and to skip those aspects which they could not comprehend properly or did not fit well within their constructive techniques. During this era, the indigenous Muslim scholars’ contributions were not in essence very different as they had been trained in the English legal system and possessed nevertheless inappropriate knowledge of their own traditions.\(^\text{13}\)

Another salient feature, according to Elisa Giunchi,\(^\text{14}\) of the judicial dispensation of the colonial enterprise which played a key role in depriving the flexibility and contextuality of Islamic law was the doctrine of *stare decisis*. For achieving certainty and uniformity, this doctrine took away the genuine and justifiable difference of opinion recognised in various schools of thought and even within one particular school. Once an opinion of one scholar disregarding others’ divergent opinions on the same point was judicially applied, it was almost impossible to reverse it in subsequent judicial contestations as the doctrine of precedent did not allow such change of heart. The courts during the Mughals era had ample discretion to prefer one or another divergent opinion considering the facts and circumstances of the cases before them. Though they could follow their earlier opinion in a subsequent matter of the similar nature, but at the same time they were at liberty to go for another opinion if necessitated by justice and the judge’s moral consciousness. This judicial discretion had been replaced by the

\(^{12}\) Ibid.  
\(^{13}\) Ibid 1128-1129.  
\(^{14}\) (n 11).
doctrine of precedent which was applied by the colonial judges formality without being conscious to the spirit and ethos of Islamic law. In this regard, Fyzee\textsuperscript{15} stated that the fatawa were ‘persuasive authorities of great value’ and the Muslim judges in the Mughal period could prefer one over others, whereas the doctrine of stare decisis ‘was not embodied in the fabric of Islamic law’.

The colonial enterprise brought the secular state at center of the legal fabric, paved the way for introduction of legal positivism in Islamic law, replaced morality as a binding force between the law and its subjects with coercion, carved out a protestant type category of family law, and eventually all these aspects led to the deprivation of the law from ethical and moral underpinnings.\textsuperscript{16} Ebrahim Moosa does not view colonialism as if it exclusively shaped the colonised people and their legal institutions without causing some reciprocal influences on the colonisers: Islamic law which was alien to the colonisers was infiltrated into their countries and debated in numerous ways (eg, in policy making institutions like parliament and before judicial bodies like Privy Council).\textsuperscript{17} Moreover, the colonial enterprise had made the colonised people to think about challenges posed by the legal apparatus of secular state (eg, synchronising Islamic law with secular state)\textsuperscript{18} as well as those aspects of their legal traditions which had been sidelined or eclipsed (eg, Maslaha, Maqasid-i-Shariah, Talfiq). Ebrahim Moosa insists on the agency of the colonised people however circumscribed it was, but the structuring and overarching influence and role embodied in the coercive power of the colonial enterprise far exceeded the resistive and accommodative agency possessed by the colonised people.

The colonial enterprise of British India took centuries to penetrate and replace the local and indigenous governance and judicial structures in Indian subcontinent. At the earliest encounters during the late 17\textsuperscript{th} and early part of 18\textsuperscript{th} centuries, the colonisers transposed themselves as agents of the Mughals. Thereafter, in the late 18\textsuperscript{th} and first half of 19\textsuperscript{th} centuries, though they had started governing directly in areas under their control, the colonisers proclaimed that they did not intend any break with the past and would minimally intervene in the indigenous modes of governance. It was this

\textsuperscript{16} Ebrahim Moosa, ‘Colonialism and Islamic Law’ in Muhammad Khalid Masud, Armando Salvatore and Martin van Bruinessen (eds), Islam and Modernity: Key Issues and Debates (Edinburgh University Press 2009) 158-181.
\textsuperscript{17} Ibid.
\textsuperscript{18} (n 15)
period in which the term Anglo-Muhammadan law was employed by the British Raj. During the late 19th and early part of 20th centuries, the colonial enterprise managed to have exclusivity over the power structure and institutions. In this era, the addendum of ‘Anglo’ was omitted and left behind Muhammadan law, Muslim law etc. The colonial enterprise was confident enough in this period that what she was administering was Muhammadan law or Muslim law by all means and she did not feel it tainted by the spirit of ‘Anglo’. Mulla’s *Principles of Mahomedan Law* appeared on the scene in this era.

The colonial enterprise constructed and influenced the Islamic law, to which Mulla’s book was an integral part, in following ways. Firstly, in separating the personal laws from the public or general laws, this categorisation specifically damaged the organic entity and wholesomeness of the legal system organised on the pattern of Islamic law which was likely to influence the Muslims more than any other community. Secondly, the domain of personal law coercively tailored from the perspective of the colonial enterprise and little consideration was accorded to the point of view, if any, extended by those upon whom such laws had to be implemented. Thirdly, the process of reproduction/rebirth of personal law through a colonial machine of translation, codification at individual or state level, and judicial verdicts took away the vast array of constructive discretion and genuine differences of opinion in interpreting and applying the Islamic law which had been exercised by the Muslim jurists and judges previously. Fourthly, for legal and judicial purposes, Islamic law was found in those treatises which were valued by the colonial enterprise and then enforced through judicial pronouncements. This aspect created a unique relationship between the Islamic law as articulated by the colonial enterprise and those on whom it had to be applied. It encouraged the selective recourse and maneuvering of Islamic law like all other worldly laws through the secular courts of British India. Finally, the reproduced and reborn Muslim personal law attained a sense of authenticity by its unswerving reverberation and application through the entire legal structure commencing from legal education and culminating into judicial decision-making.

By and large, the legal and judicial structures and institutions were progressively replaced by the colonial enterprise in Indian subcontinent to tighten her control over the colonised country and people. Simplification of personal laws aiming at certainty and uniformity obscured the multidimensional phenomena of law hitherto understood and applied by the

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19 (n 7) 301.
The communitarian and voluntary spirit of the legal apparatus was substituted with a coercive machine of secular state. This machine squeezed dramatically the numerous spaces in which the governed earlier could have avoided interaction with the government. The power and dependency relationship between the government and governed was rewritten and maintained for almost two centuries to the advantage of the former.

Mulla’s book presents a window to examine how the colonial enterprise influenced the institution of Muhammadan law in that domain which had been apparently left untouched by British Raj. Mulla’s book was an upshot of the colonial enterprise and was in turn likely to advance the purposes and motives of the system which made it relevant to its socio-political context. The next section makes an endeavor to comprehend the book’s relationship with its context.

**Mulla’s Principles of Mahomedan Law**

Mulla’s book is held in high esteem in Pakistan and referred to on the issues of Muslim personal law by both the bench and bar frequently. Mulla (1868-1934) produced ten editions of the book during his life: the 1st edition was published in 1905 and the 10th in 1933 just one year before his death. After Mulla’s death, various renowned authors edited his book incorporating the developments made by judicial pronouncements and various legislative instruments on the issues dealt with in the book. Before partition of Indian subcontinent in 1947, two more volumes were edited: one by George Rankin

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20 This part has substantially been developed from an earlier article co-authored by me: see (n 5). I extend my gratitude to my co-author for allowing me to use and further develop it.


Mulla’s *Principles of Mahomedan Law* in Pakistani Courts: Undoing/Unraveling the Colonial Enterprise?

in 1938\(^\text{24}\) and another by Sajba Rangnekar in 1944.\(^\text{25}\) After the partition, numerous editions of the book were updated by various authors in both India and Pakistan.\(^\text{26}\)

Mulla was a renowned author of his time and wrote commentaries on some enacted laws as well, eg, Civil Procedure Code 1908,\(^\text{27}\) Transfer of Properties Act 1882.\(^\text{28}\) Considering the demand for good books on Islamic law in the English language, Mulla wrote the above titled book aiming to meet the needs of the law students ‘for speedy and convenient grasp of its principles’.\(^\text{29}\) Due to its simplicity and conciseness which were started to be valued instead of complexity and intricacy thanks to the colonial enterprise, it also captured the attention of the courts and lawyers.

As is evident from his writings, Mulla had interest in various fields of law. He was well-aware of the entire gamut of legal developments and legal mechanics of his age and more particularly the pattern of enacting the legislative instruments. He successfully followed the same pattern in his *Principles of Mahomedan Law*. The pattern of writing Islamic law in form of sections or propositions of law was not in vogue then. In addition to the currency of this pattern in the legislative instruments, Mulla was inspired by Sir Roland Wilson’s monumental work titled *Digest of Anglo Muhammadan Law*.\(^\text{30}\) Mulla was of the view that reducing main principles of Muslim personal law to a ‘series of propositions arranged in consecutive sections’ would make it easily comprehensible.\(^\text{31}\) While articulating various section-like propositions in the book, Mulla preferred simplicity over complexity,

\(^{24}\) Iqbal (n 22).
\(^{29}\) (n 22) iii.
\(^{30}\) Ibid, iv.
\(^{31}\) Ibid, iii.
precision over fluidity and certainty over flexibility. These features were the trademark of the constructive machine of the colonial enterprise.

Another salient feature of the colonial enterprise was to confine Islamic law to the domain of family law and some allied property matters, and even this concession was subject to the legislative discretion and the sensibilities of British Raj under the phrase of ‘justice, equity and good conscience’. In the words of Mulla, Islamic law was not ‘the law of British India: it [was] only the law so far as the laws of India ha[d] directed it to be observed’.  

In his later editions of the book, the applicability of Islamic law to British India was more accurately explained. In addition to manifesting the epoch Mulla was situated in, his understanding of the applicability of Islamic law to British India guided him to select those topics which had relevance to the legal cum judicial system of that era.

There are thirteen chapters in Mulla’s 1st edition dealing with subjects of the history of Islamic law in British India, sects and sub-sects of Muslims, inheritance, will, gift, wakf, pre-emption, marriage, dower, divorce, parentage, guardianship, and maintenance. During his lifetime, Mulla continued to developing his book and enhancing its volume, incorporating the decisions of the courts of British India. Mulla’s 8th edition comprised 16 chapters, while his 10th edition contained 19. These editions were developed upon the original scheme and the topics of the 1st edition of the book except that some topics were expanded into exclusive chapters. For instance, the topic of ‘Conversion to Mahomedanism’ was discussed in the 1st edition, but later on considering the significance of the issue in socio-legal milieu of British India was converted into a full-fledged chapter. This restructuring was considered appropriate by the growing jurisprudence of decided cases on alleged conversions of Hindus and Christians to Islam for availing the facility of polygamous marriage and relatively easy manner of dissolution of marriage provided by Islamic law.

The section-like propositions formulated by Mulla in his book raises a question about their substance and authenticity. In other words, what was the source from which Mulla drew these propositions? Mulla stated in the prefatory note that the substance of these propositions was extracted from

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32 Ibid, 1.
34 (n 22) v.
35 (n 22) 4-7.
36 (n 33); (n 23).
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‘judgments to be found in recognised reports’. Where he could not find the judgments sufficiently instructive, he relied on ‘the Hedaya and the Fatwa Alumgiri’. These books were not consulted in original rather their translations were relied upon by him. In case of Hedaya, his reference was Hamilton and for Fatwa Alumgiri, he turned towards Bailli.

Mulla’s book was an erudite combination of two sources: the first was the judicial pronouncements and the second was Islamic law books translated into English under the auspices of the colonial enterprise. Considering the quantity of the material reproduced in Mulla’s edited versions, one could assert that the content derived from the judicial pronouncements was far more than that which was taken from the English rendered versions of Islamic law. This particular aspect demonstrates the prominence attained by the English doctrine of precedent in British India. In the past, books on Islamic law were not patterned as such and mostly they embodied the ideal version of Islamic law as enshrined in the basic sources of the Holy Qur’an and Sunnah of the Prophet Muhammad. In pre-colonial era, the practice of the courts was not compiled as meticulously as necessitated by the doctrine of precedent. Though there was a genre known as fatawa compilations of which Fatawa Alamgiri was an important illustration, but these fatawa formed a fluid milieu of legal opinions from which the Qazis were at liberty to choose an appropriate one considering the facts and circumstances of each case.

Taking into account, Mulla’s source material including the judicial pronouncements and English rendered books, the relationship of Mulla’s book with its politico-legal context was so embedded that it was near impossible to imagine its disentanglement. On the one hand, Mulla had relied on that source material which was produced and prepared by the colonial enterprise and on the other, the same enterprise thenceforth referred to Mulla as another valuable and authentic source of Muslim personal law. This circler relationship generated a unique system of support and sustenance for each other.

From the point of view of Islamic authenticity, many parts of Mulla’s book state accurate propositions of Islamic law with a rider that the

37 (n 22) iii.
38 Ibid.
39 Some versions of Hamilton’s Hedaya are available at <www.archive.org>. The most famous among them was Grady’s 2nd edition at <http://archive.org/details/hedayaorguideac00hamigoog>.
40 (n 5).
propositions are by and large reproduced in simplistic manner glossing over the spaces of judicial discretion and genuine difference of opinion. This simplicity has reduced the constructive space and interpretative discretion otherwise available and exercised by the Muslim jurists and judges while applying the rules to practical situations. In some areas, eg, Mulla’s categorisation of marriages into valid, void and irregular, do not put forward the stance of Islamic law authoritatively. Though his account is an easy way to fathom certain aspects of the categories of marriage in Islam but the same does not sufficiently bring out the complexity of the law in this matter.

Mulla edited ten editions of his book to incorporate the developments made by the judicial pronouncements and various legislative measures. For instance, the 1st edition described the Muslim endowments in line with the famous decision of the Privy Council in Abul Fata Mahomed v Rasamaya as it was the law applicable at that time. Considering two legislative instruments namely the Mussalman Wakf Validating Act 1913 and 1930, he incorporated the changes made in its later edition. This process was maintained by those editors who edited the book after his death. Before 1939, Muslim women could only get their marriages dissolved via the courts on very limited grounds as Hanafi law did not recommend judicial dissolution even if the relationship between the spouses had strained: the wives were at the mercy of their husbands for unknotted the marital tie.

This scenario was substantially modified by the Dissolution of Muslim Marriages Act 1939 which allowed women to have recourse to the courts on various grounds. The 12th edition published in 1944 brought appropriate modification to the book to correspond to the transformed legal scenario.

In context of Mulla’s overwhelming dependence on the judgments of the colonial courts, when the Pakistani courts rely on his book that amounts

41 (n 26) 391-402.
43 (1894) 22 Cal 619; 22 I.A. 76.
44 (n 22) 123-126.
45 (n 23) 141-147.
46 (n 23) 209-211.
47 (n 25) 255-260.
48 (n 26) 337-338.
to an indirect reference to the precedents of Islamic law articulated by the courts of British India. This shows how important Mulla’s book is as a bridge between the Pakistani courts and the courts of British India for a smooth transfer of legal structures and instruments. No one should object to following the judgments pronounced during the colonial period, but if the judicial decisions were made considering the needs of its time leaving no or little space for evolution under the guise of uniformity and certainty, then unreflective adherence to them may lead to problematic situations and even become source of injustice and repression.

**Mulla’s Book and Pakistani Courts**

The colonial enterprise transferred the legal structures and institutions it developed for its own purposes to the newly independent states, India and Pakistan, after official termination of the colonial era in 1947. They included but not confined to the apparatus of secular state, courts, and firmly engraved tradition of judicial dispensation on the pattern of English legal system. For the nascent states, it was not possible to avoid these structures and institutions and to evolve alternatives. Hence, Pakistan adopted virtually all of them without any variation at the beginning other than the caption of the state. However, with a passage of time, one may expect that some of the emblems of dependency may have been replaced with home-grown alternatives. Considering Mulla’s book as an artifact of the colonial enterprise, this section analyses the intricate relationship of the Pakistani courts with it. The purpose of this analysis is to highlight various dimensions of this relationship and particularly to fathom how far the courts have travelled beyond the law articulated in Mulla’s book. To start with, this relationship belies any title for its introduction.

The relationship of the Pakistani courts with Mulla’s book is manifested by romanticism at one end of the spectrum to criticism of the propositions propounded by him at another. There are some cases in which the courts have probably thought it as a sign of infidelity to refer to any other source except Mulla. This judicial approach projects the book as an exclusively authoritative reference on the subject whose authenticity has never been questioned or disputed. Stepping down from this romanticism, there are plenty of cases where the courts have relied on many books of authority and one of them is Mulla. The courts, in line with their colonial legacy of the common law system, are more tuned to follow precedent based references in preference to other modes of references. This continuity of judicial approach is reflected when we come across the decisions of the Pakistani courts in numbers referring to Mulla’s book exclusively or along
with the books of similar genre instead of making an additional effort to go
deep into the original sources of Islamic law (ie, the Qur’an and the Sunnah
of the Prophet) and rediscover de novo the spirit and ethos of the law.

Mulla’s propositions sometimes fall short of bringing out the
complexity of Islamic law or confine themselves to mere exposition of
rudimentary and simplistic version leaving plenty of space for confusion if
they are regarded authentic. Moreover, the propositions crafted in this
manner are bound to leave a void or vacuum which could only be filled by
resorting to the original sources of Islamic law or rearticulating the ethos and
spirit of the law.

There is another category of cases in which the courts have gone
beyond Mulla’s propositions and made an endeavor to find out Islamic law
from other more authentic sources, eg, the Qur’an, Sunnah and books of fiqh.
In this sort of judicial exercise, the courts sometimes point out the fault-lines
in Mulla’s propositions due to their simplicity or otherwise and even criticise
him for an inaccurate and inflexible representation of Islamic law. On the
other hand, sometimes one may find the courts confining themselves to the
exposition of authentic version without disparaging Mulla. Irrespective of the
manner in which the judicial approach is manifested in this category of
cases, one aspect of emblematic artifact of the colonial enterprise is undone
in this process though a little at a time.

The analysis of this last category of cases does not claim that the
judges who have gone beyond Mulla’s book and expounded authentic
Islamic dictates have been cognisant of the mechanics of the colonial
enterprise and have opted for such a course to undermine at least one aspect
of that enterprise. However, unwittingly as it may be, this judicial approach
has potential to divest Mulla’s book of that aura of authenticity and
deferece with which it has generally been treated over many decades. We
will now analyse some cases bringing to fore the above-mentioned spectrum
of shades of the judicial approach.

Let us start our analysis by citing some illustrations of romanticism
of the Pakistani courts with Mulla. The first case in this category is titled as
Faraz Ahmad Bhutta v ADJ.\textsuperscript{49} In this case, the court had to decide whether
the disputed property formed part of a \textit{wakf}. For settling this issue, the court
had to first describe the contours of \textit{wakf} as set out in Islamic law. In this
regard, the court exclusively as well as extensively relied on the section-like

\textsuperscript{49} PLD 2011 Lah 483.
propositions enumerated by Mulla and it did not refer to any other book of authority to set out the main features of *wakf* in Islam. To be precise, the court provided the gist of the paragraphs no. 173, 174, 178, 181, 184, 185, 186, 189, 193, 207 and 208 from Mulla’s book. The court employed the phrase ‘section’ with all abovementioned paragraphs, and at one place, it said ‘[t]he purpose of mentioning all these sections is to ascertain the intention of [the *wakif*]’. Ultimately, the case was decided as per wisdom drawn from Mulla. The consistent employment of the word ‘section’ for Mulla’s propositions depicts the solemn respect extended by the court as if there is no difference between the law enacted by a legislative assembly on the one hand and Mulla on the other. The point is not that the court was not cognizant of this difference, rather the convenient manner with which it has avoided to maintain that difference in its decision illustrates the extraordinary respect accorded to Mulla’s propositions: if they are not equivalent to statutory provisions, they are in no manner less authoritative.

Another case demonstrating the same approach is *Muhammad Akram v Mst. Chanan Begum*.\(^{50}\) In this case, the court had to decide whether the disputed transaction was a *hiba* (gift). For developing its argument, the court first reproduced a lengthy extract from an earlier judgment\(^{51}\) which was thoroughly founded on Mulla’s exposition on the subject and then it reproduced paragraph 164 from Mulla dealing with ‘gift with a condition’ and reproducing it as a ‘section’ in the judgment. At the end, the case was decided in light of the perspective offered by Mulla. We do not find any reference to any other Islamic law book in the case.

It is the charisma of Mulla’s book that sometimes it is referred to by both sides of the litigation for supporting their contradictory stances. For instance, in *Haji Muhammad Ali v Muhammad Akram*\(^{52}\) a question arose as to the validity of a gift of undivided property (*musha*). Relying on Mulla, one party argued that gift of undivided property capable of division was not valid without delivery of possession and the other party contended, while referring to the exceptions of the same proposition of Mulla which had been relied upon by the first party, that in certain exceptional situations such transaction of a gift could be validly made. Considering the facts of the case, the latter party’s stance found favor of the court.

\(^{50}\) Civil Revision No. 587/1999.


\(^{52}\) PLD 2007 SC 319.
There are a number of cases of this genre where Mulla has been relied on exclusively to find out Islamic law by the courts. For instance, it has been referred to in *Abdul Khaliq v Fazalur Rehman* for determining that distant kindred are not entitled to inheritance in the presence of sharers and residuaries; *Ghazala Sadia v Muhammad Sajjad* for holding that *khula* based divorce does not deprive a wife of her right of maintenance during the *iddat* period; *Sher Muhammad v Mahmood Bakhsh* for supporting its conclusion that collaterals do not inherit in the presence of a daughter, children of a deceased daughter and a sister both under Sunni and Shia schools; *Muhammad Khalid v Noor Bibi* to decide that those distant kindred who are nearer in degree of relationship with a deceased would exclude the remoter relations; *Gul Zaman v Maula Dad* for holding that a will beyond one third of the property would be implemented after the consent of legal heirs; *Muhammad Asghar v Hakim Bibi* to ascertain the three ingredients of gift/hiba under Islamic law; and *Tauqeer Ahmed v Bashir Ahmed* for holding that a will can be revoked by a testator during his lifetime though it was originally said to be irrevocable.

*Humayun Hassan v Arsalan Humayun* is an important case in which the apex court relied on some other books of authority as well, but its deference for Mulla was palpably visible. The judgment in this case was authored by present Chief Justice of Pakistan, Mian Saqib Nisar J., as he then was. The main issue to be decided in the case was whether a son who had been maintained by his father during his minority would automatically be entitled to maintenance for his educational expenses after attaining majority or a de novo suit had to be initiated for this purpose. Relying on Mulla, the court observed that, the father was only bound to maintain his son during his minority except in two circumstances, ie, infirmity and disease. Thereafter, the court referred to the books authored by Ameer Ali, Neil Baillie and Nishi Purohit and discovered the possibility of adding some new grounds to the abovementioned exceptions in appropriate cases, including maintenance for educational purposes during majority. Considering Mulla as providing the basic framework that there were only two grounds *ipso facto* recognised for automatic extension of maintenance during majority, the court held that an

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53 PLD 2004 SC 768.
54 2012 YLR 2841.
55 2000 SCMR 672.
56 2005 SCMR 1717.
57 2014 CLC 635.
58 Civil Revision 3342/2014.
59 2001 YLR 3153.
60 PLD 2013 SC 557.
adult son would not be entitled to maintenance for educational purposes unless he had initiated a new case in which he had substantiated his entitlement by bringing relevant and cogent evidence. In this case, the apex court though considered other books of authority, but their legal potency was not treated enough to shatter the framework imposed by Mulla. It was the ascendancy of Mulla’s framework which facilitated the court for not adjudicating on the new ground in the same litigation and making the adult son file a new case because there was no such exception contemplated by Mulla.

*Shabana Naz v Muhammad Saleem*61 is another case of the last-mentioned specie in which though the court admitted the possibility of going beyond Mulla’s propositions, but placed the responsibility of justifying that departure on the claimant. The cumulative reading of paragraphs 352 and 354 of Mulla suggests that a mother loses her right to custody on her second marriage to a person not within the prohibited degree to the minor. The court affirmed that this was not an absolute rule and its interpretation was subject to the principle of welfare of minor. At the same time, the court concluded that the burden of proof, that welfare of minor required otherwise than what has been stated in Mulla, was on the claimant. Thereby the rule mentioned in Mulla was demonstrated to be of paramount importance and it could only be departed from when the claimant justified with evidence that the welfare of minor necessitated otherwise. As this burden was not discharged in the case, the court upheld the decision of depriving the mother of the minor’s custody. It would be appropriate to note that the principle of welfare of minor is a statutory rule,62 whereas Mulla’s propositions are mainly founded on the precedents dating back to the colonial era. Treating Mulla as an overarching framework which tailors how a statutory provision is to be construed and adjusted within this framework eloquently demonstrates Mulla’s unabated influence.

The case of *Mehmood Akhtar v District Judge, Attock*63 does not appear to be in consonance with the previous case as it holds unequivocally that welfare of minor is the main determining factor superseding other considerations. A leave to appeal was sought by the father for custody of minor daughter in this case relying on two principles derived from Mulla: the first was the mother’s second marriage with a person not within the prohibited degree and the second was the father’s status as natural guardian.

61 2014 SCMR 343.
62 The Guardians and Wards Act 1890, s. 17.
63 2004 SCMR 1839.
Considering the peculiar circumstances of the case, ie, second marriage of both the father and mother of the minor and non-provision of maintenance by the father, the court refused the leave and held that welfare of minor would prevail over other considerations. It was held by the court that though principles of Muslim personal law as enunciated by Mulla carried weight, but they would remain subject to the principle of welfare of minor.

The Lahore High Court in Mst. Hifsa Naseer v ADSJ, Gujar Khan\textsuperscript{64} has relied on both the last mentioned cases of the Supreme Court\textsuperscript{65} and made an endeavor to harmonise them. The court held that the rules embodied in paragraphs 352 and 354 of Mulla did not constitute ‘an absolute rule’ which could not be departed from and the main consideration in all cases would always be the welfare of minor. The court further held that the second marriage of the mother only affected her preferential right, but did not deprive her right of minor’s custody in all situations.

\textit{Firdous Iqbal v Shifaat Ali}\textsuperscript{66} seems to be the last word on the tabulated paragraph 354 of Mulla dealing with the disqualification of a mother from claiming the custody of her minor children on various grounds including her second marriage with a stranger. Commenting on the High Court’s decision which was appealed against before the Supreme Court, the apex court observed that Mulla’s presentation on the subject suffered from ‘over simplification’. The court referred to extracts from Muhammadan Law by Tyabji and the Hedaya and held that the welfare of child was of paramount importance.

The Lahore High Court in \textit{Gakhar Hussain v Surrayya Begum}\textsuperscript{67} referred to two paragraphs (ie, 369 and 370) of Mulla dealing with the definition of maintenance and the scope of father’s responsibility to maintain his children. In this case, the court was determining the right of an unmarried, educated and earning daughter, as to maintenance from her father. The court employed commendatory phrases for Mulla during the course of judgment: it referred to the book as ‘authentic codified text’ and its propositions as ‘sections’. Despite this, the court departed from both of his propositions considering the peculiar facts of the case in light of the case law accumulated by the superior judiciary in Pakistan. After reproducing Mulla’s definition of maintenance, the court observed that it should be liberally

\textsuperscript{64} Writ Petition No. 3149 of 2014.
\textsuperscript{65} \textit{Shabana Naz v Muhammad Saleem} 2014 SCMR 343; \textit{Mehmood Akhtar v DJ Attock} 2004 SCMR 1839.
\textsuperscript{66} 2000 SCMR 838.
\textsuperscript{67} PLD 2013 Lah 464.
construed and educational expenses could, in appropriate cases, be read into it. Under paragraph 370 of Mulla, the father’s responsibility to maintain ceases when a child could be maintained out of his/her property. According to the court, this rule must not be followed for discriminating against some children while enriching and supporting other children. Consequently, it was held that the litigating daughter, though was earning, was entitled to be maintained as the other children were being taken care of by the father.

On the issue of maintenance, Mulla has explained the extent of a father’s responsibility as to maintenance of daughters in as simple a manner as he could. According to him, a father is responsible for the maintenance of his daughters until they are married. He did not contemplate the situation of a divorcee daughter and the responsibility of her maintenance. The Pakistani courts have filled this vacuum by holding that if a father is in easy circumstances and the daughter is not able to maintain herself from her own resources, then the responsibility would be placed on the former for the latter’s maintenance. During the course of their judgments, the courts referred to Ameer Ali and Asaf A. A. Fzyee as Mulla was silent on the subject.

Mulla states that wife ‘is not entitled to past maintenance unless the claim is made on a specific agreement’. Disentitling the wife from past maintenance was based on one juristic opinion, though there was contrary juristic perspective as well. The Pakistani courts neither follow the tabulated dictum of Mulla nor pay much credence to the difference of opinion and award the past maintenance to the grieving wives in appropriate cases.

Mulla described deferred dower as exclusively payable on dissolution of marriage either by death or divorce. On this, the Pakistani courts have travelled much beyond Mulla. It is fair to point out that some Muslim jurists have made payment of deferred dower dependent on the aforementioned eventualities. The colonial enterprise, however, preferred this aspect for the sake of simplicity and certainty reducing the others to a nullity. Mulla’s exposition of deferred dower as payable on dissolution of marriage glosses

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68 (n 23) 232.
69 Main Muhammad Sabir v Mst. Uzma Parveen PLD 2012 Lah 154; Manzoor Hussain v Mst. Safiya PLD 2015 Lah 683.
70 (n 22) 153; (n 23) 187.
72 (n 22) 156; (n 23) 191.
over many intricacies and subtleties. The Pakistani courts\textsuperscript{73} have pointed out that the parties to a marriage may agree on any event or specific time for the payment of deferred dower: there is no legal necessity to defer it till dissolution in all circumstances. Moreover, when no time is specified for payment of deferred dower, it could be claimed at any time after the consummation of marriage and it would be erroneous to consider its payment as deferred till dissolution of marriage. Though there are cases to the contrary,\textsuperscript{74} but this judicial approach is gaining ground progressively.

According to Mulla,\textsuperscript{75} adoption is not recognised under Islamic law as a ‘mode of filiation’. This simple proposition seems unequivocal and uncomplicated, but it leaves spaces as to the impact of adoption on other equally important aspects of Muslim personal law. The Pakistani courts have taken unto them the task of filling those spaces in light of Islamic law. In Mst. Irfana Shaheen v Abid Waheed,\textsuperscript{76} the court held that in matters of custody of an adopted child the principle of welfare of minor would be adhered to as long as the same has not been disallowed by Islamic law. The Lahore High Court held in Mariam Bibi v Naseer Ahmad\textsuperscript{77} that adopted parents could be obligated for the provision of maintenance to their adopted children. In this case, an adopted daughter was held to be entitled to maintenance from her adopted father who was financially well off to cater to her needs. The both abovementioned cases, in addition to deciding the disputes they were approached to resolve, discussed the true importance of non-recognition of the concept of adoption in Islam. That it could not create the mutual rights of inheritance among the adopted child and adopted parents/relatives; the incident of adoption is not sufficient for substituting the name of biological father by adopted father;\textsuperscript{78} and the marriage between an adopted child and adopted relative is only prohibited in case the foster relationship is created by breast-feeding the child.

The simplicity of Mulla’s proposition is alluring and destructive at the same time: if this aspect is not appreciated, it may adversely affect the valuable rights of litigating parties. A consanguine brother was deprived of

\textsuperscript{73} Tahir Hanif v Saira Kosar 2016 YLR 440; Muhammad Sajjid v ADSJ PLD 2015 Lah 405; Joodat Kamran Alvi v ADJ 2013 MLD 1466; Muhammad Azam v ADJ 2006 YLR 33; Dr Sabira Sultana v Maqsood Sulari 2000 CLC 1384.

\textsuperscript{74} Saadia Usman v Muhammad Usman Iqbal Jadoon 2009 SCMR 1458; Shah Daraz Khan v Mst. Naila 2015 MLD 73.

\textsuperscript{75} (n 23) 220.

\textsuperscript{76} PLD 2002 Lah 283.

\textsuperscript{77} PLD 2015 Lah 336.

\textsuperscript{78} Jamshed v Saleemuddin PLD 2014 Kar 120.
his right to inheritance in *Saadullah v Gulbanda* and the court unlawfully enriched the full sisters under the principle of *radd*. The court while construing the Qur’anic verse 4:176 and relying upon the table of residuaries from Mulla concluded that the full sisters were nearer in degree of relationship with the deceased than the consanguine brother. Hence, they would first be entitled as sharers and then the residue would be given to them under the principle of *radd*. The apex court misconstrued the application of the principle as it is not attracted in the presence of a residuary and the consanguine brother was a residuary in the case. In this case, simplistic understanding of the table of residuaries embodied in Mulla caused confusion. A full sister is placed at number 6, while a consanguine brother at 7 in the table. The court noted the sequence, but failed to apprehend the significance of the conditions narrated by Mulla for entitlement of a full sister as residuary.

The most notable departure of the Pakistani courts from Mulla’s book during the first two decades of the independence was on the issue of wife’s right to seek *khula* through the Qazi without consent of husband. According to Mulla, in case of *khula* ‘the terms of the bargain are matter of arrangement between the husband and the wife’. So, a *khula* could not be affected unless the husband agreed to the arrangement and the wife could not effectuate this mode of dissolution without the blessing of her husband. Eventually, *khula* was reduced to be an efficient tool in the hands of the husbands to make their wives pay for purchasing the dissolution and if a husband did not feel satisfied as to the price of *khula*, he could simply make his wife suffer by refusing to agree to the bargain. It was this context in which the West Pakistan High Court decided *Mst. Balqis Fatima v Najmul Ikram Qureshi*. The court held that marriages can be dissolved on the basis of *khula* by the courts when the parties are unable to observe the ‘limits of God’ as mentioned in the Holy Qur’an in 2:229 and the willingness of husband is not a pre-requisite for such dissolution.

The Supreme Court cited this decision of the West Pakistan High Court with approval in the case titled *Mst. Khurshid Bibi v Muhammad Amin*. The apex court observed that *khula* was a charter granted to wives

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79 2014 SCMR 1205.
80 Mannan (n 26) 115; Dr Shahbaz Ahmad Cheema, *Islamic Law of Inheritance: Practices in Pakistan* (Shariah Academy, International Islamic University, Islamabad 2017) 112-113.
81 Mannan (n 26) 100-101.
82 (n 22) 164-165; (n 23) 208.
83 PLD 1959 (W.P.) Lah 566.
84 PLD 1967 SC 97.
for seeking dissolution of their marriages from intolerable and painful marital unions. The court criticised jurists who had equated *khula* with *talaq* by making it dependent on the consent of husband. By placing reliance on numerous sources including the Qur’an, its exegeses, Hadiths compilations, and books of *fiqh*, the court concluded that the wives were entitled to dissolve their marriages by way of *khula* through the courts without their husbands’ consent when the parties fear they could not keep their relationship within the contours prescribed by God.

It is noteworthy that the above decisions provided an avenue to wives for dissolution on the basis of *khula* which had been foreclosed by a monodirectional and selective approach of the colonial enterprise and then stultified in the colonially orchestrated reference material of which Mulla was an integral part. Both courts, the West Pakistan High Court and the Supreme Court, relied on diversified source material including the original sources like the Qur’an and Sunnah of the Holy Prophet. By adopting this approach, the courts made an appropriate call for having direct recourse to the original sources for deriving the rules instead of following the secondary sources unreflectively and thoughtlessly. Above all, no single reference to Mulla is found in these decisions.

The rule as to disinheriting a childless widow from her deceased husband’s estate as per Shia law of inheritance is described in paragraph 113 of Mulla.\(^{85}\) According to this rule, a childless widow is only entitled to her share (ie, 1/4) from movable property and she will not be given anything from land and immovable property. This rule has been applied by the courts in Pakistan until recently\(^ {86}\) though it contravenes the explicit text of the Qur’anic verse 4:12 and a contrary view held by equally authoritative books of Shia law of inheritance. The Lahore High Court in *Khalida Shamim Akhtar v Ghulam Jaffar*,\(^ {87}\) after construing the verse 4:12 and relying upon the authoritative books and an amicus curiae, concluded that the rule of disinheriting a childless widow from landed property was against Islamic law. During the course of its judgment, considering the paragraph 113 of Mulla and its inconsistency with Islamic law, the court delved into determining the value of this book. In this context, the court observed, relying on a Federal Sharit Court’s decision,\(^ {88}\) that Mulla’s book was ‘in fact a reference book and not a statutory law applicable in Pakistan, in the sense

\(^{85}\) Mannan (n 26) 179.

\(^{86}\) *Mst. Noor Bibi v Ghulam Qamar* 2016 SCMR 1195.

\(^{87}\) PLD 2016 Lah 865.

\(^{88}\) *Muhammad Nasrullah Khan v The Federation of Pakistan* (Shariat Petition No. 06/I of 2013).
that the legislature has not enacted the same. It is just an option for the Court to consult the same on the basis of equity and refer to the principles mentioned in paragraphs of the said book, at times, and that too casually in some matters only'. The court further observed that any rule embodied in Mulla which went against the Qur’an and Sunnah was liable to be ignored.

Mulla did not discountenance the disininheritance of daughters either by custom and statutory law as the colonial enterprise was more tuned to foster its administrative control rather than the revival of such rights of Muslim women which were not specifically demanded by the colonised people. Though the right of female legal heirs was progressively revived by various statutes from 1937 to 1962, but the real blow to this un-Islamic practice was given by the Supreme Court in Ghulam Ali v Mst Ghulam Sarwar Naqvi. The apex court observed that after death of Muslim deceased, his/her property immediately vested in his/her legal heirs irrespective of their gender. If the estate was possessed by some male members of the family, it would be considered to be on behalf of the female legal heirs. It was further said that the former in their capacity of holding the position of active confidence could not in any manner put forward a claim that the latter had relinquished their share in the estate in favour of the former because such relinquishment was against public policy as conceived by Islamic law. Considering the detailed and minute explanations of the principles of inheritance in the primary sources, ie, the Qur’an and Sunnah, the court held that the rights of female legal heirs were so entrenched that even if they were not implemented by legislature in their letter and spirit, the courts would ensure their enforcement.

The analysis in this part has demonstrated that how complicated the relationship is between the Pakistani courts and Mulla spanning over romanticism and deference on the one hand and criticism and disapproval on the other. The courts have frequently relied on Mulla for guidance in many areas of Muslim personal law, unless it is housing an inaccurate and fractional version of Islamic law and cataloguing it as the most authentic one, eg, khula and rights of inheritance for females. Furthermore, the areas of personal law where Mulla’s simplicity deprives the courts from exercising their discretion, eg, maintenance, dower, custody, adoption, they have assertively travelled well beyond the propositions laid by him in search of more authentic and contextually befitting solutions of Islamic law. Nonetheless, Mulla’s magnum opus is expected to remain as relevant and

89 (n 23) 31.
90 PLD 1990 SC 1.
continue to be as a valuable reference book of Muslim personal law for decades to come.

**Conclusion**

Mulla’s book on Muslim personal law is one of the best illustrations of the processes of authenticity and transformations carried out by the colonial enterprise in British India. Though the book was primarily authored for struggling law students to appreciate the Muslim personal law applicable in British India, it attracted the attention of the legal profession including judges and lawyers. The same is continuing to hold the field in the post independence state of Pakistan. The admiration accumulated and reverence held by Mulla in the domain of Muslim personal law by the Pakistani courts is not comparable to any other book on the subject.

Despite all this, Mulla was and will remain a best manifestation of the colonial machine for simplification of Islamic law and divesting it from the constructive space which had been at the disposal of Muslim judges and Qazis in the pre-colonial era. The salience extended by Mulla to the judicial pronouncements of the colonial courts illustrates the process, though naively, of how the center of authority was shifted from Muslim scholars to the secular courts for adjudication of that law which was considered to be mandated by the religion. Mulla facilitated the transplanting process of the very spirit and cornel of common law system, ie, the doctrine of precedent, into Islamic law.

Considering the above configuration between Mulla and the colonial context with which it had a layered relationship, there is a growing realisation that the simplistic propositions articulated by Mulla need reconsideration and revision as they downplay the complexity and multidimensional interpretative space of Islamic law. The cases pronounced by the superior judiciary in which the courts have gone beyond Mulla and made earnest efforts to find out the real spirit of Islamic law from its original sources or from comparatively more authentic books of *fiqh* are increasing gradually. This judicial trend is bound to relieve the courts and the grieving parties from some of the shackles put upon by the unreflective adherence to Mulla and like. Though this trend was kicked off soon after the emergence of Pakistan in the wake of an expectation that she would put in place an Islamic constitutional setup, but it has been gaining momentum after the establishment of the Federal Shariat Court. Inspired from the shariat court, the courts are now more willing and prepared to pay attention to primary sources of Islamic law, ie, the Qur’an and Sunnah, rather than engaging
themselves in the secondary sources like Mulla. In contradistinction to the courts in the colonial era where the courts were merely an effective tool to administer justice by maintaining the law and order and controlling over the colonised people, the Pakistani courts have started considering themselves as Qazis who are empowered to interpret and reinterpret the sources of law for meeting the higher ideals of justice and equity envisioned by Islamic law. It is this sense of responsibility which encourages them to break barriers constructed by precedents and the monolithic as well as simplistic interpretations of Islamic law.

Though the trend of discovering the real dictates of Islamic law has gained momentum due to the peculiarities of Pakistani statecraft, but this is not enough to completely put at rest the salience attained by Mulla and we find a number of cases where Mulla is resorted to as an easy and readymade reference. This propensity to fall upon accessible source material signifies that Mulla still holds an enormous stature and will continue to retain it in the near future. On the other hand, the counter trend of going beyond Mulla has surely come out of its embryonic phase and is progressively expected to rejuvenate Islamic legal space by bringing back the constructive space and judicial discretion enjoyed by the erstwhile Qazis in Islamic antiquity.
Law on the Custody of Children in Pakistan: Past, Present and Future

Dr. Mudasra Sabreen*

This article highlights the deficiencies in the laws relating to the custody of children in Pakistan. It argues that deficiencies in the Guardians and Wards Act 1890 allow the courts to exercise wide discretion, thereby leading to contradictory judgments. After separation between parents, custody is the major issue affecting the children’s wellbeing. Pakistan, however, lacks detailed laws about issues relating to custody of children. The Guardians and Wards Act 1890 gives a few rules regarding custody and the rest is left to the discretion of the courts which occasionally results in contradictory judgments. Due to the lack of detailed rules in the statutes, the litigants have to resort to case law to find out rules regarding custody. This article analyses the relevant provisions of the Act along with the case law to point out legal lacunas. It also analyses the proposed legal reforms regarding custody of children.

Introduction

The lacunas present in Pakistan’s child custody laws necessitate legislative and judicial intervention. This paper relies on both statutory provisions and judicial precedents to highlight the approach employed to address the issue of custody. The Guardian and Wards Act 1890 governs disputes relating to child custody. The Act, however, is marked by several deficiencies. These include the Act’s failure to distinguish between custody and guardianship. Custody and guardianship can be distinguished as following: custody is the bringing up, nursing or fostering of the child and taking care of the child’s emotional and personal affairs on a day to day basis whereas guardianship

* Assistant Professor at the Faculty of Shariah and Law, International Islamic University Islamabad. LLM (Shariah and Law), International Islamic University Islamabad; PhD (Law), School of Oriental and African Studies (SOAS), University of London, UK.

1 There are some other laws which affect custody and guardianship: The Majority Act 1875, the Punjab Court of Wards Act 1903, and the High Court Rules and orders and the Civil Procedure Code 1908. The most important among the laws related to custody is the Guardians and Wards Act 1890; therefore, the analysis will be restricted to this Act.

means the power to effect legal transactions and contracts with responsibility for the legal consequences. Unlike guardianship, in custody, the child must live with the custodian. In cases regarding custody, the best interests of the minor are given primary consideration. While courts often rely on the Act when adjudicating upon matters pertaining to custody of Children, the Act does not explicitly address the issue of custody. As a result, the courts have often applied provisions pertaining to guardianship to matters of custody too, thereby diluting the distinction between the two. Custody is, therefore, considered a kind of guardianship by Pakistani courts. A guardian is defined by section 4 of the Act as ‘a person having the care of the person of a minor, or of both his person and property’. Therefore, even within the Act guardianship is considered to include the concept of custody as well. Traditionally, however, custody belongs to the mother whereas guardianship of property and marriage belong to the father. In Pakistan, there have been cases where guardianship of marriage and property is awarded to the mother if the welfare of the child demands so. According to the Act, custody is a personal right which can be enforced through judicial proceedings. The distinction between custody and guardianship is pertinent since the two attract the application of different rules and principles. Furthermore, the qualifications and concomitant duties associated with custody and guardianship also differ.

The rest of this paper is divided into three parts. First, I analyze the case law relating to child custody and identify the inconsistencies in judicial precedents. Second, I discuss the provisions of the Convention on Rights of the Child (1989). Third, I analyze the Child Protection Bill (2009) along with proposed reforms in the Guardians and Wards Act 1890. Finally, I conclude this paper.

The Law related to Custody

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The Guardians and Wards Act 1890 uses the term ‘guardianship of person’ for custody and the term ‘guardian’ for custodian.\(^8\) Given the absence of express provisions that stipulates rules for custody, reliance is placed on judicial precedents in this regard. In 1972 in *Juma Khan v Gul Ferosha*, the Peshawar High Court defined custody as actual or constructive possession for the purpose of protection.\(^9\) In 1988 in *Sultana Begum v Mir Afzal*, the Karachi High Court defined custody as the ‘upbringing of a minor child by the mother or by someone legally entitled to it’.\(^10\) The custody of a child generally rests with the mother in tender age; afterwards it goes to the father. It is considered in the welfare of the child that the child should be with the mother in his/her tender years so the mother will get preference over other relatives including the father.\(^11\) The presumption is that to live with the person entitled to custody according to Islamic law is in the welfare of the child but this presumption is refutable. Flaws in the custodian’s character, for instance, are grounds to displace him/her of their right to custody.\(^12\)

Additionally, the mother may lose her right to custody in peculiar circumstances. In *Mst. Imtiaz Begum v Tariq Mehmood*,\(^13\) the court held that during the period of breastfeeding the mother has a preferential right of custody and if the mother refuses to breast-feed the child she will lose her right to custody. To this end, the court resorted to the following verses of the Qur’an: ‘No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child, nor father on account of his child’\(^14\) and ‘Let the woman live (in ‘iddah) in the same style as ye live, according to your means: annoy them not, so as to restrict them...’.\(^15\) The court interpreted these verses as meaning that neither parent should be burdened or treated unfairly on account of the child. This means that the mother cannot abandon the child or refuse to suckle the child as it would amount to a burden on the father to hire a wet nurse for his child. Likewise, a father is prohibited from stopping a willing mother from breast feeding the child.\(^16\) In this case, the court seems to construe breastfeeding as a reason for awarding custody to the mother. However, this dictum is

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\(^8\) Guardians and Wards Act 1890, s. 4.

\(^9\) PLD 1972 Pesh 1.

\(^10\) PLD 1988 Kar 252.


\(^12\) *Munawar Jan v Muhammad Afsar Khan* PLD 1962 Lah 142.

\(^13\) 1995 CLC 800.

\(^14\) Qur’an 2:233.

\(^15\) Qur’an 65:6.

\(^16\) (n 13).
inconsistent with the traditional principles of Islamic law.\textsuperscript{17} Herein, if a mother, after divorce, refuses to suckle the child the father is obliged to engage a wet nurse and the mother cannot be deprived from custody on the basis of her refusal to suckle the child.\textsuperscript{18}

Generally, a mother has a right to the custody of her son till the age of seven, while she retains the daughter’s custody till her puberty.\textsuperscript{19} In \textit{Mst. Intiaz Begum v Tariq Mehmood}, the Lahore High Court allowed the mother to keep the child till it had attained the age to receive formal education. According to the court, this age would be determined according to the custom of the area of parent’s residence. The court stated that to set the age at seven or nine is not a requirement of Islamic law.\textsuperscript{20} If the age at which a child starts its school is made the standard for termination of custody, a mother will be allowed to keep the child till the child becomes three and a half years old as that is the age at which a child starts going to school in most of the Pakistani cities. In a village, probably this age will be around five years which is far less than the age fixed by the jurists. However, most courts have not followed this approach and consider the mother entitled to custody of a boy till seven years and a girl till puberty.\textsuperscript{21} The aforesaid case is an example where the judge deviated from Islamic law and such decisions affect rights of custodian as well. However, had laws relating to the period of custody been laid down, judges would not have been able to exercise their discretion.

\textit{Welfare of the Minor}

Welfare of the minor is given paramount importance within our domestic jurisprudence. Welfare is determined by taking into account the minor’s age, sex and religion. Weight is also given to the character and capacity of the guardian and his/her nearness of kin to the minor. Preference of the minor is

\textsuperscript{17} The term ‘Islamic law’ here means four Sunni schools which are Hanafis, Malikis, Shafi’is and Hanbalis; these schools are named after their founders respectively Abu Hanifah (d. 767 C.E.), Malik bin Anas (d. 801 C.E.), Muhammad bin Idris Al-Shafi’i (d. 820 C.E.), and Ahmad bin Hanbal (d. 855 C.E.).

\textsuperscript{18} Moulvī Muhammad Yousaf Khān Bahādur and Moulvī Wilāyat Hussain (trs), \textit{Fatāwa-i-Kāzee Khān} (Kitāb Bhavan 1986) 323.

\textsuperscript{19} \textit{Maryam Tariq v SHO of Police Station Defence} PLD 2015 Kar 382; \textit{Ali Akbar v Mst. Kaniz Maryam} PLD 1956 Lah 484; \textit{Sardar Hussain v Mst. Parveen Umer} PLD 2004 SC 357; \textit{Mian Muhammad Sabir v Mst. Uzma Parveen} PLD 2012 Lah 154; \textit{Muhammad Faraz v Mehfeez} PLD 2012 Isl 61; (n 11).

\textsuperscript{20} (n 13).

\textsuperscript{21} (n 19).
taken into account, if the minor is capable of forming such preference.\textsuperscript{22} However, ‘religion’, in this regard has been construed inconsistently. In 2010 in \textit{Mst. Shahnaz Ghulam Rasool v Muhammad Shakeel Ahmad Siddiqui}, the Karachi High Court held that the word ‘religion’ does not include sect. While differences in religion would be considered while awarding custody, sectarian differences would be disregarded.\textsuperscript{23} In \textit{Imran Ali v Mst. Iffat Siddiqui}, however, the Karachi High Court while giving custody of the minors to the father considered the fact that he was an \textit{Isma’ili Shi’a} and would be in a better position to raise his children in accordance with his sect. The court opined that the child follows his/her father’s religion. In the case of \textit{sunni-shi’a} marriages the child is supposed to follow the sect of the father.\textsuperscript{24}

A person who has custody of a minor is responsible to look after the minor with regards to its health, education and support him/her in all respects.\textsuperscript{25}

In every matter related to a minor, the court will give preference to child’s welfare and interest over that of parents’ rights. Section 17 of the Guardians and Wards Act 1890 declares the ‘welfare of a minor’ a paramount consideration. The approach of the Pakistani courts is that the welfare is not proved by presumption but by evidence since it is a question of fact.\textsuperscript{26} According to the courts the welfare of a child means a child’s health, education, physical, mental, and psychological development. The minor’s comfort and spiritual and moral wellbeing along with his/her religion is also considered.\textsuperscript{27} Considerable attention is given to the minor’s happiness and emotional attachment with a custodian. It is considered in the interests of the child to live with his/her siblings.\textsuperscript{28}

The presumption is that to award custody according to the rules of personal law is in the minor’s welfare but this presumption is debatable. If it is evident from the circumstances of a case that following personal law is not

\textsuperscript{22} Guardians and Wards Act 1890, s. 17.
\textsuperscript{23} PLD 2010 Kar 50.
\textsuperscript{24} PLD 2008 Kar 198.
\textsuperscript{25} Guardians and Wards Act 1890, s. 24.
\textsuperscript{26} Rahimullah v Hilali begum 1974 SCMR 305.
\textsuperscript{27} Feroze Begum v Muhammad Hussain 1978 SCMR 299; Ms. Christine Brass v Javed Iqbal PLD 1981 Pesh 110; Mrs. Marina Pushong v Derick Noel Pushong PLD 1975 Lah 793; Maryam Zohra v Younas Jamal 1986 CLC 1857; Mehtab Mirza v Mst. Shazia Mansoor 2005 MLD Lah 256 can also be written as PLJ 2005 Lah 1562; Abdul Razzaque v Dr. Rehana Shaheen PLD 2005 Kar 610; Mst. Nazli v Muhammad Ilyas 2010 MLD Lah 477.
\textsuperscript{28} Muhammad Ishfaq Qureshi v Mst. Surayya Bibi 2010 YLR 556; (n 13); (n 27) 793
in the interest of the child, the decision will be in accordance with his/her interest. 29 The courts while applying the welfare principle quite often deviate from the principles set down by the majority of jurists in Islamic law. If there is a contradiction between the interests of the minor and the rules of Islamic law preference is given to the interests of the minor. In Mohammad Bashir v Ghulam Fatima, the Lahore High Court awarded custody of a child to her mother who had remarried. The court justified its deviation from the rules of Islamic Personal law by stating that in Islam consideration of the welfare of a minor is paramount and all rules of personal law are the application of welfare of the minor. If in any case there is contradiction between welfare and the rules of personal law the former prevails. 30

The courts while deciding about custody consider the opinions of the majority of Muslim jurists that after seven years of age custody of a boy goes to the father 31 and custody of a girl goes to the father after attaining puberty. But the main consideration in such cases again is the welfare of the minor. In such a case if the court considers that living with the mother is in the child’s welfare, the father will not be entitled to custody even after the attainment of the ages mentioned above. If the court thinks that to live with the mother in the child’s tender years is not in the child’s welfare the court may deprive her from custody. 32 If there is a clash between the rights of the parents and the welfare of the minor the latter prevails. 33 Even if the parents agree on custody arrangements, the court can decide against such an agreement if the situation requires it. 34 This is done after carefully analyzing every possible consideration relating to the child’s best interests. 35 In Bulan v Rahiman the father applied for custody of the child aged between ten to twelve years who was in the mother’s custody. The judge held that the father would get custody if he returned all expenses incurred by the mother for the minor’s maintenance. The judge awarded this sum as compensation to the mother. However, the Karachi High Court decided that imposition of such a condition was illegal. The decisive factor in cases of custody should be the

29 Atia Waris v Sultan Ahmad Khan PLD 1959 Lah 205; (n 12).
30 PLD 1953 Lah 73.
31 (n 21). In (n 19), the custody of a seven-year-old boy was given to the mother despite of her remarriage as to living with the mother was considered by the court in welfare of the minor.
32 Hamida Begum v Ubedullah 1989 CLC 604.
33 (n 12).
34 Taj Bibi v Khuda Bakhsh PLD 1988 Pesh 57; Tahira v A. D. J. Rawalpindi 1990 SCMR 852.
welfare of the child and not the welfare of the parents. Custody is a right of the child and not of either of the parents.

**Qualifications of a Custodian**

According to the case law there are certain qualifications for the custodian of the child. In *Imtiaz Begum v Tariq Mehmood*, the Lahore High Court while discussing qualifications of the custodian declared that the custodian should not be *fāsiq* (sinner) and *Khā’in* (dishonest). The court defined *fāsiq* (sinner) as the reverse of *ādil* (just) and *khā’in* (dishonest) as reverse of *amīn* (honest). A person would be disqualified if the court has reason to believe that they were a sinner or dishonest. There is no need for conviction of the court. The character of the custodian is important to determine custody issues.

Another condition for a custodian is that s/he should be *mahram* to the child. If the custodian is the mother she should not be married to a person who is a stranger to the child especially where she has custody of a female child. It cannot be said that the second husband comes within the prohibited degrees by affinity as soon as marriage between him and the mother is consummated. The second husband must be related to the minor within the prohibited degree by consanguinity. The reason behind the principle of disqualification of the mother on remarriage is that after remarriage her attention will be diverted to her new household and children from the second marriage. Although this is a general rule, the welfare of the child is still paramount. In some cases, Pakistani courts have shown this approach that the child should not be taken away from the mother if it is in its welfare to be with the mother simply because the mother has remarried a person not related to the minor within the prohibited degrees. In *Muhammad Bashir v Ghulam Fatima* and *Amar Elahi v Rashida Akhtar*, the Lahore High Court observed that the principle of the mother’s disqualification upon remarriage is not based on the Qur’an. However, remarriage only causes the mother to lose her preferential right to custody. If there is no other qualified person for custody or the welfare of the child demands it, the mother will be

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36 PLD 1963 Kar 839.
37 (n 13).
38 Ibid.
40 *Muhammad Bashir v Ghulam Fatima* PLD 1953 Lah 73.
41 Ibid.
42 PLD 1955 Lah 412.
given custody.\(^\text{43}\) In this case, although the court was right in preferring the interests of the minor over the rule of forfeiture of the mother’s right to custody upon her remarriage to a stranger, it did not consider the fact that this rule is based on a *hadith*.\(^\text{44}\) In *Mst. Hifsa Naseer v ADJ Gujar Khan*,\(^\text{45}\) the Lahore High Court observed that disentitlement from custody due to second marriage is not an absolute rule. In this case, the father of the child was not interested in taking custody. The paternal grandmother had filed a case for custody of the child. The court while awarding custody to the mother despite her remarriage held that it will be against welfare of the child to award custody to paternal grandmother in the presence of the real mother. There have been cases where even a female child is given to the mother despite her remarriage.\(^\text{46}\) But generally the residence of the female child with non-*mahram* is taken into consideration by the courts. To live with the step father’s brothers and sons was in one case considered against the interests of a female child as these people are non-*mahram* for her.\(^\text{47}\) Sometimes remarriage of the father and his having children from such marriage is considered as an impediment to custody and courts consider it against the welfare of the child to award custody to the mother.\(^\text{48}\) The father may lose custody as living with a step mother is considered against the welfare of the minor.\(^\text{49}\) In *Uzma Wahid v Guardian Judge*,\(^\text{50}\) the Lahore High Court gave custody of two minor daughters to the father due to children’s emotional attachment with him despite his second marriage. The court declared welfare of the child first priority. The rule of forfeiture of the right of custody of the mother upon remarriage is an Islamic law rule but Pakistani courts have extended this rule to the remarriage of the father. The courts decide each case according to its facts and all rules regarding custody including disqualification due to remarriage are considered subordinate to the welfare

\(^{43}\) *Rahela Khatun v Ramela Khatun* PLD 1971 Dac 24; (n 43).

\(^{44}\) According to a tradition, the Prophet said to a woman who was demanding custody of her child: ‘thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger. It means that the mother will be given priority for custody unless she has remarried’. Charles Hamilton (trs), *The Hedāya: A Commentary on the Islamic Laws* (Kitab Bhavan 1870) 138; Abī Dā’ud Sulaimān b. Al-Ash’ath b. Ishāq Al-Uzrī Al-Sajistānī, *Mukhtasar Sunan Abī Da’ud* (Dar-al-Ma’rafah 1980) 3:185.

\(^{45}\) PLD 2017 Lah 153.


\(^{47}\) Feroze Begum v Muhammad Hussain 1978 SCMR 299.

\(^{48}\) Muhammad Jameel v Azmat Naveed 2010 MLD 1388; Humayun Gohar Khan v Guardian Judge, Okara 2010 MLD 1313; Muhammad Zulqarnain Satti v Mt. Isum Farooq 2010 CLC 1281; Abdul Razzaque v Dr. Rehena Shaheen PLD 2005 Kar 1285; Masroor Hussain v Additional District Judge Isl 2011 CLC 851. 1989 MLD 3064.
of the child.\textsuperscript{51} In \textit{Rafiqan v Jalal Din}, the Supreme Court of Pakistan decided that after termination of a second marriage the bar to custody is removed and the parent may become qualified for custody again.\textsuperscript{52} In the case of remarriage of both parents the courts consider the circumstances of both parents and decide accordingly.

Education and financial status of the parties are considered and custody is given to the parent who is more educated and is financially stable.\textsuperscript{53} The courts also give due importance to the factor that the minor is emotionally attached to one parent as compared to the other. In 2004 in \textit{Sardar Hussain and others v Mst. Parveen Umar}, the Supreme Court gave custody of the minor of seven years to the mother despite her remarriage due to the fact that the minor was emotionally attached to her and regarded his father as a stranger despite living with him for fifteen days.\textsuperscript{54} In \textit{Amar Ilahi v Rashida Akhtar}, the Lahore High Court decided that if the father failed to maintain the child he will lose his right to custody and guardianship. In this case the father did not take any interest in the daughter until the time of her mother’s remarriage. He failed to maintain the child but at the marriage of the mother claimed guardianship of the child. The court gave the right of custody and guardianship to the mother despite her remarriage.\textsuperscript{55}

According to Pakistani courts the custodian should be of the same religion as of the minor. A child follows the religion and social status of her father.\textsuperscript{56} Apostasy and slavery are disqualifications for the mother to have custody of the minor but a \textit{kitābiyāh} (Christian or Jewish) mother can have custody of her child. Being sane and free from mental or bodily diseases and being of good moral character and reputation are essential requisites for a custodian.\textsuperscript{57} A person not fulfilling any of the above-mentioned conditions could not be a custodian.

The custodian should be of good moral character. The approach of the Pakistani courts regarding character of the custodian is that mere allegations of un-chastity or bad character are not sufficient to disqualify the

\textsuperscript{51} (n 40).
\textsuperscript{52} 1983 SCMR 481; \textit{Muhammad Naeem Ahmed v Asgeeri} 2002 YLR 2854.
\textsuperscript{53} \textit{Mst. Zahida Parveen v Muhammad Nawaz} 2010 MLD 340.
\textsuperscript{54} (n 19) 357.
\textsuperscript{55} (n 42); (n 40) 2011 CLC 851.
\textsuperscript{56} (n 29) 205; (n 27) 110.
\textsuperscript{57} (n 16) 800; \textit{Muhammad Shafi v Maqbool Afzal} 1986 SCMR 1634; Werner Menski and David Pearl, \textit{Muslim Family Law} (Sweet and Maxwell 1998) 416.
mother from custody. In Munawwar Bibi v Muhammad Amin the mother applied for custody of her children and the father accused her of being bad character and argued that she was not entitled to custody. The husband filed a case of zina (unlawful sexual intercourse) against the wife with her brother-in-law. The mother was acquitted by the trial court and the husband filed an appeal against that acquittal. The contention of the mother was that the father of her children filed the case of zina against her to deprive her of custody. While deciding custody of children the trial court did not give custody to the mother because of her bad character although nothing was proved yet. The appellate court while accepting mother’s contention gave her custody. On appeal, the High Court restored the order of the trial court and gave custody to the father on the basis of bad character and inability of the mother to maintain the children. While deciding the custody of children the Supreme Court held that the acquittal of the mother proves her innocence and the fact of filing an appeal does not destroy presumption of her innocence. As far as maintenance was concerned the Supreme Court declared it a duty of the father so the mother could not be deprived of custody because of her inability to maintain her children.

As far as the financial position of the mother is concerned Pakistani courts have not been consistent regarding the relevance of the sound financial position of the mother to her right of custody. Maintenance is a duty of the father but in Intiaz Begum v Tariq Mehmood the Lahore High Court while giving custody to the father took into consideration the financial position of the mother. This judgment was against the Supreme Court’s judgment in Mst. Feroze Begum v Lt-Col. Muhammad Hussain and Munawwar Bibi v Muhammad Amin in which the Supreme Court of Pakistan decided that as maintenance is a duty of the father, a mother cannot be deprived of custody just because she cannot maintain the child. Although a mother cannot be deprived of custody because of her poor financial position but if the mother is earning and is financially independent it goes in her favor as the courts consider her capable to fulfill her child’s needs. In Abdul Razzaque v Dr. Rehana Shaheen the mother was a doctor and the father of the children died. The grandparents contested custody but the

59 1995 SCMR 1206.
60 Ibid.
61 (n 13).
62 1983 SCMR 606.
63 1995 SCMR 1206; (n 11) 40; Najma Parveen v Ihsan-ur-Rehman 1988 CLC 2196; Niaz Bibi v Fazal Elahi PLD 1953 Lah 442; Ramzan v Fazal Nishan 1968 SCMR 1435.
Karachi High Court gave custody of the four minor children to the mother. Along with other facts, the court took into consideration the fact that the mother was working and was financially independent. The grandparents of the child argued that as she will be working she will not be able to give time to the minors. The court did not accept this contention and gave custody to the mother.\textsuperscript{64} In \textit{Mst. Abida Bibi v Abdul Latif} the Peshawar High Court while stating that the mother could not be deprived of custody on the basis of her poor financial position took into consideration the fact that the mother was working. The court gave Custody to the mother stating that she could provide the child with good education and other facilities of life.\textsuperscript{65}

It is evident from the analysis of the above cases that judges use their discretion while deciding custody disputes. This use of huge discretion occasionally results in contradictory decisions. A law stating detailed rules of custody will curtail the discretion of the courts and will bring certainty and stability to the legal system of Pakistan.

\textbf{Persons entitled to Custody}

The mother is entitled to the custody of her child. However, in the case of her death or disqualification the maternal grandmother maintains the right to custody\textsuperscript{66} till the child becomes seven years old.\textsuperscript{67} In the case of death of the mother custody of the child may be given to the father if welfare of the child demands that. In \textit{Fatima Bibi v District and Sessions Judge, Mandi Baha-ud-Din}, the Lahore High Court gave custody of the child to the father because the maternal grandmother had six children to look after and the court considered it in the welfare of the child to be with the father.\textsuperscript{68} If the father of the child dies custody goes to the mother. Paternal grandparents are not entitled to custody in the presence of the mother.\textsuperscript{69} If the court considers it in the welfare of the child it may give custody to grandparents in the case of disqualification of the mother.\textsuperscript{70}

As far as foreign non-Muslim mothers are concerned custody is not usually awarded to them. The environment and culture of a foreign country

\textsuperscript{64} (n 27) 610.
\textsuperscript{65} 2002 CLC Pesh 1416.
\textsuperscript{67} (n 36)
\textsuperscript{68} 2004 YLR 652.
\textsuperscript{69} (n 27) 610.
\textsuperscript{70} Bashir Ahmad v Rehana Umar 1976 SCMR 28.
are not considered conducive to an Islamic upbringing. In *Christine Brass v Dr. Javed Iqbal*, the Peshawar High Court refused to give custody to a Canadian mother on the ground that Canada is a non-Muslim country and it is not in the interests of the child to live in an un-Islamic environment.\textsuperscript{71} The courts consider the fact that not only the mother should be a Muslim but the environment where a Muslim child has to live should also be Islamic.\textsuperscript{72} In *Mrs. Mosselle Gubbay v Khawaja Ahmad Said*, the mother of the child was Jewish Indian. The Karachi High Court considered it improper and against the interests of the child to give custody to the mother.\textsuperscript{73} But in few cases custody has been given to a foreign non-Muslim mother if it is in the interests of the child. In *Peggy Collin v Muhammad Ishfaque Malik*, the Lahore High Court gave custody to a French Christian mother following the principle of the welfare of the child. The Muslim father of the child was a convict and was already under arrest facing criminal charges. The court decided that the Muslim faith of the father is not enough to establish that to give custody to the father is in the welfare of the child.\textsuperscript{74} As far as religion of the child is concerned, the rule is that the child follows the religion of the father until s/he changes her religion after majority.\textsuperscript{75} In *Ms. Hina Jillani, Director of A. G. H. S. Legal Aid Cell v Sohail Butt*, the Lahore High Court gave custody of a female child to an Uzbek Muslim mother and allowed her to take the child to Tashkent. The court considered the fact that the child was very young and the father had financial means to visit his child in Tashkent.\textsuperscript{76}

If the child is illegitimate, custody goes to the mother irrespective of the mother’s religion. According to Islamic as well as Pakistani law, an illegitimate child only belongs to her mother and the father has no right to claim custody. In *Roshni Desai v Jahanzeb Niazi*, the court awarded the custody of an illegitimate child to the mother. The father of the child was a Muslim whereas the mother was a Hindu. They were living in Canada and had a son without marriage. The mother claimed custody of the minor when the father took her son to Pakistan. The Lahore High Court decided that Islamic law did not recognize such a relationship. And the child was declared illegitimate. The court noticed that in Islamic law and in Pakistani law, the father has no relation with his illegitimate child and an illegitimate child

\textsuperscript{71} *Christine* (n 27) 110; *Sara Palmer v Muhammad Aslam* 1992 MLD 520.
\textsuperscript{72} (n 29) 205.
\textsuperscript{73} PLD 1957 Kar 50; *Mst. Maria Khan v Muhammad Zubair Khan* 1993 PCr.LJ 1097.
\textsuperscript{74} PLD 2010 Lah 48; *Sajjad Ahmad Rana and others v Ms. Louise Anne Fairley* PLD 2007 SC 292 SC.
\textsuperscript{75} *Grace Abdul Hadi Haqani v Abdul Hadi Haqani* PLD 1961 (W. P.) Kar 296; (n 29) 205.
\textsuperscript{76} (n 11) 151.
belongs to her mother. The court gave custody of the minor to the mother and held that in case of absence or disqualification of the mother only maternal relatives are entitled to claim custody of an illegitimate child. The father could not claim custody on the ground of the mother being non-Muslim.\textsuperscript{77}

In cases where the father resides in a foreign country, the courts have shown reluctance in awarding custody to the father. In \textit{Habib-ur-Rehman v Mst. Hina Saeed}, the father, who was living in France, was refused custody on the basis that if he would take the children to France the mother would not be able to see them. The Karachi High Court held, that as Muslims, the children could have a better upbringing in Pakistan. However, the father was held responsible for paying maintenance to children.\textsuperscript{78} In \textit{Mst. Fauzia Begum v Amin Saddruddin Jamal Gonji}, the father, who had Canadian nationality, was refused custody on the ground that it was in the welfare of the child to be with the mother. The mother was residing in Gilgit in the North West of Pakistan. The father argued that Gilgit was a backward area and the child could have better facilities in Canada but the court refused the father’s contention and gave custody to the mother. However, he was held responsible for education and maintenance of the child and was allowed to visit the child once a month at the mother’s residence.\textsuperscript{79}

If a child is adopted and the adoptive parents separated afterwards the court will decide custody issues after considering the best interests of the child. In \textit{Irfana Shaheen v Abid Waheed}, the Lahore High Court gave custody of a minor girl to the adoptive mother by considering the fact that the father in this case is not a real father so he has no preferential right of custody. The court held that the adoptive mother’s right to custody cannot be challenged by anyone except the child’s real parents.\textsuperscript{80} In \textit{Shaukat Khalid v Additional District Judge}, a girl was adopted by her paternal uncle and his wife. When the girl was fifteen years old her paternal uncle (the adoptive father) died. The biological parents demanded custody of the girl. The Supreme Court awarded custody of the girl to her biological parents. The court noticed that the girl was estranged from her biological parents and siblings but found it in the interests of the minor to be with real parents.\textsuperscript{81}

\textsuperscript{77} PLD 2011 Lah 423.  
\textsuperscript{78} 2010 MLD 544.  
\textsuperscript{79} 2007 CLC 1403.  
\textsuperscript{80} PLD 2002 Lah 283.  
\textsuperscript{81} 1991 SCMR 19.
Adopted children cannot inherit from adoptive parents but have a right to inherit from their biological parents.\textsuperscript{82}

The parent who does not have custody has visitation rights. However, the Guardians and Wards Act 1890 is silent about this issue. According to section 7 of the Family Courts Act 1964, the non-custodial parent has a right to file a suit for visitation rights. This law lacks any guidelines about the duration or frequency of visits. If custody is with the mother, the father has a right to file a suit to demand his right to visit the child on regular basis and vice versa.\textsuperscript{83}

In \textit{Imran Butt v Mehreen Imran}, custody of an eight years old daughter was given to the mother. The father demanded temporary custody of the child during the summer vacation. The court granted temporary custody to the father but restrained him from removing the child from the territorial jurisdiction of the court. While granting temporary custody the court considered the fact that the father was constantly giving maintenance to the child and his second wife had filed an affidavit stating she had loved and cared for the child and would not harm her.\textsuperscript{84}

The father is the natural guardian and has the right to supervise the child. He remains the guardian even when the child is in the custody of the mother as custody is not a condition for exercising guardianship.\textsuperscript{85} This is due to his responsibility for providing maintenance for the child. Because of his right of supervision, when the actual custody is with the mother the father is still considered as having constructive custody of the child.\textsuperscript{86} The mother is not allowed to keep the child at a distance from the father’s residence. The distance is not defined in the law\textsuperscript{87} and the court decides it according to the facts of each case. In \textit{Ms. Hina Jillani, Director of A. G. H. S. Legal Aid Cell v Sohail Butt}, the Lahore High Court decided that the mother would be entitled to retain her infant child with her and to return to her native city provided the marriage had taken place there and the father is financially and physically capable to visit that place.\textsuperscript{88} Generally, when the mother takes the

\textsuperscript{82} \textit{Abdus Salam v A. D. J. Jhang} 1988 SCMR 608.
\textsuperscript{83} \textit{Asma v D. J. Sialkot} 1988 SCMR 1430; \textit{Najma Parveen v Ihsan-ur-Rehman} 1988 CLC 2196.
\textsuperscript{84} 2015 CLC 1209.
\textsuperscript{85} \textit{Ghulam Fatima Alias Shammi Bai v Chanoomal and another} PLD 1967 Kar 569; \textit{Fahimuddin v Zaibunnisa} PLD 1968 Kar 774; \textit{Muhammad Sadiq v Mrs. Sadiq Safoora} PLD 1963 Lah 534.
\textsuperscript{86} (n 85) 534.
\textsuperscript{87} \textit{Bivi v Shah Nawaz Khan} PLD 1961 Lah 509.
\textsuperscript{88} (n 11) 151.
minor to a place where it would be impossible for the father to exercise control over the child she will lose her right to custody. In *Ms. Chiragh Bibi v Khadim Hussain*, the Lahore High Court held that the father has constructive custody over the child. If the custodian is precluding the father from accessing the child it will be considered as removing the child from the constructive custody of the father. Such an act is considered detrimental for the mental and emotional welfare of the child. The court decided that in such a situation custody shall be given to the father.

The courts consider the father’s financial status before awarding him custody. It is a requirement that he should be able to provide for the child’s necessities. If the mother is financially stronger the court may consider this fact to award custody to the mother as she will be able to provide good education and other facilities to the child. Pakistani courts follow the English doctrine of laches or unreasonable delay. An unreasonable delay on the part of the father in claiming custody amounts to waiving his right. In *Nazeer Begum v Abdul Sattar*, the mother had custody of her two daughters. After divorce from her first husband she remarried and the father of the children filed a suit for custody after five years from her remarriage. The Karachi High Court considered a five year delay in filing an application for custody as unreasonable and while giving custody to the mother held that if the father was interested in the custody of his daughters he should have filed application for custody within one year of the mother’s remarriage.

After the termination of the period of custody the father has to file a case to get custody and custody does not revert to the father automatically. In *Nazeer Begum v Abdul Sattar*, the Karachi High Court held that despite his status as a legal guardian the father has to file a case to take custody of the child after termination of the period of custody with the mother. He would not get custody automatically. The father’s right to custody is not absolute and the court will decide custody matters according to the welfare of the minor. In *Yaqoob Ahmed v Mst. Shaista*, the Karachi High Court considered the fact that the father was residing with two married brothers

89 (n 46) 1142; *Ms. Nazeer Begum v Abdul Sattar* PLD 1963 Kar 465.
90 (n 36) 382.
91 (n 27) 385; *Muhammad Zaman Khan v District Judge* 1983 CLC 3165.
92 (n 46) 465.
93 Ibid.
94 Ibid.
95 Zainab Bibi v Ferozuddin PLD 1954 Lah 704.
and his parents had died. During the father’s absence, there would be no one at his house to look after the child thus custody was given to the mother.\(^{97}\) If the court decides that being with the father is against the interests of the minor or the father is disqualified, then the mother is declared custodian.\(^{98}\) If there is a private agreement between the parents about custody of the child and it goes against the welfare of the child it will not be considered valid and enforceable.\(^{99}\)

As far as the minor’s choice is concerned, the approach of the courts is not consistent. In some cases, the courts have asked for the minor’s preference if it is old enough to make a choice.\(^{100}\) In the Hanafi school, a minor has no right of choice but in some cases the courts deviate from this principle by considering the minor’s choice. Although under Islamic law, according to some opinions, a minor female has no right of choice, the courts have made no distinction in this respect and have asked minor girls for their choice as well.\(^{101}\) In some other cases, the courts have not asked for the minor’s choice by not considering it important.\(^{102}\) In *Abdul Razzaque v Dr. Rehana Shaheen*, the Karachi High Court decided that choice of the minor is a factor to be taken into consideration but it cannot be a decisive factor in matters related to custody. In this case, the custody was contested by the grandparents against the mother. Two children aged twelve and eleven showed their unwillingness to accompany their mother. The Karachi High Court awarded custody to the mother by stating that if choice of a child contradicts its welfare the latter prevails. The court also noticed that children can be influenced by older people to make a particular choice.\(^{103}\) In *Mst. Aisha v Manzoor Hussain*, the Supreme Court held that a minor is not the best judge of his/her interests. Thus, their choice will be considered only if it is in their interest.\(^{104}\)

In *Zohra Begum v Latif Ahmad Munawwar*,\(^{105}\) the Lahore High Court gave custody of a minor son aged seven years to the mother and held that as

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\(^{97}\) 2008 CLC Kar 654.

\(^{98}\) (n 63) 442.

\(^{99}\) *Dr. Fauzia Haneef v Dr. Raashid Javaid* PLD 2010 Lah 206; *Muhammad Zulqarnain Satti v Mst. Ismat Farooq* 2010 CLC 1281.

\(^{100}\) (n 19) 357; *Akbar Bibi v Shaukat Ali* 1981 CLC 78.

\(^{101}\) *Nazir Ahmad v A. D. J. III Sahiwal* 1988 SCMR 1359; *Fehmida Begum v Habib Ahmed* PLD 1968 Lah 1112; *Rafiqan v Jalal Din* 1983 SCMR 481.

\(^{102}\) *Safia Bibi v Ghulam Hussain Shah* PLD 1970 AJK 13; *Shaukat Khalid v A. D. J. Rawalpindi* 1989 CLC 1377; (n 27) 610.

\(^{103}\) (n 27) 610.

\(^{104}\) PLD 1985 SC 436.

\(^{105}\) PLD 1965 Lah 695.
the rules of custody are not given by the Qur’an or the Sunnah, it is permissible for the courts to differ from the textbooks on Muslim law. The courts can come to their own conclusions by way of *ijtihad*. The rules given by the books are not uniform so the courts may depart from the rules stated therein if their application is against the welfare of the minor. This approach of the court was criticized on the ground that the courts are incapable to perform *ijtihad*.106 Tanzil-ur-Rahman, while criticizing this approach of the Lahore High Court, suggested that although the courts are incapable to perform *ijtihad*, where there is a very strong ground the court may substitute one rule of Islamic law by adopting another rule, for instance, the rule ‘the mother shall lose her right if she remarries with a stranger’ can be substituted by the rule ‘the paramount consideration is welfare of the child’. In the case of contradiction between these two rules, Pakistani courts follow the second rule.107

The reason for the claim to perform *ijtihad* is the extensive discretion on the part of the courts in the child law. Due to lack of detailed legislation, the courts either have to rely on case law or use their own discretion. Ali and Azam rightly observed that ‘the lack of clarity and uniformity of rules relating to custody and guardianship is perhaps the single most important factor used to justify deviation from the general principles of personal law regulating this area’.108 Although the Guardians and Wards Act 1890 is based on English law the courts interpret sections of this Act in the light of Islamic law. There are conflicting decisions of courts in the matters relating to custody. In some decisions, Islamic principles and jurisprudence have been adopted by the courts while interpreting statutory provisions.109 In others, the courts referred to the Anglo-Indian concept of justice, equity and good conscience. The welfare of the child is a paramount consideration and is given preference in case of a clash with personal law.110

It has been discussed before that due to lack of a consolidated statute, courts occasionally give contradicting decisions. For instance, when there is a clash between the child’s personal law and its best interests or between the child’s autonomy and its best interests, there are no rules to guide the courts

107 (n 105) 744-745.
108 (n 4) 158.
109 (n 13).
110 (n 4) 161.
so resultant courts show inconsistent approach towards such issues. Pakistan needs a consolidated child rights statute to resolve such issues.

In the following section, I discuss the Convention on the Rights of the Child 1989 (‘CRC’). Pakistan signed and ratified the CRC in 1990. Efforts have been made to incorporate the provisions of the CRC in Pakistan’s domestic law and to reform the Guardians and Wards Act 1890. In the following section, first I discuss the relevant provisions of the Convention on the Rights of the Child and then analyze the proposed reforms in the law relating to custody.

The Convention on the Rights of the Child 1989

The Convention on the Rights of the Child 1989 is the most significant instrument on children’s rights. The Convention has contributed tremendously in recognition and protection of the rights of the child. It was adopted by the United Nations General Assembly in 1989 and entered into force in 1990. Pakistan signed and ratified the CRC in 1990. Initially, Pakistan entered a reservation that the provisions of the Convention shall be interpreted according to Islamic laws and values but in 1997 the reservation was withdrawn.

The CRC accords children a special status. In its preamble, it recognizes that due to their immaturity and vulnerability children are in need of special care and legal protection. It recognizes and protects the basic human rights of the child which includes the right to a name; the right to know and be cared for by his or her parents; the preservation of child’s identity; freedom from sexual abuse and exploitation, narcotic drugs and trafficking; the right to survival; to develop to the fullest in terms of physical and mental capacities; to protection from harmful influences and to participate in family; cultural and social life; the right to respect; the right to have and express views and right to be heard; the right to make decisions and the right to protection and establishment of the best interests of the child. \(^{111}\) Articles 2, 3, 6 and 12 govern the interpretation and implementation of the CRC and are considered basic principles. \(^{112}\) These are the following:


1. Non-Discrimination: the CRC applies to every child irrespective of the child’s race, color, sex, language, religion, ethnic or social origin, property, disability, birth or status etc. Every child without discrimination should enjoy the rights enunciated in the CRC.\textsuperscript{113}

2. The Best Interests of the Child: In every law or decision affecting children the interests of the child should be the primary consideration.\textsuperscript{114} In this article state parties are asked to consider the best interests of the child as a primary consideration. Pakistani law went a step further and declared the welfare of the child not a primary but a paramount consideration.

3. The Right to Life, Survival, and Development: According to Article 6 every child has a right to life, survival and development which includes physical, mental, emotional, cognitive, social and cultural development.\textsuperscript{115}

4. The Right to be heard: Children have a right to be heard in all matters affecting them and their views should be given due weight in accordance with their age and maturity.\textsuperscript{116}

In some situations, Article 3 of the CRC, which provides for the best interests of the child, might clash with Article 12 which discusses the importance of a child’s views in all matters affecting him/her. In some cases, it may happen that to decide in favor of the child’s wishes is not in its best interests. In such a situation, the principle of protection of the best interests shall prevail. Again, there might be disagreement among cultures about interpretation of the principle of best interests. The conception of morality in a society has a lot to do with the interpretation of the best interests of the child. The rights given by the CRC are said to be given to all children irrespective of any difference but some of these rights are definitely for older children having enough maturity and understanding. The right to form and express views and the right to be heard cannot be exercised by a child who is not capable of understanding the issue in question. The older the child is the more important its views are.

Article 2 enumerates the principle of non-discrimination. It states that ‘no child should be discriminated on the basis of race, color, sex, language, religion, ethnic or social origin, property, disability, birth or status etc’. The

\begin{flushright}
\textsuperscript{113} The CRC, art. 2.
\textsuperscript{114} Ibid, art. 3.
\textsuperscript{115} Ibid, art. 6.
\textsuperscript{116} Ibid, art. 12.
\end{flushright}
rules regarding custody in Islamic law and Pakistani law are not the same for girls and boys. This is a violation of Article 2 of the CRC; there is discrimination between the mother and the father regarding rules of custody and guardianship. Another objection against these rules is that the rules of custody are based on the age of the child and not on its best interests as enunciated in Article 3 of the CRC. The difference between the rules of custody for male and female children is based on cultural and social values and requirements. The father is viewed as a protector for the child. The rules of custody regarding the age of the child are not absolute and are subject to his/her welfare. If there is contradiction between a rule of custody and the interests of the child the latter prevails.

Efforts to Amend the Law Relating to Custody

Efforts have been made to amend the law relating to custody but so far have not been proved successful. Following is a brief overview of the proposed reforms.

The Law and Justice Commission in its report in 2007-2008 proposed amendments in the Guardians and Wards Act 1890. The Commission considered sections 19(b) and 41(e) discriminatory against the mother. Section 19(b) of the Act states that no guardian should be appointed by the court if the father of the minor is not unfit to be his guardian. It was proposed that the word ‘mother’ should also be included in this section which would mean that the court will not be able to appoint a guardian if the child’s mother or father are not unfit for this job. An amendment was also proposed in section 41(e) of the Act. This pertains to the cessation of authority of a guardian. This section states that power of a guardian ceases when the court

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118 Ibid, 213.
119 Section 19 is about the cases in which the court has no authority to appoint a guardian. It includes following cases: a minor who is a married female and whose husband is not unfit to be guardian of her person; a minor whose father is living and is not unfit to be guardian of the person of the minor; of a minor whose property is under the superintendence of a court of wards competent to appoint a guardian of the person of the minor.
120 Section 41 is about cessation of authority of a guardian. This section states that powers of a guardian of a person cease in following cases: by his death, removal or discharge; by the minor obtaining the age of majority; in the case of a female ward by her marriage to a person who is not unfit to b a guardian; in the case of a ward whose father was unfit to be guardian of the person of the ward, by the father ceasing to be so or, if the father was deemed by the court to be so unfit, by his ceasing to be so in the opinion of the court.
considers the father unfit to be the guardian of the person. The Commission proposes to include the word ‘mother’ in this proviso as well. These recommendations are ignored by the legislature but should be incorporated in the Guardians and Wards Act 1890 as it removes gender disparity in the said law.

In 2008 an effort was made by the Pakistan Peoples Party’s government to amend the Guardians and Wards Act 1890. The Guardians and Wards Act Amendment Bill 2008 was tabled in the National Assembly but it was never passed. Through this bill, amendment was proposed in section 12(1) to include the proviso that in a custody dispute the court shall on the first date of hearing pass an interim order to handover custody of a minor boy if he has not attained the age of seven years and a minor girl if she has not attained the age of sixteen years to the mother. Visitation rights will be granted to the father. According to this Bill, this amendment will protect custody rights of the mother and is in welfare of the child.

In 2014 the Child Protection System Bill was tabled in the parliament. This Bill, if passed, will be applicable in Islamabad. The preamble while making reference to Islam, the Constitution of Pakistan 1973 and the CRC emphasizes implementation of child rights. According to the provisions of this Bill a Child Protection Commission will be set up by the government. The Secretary, Law Justice and Human Rights shall be the chairperson of the Commission. The Commission shall consist of 11 members. Its function is to examine the policy, programs and other measures taken by the government for implementation of the CRC. The Commission shall appoint child protection officers to carryout purposes of this Bill. In local areas Child Protection Units will be set up which will function under supervision of the Commission. The Bill defines a child as every human being under the age of eighteen years. According to section 2(b) in all matters related to a child his/her best interests are a primary consideration. This Bill is related to protection of children’s rights in general but includes few provisions related to custody as well. Section 2(e)(iv) defines ‘child at

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123 The Child Protection System Bill 2014, s. 5.
124 Ibid, s. 15.
125 Ibid, s. 16.
126 Ibid, s. 5.
risk’ and includes in it a child who has a parent or guardian who is unfit or incapacitated to exercise control over the child. Such a child can be given in custody of a suitable person or may be admitted to a child protection institution. A child protection institution is an institution or organization for the care, protection and rehabilitation of a child at risk. Whether a particular person is suitable to take custody of the child will be determined by the court. The federal government may establish Child Protection Courts in any local area and this court will be bound to give decision within one month from the date of institution of the case. The Child Protection Officer will make a report regarding misconduct of a custodian of the child at risk. The court to which a report is made by the child protection officer may call upon the parent/guardian to produce the child in the court and ask him/her to prove why such child should not be removed from his/her custody. In such a situation, the court may admit the child in a child protection institution or on suitable surety allow the child to remain in custody of the parent/guardian. The child at risk will remain in custody of a child protection institution or a suitable person until the child attains the age of eighteen years and in exceptional cases for a shorter period. The court may impose conditions regarding such custody as it deems fit. The court has authority to demand periodical reports regarding custody of the child and may also demand production of child from time to time to check conditions of child custody. In case of breach of any condition custody can be revoked. If a person takes custody of a child in contravention of the provisions of this law, s/he shall be punished with imprisonment for a term which may extend to two years or with fine up to Rs. 50,000 or both. The commission and the court may at any time order discharge of a child from a child protection institution or custody of any person.

The Khyber Pakhtunkhwa Child Protection and Welfare Act 2010 is related to the protection of rights of children and has few sections on custody. Most of the provisions of this Act are similar to the Child Protection System Bill 2014 and the Punjab Destitute and Neglected Children Act 2007. According to this Act a child is a person under the age of eighteen years.

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127 Ibid, s. 2(g) and 2(z).
128 Ibid, s. 2(g).
129 Ibid, s. 26, 27.
130 Ibid, s. 28.
131 Ibid, s. 30.
132 Ibid, s. 32.
133 Ibid, s. 47.
134 Ibid, s. 61.
135 The Khyber Pakhtunkhwa Child Protection and Welfare Act 2010, s. 2(d).
In all matters regarding a child his/her best interests will be a primary consideration. The Act defines ‘the child at risk’ and includes in it a child whose parent or guardian is unfit or incapacitated to exercise control over the child. The Provincial Government shall set up a Khyber Pakhtunkhwa Child Protection and Welfare Commission will be set up. It shall comprise of nine members. Chairperson will be Minister for Social Welfare and Women Development Department. The Commission will supervise matters related to child rights at local level including developing programs and policies for development and wellbeing of children and review of existing law. Under the supervision of this Commission child protection institutions will be set up. Authority is given to the Peshawar High Court to notify different courts of sessions as child protection courts. Child Protection Courts will have authority to hand over custody of a child to parents, suitable person or child protection institution as the case may be but preference will be given to parents and extended families. The court shall inform the child of the situation and will take its views before making decision. Continuity in upbringing, child’s ethnic, religious, cultural, linguistic background and all other relevant factors in the best interests of the child will be considered. Progress will be monitored by child protection officer’s report. The time period to decide a case is fixed at two months after which the court shall communicate reasons for delay in deciding the case. In that case the time period can be extended up to four months. Appeal shall lie to the High Court within thirty days of the judgment. Under this Act proceedings for a child at risk can be initiated if s/he is not yet eighteen years old. In case of any dispute regarding age of the child the court shall decide it on the basis of a medical report of the medical superintendent of the district concerned whose advice regarding age of the child shall be final. If a negative report is received regarding conditions of custody of a child, the court may ask the parent/guardian to produce the child in front of the court and show cause why such child should not be removed from his/her custody. The court may order to admit the child in a child protection unit or on suitable surety being offered for safety of the child and for his being brought before it, permit the child to remain in the protection of his parents or guardian. The court may

136 Ibid, s. 2(b).
137 Ibid, s. 2(e)(iv).
138 Ibid, s. 3.
139 Ibid, s. 4.
140 Ibid, s. 2(g).
141 Ibid, s. 15.
142 Ibid, s. 16.
143 Ibid, s. 16(6).
144 Ibid, s. 16(7).
145 Ibid, s. 18.
also bar the custodian from removing child from territorial jurisdiction of the court. Identity of the child at risk will not be disclosed or published in media except with prior approval of the concerned authority. Where the child is in custody of parents or any other person, the court may ask the parent to pay certain amount of maintenance keeping in view parent’s financial position. If maintenance is not paid the court may recover this amount as arrears of land review. The punishment of taking unauthorized custody in contravention of the terms of this Act will be punishable with two years’ imprisonment or with fine up to Rs. 50,000 or both. This offence is cognizable, non-bailable and non-compoundable.

These reforms bring few positive changes in the current law of custody. To impose a time limit for deciding custody disputes is a much-needed provision as litigants suffer due to prolonged litigation. But the above-mentioned proposals/laws are mostly of general nature which emphasize implementation of child rights and do not give detailed rules regarding custody. It is also not clear whether personal law of the minor will be relevant or not. Currently in Pakistan, as the law is not detailed, the courts in some cases follow the personal law of the minor whereas in other cases decide in the child’s best interests. Ambiguity is still there. This void can only be filled a making a law which specifically deals with custody issues.

**Conclusion**

The dearth of statutory provisions relating to custody gives wide discretion to courts in matters relating to child custody. As a result, the courts often render inconsistent judgments, ensuing in ambiguity in custody disputes. The Guardian and Wards Act 1890 was promulgated during the colonial period, whereas courts in contemporary Pakistan rely on the principles of Islamic Family Law (Muslim Personal Law). It is, therefore, imperative to consolidate the myriad of laws relating to the rights of children and ensure that ‘the best interests’ of the minor are afforded precedence over personal law. Efforts have been made to reform the law related to custody in Pakistan but no consolidated statute has been made which gives detailed rules regarding custody of the child. Such a statute will stifle the wide discretion exercised by the courts, thus, resulting in consistent decision making which is the very objective of any legal system.

146 Ibid, s. 21.
147 Ibid, s. 24.
148 Ibid, s. 29.
149 Ibid, s. 42.
150 Ibid, s. 54.
Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice

Muhammad Wajid Munir*

This article analyses the judicial intervention in enforcing the Public Trust Doctrine (‘PTD’) in Pakistan. According to the PTD, a government is responsible to protect certain natural resources like clean air, water, rivers, public parks, and forests. The government acts as a trustee to protect these unique natural resources. This article critically examines the application of the PTD by the superior judiciary in Pakistan. It does so by tracing out the theoretical framework, origin, and background of the PTD. The article analyses the development, application, and geological scope of this doctrine in Pakistan by critically examining the leading case law. It is argued that the superior judiciary in Pakistan has applied this doctrine in two ways — directly and impliedly. It has done so by relying on Indian and American case law and leading international environmental treaties. This article examines two widely applicable tests namely, the ‘Legislative Test Approach’ and the ‘Substantive Test Approach’ to assess the scope of the PTD. Finally, the article traces the limitations of the PTD. It concludes with the suggestion that policy makers should treat environmental rights as fundamental human rights by including it in Part II, Chapter I of the Constitution of Islamic Republic of Pakistan 1973.

Introduction

Professor Joseph Sax\(^1\) expounded the Public Trust Doctrine (‘PTD’) in 1970 in his influential study ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’. It is based on the Roman concept of common properties (\textit{res communis}).\(^2\) Before Professor Sax’s article, the PTD appeared into English (Magna Carta 1215) and American jurisprudence

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* LL.M (Corporate Law), and LLB (Hons) Shariah & Law, International Islamic University, Islamabad.

\(^1\) Joseph Sax was Professor of Law at the University of Michigan. He also drafted the Michigan Environment Protection Act (MEPA).

Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice

(Arnold v Mundy)³ via legislation and court decisions respectively. The PTD stipulates that certain resources are held in trust in the hands of sovereigns and cannot be given away to private citizens arbitrarily. It means that states have a general duty to act for the benefit of the public, and a special duty to act as trustee to preserve these resources. In other words, certain natural resources are held as a public trust and the governments, being the chosen representative of the public, are supposed to act as the trustees of these resources. Moreover, every citizen enjoys the right to file a suit against government authorities to hold them accountable for their treatment of these resources in the designated judicial body. Environmental experts, such as James Huffman, criticise the PTD’s common law historical roots. Critics point out that the doctrine violates the property rights of individuals, the concept of popular sovereignty, and the doctrine of separation of powers. They also criticise the role of the judiciary in the application of the PTD instead of relying on the statutory laws in violation of the doctrine of separation of powers.

In Pakistan, the Shehla Zia case is the seminal case on environmental jurisprudence, and it sets the tone for the judiciary to dispense environmental justice.⁴ The Supreme Court of Pakistan (‘SC’) relied on Indian case law, the latest environmental research – primarily relying on the ‘Precautionary Principle’,⁵ and leading environmental law treaties such as the Rio Declaration 1992 to declare that the ‘right to life’ included the right to live in a healthy environment. The procedure adopted in the Shehla Zia case has been consistently followed by the judiciary in all subsequent environmental law cases. There are a few pertinent questions that need to be addressed. Mainly, how is the judiciary applying this doctrine in Pakistan? Moreover, what is the methodology being employed by judges in Pakistan and how is it different from the methodology used in other civil cases? This essay will also go on to reflect on the scope of the PTD and different approaches that will be required to determine it.

Judiciary in Pakistan has tried to answer the abovementioned questions in various cases by engaging leading environmentalists such as Dr.

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³ Arnold v Mundy [1821] 6 N.J.L. 1.
⁴ Shehla Zia v WAPDA PLD 1994 SC 693.
⁵ The Rio Declaration on Environment and Development 1992, principle 15. It states:
‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.
Pervez Hassan and relying on academic debates, environmental treaties, and comparative case law, primarily from India and the United States of America. The judiciary has applied this distinctive doctrine in two ways—directly and impliedly. The Sindh Institute of Urology and Transplantation case was the first instance where the court applied the PTD directly. Previously, the courts had only applied it impliedly without making a specific reference to the PTD. Later, Justice Tassaduq Hussain Jillani elaborated on the PTD and described its scope and parameters in the suo moto case relating to the matter of cutting of trees in Lahore to widen the canal. Recently in 2015, Justice Syed Mansoor Ali Shah, in the case of Imrana Tiwana invoked the PTD and also enlarged its theoretical framework. The significant aspect of this doctrine is that it regards environmental rights as fundamental human rights. Likewise, the doctrine guarantees the right to a healthy environment which has not been expressly protected by the framers of the Constitution.

This article investigates the application of the PTD by the superior courts in Pakistan. The article is divided into five parts. Part I elaborates the theoretical framework of the PTD, as expounded by Joseph Sax, by discussing the fiduciary duty of public institutions to preserve certain public resources. Subsequently, the relation of trust, trustee, and the beneficiary is discussed in terms of the PTD. Part II surveys the origin and background of the PTD by examining its historical roots starting from the Roman emperor Justinian and its development in England, America, and India. Part III analyses the development and the application of the PTD in Pakistan. It also critically evaluates the direct and implied application of the PTD by the superior judiciary in Pakistan and the methodology employed by and relief granted by the courts. Part IV surveys the geological scope and the parameters of the PTD. It also discusses two approaches: ‘the Legislative approach’ and ‘Substantive approach’ to determine the scope of the application of the PTD. Part V traces the limitations of the PTD. The article concludes with a suggestion that policy makers should treat environmental rights as fundamental human rights and include it in Part II, Chapter I of the Constitution as has been done in Article 24 of the Constitution of South Africa 1997.

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6 Senior Advocate Supreme Court of Pakistan. He chaired the panel which drafted the Pakistan Environmental Protection Act, 2007. He also drafted the Pakistan Environmental Protection Ordinance, 1983.
7 Sindh Institute of Urology and Transplantation v Nestle Milkipak Limited 2005 CLC 424.
8 Cutting of Trees for Canal Widening Project Lahore 2011 SCMR 1743.
9 Imrana Tiwana v Province of Punjab PLD 2015 Lahore 522.
Theoretical Framework

The PTD stipulates that the state has a fiduciary duty to protect certain natural resources like air, water, parks, wildlife, rivers, lakes, and forests for the benefit of the general public and future generations. The governmental institutions act as trustees to safeguard these natural resources and the public. This doctrine empowers a state to act as a trustee to manage these public resources since the title of these resources is vested in the state. Hence, the state has a fiduciary obligation to preserve these resources. Therefore, a sovereign cannot alienate these resources to private citizens, because the resources are inherently public. The PTD gives a cause of action to the public against any person who interferes with the enjoyment of these resources as well as against the state which fails to protect them. Further, the judiciary can hold a sovereign accountable in the event of neglect or failure to protect the natural resources. This doctrine is a powerful tool to compel administrators and legislators to recognize the public’s right to a healthy environment and allows the judiciary to take a proactive approach in terms of environmental protection. The primary aim of the doctrine is to provide a much-needed legal avenue to protect environmental rights.

Professor Sax explains the doctrine in his influential article ‘The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention’ in terms of the preservation of natural resources by a sovereign as a trustee, its exclusive usage by the general public, and the non-alienation of public resources to private parties. For justification of the doctrine, Professor Serena Williams describes three conceptual principles taken from Joseph Sax’s article. First, ‘certain interests are so intrinsically important to every citizen that their free availability tends to mark the society as one of the citizens rather than of serfs’. Second, ‘certain interests are so particularly the gifts of nature’s bounty that they ought to be reserved for the whole of the populace’. Third, ‘certain uses have a peculiarly public nature that makes their adaptation to private use inappropriate’. While analysing the case of Illinois Central Railroad, David Takacs describes the essential elements of

14 Illinois Central Railroad v Illinois (1892) 146 U.S. 387.
the PTD in his influential article ‘the Public Trust Doctrine, Environmental Rights, and the future of Private Property’. A government maintains certain resources for the enjoyment of the public. Thus, judicial acts in relation to the application of the PTD even though may seem against the separation of powers, serve democracy by preserving these rights for the people.\(^\text{15}\) In simple terms, certain natural resources are held in an inalienable public trust with the government acting as a trustee. Furthermore, any person in his capacity as a beneficiary can institute a suit against the violator of these resources and against the state for failing to protect these resources.\(^\text{16}\) The PTD functions as a public easement, which allows public access to natural resources without infringing the property rights of other individuals.\(^\text{17}\)

The PTD imposes some restrictions on government authorities. Firstly, it is the duty of the state to provide access to these natural resources to members of the public without any interference. Secondly, the government must not sell these natural resources or property to private individuals. Lastly, these resources should be utilized for a specific purpose. To clarify the last point, Professor Sax gives an example of the San Francisco Bay, which must be used for commercial or amenity purposes and must not be used for trash disposal or any other housing project.\(^\text{18}\) The courts must recognize the dual nature of governmental duties in enforcing the PTD.\(^\text{19}\)

The PTD serves two important purposes. Firstly, it forces government officials to manage natural resources in a conservative and productive way. Secondly, it authorizes the citizens to hold the relevant government officials accountable before the designated judicial forum.\(^\text{20}\) Further, the PTD gives a cause of action to the general public against private parties who interfere with these resources and against the government officials for breach of their duties as trustees.\(^\text{21}\) Nevertheless, the most important feature of the PTD is that it ensures the right to a healthy


\(^{17}\) (n 10) 1120.

\(^{18}\) (n 14) 477.

\(^{19}\) Ibid, 478.

\(^{20}\) (n 8) [23].

environment besides the right to life, which is not expressly protected in the Constitution.\textsuperscript{22}

In sum, public institutions must conserve natural resources for future generations. These resources should be preserved for future generations and be utilized for sustainable development by not being neglected and/or being impaired by private parties.

**Origin and Background**

The PTD is a common law doctrine, which has its roots in Roman and English Law.\textsuperscript{23} Justinian codified the PTD – *jus publicum*\textsuperscript{24} (Public Affair) – in *Corpus Juris Civilis* about 529 B.C. in following words: ‘by the law of nature these things are common to all mankind, the air, running water, the sea and consequently the shores of the sea’.\textsuperscript{25} On the other hand, Patrick Deveney contends that the concept was first developed by the third-century jurist Marcian.\textsuperscript{26} Following that, an English Judge, Justice Henry Bracton, declared that the concept of *jus publicum* is also a part of the law of England.\textsuperscript{27} In addition, Charles Wilkinson traced out the reference to public trust in Chinese water law 249-207 B.C., Islamic water law, traditional customs of Nigeria, medieval Spain, and medieval France.\textsuperscript{28}

In 1215, in England, the Magna Carta codified this concept\textsuperscript{29} around the same time as when King John failed to protect his friends’ exclusive rights to fishing and hunting in 1225.\textsuperscript{30} Subsequently, in 1821, the PTD


\textsuperscript{23} (n 11) 396.


\textsuperscript{25} (n 17) 713.

\textsuperscript{26} (n 26) 16.

\textsuperscript{27} Ibid, 10.


\textsuperscript{29} (n 26) 19 - Chapter 16 of Magna Carta states: ‘No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time’; (n 26) 20 - Chapter 23 of Magna Carta provides that: ‘All weirs for the future shall be utterly put down on the Thames and Medway and throughout all England, except on the seashore’.

\textsuperscript{30} (n 8) [20].
entered into the jurisprudence of the United States, in the Arnold case\textsuperscript{31} quoted as;

\begin{quote}
[T]he government could not, consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.\textsuperscript{32}
\end{quote}

The PTD further made progress in American jurisprudence in the case of Illinois Central Railroad,\textsuperscript{33} wherein the State of Illinois granted land to the Illinois Central Railroad in 1869.\textsuperscript{34} After four years, the State of Illinois rescinded the land and Illinois Railroad sued the government. The court declared that:

\begin{quote}
[A] title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them and have the liberty of fishing therein freed from the obstruction or interference of private parties.\textsuperscript{35}
\end{quote}

The PTD did not remain confined to Europe and the United States. This doctrine found its way into Indian jurisprudence in M.C. Mehta case where the Division Bench held that ‘the State is the trustee of all natural resources which are by nature meant for public use and enjoyment’.\textsuperscript{36} Moreover, the PTD was also incorporated in some state constitutions in the United States such as those of Wisconsin\textsuperscript{37} and Pennsylvania.\textsuperscript{38}

\section*{Development and Application of the Public Trust Doctrine in Pakistan}

Professor Sax argues that judicial attitude matters a lot in the advancement of the PTD.\textsuperscript{39} It has also been argued that judges should take action when officials are destroying the environment or in the same spirit are failing to protect it.\textsuperscript{40} The seemingly proactive attitude of the courts in Pakistan is

\begin{footnotesize}
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\item \textsuperscript{31} (n 3).
\item \textsuperscript{32} (n 8) [20].
\item \textsuperscript{33} (n 16).
\item \textsuperscript{34} James L. Huffman ‘Why Liberating the Public Trust Doctrine is Bad for the Public’ (2015) \textit{Environmental Law} 337-377.
\item \textsuperscript{35} (n 8) [21].
\item \textsuperscript{36} \textit{M.C. Mehta v Kamal Nath} (1997) 1 SCC 388.
\item \textsuperscript{37} (n 15) 32, 33.
\item \textsuperscript{38} (n 15) 33, 34 - Pennsylvania Constitution, art. I, s. 27.
\item \textsuperscript{39} (n 14) 521.
\item \textsuperscript{40} (n 17).
\end{itemize}
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reflected in many *suo moto* actions taken by the judiciary to enforce environmental laws. The courts in Pakistan have applied this doctrine in two ways: directly and impliedly. The doctrine was applied impliedly, albeit without referring its name, in the cases of *Ardeshir Cowasjee* and *Salt Miners*. However, after the case of *Sindh Institute of Urology and Transplantation*, the courts are now applying it directly.

In the case of *Shehla Zia*, the seminal case on environmental law in Pakistan, the Supreme Court’s Larger Bench defined the word ‘life’ under Article 9 read with Article 14 of the Constitution to include ‘life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally’. This landmark case sets out a conceptual framework on which the judiciary is now heavily leaning on. The facts in the *Shehla Zia* case were that the petitioners had filed a suit against the Water and Power Development Authority (‘WAPDA’) for its construction of a grid station in their residential area. The petitioners were of the view that the electromagnetic field created by the grid station could pose a threat to the health of the residents. This case is significant for a number of reasons. Firstly, it expanded the definition of the right to life by including environmental rights within its ambit. Secondly, it laid the foundation for the rule of the Precautionary Principle, which has a close relation with the PTD. Thirdly, the court relied on the Rio Declaration 1992 stating that it should be implemented at least in spirit, if not in letter, despite it not being directly binding on the SC. Fourthly, the court also initiated a tradition of appointing a commission which set the tone for the development of the PTD. Lastly, but most importantly, the court interpreted the term ‘right to life’ to include environmental health, clean atmosphere, and unpolluted environment. This case has been referred to in almost all subsequent environmental law cases in Pakistan.

The judiciary in Pakistan does not distinguish the PTD from the right to life, unlike courts in India. In India, the right to life includes ‘the right to have a healthy environment and right to livelihood’ under Article 21 of

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41 *Human Rights Case* 1994 SC 102; *New Murree Project* 2010 SCMR 361; *Cutting of Trees* 2011 SCMR 1743.
42 *Ardeshir Cowasjee v Karachi Building Control Authority* 1999 SCMR 2883.
43 *General Secretary, West Pakistan Salt Miners Labour Union (CBA), Khewra, Jhelum v Director, Industries and Mineral Development, Punjab, Lahore* 1994 SCMR 2061.
44 Ibid. (n 7).
45 (n 4) [12].
46 Ibid.
47 Ibid, [16] - The commission was appointed to study the scheme, planning, device and technique employed by WAPDA.
Indian Constitution. The PTD is the third aspect of the right to life. As the courts in Pakistan have been heavily relying on Indian case law, the PTD is impliedly included in the right to life. Additionally, the doctrine has also branded environmental rights as fundamental human rights.

**Direct Application of the Public Trust Doctrine**

The direct application of the PTD by courts in Pakistan started in 2005. The *Sindh Institute of Urology and Transplantation* was the first case in which the court specifically referred to the PTD. In this case, Nestle wanted to acquire a certain piece of land for setting up a water plant, which could have had a potentially negative impact on sub-soil water. The court decided the case and declared certain resources such as clean air, water, and forests as the public trust. The court directed state officials to make these resources available to everyone irrespective of economic inequalities. The court ruled that it was the duty of the state to protect natural resources for the people and for future generations. The conversion of these natural resources into private use would hamper fundamental rights of the citizens. Therefore, underground water belonged to the general public. This is an important case for three reasons. First, the court applied the PTD for the very first time since it was envisioned by Professor Sax. Second, this was the first time that the court expanded the doctrine to include ground-water as a natural resource. Third, that in this case the court referred to Principle 2 of the Stockholm Declaration 1972, which safeguards natural resources like earth, air, water, land, flora, and fauna for the benefits of present and future generations.

Chronologically, the second case on this subject was the *Moulvi Iqbal* case, wherein the petitioner challenged the construction of a golf course on a public park. The Supreme Court declared that the conversion of a public park into a golf course was a violation of the fundamental rights of the citizens. The then Chief Justice, Mr. Iftikhar Chaudhry observed that ‘reasonable access to the sea and the right to cross the dry sand beach is an integral component of the public trust doctrine’.

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48 (n 24).
49 (n 8) [24].
50 (n 7) [24].
51 Ibid, [15].
52 Ibid, para 13.
53 *Moulvi Iqbal Haider v Capital Development Authority and others* 2006 PLD SC 394.
54 Ibid.
Another case which further strengthened the inclusion of the PTD into Pakistani jurisprudence was the case of Muhammad Tariq Abbasi. Justice Sarmad Osmany invoked Article 9 of the Constitution to hold that ‘the doctrine of public trust has long been recognised all over the world, which enjoins the State to preserve and protect the public interest in beaches, Lakeshores etc’.\(^\text{55}\) This case was important because the PTD was expanded to include the right to access to public places. This case gave an additional remedy to citizens for unhindered access to public places in addition to the one provided by the Constitution.

The true nature of the doctrine was reflected in the \textit{Cutting of Trees suo moto} matter,\(^\text{56}\) wherein the petitioner objected to the widening of the Canal Bank Road, Lahore. The Division Bench of the Lahore High Court after explaining the doctrine declared the green belt of the road as a public trust.\(^\text{57}\) This case was the most important PTD case because it explained the PTD comprehensively for the first time in the context of Pakistan. Firstly, the court appointed the renowned environmentalist Dr. Pervez Hassan as a mediator. Secondly, the court delineated the scope and parameter of the PTD\(^\text{58}\) using an influential article by Professor Serena M. Williams.\(^\text{59}\) Thirdly, the court determined the scope of the doctrine by indicating that public property could not be converted into private property except for a public purpose. Lastly, the court explained the concept of sustainable development,\(^\text{60}\) a closely related concept of the PTD.

Four years later, the doctrine emerged again in the \textit{Lahore Bachao Tehrik} case.\(^\text{61}\) Speaking on behalf of the Larger Bench of the Supreme Court, Justice Mian Saqib Nisar demarcated the scope of the doctrine, stating that ‘… a public trust resource cannot be converted into private use or any other use other than a public purpose…’\(^\text{62}\)

In the same year, in the case of \textit{Young Doctors Association}, the petitioners challenged the Signal Free Junction at Azadi Chowk in Lahore because it was purportedly affecting a portion of the Lady Willingdon

\(^{55}\) \textit{Muhammad Tariq Abbasi v Defence Housing Authority} 2007 CLC 1358 [Karachi].
\(^{56}\) (n 8).
\(^{57}\) Ibid, [35].
\(^{58}\) Ibid, [32].
\(^{59}\) (n 15).
\(^{60}\) (n 8), [36]-[39].
\(^{61}\) \textit{Lahore Bachao Tehrik v Dr Iqbal Muhammad Chauhan and others} 2015 SCMR 1520.
\(^{62}\) Ibid, [20].
Hospital. The court rejected the petitioner’s claim that the scheme violated the PTD and the concept of sustainable development.\(^{63}\) For this the court heavily relied on the *Cutting of Trees* case, wherein it was declared that ‘the diversion of one half acre of park space was upheld under the public trust doctrine as “merely a diversion of a minimal quantum of public land from one public purpose to another public purpose”’.\(^{64}\)

The latest case on the PTD is the *Imrana Tiwana* case,\(^{65}\) which widened the sphere of the doctrine by including the process of the Environment Impact Assessment (‘EIA’) in it. In the *Imrana Tiwana* case, the petitioner challenged the Signal Free Corridor Project before the Larger Bench of the Lahore High Court. The petitioner contended that the Lahore Development Authority never undertook the EIA.\(^{66}\) The court ruled in favour of the petitioner stating that:

\[
\text{[T]o us environmental justice is an amalgam of the constitutional principles of democracy, equality, social, economic and political justice guaranteed under our Objectives Resolution, the fundamental right to life, liberty and human dignity (article 14) which include the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine.}\]^{67}

The court suspended further work on the signal free corridor. The case was important for the following reasons. Firstly, the court declared that the Environment Protection Agency (EPA) was suffering from a complete ‘Regulatory Capture’.\(^{68}\) Secondly, the court referred principle 1 of the Stockholm Declaration, which stated:

\[
\text{Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.}\]^{69}

\(^{63}\) *Young Doctors Association v Government of Pakistan* 2015 PLD 112, [14].

\(^{64}\) Ibid, [10].

\(^{65}\) *Imrana Tiwana v Province of Punjab* PLD 2015 Lahore 522.

\(^{66}\) Ibid.

\(^{67}\) Ibid, [25].

\(^{68}\) Ibid, [33].

\(^{69}\) Ibid, [24].
Thirdly, the court observed that the purpose of environmental laws is to protect life and nature which include ‘the principle of ‘Sustainable Development’,70 the Precautionary Principle,71 the EIA, inter and intra-generational equity and the PTD’.72 Finally, the court explained the scope, meaning and the review process of the EIA.73 The case further expanded the PTD by including the EIA in it.74 However, the Supreme Court overturned the decision of the Lahore High Court by stating that the Objectives Resolution, Principles of Policy, and Article 2-A of the Constitution could not be used to strike down laws.75

**Implied Application of the Public Trust Doctrine**

The PTD was applied impliedly in numerous environmental law cases in Pakistan. Although, the courts in Pakistan have applied various concepts relating to the doctrine, they have never specifically mentioned the PTD. The courts delivered judgments on the basis of public policy and the right to life by relying solely on the above mentioned *Shehla Zia* case.76 Additionally, the courts applied various principles of the doctrine including the principle related to the availability of public property to the general public, the particular type of usage of the public property, right to have clean water, and non-conversion of public property to private property.

Justice Munib Akhtar has provided a list of superior court cases in Pakistan wherein the PTD was impliedly applied.77 These include cases

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70 Ibid, [35] - ‘Development that meets the needs of current generations without compromising the ability of future generations to meet their own needs’.
71 Ibid. ‘Principle 15: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation’.
72 Ibid, [25].
73 Ibid, [35]-[41].
74 It is important to note that section 2(xi) read with section 12 of the Pakistan Environmental Protection Act, 1997 also deals with EIA and its requirements.
76 (n 4).
related to housing schemes,\textsuperscript{78} power plants,\textsuperscript{79} companies’ usage of antennae and towers,\textsuperscript{80} construction of high-rise buildings,\textsuperscript{81} air pollution (asbestos),\textsuperscript{82} CNG stations,\textsuperscript{83} parks,\textsuperscript{84} disposal of effluent, waste and water,\textsuperscript{85} and smoke pollution.\textsuperscript{86}

The first case in which the PTD was impliedly applied was the case of \textit{Ardeshir Cowasjee}, wherein a larger bench of the Supreme Court was tasked with resolving the issue of the construction of a revolving restaurant on a plot near a public park instead of commercial-cum-residential building. The court observed that the plot near the public park must be used for the construction of a revolving restaurant for the benefit of the people. The court held that ‘the use of the Park involves enjoyment of life which is covered by the word life employed in Article 9 of the Constitution as interpreted by this Court’.\textsuperscript{87} This case is significant because it expounded on Professor Sax’s concept of non-alienation of public property to private ownership was impliedly applied. Additionally, the court also declared that the plot in question must be used for a ‘particular type of usage’, i.e. for the construction of the revolving restaurant. This concept of ‘particular type of usage of public property’ is a central pillar of Professor Sax’s theory. To clarify the last point, he gives an example of San Francisco Bay, which must be used for commercial or amenity purposes only and must not be used for

\textsuperscript{78} \textit{Re: Environmental hazard of the proposed New Murree Project} 2010 SCMR 361.
\textsuperscript{79} \textit{Shehri CBE v Government of Pakistan and others} 2007 CLD 783, PLD 2007 Karachi 293.
\textsuperscript{80} \textit{Rabiya Associates v Zong (China Mobile) and others} PLD 2011 Karachi 132.
\textsuperscript{81} \textit{Zubaida A. Sattar v Karachi Building Control Authority and others} 1999 SCMR 243; \textit{Al Jamiaul Arabia Ahsanul Aloom and Jamia Masjid and others v Syed Sibte Hasan and others} 1999 YLR 1634; \textit{Zahir Ansari and others v Karachi Development Authority and others} PLD 2000 Karachi 168; \textit{Shamsul Arfin and others v Karachi Building Control Authority and others} PLD 2007 Karachi 498; \textit{Navid Hussain and others v City District Government Karachi and others} 2007 CLC 912; \textit{Farooq Hamid v LDA and others} 2008 SCMR 483; \textit{Nighat Jamal v Province of Sindh and others} 2010 YLR 2624; \textit{Muhammad Aslam v Real Builders and others} PLD 2011 Karachi 204.
\textsuperscript{82} \textit{Dadex Eternit Ltd. v Haroon Ahmed and others} PLD 2011 Karachi 435.
\textsuperscript{83} \textit{Ummatullah v Province of Sindh and others} PLD 2010 Karachi 236; \textit{see also Sultan Ahmed v Dr. Shaheen A. Hussain and others} 2009 MLD 231.
\textsuperscript{84} \textit{Muhammad Tariq Abbasi and others v Defence Housing Authority and others} 2007 CLC 1358; \textit{Shehri and others v Province of Sindh and others} 2001 YLR 1139.
\textsuperscript{85} \textit{Muhammad Shafig and others v Arif Hameed Mehar and others} PLD 2008 SC 716, 2008 CLD 1103; \textit{Muhammad Yousaf and others v Province of Punjab and others} 2003 CLC 576; \textit{Anjum Irfan v Lahore Development Authority and others} PLD 2002 Lahore 555.
\textsuperscript{86} \textit{Syed Mansoor Ali Shah v Government of Punjab and others} PLD 2007 Lahore 403.
\textsuperscript{87} (n 44) [12].
trash disposal or any housing project. A similar issue was raised in *Shehri-CBE*, wherein the Supreme Court stopped the construction of a multiplex cinema on a ground where the public used to play cricket, football, and hockey.

In the case of *Salt Miners*, the petitioners filed a suit for the enforcement of their right to clean water. The defendant, Industries and Mineral Development Punjab, was responsible for polluting the water reservoir and reduction of the water catchment area. The petitioners contended that the impugned project would contaminate the watercourse and reservoirs. Justice Saleem Akhter quoted the *Shehla Zia* case extensively and ruled that ‘the right to have water free from pollution and contamination is a right to life itself’. The court ordered the Pakistan Mineral Development Corporation to install an additional pipeline to preserve clean water. Additionally, the court also directed the establishment of a commission to investigate the mining operation.

In the same year, in the *Human Rights* case, the Supreme Court took *suo moto* action on a daily newspaper report regarding dumping of nuclear and industrial waste in the coastal land of Baluchistan. The Supreme Court ruled that:

> The coast land of Baluchistan is about 450 miles long. To dump waste materials including nuclear waste from the developed countries would not only be a hazard to the health of the people but also to the environment and the marine life in the region.

The latest case in which the doctrine has been impliedly applied is the *New Murree Project* case. The Supreme Court disbanded the project by raising the corollary principles of the PTD: Sustainable Development and Protection of the environment for future generations. The full bench of the Supreme Court declared that the project was an environmental hazard owing to the fact that acres of forests could be affected by it.

**Methodology of the Courts**

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88 (n 14) 477.
89 (n 82).
90 (n 45).
91 *Human Rights Case (Environmental Pollution in Balochistan)* PLD 1994 SC 102.
92 *Suo Motu Case No. 10 of 2005* 2010 SCMR 361.
The courts in Pakistan have adopted a unique methodology in applying the PTD, which is slightly advanced as compared to the methodology applied in other civil rights matters. The courts equated environmental rights to fundamental human rights. Hence, the doctrine ‘seems embedded in Article 9 of the Constitution’. Additionally, the courts gave injunctive relief to the petitioners in several cases, but no money damages were awarded till now. The courts in Pakistan constituted advisory committees and commissions for technical assistance. Furthermore, the courts have relied on international environmental treaties like the Stockholm’s Declaration 1972, the Rio Declaration 1992, and have also requested assistance from leading experts.

Judicial intervention in environmental matters is a positive development. Yet there is no substitute for a clear-cut environmental right provision in the constitution. The government should incorporate environmental right in Chapter I of the Constitution as it is done in South Africa by insertion of section 24 in the constitution which reads as:

In terms of section 24 of the Bill of Rights, it has been unequivocally declared that everyone has the right: a) to an environment that is not harmful to their health or well-being; and b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:

i) prevent pollution and ecological degradation;
ii) promote conservation; and
iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Part IV: Geological Scope and Parameter of the Public Trust Doctrine

Professor Sax, in his theory, explained that the PTD would apply to natural resources like forests, ecosystems, and fisheries. Harrison C. Dunning

94 Ibid, 770.
96 Ibid.
97 (n 8) [31].
identified the practice of courts in the United States in three important areas of natural resource requiring attention: navigation, commerce, and fishing.\textsuperscript{99} The PTD was also applied in parks,\textsuperscript{100} wildlife and wildlife habitat,\textsuperscript{101} swimming, fishing, pleasure boating, sailing, environmental preservation,\textsuperscript{102} and enjoying of scenic beauty.\textsuperscript{103} In the case of \textit{Marks v. Whitney}, the California Supreme Court ruled that the purposes of the doctrine are sufficiently flexible in order to protect the environment.\textsuperscript{104}

A unique application of this doctrine is to be found in the case of \textit{National Audubon Society},\textsuperscript{105} which entailed the preservation of the land for ecological and recreational use\textsuperscript{106} including ‘ecological study, open space, fish and wildlife habitat and scenic resources’.\textsuperscript{107} In the case of \textit{Kootenai Environmental Alliance}, the court also included aesthetic beauty and water quality in the PTD.\textsuperscript{108}

In Pakistan, the scope of the doctrine is very broad.’\textsuperscript{109} The doctrine has been directly applied in cases involving waters,\textsuperscript{110} recreational usage of public property,\textsuperscript{111} parks,\textsuperscript{112} green belts,\textsuperscript{113} and the conversion of public property into private property.\textsuperscript{114}


\textsuperscript{100} \textit{Citizens to Preserve Overton Park, Inc. v Volpe} 401 U.S. 402 (1971). According to Serena M. Williams, it is the most frequently cited decision in the history of environmental law. See also \textit{Paepke v Public Bldg. Commn.} 263 N.E.2d 11, 15 (Ill. 1970); \textit{Timothy Christian Schs. v Village of W. Springs} 675 N.E.2d (Ill. 1996).

\textsuperscript{101} (n 26) 4 - Gary Meyers has argued that the public trust doctrine can be the vehicle for a more holistic approach to the management of wildlife and wildlife habitat.


\textsuperscript{103} (n 15) 33 - \textit{State v Town of Linn} 556 N.W.2d 394, 402 (Wis. App. 1996); \textit{State v Public Servo Commn.} 81 N.W.2d 71, 74 (Wis. 1957).

\textsuperscript{104} (n 10) 1110.


\textsuperscript{106} (n 26) 7.


\textsuperscript{108} (n 112) 523, 524 - \textit{Kootenai Environmental Alliance v Panhandle Yacht Club} 671 P,2d 1085 (Idaho 1983).

\textsuperscript{109} (n 97) 769.

\textsuperscript{110} (n 7).

\textsuperscript{111} Muhammad Tariq Abbasi v Defence Housing Authority 2007 CLC 1358.
Furthermore, the doctrine is also implicitly applied in various cases such as those involving particular type of usage of public property,\textsuperscript{115} clean water,\textsuperscript{116} environmental hazard,\textsuperscript{117} housing schemes,\textsuperscript{118} power plants,\textsuperscript{119} cellular companies’ usage of antennae and towers,\textsuperscript{120} construction of high-rise buildings,\textsuperscript{121} air pollution (asbestos),\textsuperscript{122} CNG stations,\textsuperscript{123} parks,\textsuperscript{124} disposal of effluent, waste, and water,\textsuperscript{125} and smoke pollution.\textsuperscript{126}

In Pakistan, the scope of the PTD is addressed in two important environmental law cases. In the \textit{Cutting of Trees} case\textsuperscript{127}, the court explained the scope of the doctrine. The Constitution obliges the courts to observe judicial restraint in policy matters. The court decided that the doctrine only intervenes in matters wherein the governmental authorities violate a law or a constitutional provision ‘or when it relates to the enforcement of a fundamental right which \textit{inter alia} includes environmental human rights’.\textsuperscript{128} Justice Jillani posed the following question to determine the scope of the doctrine:

\begin{quote}
How far the public or private project can be stalled by invoking this concept and to what extent the public use of a trust resource can be converted to private use or for a different public purpose?\textsuperscript{129}
\end{quote}

\begin{itemize}
\item \textsuperscript{112} \textit{Moulvi Iqbal Haider v Capital Development Authority and others} PLD 2006 SC 394.
\item \textsuperscript{113} (n 8).
\item \textsuperscript{114} (n 64).
\item \textsuperscript{115} (n 44); \textit{Shehri-CBE v LDA} 2006 SCMR 1202.
\item \textsuperscript{116} (n 45).
\item \textsuperscript{117} (n 95).
\item \textsuperscript{118} (n 81).
\item \textsuperscript{119} (n 82).
\item \textsuperscript{120} (n 83).
\item \textsuperscript{121} (n 84).
\item \textsuperscript{122} (n 85).
\item \textsuperscript{123} (n 86).
\item \textsuperscript{124} (n 86).
\item \textsuperscript{125} (n 88).
\item \textsuperscript{126} (n 89).
\item \textsuperscript{127} (n 8).
\item \textsuperscript{128} Ibid, [53].
\item \textsuperscript{129} Ibid, [32].
\end{itemize}
For this, he quoted an article by Professor Williams,\textsuperscript{130} who identified two broader approaches: the legislative approach and the substantive test approach\textsuperscript{131} to determine the scope of the PTD.

According to Professor Williams, the doctrine is not an absolute concept and has minor limitations.\textsuperscript{132} The two approaches mentioned above are widely pertinent in the application of the doctrine. The first is the ‘Legislative Approach’ or the ‘Massachusetts Approach’. The case of \textit{Gould v. Greylock} prohibits ‘alienation or diversion of parkland without plain and explicit legislation to that end’.\textsuperscript{133} Therefore, the doctrine can be circumvented through legislation.

The second approach is the ‘Substantive Approach’ or ‘Wisconsin Approach’. The two important Wisconsin cases\textsuperscript{134} describe the five conditions to alienate or divert a public land. These conditions are as follows:

(1) that public bodies would control use of the area in question;
(2) that the area would be devoted to public purposes and open to the public;
(3) the diminution of the area of original use would be small compared with the entire area;
(4) that none of the public uses of the original area would be destroyed or greatly impaired; and
(5) that the disappointment of those wanting to use the area of new use for former purposes was negligible when compared to the greater convenience to be afforded to those members of the public who are using the new facility.\textsuperscript{135}

In the case of \textit{Lahore Bachao Tehrik}, the Supreme Court delimited the scope of the doctrine declaring that public property could not be converted into private property. However, in the instant case, it was held that the widening

\textsuperscript{130} (n 15).
\textsuperscript{131} (n 8) [32].
\textsuperscript{132} (n 15) 40.
\textsuperscript{133} (n 15) 41 - \textit{Gould v Greylock Reservation Commn} 215 N.E.2d 114, 121 (Mass. 1966); \textit{Williams v Gallatin} 128 N.E. 121, 122 (N.Y. 1920).
\textsuperscript{134} (n 15) 42 - \textit{City of Madison v State} 83 N.W.2d 674 (Wis. 1957); \textit{State v Pub. Service Commn.} 81 N.W.2d 71 (Wis. 1957).
\textsuperscript{135} (n 15) 42.
of a road is for the benefit of the general public and so should be allowed. In this case, the purpose of widening the road was to ease traffic congestion and to facilitate commuters.\textsuperscript{136}

The courts demarcated the scope of the PTD by declaring that even if any project is beneficial to the general public but was negligibly violating the doctrine, the PTD would not apply. In other words, in public good projects, the doctrine has a slightly limited scope.

**Part V: Limitation of the Public Trust Doctrine**

James Huffman is one of the critics of the PTD. He maintains that the PTD violates the private property rights of individuals, the popular sovereignty, the rule of law, and the doctrine of separation of power.\textsuperscript{137}

Experts question the common law background of the doctrine and its impact on administrative and statutory governance.\textsuperscript{138} William Araiza also criticizes the common law foundation of the doctrine and questions the interaction of an unwritten common law doctrine with constitutionally protected environmental rights.\textsuperscript{139} According to Dave Owen, it is a doctrine that has disputed ambiguous and old roots.\textsuperscript{140} Araiza also argues that the legal foundation of the PTD is murky with limited scope and unsound policy supports.\textsuperscript{141} The doctrine’s legal underpinnings are vague and its scope is murky and paradoxical.\textsuperscript{142} Owen argues that often high-profile doctrines do not work well similar to statutory provisions of law.\textsuperscript{143} This is also one of the reasons that land-mark cases often have limited scope.\textsuperscript{144}

Critics also question the judicial logic of giving overriding effect to the doctrine as opposed to a piece of legislation especially considering the fact that the latter can supersede common law.\textsuperscript{145} Araiza maintains that the

\textsuperscript{136} Ibid, [20].
\textsuperscript{138} (n 10) 1151.
\textsuperscript{139} William D. Araiza, ‘The Public trust Doctrine as an Interpretive Canon’ (2011) 45 UCDL Rev. 693, 702.
\textsuperscript{140} (n 10) 1102.
\textsuperscript{141} (n 145) 693.
\textsuperscript{143} (n 10) 1102.
\textsuperscript{144} Ibid, 1102.
\textsuperscript{145} (n 145) 702.
doctrine provides the courts with wide-ranging authority.\textsuperscript{146} The PTD has become equivalent to judicial constitution-making in the field of environmental law.\textsuperscript{147} Huffman argues that judges have an important but a limited role in the constitutional republics and hence they should exercise restraint in issues related to public policy.\textsuperscript{148} The courts cannot determine public good simply by becoming acquainted with the view of self-interested parties on a particular issue.\textsuperscript{149} Moreover, judges should not interfere with affairs of the legislators, since the latter have the duty to make laws as per the principle of separation of powers.\textsuperscript{150} Public good and individual liberty are better safeguarded when there is a clear-cut separation of power between the legislature, executive, and the judiciary.\textsuperscript{151} The issue remains that courts are ignoring popular sovereignty in the application of the PTD.\textsuperscript{152} This is because courts do not have the authority to invalidate laws enacted by the legislators if they are in tandem with popular demand. If the courts invalidate duly enacted laws on the basis of popular demand, it means that they are ignoring popular sovereignty.\textsuperscript{153} James Huffman laments that the constitution of the United States, which is based on popular sovereignty, relies on the monarchical doctrine or the concept of parliamentary sovereignty.\textsuperscript{154} He argues that the PTD is not a rule of law because it is judge-made law. He further argues that the PTD, being judge-made law, is not a rule of law. He states,

\begin{quote}
The latter approach, rooted in the supply-side view that judges should be attentive to public needs and should rewrite the law accordingly, positions the judge as lawmaker in the context of particular disputes. This is the rule of the judge, not the rule of law.\textsuperscript{155}
\end{quote}

Huffman further argues that,

\begin{quote}
Along the lines of the earlier hypothetical judicial holding, imagine a law, judicially declared or statutorily enacted, providing that property owners may do as they please with
\end{quote}

\begin{footnotes}
\item[146] Ibid, 738.
\item[147] (n 148).
\item[148] (n 36) 341.
\item[149] Ibid, 374.
\item[150] Ibid, 375.
\item[151] (n 143) 267.
\item[152] Ibid, 267.
\item[153] Ibid, 268.
\item[154] Ibid, 269.
\item[155] Ibid, 269.
\end{footnotes}
their property subject to the unlimited discretion of the state to restrict use of private property. Would judicial adherence to such a rule be consistent with the rule of law? Of course not. A property right thus guaranteed would be no right at all. Enforcing such a rule as precedent would be a mockery of the rule of law.156

Moreover, it is contended that the PTD is also the antithesis to the economic prosperity of a country. Economic prosperity is vital for infrastructure, environmental protection, and education.157 ‘By making private property rights increasingly contingent, a liberated public trust doctrine will not serve the public good’.158 Richard Lazarus argues that people do not need the doctrine due to the development of statutory and administrative environmental law.159 He argues that the ‘doctrine would undermine regulatory environmental law by breathing life into a common law – and property-based legal scheme that had operated to the detriment of environmental protection’.160 Furthermore, the economy of a country will wither away in absence of proper property rights.161

The issue of judicial restraint has been raised in numerous cases in Pakistan. In the Cutting of Trees case, Justice Jillani observed that many times the executive’s policy actions were brought before the court having socio-political or economic connotation. The constitution demands judicial restraint in respect of the trichotomy of power. However, the court intervenes whenever the Executive’s policies and actions violate any provision of law or constitutional provision or fundamental human rights including environmental human rights.162 In the Young Doctors Association case, the court decided a limited application and scope of the PTD by deciding that if a project was launched by a competent authority after consulting the relevant departments or agencies and taking expert opinion into account from reputed firms like NESPAK, then the issue of public trust would not arise.163

In the case of Lahore Conservation Society, the petitioners challenged the construction of a flyover. They were of the view that the

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156 Ibid, 270.
157 (n 143) 374.
158 Ibid, 375.
159 (n 10) 1121.
160 Ibid.
161 (n 143) 263.
162 (n 8) [53].
163 (n 66).
construction would require cutting down a number of plants and trees, which would adversely affect the health of the inhabitants of the area. The court dismissed the petition on the ground that the flyover would be very beneficial for the citizens especially in the future as it would solve the problem of traffic blockages. Moreover, it was stated that the construction of the flyover would also save precious time. Similarly, in the case of *Kamil Khan Mumtaz (Lahore Orange Line Metro Train Project Case)*, the Lahore High Court noted that the court was not authorised to entertain matters regarding policy matters and decision-making of competent authorities. However, in the event of violation of the law or irrational, unreasonable, and arbitrary decision making, the courts can direct the state or government to strictly adhere to the law.

Babcock argues that despite all its criticism, the PTD acts as a gap filler in the absence of a positive law on the subject. For this, he gives an example of the formation of Executive Economic Zone (‘EEZ’) which deals with the issue of endangered wild fish owing to a regulatory gap. The PTD has the potential to fill the vacuum. This doctrine is particularly essential in common property resources because these resources are not fully protected by positive law. It can also address regulatory commons which arises ‘when there is not “a matching political-legal regime, leaving the underlying social ill unattended.”’ Furthermore, Babcock argues that the doctrine’s historical roots are less important than the social purpose it is performing. Similarly, he favours judicial intervention in environmental justice by quoting the words of Professor Felix Cohen who states that:

A judicial decision is a social event. Like the enactment of a Federal statute, a judicial decision is an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it.

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164 *Lahore Conservation Society through President and 3 others vs. Chief Minister of Punjab and another PLD 2011 Lahore 344.*
166 (n 11) 394.
167 Ibid, 395.
168 Ibid, 406.
170 Ibid, 398.
171 Ibid, 399.
He argues that because of the PTD many states have legislated new laws.\textsuperscript{172} Albert Lin argues that the doctrine is an effective weapon in preventing governments and private parties from violating public rights.\textsuperscript{173} He argues that the PTD protects public interest similar to Tort’s Public Nuisance doctrine. It should be noted that both of the doctrines have a common law background.\textsuperscript{174} In both doctrines, judges take decisions regarding public policy considerations.\textsuperscript{175} Lin acknowledges that the doctrine developed through individual case law, which works well in a limited context. But this individual case by case solution is inadequate for comprehensive regulation. He argues that although statutory laws protect the environment directly and systematically, yet there always remains some lacunae. The doctrine is a perfect gap-filling and corrective device to remove lacunae left by the statutes.\textsuperscript{176} Some scholars point out that the doctrine is normally applied by generalist judges, who often lack expertise in environmental matters.\textsuperscript{177} Richard Lazarus maintains that instead of the doctrine, we should expand regulatory power to resolve environmental disputes.\textsuperscript{178} However, Lin argues that the doctrine must be taken as ‘corrective responses to political failures in the democratic process than as undemocratic or unaccountable interventions’.\textsuperscript{179} The doctrine has the prowess to fix the inability of environmental laws and addresses problems like declining fisheries, climate change, and toxic substances.\textsuperscript{180}

Justice Tassaduq Jillani has perfectly summarized the intervention of the judiciary in environmental matters in the following words:

The rationale behind public interest litigation in developing countries like Pakistan and India is the social and educational backwardness of its people, the dwarfed development of law of tort, lack of developed institutions to attend to the matters of public concern, the general inefficacy and corruption at various levels. In such a socioeconomic and political milieu, the non-intervention by Court in complaints of matters of
Putting Public Trust Doctrine to Work: A Study of Judicial Intervention in Environmental Justice

public concern will amount to abdication of judicial authority.\textsuperscript{181}

Conclusion

The courts in Pakistan apply the PTD in its true letter and spirit; which maintains that certain natural resources are inalienable public trusts, the government is the trustee of these natural resources and the citizens as beneficiaries may take recourse to the courts if anyone tries to alienate, modify or destroy these resources. It is a common law doctrine which has its roots in Roman and English laws. Environmental experts also criticise its common law historical roots. Critics state that the PTD violates the property rights of individuals, the popular sovereignty, and the doctrine of separation of powers. They also criticise the role of the judiciary in the application of the PTD. They argue that the courts should have limited authority in environmental matters. The courts should rely on the statutory laws instead of the PTD. However, environmental experts defend the doctrine and state that it can be an important gap-filler. It can also play an important role just like the common law doctrine of public nuisance.

In Pakistan, prior to the case of Sindh Institute of Urology and Transplantation, the doctrine was applied impliedly, but now courts are applying it directly. The courts are not only applying this doctrine in its full spirit, but they have also successfully determined its true scope and parameter. In Pakistan, the scope of the doctrine is very broad. The doctrine was directly applied in the cases related to waters, recreational usage of public property, parks, green belts, and conversion of public property into private property. For this, courts are appointing commissions and meditators to provide technical support on issues related to the environment.

Furthermore, although Article 9 of the Constitution has been interpreted over time by the constitutional courts to include environmental rights and the PTD,\textsuperscript{182} yet a proper and dedicated piece of legislation would be more appropriate. The government should consider the place of such legislation in Part II, Chapter I of the Constitution as it is done in South Africa by the insertion of section 24 in the South African constitution.\textsuperscript{183}

\textsuperscript{181} (n 8) [49].
\textsuperscript{182} (n 4).
\textsuperscript{183} (n 8) [31].
The Economics of Marriage: Recent Legal Developments in *Khula* and *Haq Mehr* in Pakistan

Sana Naeem & Asad Ullah Khan*

In Islam, the institution of marriage has been imagined as a contract rather than a sacrament, making economic transactions a significant part of marital relationships. This paper argues that this particular understanding of the nature of marriage as a contract has resulted in a peculiar ordering of marital rights and obligations, where almost every aspect of marriage – sex, child rearing, the husband’s obligations et cetera – has been attached a monetary value, leading to the development of a particular ‘economics of marriage’. This is predicated on the understanding of women as distinct legal and economic entities within a marriage, owing certain duties to the marital relationship in exchange for economic and social security. Limiting this study to economic transactions in cases of *khula*, this paper traces the development of the principle whereby courts weigh the amount of *haq mehr* to be returned against the wife’s contribution to the marriage, through her services as primary care-giver and home-keeper. Arguing that this is one way of recognizing women’s previously invisible labor within marriage as ‘work’, this paper contends that there is room within the legal framework of Islamic Family Law for progressive, pro-women developments.

**Introduction**

In Islam, the institution of marriage has been conceived in contractual terms, rather than as a holy sacrament – a circumstance that has significant implications for the way marital relationships are subsequently ordered. This particular understanding of marriage as contract has resulted in a peculiar ordering of marital rights and obligations, where almost every aspect of marriage – sex, child rearing, the husband’s obligations et cetera – has been attached a particular cash value, leading to the development of a particular ‘economics of marriage’. While this has generally led to a commodification

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* B.A. LL.B (Hons) 5th Year Candidates, Lahore University of Management Sciences (LUMS).
of women’s bodies, where marriage is considered an exchange of women between groups of men, the intrusion of cash contracts typical of the marketplace into the domain of personal relationships may have made it possible for women to challenge the ideal of an autonomous and hierarchical patriarchal household. This is made possible by the establishment of a distinct legal and economic personality for the woman within the framework of a Muslim marriage, a situation that is paralleled in few other religious jurisprudential systems, where the wife is usually subsumed within the legal personality of her husband. This paper seeks to explore the significance of this conceptualization of marriage, focusing particularly on how the recognition of the wife’s distinct existence in law subsequently manifests in the Muslim concept of *khula*, i.e. the dissolution of marriage by a wife. This paper further focuses on the implications of this particular economic understanding of marriage when it comes to the laws that govern such dissolution, specifically the factors that come into play when deciding upon the repayment of dower in circumstances of *khula*. It seeks to establish that the monetization of marriage may, particularly within the context of Pakistani courts, be leading to progressive developments in case law. In light of these developments, women’s work in, and contributions to, a marriage may be considered as having an economic value – a development that would be highly significant in its potential to allow for a reimagining of marriage.

**Marriage in Christianity and Hinduism: A Comparative Framework**

Since Muslim marriage has been uniquely understood in contractual terms, this makes economic transactions a significant part of marital relationships. The validity of marriage depends upon the mutual consent of the parties; the contract is open for additional, but legitimate, conditions and its terms are, within legal bounds, capable of being altered; it is dissoluble if there arise grievances leading to an irreconcilable break in the marital relations.\(^1\) The event of marriage, therefore, is understood as creating mutual rights and obligations between the parties – a conception of marriage which is entirely different from that of Christianity and Hinduism.

In Christianity, the institution of marriage has been regarded as a sacrament, with its concomitant doctrine of indissolubility of the conjugal bond. Once entered into and consummated, the marriage is considered

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complete, and the parties are treated as ‘ministers of the sacrament’.

The marital bond has been considered as an indissoluble solemn union entered into by the parties for life, so as to prevent fornication on the part of unmarried individuals. Before the advent of Reformation, a marriage could only be dissolved either on the death of one of the parties, or by a decree of the ecclesiastical court. Such annulment meant that the marriage never existed; the assumption being that either the marriage was valid forever or never. Since the bond was ordained by God, the law of marriage, in Christianity, was beyond the pale of human agency.

Similarly, in Hinduism, the marital bond is conceived as an immutable union – a union for all lives to come – between a man and a woman. Since it is a union that outlasts mortal lifespans, the wife can never ask for a divorce, or seek another husband, even if her husband is ‘a lunatic, impotent, a leper, a deserter, a chronic patient of venerable diseases, or even a dead man’. The wife’s position is that of the mother of her husband’s legitimate children, of patrani, and of the chief housekeeper, meaning thereby that, by entering into this permanent bond of servitude, the woman practically surrenders her personhood in favor of the husband.

**Marriage in Islam: A Contractual Relationship**

As mentioned above, the Islamic conception of marriage is almost entirely different from the Christian and Hindu understanding, inasmuch as it makes room for the parties to negotiate mutual rights and obligations. In Islam, the instance of marriage is considered to be an exchange of woman’s services, sexual and otherwise, for a certain amount of money, or any other lawful object having economic value – the haq mehr. This particular conception of marriage was adopted by the Lahore High Court in *Shahida Parveen v Sami Ullah*, where the court held that marriage – while not a contract in the sense that the Contract Act 1872 applied to it – was a special type of contract, the latter assertion affirming the contractual understanding of the marital bond. Similarly, in *Abdul Kadir v Salima*, the court asserted that like a civil contract, the marriage becomes complete upon the acceptance of an offer made by the other party or their guardians before competent witnesses. Analogizing the marital bond with a sales contract, the court held that once the offer of marriage is accepted, the woman is bound to fulfill her conjugal

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4 Ibid, 22.
5 Ibid, 19.
6 PLJ 2006 Lah. 1215.
7 *Abdul Qadir v. Salima* (1886) ILR 8 All 149.
obligations; in the instance where she refuses to do so, her body is to be restored to the husband – the rightful owner of her person. However, this case has been subsequently decried as a misunderstanding of the Islamic conception of marriage, inasmuch as it regarded it as a sales contract; instead of regarding it as an exchange of commodities, it might be more accurate to consider marriage as a service contract – an exchange of the woman’s sexual services for the *haq mehr*.

Understanding marriage as a contractual rather than a sacred, immutable union has several implications for the way marital relationships are subsequently structured. It also leads to a conceptualization of these relationships – and the subsequent rights and obligations – in peculiarly monetary terms. Thus, the wife is entitled to the dower; the husband must maintain her as well as the children – *nafaqa*; the husband occasionally has to pay *muta’a* to lessen the woman’s difficulties upon divorce; and the wife has to compensate the man in order to terminate the marriage by exercising her right to *khula*. All of these aspects of the marital relationship have been assigned some cash value, leading to the development of a particular ‘economics of marriage’.\(^8\) In contrast to previous Western understandings of marital economics where the married couple was a single, unified economic unit, the Islamic monetization of marriage where it is a complex business partnership quite often lead to litigation.\(^9\) Such understanding has thus made room for the creation of the wife’s own legal and economic identity, and delineated her contribution to the marital relationship as conceptualized by Islam. This has been done by quantifying her obligations and rights in a marriage, e.g. by making the dower and maintenance her absolute financial right – a right that vests in her rather than her husband or father. This understanding of the woman as a separate legal and economic entity is unique to Islamic law and quite the counterpart to the traditional Christian understanding (or lack thereof) of women’s property rights within a marriage: the idea of ‘what’s hers is mine’.\(^10\)

**The Muslim Wife as a Distinct Legal Person within Marriage**

The creation of this separate legal identity, emerging from the contractual nature of Muslim marriage, has important implications for women inasmuch as it provides them with avenues to exercise their agency. While the idea of

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\(^8\) (n 1).

\(^9\) Ibid, 68.

female bodies being commodified, or made subjects of contracts, is an especially distasteful one, such monetization of marriage also allows for the existence of avenues that then challenge the ideal of an autonomous and hierarchical patriarchal household. Islamic law, by conceiving marriage as a contract for the delivery of woman’s services in exchange for *haq mehr* that vest solely in her person, assumes the existence of two distinct legal and economic personalities which are capable of entering into a valid contract, i.e., have distinct personhoods. And, especially since the marriage is a voluntary contract between two separate legal personalities, not an immutable union as conceived in Christianity and Hinduism, it is evident that this bond is susceptible to dissolution by either party: the woman is given the right to *khula*, while the husband may exercise his absolute right of divorce. The high rate of female-initiated divorce in Ottoman and other medieval Muslim societies provides an interesting example of how the right of *khula* has played a key role in allowing women to exercise their agency in subverting the power relationship within patriarchal households.11

The agency of women’s distinct legal personality, as produced by the contractual understanding of marriage, is most clearly manifested in the woman’s right to *khula*. According to the traditional conception of *khula*, the wife could terminate her marriage contract by procuring the husband’s consent and providing him with some compensation from her personal property. While this compensation has usually been understood as some part of the *haq mehr*, according to the *Hedaya*, ‘whatever is lawful as dower, or capable of being accepted as dower, may lawfully be given in exchange of *khula*’.12 In this respect, some Muslim countries such as Egypt have gone so far as passing statutes to provide that even an outstanding right of the wife is a valid object that could be surrendered in exchange for *khula*.13 It must be noted here that this particular right of *khula*, providing women with the agency to terminate their marriage contract, is peculiar to the Islamic conception of marriage since, for instance, in Christianity the marital bond is considered to be of permanent nature, dissoluble only at the death of either party or by the decree of the ecclesiastical court.14 This peculiar agency afforded to Muslim women has been an inevitable consequence of the Islamic understanding of marriage as a service contract, with rights and

13 Lynn Welchman, *Women and Muslim Family Law in Arab States* (Amsterdam University Press 2007) 112.
14 (n 3).
obligations understood in economic terms, entered into by two distinct legal persons, and dissoluble at the instance of either party.

**Khula in the Pakistani Courts: Progressive Interpretations**

Working within the theoretical framework of marriage as a service contract, and the monetization of subsequent rights and obligation, the courts in Pakistan have interpreted the law regulating *khula* in a fairly progressive manner. Traditionally, as mentioned before, the consent of the husband was an essential precondition for the wife’s ability to exercise her right of *khula*. In *Moonshee Buzloor Ruheem v Shumsoonnissa Begum*,\(^\text{15}\) the court held that the wife’s right to *khula* is contingent upon the consent of her husband. However, *Balqis Fatima v Najam ul-Ikram Qureshi*\(^\text{16}\) and *Khurshid Bibi v Baboo Muhammad Amin*\(^\text{17}\) overruled the *Moonshee Buzloor Ruheem* case, and declared that the right to *khula* is the wife’s right which could be availed through a court of law. The court, in the *Khurshid Bibi* case, held that the spouses are put on the same footing with respect to their rights and obligations. The judgment equated the husband’s right to *talaq* with a wife’s right to *khula*, concluding that in the case of dispute regarding dissolution of marriage between spouses, the courts have jurisdiction to decide the matter. The wife could, therefore, approach a court of law in order to seek a decree of dissolution by exercising her right of *khula*, as is granted by the Holy Qur’an. The immediate consequence of this particular development has been that only the economic, transactional part of the procedure for *khula* has been left relevant: the requirement of asking for a husband’s consent has been reduced to a formality; and the wife can, therefore, have her marriage contract terminated only by providing some compensation to the husband.

This conceptualization of marital obligations in economic terms has also led to further progressive development in Pakistani case law. With regard to the requirement that the wife is obliged to pay compensation to the husband to get out of the wedlock, the court, in *Shams Ali v Additional District Judge*,\(^\text{18}\) held that if the dissolution is caused by the cruel conduct of the husband, he is not entitled to the return of dower. The husband’s conduct is, therefore, quantified by assigning it a monetary value and he is penalized by depriving him of the return of the dower. For his behavior, the husband faces a financial detriment; for the wife’s suffering, she is allowed a financial

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\(^{15}\) [1867] UKPC 22.  
\(^{16}\) PLD 1959 Lahore 566.  
\(^{17}\) PLD 1967 SC 97.  
\(^{18}\) PLD 2012 Lahore 183.
advantage. By conceptualizing marital relationships in monetary terms, the courts have given them material weight, dis-incentivizing cruel conduct by something more than mere societal disapprobation. The wife is allowed monetary relief, even though it is she who is initiating the divorce – a development which is a significant step forward in the development of the Islamic understanding of marriage.

The disentitlement of the husband from compensation is accompanied by the potential for further development. In several cases, when discussing the amount of dower to be returned in circumstances where the husband’s cruelty has compelled the wife to file for *khula*, the Court also mentions the services the wife has rendered during the subsistence of the marriage. When deciding the question of whether the husband is entitled to the return of dower, the courts have considered it important to examine the domestic functions the wife has performed, such as her domestic and child rearing duties. If the wife is considered to have devoted a large part of her life to such duties, the courts – seemingly assigning a cash value to the performance of such duties – have shown a tendency to allow her to retain the *haq mehr* that she was otherwise obliged to return. In doing so, the courts have gone as far as holding that the restoration of dower is not an indispensable condition for granting *khula*. If the court finds that the husband and wife cannot live within the limits prescribed by God, a decree of *khula* must follow. The factum of benefits that the wife may have to return will be decided subsequent to such a decree in light of reciprocal benefits received by the parties. Such a finding would only create civil liability on the wife and will not have any effect on the decree of *khula*.\(^{19}\)

To this end, in *M. Saqlain v Zaib un-Nisa*,\(^ {20}\) the court held that while deciding upon the compensation to be provided at the instance of *khula*, reciprocal benefits received by the husband should be taken into account. The court held that continuous living together, bearing and rearing of children, housekeeping etc., could also be counted as benefits thereby offsetting the benefits that the wife has to return. While seized with a similar question, the court in *Abdul Rashid v Shahida Parveen*\(^ {21}\) observed that the life spent by the wife with her husband can also be taken as consideration for *khula*. In this case, the wife had lived with the petitioner for sixteen years and had performed all of her marital obligations during the time. The court observed that in doing so, the wife had spent the most precious time of her

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20 1988 MLD 427.
21 PLD 2009 Pesh 92.
young age with the husband; therefore, all these factors should be taken into consideration when adjudicating upon the repayment of dower. In some cases, the courts have even neglected to draw primarily on the requirement that the husband’s cruelty have compelled the khula, relying solely on the argument that the wife’s services during the marriage constitute sufficient basis for denying the return of the haq mehr. For instance, in *Nasir v Rubina*, the court, without even referring to the cruelty of the husband, simply awarded a wife half of the haq mehr on the basis of her services in the marriage. Similarly, in *Aurangzeb v Mst. Gulnazar*, the court held that the life spent by the wife with the husband can be treated as sufficient reciprocal benefits received by the husband for a dower of Rs. 42,000.

Even though most of these observations have formed the obiter dicta of the respective judgments, they illustrate a distinct tendency to measure marital obligations and rights in cash value. Thus, not only is the husband’s cruelty penalized by depriving him of dower, there has also been a move to value women’s domestic work within the home in monetary terms. This tendency might allow the women filing khula cases in the future to argue that their domestic services have economic value and should, therefore, be weighed against the compensation that they are obliged to pay as a means of ransoming themselves from the wedlock; and, conversely, if the benefits received by the husband are found to outweigh the benefits received by the wife, the court may even direct him to compensate the wife for the respective benefits.

**Conclusion**

The Islamic understanding of marriage as a contractual relationship – as opposed to an indissoluble holy union – has produced significant avenues for women to exercise their agency. In light of this understanding, almost every aspect of marital life has been assigned cash value which can be claimed through a court of law. Such monetization of marital rights and obligations have not only led to the creation of a distinct economic and legal identity for Muslim women, but has also provided them with such rights that challenge the conventional understanding of a hierarchical, patriarchal household. The right of khula, for instance, is one such tool that Muslim women have historically utilized to subvert the power relationships in traditional households. A critical analysis of the development of this right and its

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22 2012 MLD 1576.
23 PLD 2006 Kar 563.
24 Ibid, 567.
subsequent implications in the context of Pakistan reveals a distinct progressive tendency among the Pakistani courts to monetize the domestic services rendered by the wife during the subsistence of marriage. This tendency may allow Muslim women seeking to dissolve their marriage through *khula* to argue that their domestic services should be weighed against the compensation that they are obliged to pay upon such dissolution – a development that may lead to the reimagining of the gendered power relationships within traditional sub-continental households. The contractual nature of marriage in Islam, therefore, makes room for a woman’s work within the home to be quantified in monetary terms – a progressive and pro-woman leap that has been made entirely within the framework of Islamic, rather than secular law.
Countering Legal Voids of Exceptionalism in Pakistan

Dr. Kashif Mahmood*

Analytical study of violent extremism revels that deterrence theory of criminal law is ineffective to curb irrational behaviors of ideologically disoriented men. Such behaviors are mostly the outcomes of circumstances where subjectivities of hate, fear, anguish, zeal, and passion override the punitive objectivity of laws. Socio-political and ideological violence are systematic behaviors of masses to express chronic agonies emerging from the scarcity of their basic human needs including dignity, pursuit of happiness, social justice, and common wealth. Whereas concept of fundamental rights primarily emerges from the normative imperative of personal and civil liberties. Such liberal interpretations mostly revolve around an ultimate conception of egalitarian equality that is hard to accomplish in ethnically or socially polarized societies. It is because the legal systems in these societies are meant to enforce coercive public order than construction of collective conception of justice. Nevertheless, aforementioned seems relevant to Pakistan as keeping in view its ethnic, socio-cultural, and theological atomization and colonial legacies of administrative and adjudicative patterns. Therefore, owing to institutional psyche and trends to enforce retributive justice, neither governance nor adjudication has ever had a rights centric approach in Pakistan. The resultant judicial apathy to protect personal and civil liberties during law enforcement operations augments an allegation of mass scale human rights abuses with impunity. These gray areas of criminal justice system not only negate egalitarianism but also catalyze unrests into systematic sequels of violent extremism. However, this vicious cycle of impunities and retribution can be redeemed through tangible constitutionalism by installing collective conception of justice in masses through judicial scrutiny of administrative actions on the touchstone of fundamental rights. This pro-people approach has potential to reduce popular unrests and violent extremisms.
Introduction

This article indicates that where politics of interest dominates, the law and logic dismantle automatically to give way to Darwinian real politics.¹ This notion of survival of the fittest knows no limits of legality or validity and promotes a coercive elite and system of government.² Hence, autocratic regimes use a mix of civil and military bureaucracy to sustain the status quo in domestic politics.³ This signifies problem-solving through a pro-administrative approach at the expense of a pro-people approach that has a diminishing impact on civil and personal liberties.

A pro-administrative approach is the core element of the colonial legacy that governs a non-egalitarian society. Permanency, centralization, formalization, vertical faceless hierarchy, patrician training, aristocratic attitude, alienation from the masses and proxy representation of central government through magisterial and police power are basic characteristics of the colonial legacy. It has undermined constitutionalism and the rule of law in Pakistan, not only during authoritarian military regimes but also during democratic eras.⁴ Subsequently, this research argues that excessive delegated legislations in the name of state necessity have a direct relationship with human rights violations especially when armed forces begin to act in aid of civil power.⁵

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⁵ Muhammad Umar Khan v The Crown PLD 1953 Lah 528, 538.
The concern of this research is to place these arbitrary and subjective administrative discretions under the constitutional domain through the judicial apparatus of Pakistan. Thus, to avoid executive impunities, this article suggests alternative jurisprudence, legislation, and other remedial mechanisms available under constitutionalism to create a system of law enforcement that thrives on a collective conception of justice. These alternatives would also ensure substantial control on human rights abuses during current counter insurgency operations in the federal and provincial areas of Pakistan.

This research also attempts to locate a practical contingency point between international human rights and international humanitarian law. International humanitarian law (‘IHL’) concerns the application of the principles of proportionality and distinction. These two principles manage the use of lethal force and identify the lawful object to fire upon under self-defense or military necessity. International human rights law (‘HRL’) ensures a sustainable quantum of basic human rights protection during all kinds of conflicts to avoid unnecessary human suffering and to diminish the circle of violence. If applied in Pakistan’s context, both bodies of law aim to avoid the probability of human rights abuses associated with the proclamation of public emergency in Pakistan, since the judicial revoking of IHL and HRL is held to be a political question out of the ambit of the court of law. It becomes especially important to deal with internal disturbances through administrative means when core human rights and personal liberties (such as the right to life, protections against double jeopardy and self-

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7 Maneka Gandhi v Union of India AIR 1978 SC 597, 632-635 – ‘The chapter of fundamental rights being a touchstone to test the validity and constitutionality of a statue’.
10 Martin Scheinin, ‘Terrorism’ in Daniel Moeckli, Sangeeta Shah, Sandesh Sivakumaran and David Harris (eds), International Human Rights Law (Oxford University Press 2010) 551-561 – Under HRL, the ‘right to life’ and [prevention against torture] are widely described as jus cogens norms that do not admit derogation even in public emergencies, violent riot or insurrection. The right to life with dignity does not prohibit all use of lethal force by states; rather, it imposes a requirement of justification: states may not use lethal force unless they can show that this extraordinary measure is ‘absolutely necessary’ to protect life or legal order.
incrimination, torture and inhuman treatment, enslavement, pillage, freedom of conscious and religion, protection of property and family) become vulnerable under the notion of necessity. Subsequently, this study attempts to dig out some plausible ways to strengthen pro-people approaches based on a correlation between collectivism and individualism for peace, tolerance and maximization of social cohesion in Pakistan. The subsequent portions of this study revolve around the theoretical framework of offence against the state and the political dimensions of terrorism and insurgencies. It also examines the British model of executive prerogative, as the legal and administrative system in Pakistan is originally designed on this pattern. Finally, it assesses the core security legislation of Pakistan on the touchstone of constitutional guarantees and judicial pronouncement to identify lacunas in the pro-administrative approach of executive prerogative and exceptionalism.

Theoretical Causation of Internal Disturbance and Violent Conflicts

In his book, titled Low Intensity Operations: Subversion, Insurgency and Peacekeeping, Frank Kitson, a defense analyst with a pro-administrative ‘rule by law’ approach, illustrates the role of armed forces to restore order amid Irish unrest in the United Kingdom. He construes an extreme threshold of popular unrest as a subversion of the government, which is a non-violent movement against a regime to ouster it from power. The core determinant that transforms subversion into sabotage, terrorism and insurgency is the use of violence. Accordingly, campaigns of subversion that act as severe law and order crisis have three core dimensions: strategically used to oppose regimes

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12 Farid Ahmad v Province of East Pakistan PLD 1969 Dacca 961; Gohar Nawaz Sindhu v Province of Punjab and others 2014 CLC 1558 – In context of the long march, civil disobedience and political agitation movement of Pakistan Tehrik-e-Insaf (PTI) and Pakistan Awami Tehrike (PAT) in 2014. It has been observed that ‘unreasonable restrictions had been imposed by the government. It included blocking of all roads, routs, highways, motorway by putting barriers and containers which have violated the constitutional guarantees such as freedom of movement and assembly. Since wholesale blockade of roads and highways are unwarranted, unlawful and unconstitutional. Thus, large scale arrest intended to prevent citizens from participating in processions were abhorrent to the spirit and mandate of the Constitution’; Kamran Murtaza v Federation of Pakistan 2014 SCMR 1667. In the same context of PAT/PTI’s political protests and agitation for electoral and constitutional reforms in 2014 in Pakistan, the court observes, ‘in handling of a large-scale agitation violations of fundamental rights under Article of 9 (right to life and security of person), 14 (inviolability of dignity of man), 15 (freedom of movement), 16 (freedom of assembly), 24 (protection of property) are taking place’; Darwesh M. Arbey, Advocate v Federation of Pakistan PLD 1980 Lah 206 – ‘Imposition of curfew for indefinite period without relaxing is in violation of fundamental rights’.

13 Frank Kitson, Low Intensity Operations: Subversion, Insurgency and Peace Keeping (Faber and Faber Limited 1991) 82-86.
and their policies without resorting to sabotage; employed in conjunction
with terrorism to achieve objectives; and employed as a precondition for a
full-scale insurgency in combination with protracted urban riots and other
acts of terrorism. Such classifications of internal strife and disturbance
have also been illustrated by the Supreme Court of Pakistan in *Islamic
Republic of Pakistan through Secretary, Ministry of Interior and Kashmir
Affairs Islamabad v Abdul Wali Khan, MNA, Former President of Defunct
National Awami Party* by relying on Kitson’s work.

**Political Connotations of Subversions and Insurgencies**

Such violent challenges to the legitimacy of the order and sovereignty of the
country are inherently political. They are usually camouflaged as
ideological challenges to the status quo. Consequently, Khilnani describes
the political intent of ‘ism’ especially in the crime of terrorism. The notion of
‘ism’ indicates a forceful assertion of a specific ideology, or policy through
the employment of terror in a particular society.

However, the important question is what kind of impact do the
perpetrators of terror expect to have on a society? Are their violent strategies
capable of bringing a desired change in the targeted system? Forst responds
that terror engenders fear in the minds of its audience, which distorts the
potential for rational thinking. It creates such hysteria that instead of relying
upon reason or morality, communities and individuals resort to their instinct
for survival. Singer perceives the employment of fear as a tool to create a
sense of powerlessness in the mind of its addressees, and Hassan considers
it as a manipulative tool that can be used to control the will of others.

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14 Ibid, 82-83.
15 *Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs Islamabad v Abdul Wali Khan, MNA, Former President of Defunct National Awami Party* PLD 1976 SC 57.
16 Ibid.
21 Steven Hassan, *Releasing the Bonds: Empowering People to Think for Themselves* (Aitan Publishing Company 2000) 60-70 – ‘Psychological impact of terror and correlative fears on human behaviors in three interdependent cycles such as Unfreezing: which breaks down the
Gearson argues in this context that terror is politically employed to break the will of its opponents. He further contends that terror is paradoxically engendered by an irrational response of the state apparatus to the incidents of terrorism. It means that magnification of such incidents through state agents creates a negative effect on the masses; resultantly society becomes psychologically hostage to such propagations. Likewise, normative arguments such as the rule of law, fair trial, innocent until proven guilty, appreciation of evidence and individual integrity lose their social legitimacy amid popular reprisal.

Thompson also contextualizes the terminology of ‘ism’ in terrorism with power politics for assertion of specific ideologies in particular areas during interstate conflicts. He specifically associates it with minorities and other sub-state groups. He excludes the majorities, ruling elites and other state agents from such violent wrangling as their ideologies are already hegemonic and prevalent in society. These terrorist sub-state groups are ‘principled evildoers’. These groups consist of members of society who, out of their own convictions, deviate from the general will and the ‘categorical imperative: a commune for egalitarians’. Resultantly, they not only challenge the legitimacy of the state and its regimes, but also the core social norms by possessing a deviated socio-political and economic mindset.

Prolonged isolation and exclusion of these terrorist sub-groups from the parliamentary dialectical process motivates them to build radical narratives that further alienate them from the dominant ideology. An ideology in this context is a set of beliefs, based upon the orientation of life and involves a specific mindset to interpret the facts that justify violent acts to protect and promote their self-acclaimed cause. Such an alienating ideology not only leads to fundamentalism, but also helps to formulate

will and reasonability, Changing: an indoctrinate process, which transforms reality in to deception and Refreezing: which is a process of reinforcing the new identity and mindset’.  
24 Fernando R. Teson, ‘Liberal Security,’ in Richard Ashby Wilson (ed), Human Rights in the ‘War on Terror’ (Cambridge University Press 2005) 71-73 – With Kant’s perspective explains the moral convictions of the members of armed groups. It seems that due to their commitment and zeal toward a deviant philosophy, they seize to become egalitarians. It is mainly due to their opposition to the core social values of society as enshrined in ‘categorical imperative’ which is also a foundation stone to further carve out core political values of the ‘general will’ of a state.
particular objectives and strategies to accomplish such causes.\textsuperscript{25} Hence, conducting severe acts of terrorism is one form of strategy that they employ to transform sub-state groups into armed groups.\textsuperscript{26}

Besides, owing to variations in objectives and accompanying strategies, armed groups are often involved in transnational criminal activities, militia warfare, gang warfare, terrorist campaigns and insurgency.\textsuperscript{27} Though the element of terrorism remains constant in all kinds of conflicts, yet it could be bifurcated into two core thresholds. In the lower threshold, the terrorist groups are involved in a micro level conflict under the legal order paradigm. They do not intend to destroy the entire structure of the state, rather just require a hegemonic role for their perspectives. In the upper threshold, such insurgent groups are involved in a macro level conflict through revolutionary and separatist movements under a public emergency paradigm. They either intend to cause fundamental changes in the established order or want to institute an entirely new order in accordance with their perspectives. Acts of terrorism are relied upon as a tool by both hegemonic centric terrorists and revolution centric insurgents. It seems that military achievements through sabotage or mayhem are not the core purpose

\textsuperscript{25} (n 23) 33-36, 44-45, 125-129.
\textsuperscript{26} Gerard Hugh and Manuel Bessler, \textit{Humanitarian Negotiations with Armed Groups: A Manual for Practitioners} (United Nations office for the Coordination of Humanitarian Affairs 2006) 6 – ‘An Armed Group means a group that have the potential to employ in the use of force to achieve political, ideological or economic objectives: are not within the formal military structures of State, State-alliances or intergovernmental organization: and are not under the control of the State[s] in which they operate’; (n 23) 59 – ‘Armed groups are coherent, autonomous, non-state actors that rely on the threat or use of force to achieve their objectives’. It seems that terrorism is a strategic use of indiscriminate violence by non-conformists to convince coercively and to negotiate manipulatively with majority as well as to propagate their agenda or ideology. Often used by morally and politically disengaged groups who either do not believe in dialectical synthesis or are forced out to do so by a stringent legal system which does not assimilate pluralism and stigmatized them as enemy aliens, hardened criminals, traitors or terrorists. Resultantly two extremely polarized perspectives emerge, where violence is employed to initiate a dialogue, analogically prosecutions and trials are also considered as a dialogue under this scenario. Such contestation varies time to time and place to place such as hegemony over natural resources, propagation of a specific political and constitutional narrative, geostrategic control of territory and its population, advocacy for a particular socio-cultural norm, and an assumed superiority of theological perspectives of a sect.

\textsuperscript{27} (n 23) 80-92 – Following are some common characteristics of armed groups: 1) autonomous actors; 2) Sub-state actors, means consist of small population s or membership as compared to large communities; 3) small membership; 4) lacks legitimacy and sovereignty; 5) clandestine; 6) believe in covert tactical moves; 7) Transnational-though armed groups operate intra-state yet they have sanctuaries in neighboring countries to gain logistical and moral support.
of these two thresholds; rather terrorists primarily use these tactics as a means to influence people by implanting fear or sympathy. Armed groups perceive this scenario as a political opportunity not only to gain momentum for their cause, but also to create a sense of legitimacy for their ideology in the targeted population. The pre-2009 black turban insurgency in Swat and Malakand indicates that the local population, as a consequence of their diminishing utility from the existing legal and justice system of Pakistan, were ensnared in the so-called speedy justice that the Taliban expended in accordance with Sharia.

As a result, a nexus develops between ideology, politics, and crime amid an internal armed conflict. In turn, this nexus distorts distinctions between criminals and political activists similar to the distortion between combatants and civilians. Such amalgamations also make it difficult to categorize an internal conflict objectively and authoritatively. Resultantly the state relies upon a generalized term like ‘internal disturbance’ to categorize these conflicts. The Supreme Court has also discussed this complication of labeling as it observes, ‘these definitions are vide enough to cover virtually every form of disturbance up to the threshold of conventional war’. Reynolds argues that such a broad scope of internal disturbance has its traces in the colonial patterns of administration, which conceived an even lesser

28 Ibid, 34, 67.
31 (n 23) 6, 35 – The following labels of intra-state conflicts not only overlap each other but are used interchangeably in a sheer ‘confusion’, as the subjectivity of labeling leads to another problem which deals with the application of the relevant legal regime. Since internal armed conflicts as of the threshold of insurgency, low intensity conflicts and civil war attract the application of the laws of war and protection of humanitarian laws especially in the case of proclamation of emergency. While terrorism and other hybrid conflicts come under public order and human rights regime. Therefore, the notion of internal disturbance covers civil war, low intensity conflict, armed conflicts, internationalized conflicts, interstate conflicts, hybrid conflicts, extra systematic conflicts, insurgency, small war, irregular war, and law and order crisis.
32 Islamic Republic of Pakistan through Secretary, Ministry of Interior and Kashmir Affairs Islamabad v Abdul Wali Khan, MNA, Former President of Defunct National Awami Party PLD 1976 SC 57.
probability of dissent as ‘in terrorem populai’ (sense of insecurity in general public) out of an exaggerated fear of mass resistance.³³

Ben Saul argues that the wide scope of internal disturbance and terrorism blurs a distinction between crimes and political resistance due to which the state resorts to identical tactics to curb both of them. As a corollary, the ordinary criminal justice system misperceives the complexity of the intents and motives of the acts of terrorism, and often ‘lumps’ them in the middle of public order, national security and waging war against the state. Socio-political alienation, economic deprivation, theological misperception, ideological polarization, geographical context and international politics jointly form the intent for such acts. Thus, domestic criminal law proves ineffective to deter terrorist groups punitively from conducting acts of terrorism. This leads to stringent special legislations to curb such ill-defined and unexplored intents and motives. Resultantly, minorities and other segments of society who raise their voices for socio-political empowerment are victimized under the lex specialis (law governing a specific subject matter) of anti-terrorism.³⁴ Saul further highlights another aspect of anti-terrorism legislations as he discusses their potential to deter acts of terrorism. He believes that political violence through terrorism is a result of an ideological conviction for a cause that happens to be immune from punitive impacts of stringent administrative actions. Hence, the utilitarian ethics of maximization of pain often prove to be ineffective to deter such ‘principled’ offenders, who perceive such stringency as justification for their cause. Therefore, severe punitive measures without a counter narrative become counterproductive in anti-terrorism campaigns. Such counter narrative mainly deals with educational, economic, socio-political, and constitutional reforms under pragmatic counter violent extremist initiatives of the state to cater to the segregated segments of society.³⁵

Another problem which emerges during intra-state conflicts is that, on the one hand, radical mindsets distort rationality and reasonability of armed groups while, on the other hand the counter narratives of governing

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³⁴ Ben Saul, ‘Criminality and Terrorism,’ in Ana Maria Salinas De Frias, Katja Samuel and Nigel D White (eds), Counter-Terrorism: International Law and Practice (Oxford University Press 2012) 133-135.

³⁵ Faiza Patel and Meghan Koushik, Countering Violent Extremism (Brennan Center for Justice 2017) 2-5.
elites and state agents distort the regime of the rule of law as well as the reasonability of administrative actions. Yet, the fatal lacunas in these laws implicitly authorize torture, forced disappearances and the ability to shoot on sight for mere suspicion without being fired upon, or in self-defense.\textsuperscript{36} O’Donnell believes that in the context of protracted and unresolved socio-political conflicts such procedural lacunas produce ‘brown zones’ even in liberal democracies. Consequently, civil and personal liberties become vulnerable in these zones not only during anti-terrorism and counter-insurgency campaigns but also during the ordinary public order paradigm.\textsuperscript{37} Dyzenhaus identifies such zones as ‘lawless void’ of ‘legal black holes’.\textsuperscript{38} Poole argues that, these zones mainly emerge from the political rhetoric of the authorities, which consider human rights protections as major constraints to accomplish strategic gains during law and order operations and anti-terrorism campaigns.\textsuperscript{39}

Likewise, states enthusiastically adopt international obligations on counter-terrorism measures but are mostly reluctant to cope with international obligations on human rights and humanitarian protections. Pakistan has vigorously adopted the United Nations Security Council’s (‘UNSC’) resolutions 1267 and 1373\textsuperscript{40} along with other horizontal conventions on counterterrorism through the Anti-Terrorism Act, 1997. However, the UNSC resolution 1265 relating to humanitarian protections during armed conflicts is completely ignored in this special law.\textsuperscript{41}

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\begin{footnotesize}
\begin{enumerate}
\item Colm Campbell, ‘Beyond Radicalization: Towards an Integrated Anti-Violence Rule of Law Strategy,’ in Ana Maria Salinas De Frias, Katja Samuel and Nigel D White (eds), \textit{Counter-Terrorism: International Law and Practice} (Oxford University Press 2012) 255-263.
\item Thomas Poole, ‘Sovereign Indignities: International Law as Public Law’ (2011) 22 (2) \textit{European Journal of International Law} 351.
\item UNSC Res 1267 (15 October 1999) UN Doc S/RES/1267/1999; UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373 – ‘For prevention of act of international terrorism anywhere in the world’; Both of these resolution are the part schedule of the Anti-Terrorism Act 1997.
\item UNSC Res 1265 (17 September 1999) UN Doc S/Res 1265-1999 – ‘Stressing the need to address the causes of armed conflict in a comprehensive manner in order to enhance the protection of civilians on a long-term basis,—Calls on States which have not already done so to consider ratifying the major instruments of International humanitarian,[and] human rights-law and to take appropriate legislative, judicial and administrative measures to
\end{enumerate}
\end{footnotesize}
arise regarding the outcomes of these mixed responses to internal disturbances under the criminal law paradigm. It leads to formulations of special laws with special executive powers, such as identified by Dicey, this operates as a ‘rule by law’ to deal with probable and actual crises. However, its rationales, likely justifications and implications for rule of law and due process are the subject matters of the subsequent section of this comprehensive chapter. Yet it would initially analyze the probability of ideological and political armed contests in classic egalitarian society, to understand the occurrence of severe law and order crises under contractual paradigms.

**Emergence of Exceptionalism and Executive Prerogatives**

Rossiter believes that crisis is a kind of turmoil, which is certainly beyond the judicial capacity for corresponding remedial measures. He narrates that what comes in the ambit of rule of law cannot be categorized as a crisis. Subsequently, Dyzenhaus identifies such occurrences as a ‘lawless void’, which cannot be comprehended by the ordinary legal system and its laws. Schmitt indicates that since an ordinary legal system is prospectively crafted by keeping in mind the normal state of affairs, therefore, it is logical to deduce that the rule of law paradigm fails to counter catastrophic turmoil. Rossiter further categorizes the occurrence of unusual crisis into three core domains. The first domain deals with external aggressions and trans-border war, the second deals with internal disturbances and insurrections and the last one focuses on economic depressions associated with governmental policies or linked with natural calamities such as famines, droughts, hurricanes, cyclones and/or earthquakes. For Rossiter’s second category, which is the subject of this article, he describes that ‘judicial injunctions’ and ‘dialectical debates’ are futile to suppress catastrophic turmoils. Carr believes that governments resort to adopting counter repression even in liberal democracies. To combat deviant repressions and atrocities, Rossiter identifies such state actions as characteristic of a ‘constitutional

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42 (n 38) 2031-2032.
44 (n 38).
45 (n 66) 85-86.
46 (n 43) 6.
dictatorship’. This is a transitory combination of legislative, executive and judicial powers in the hands of a man or men to curb imminent danger in a democratic country. Moreover, if the judiciary is kept out of the ambit during such an exceptional period, then which institution has the authority to adopt or direct others to adopt these counter repressive means? Accordingly, Locke indicates that the prime obligation of political society is to protect contractarian ‘commonwealth’. Accordingly, the legislature is not only capable of comprehending such a danger but also recognizes the real danger to public peace. The legislature does not intend to draft absolute discretionary and ad-hoc orders. However, according to Dicey, during turmoil, the legislature relies upon its optimal supremacy to legislate what Schmitt identifies as ‘situational law’ in accordance with the political necessity of the time. Rossiter illustrates that through a novel device of an ‘enabling act’, crisis legislations will temporarily delegate legislative powers to the executive, called as ‘executive law making during crises’ by Rossi, which provide complete indemnity to all executive actions taken to seemingly deal with apparent danger. Dicey identifies such crisis legislation as the ‘rule by law’, and though it may be contrary to natural justice, yet it is still adopted by the legislature as a last resort to save an entire legal order. He believes that in spite of its unavoidable illegality and rigor, a ‘rule by law’ is far better than the ‘total state’ perspective of an absolute administrative state because it is legitimately tasked by the legislature, instead of the Schmitt’s ‘motivated’ dictator or a military commander. However, Dyzenhaus identifies such a ‘rule by law’ paradigm as a ‘legal black hole’, where civil and personal liberties are indiscriminately violated by executives with absolute impunity, as the judicial organ has already been restrained to examine it under the doctrine of political question.

49 (n 43) 289.
50 (n 38) 2013; (n 43) 8.
51 (n 18) 39–41.
52 (n 38) 2028; (n 43) 13.
55 (n 43) 10.
56 (n 53) 229–237, 412–414.
57 (n 38) 2029–2030, 2034.
58 Ibid, 2032–2033.
Hence, owing to such ratio of common law doctrine of necessity amid crisis management, Reynolds and Rajagopal criticize Article 4 of the International Covenant on Civil and Political Rights (‘ICCPR’).\(^{59}\) They believe that permissible derogations of certain political rights by the state to comprehend grave emergencies, as incorporated in the said Article represents Dicey’s legacy of ‘rule by law’ and its resultant ‘lawless void’.\(^{60}\) Both indicate that since the United Kingdom actively negotiated in the drafting of the ICCPR, its experience of handling law and order crisis through special legislations and stringent police measures especially in colonial territories creeped into this instrument. Hence, Reynolds identifies such state prerogative as ‘the long shadow of colonialism’\(^{61}\), whereas Rajagopal declares this ‘grim zone’ of international human rights incompatible for pragmatic pluralism. Under the guise of state necessity, public emergency attempts to legitimize an almost discretionary and unaccountable administrative penology.\(^{62}\) However, the question remains: does such a prerogative possess any neutralizer that limits the scope of discretions, nationally and internationally?

For Schmitt, the police measures under this arena of real politik are absolute until the objectives which a public emergency meant to achieve are met.\(^{63}\) He believes that laws yield to politics and the latter intends total domination.

However, in quite a contrast to him, Rossiter emphasizes on a pro-people special ‘rule by law’ paradigm under normal constitutionalism. Crisis legislation under his ‘constitutional dictatorship’ is based on dire necessity, third party appraisal, oversight, sunset clauses, due process, fair trial, and procedural reliability. Moreover, it contains a temporary course of action, pluralistic accountability of such actions, evaluation of the chain of command, repeal by the same appraisal authority and prohibition on extension and post-operative normalcy of the rule of law.\(^{64}\) Similarly Ackerman formulates a novel constitutional device, recognized as a ‘supran-majoritarian escalator’\(^{65}\) to apprise the powers of ‘un-commanded


\(^{61}\) (n 33) 10-30.

\(^{62}\) (n 60) 195-202; (n 38) 2032-2033.

\(^{63}\) (n 43) 96-109.

\(^{64}\) (n 43) 288-306; (n 38) 2012-2014.

commander\textsuperscript{66} when acting in the ‘black hole’, either during the pre-emergency exceptional phase or during a public emergency.\textsuperscript{67} Dyzenhaus believes that it is intended to convert the ‘black hole’ of public emergencies in to a ‘gray hole’, when the minority of legislators deliberately file petitions in court to examine the constitutional validity of special crisis legislations.\textsuperscript{68} Under such unusual purview the judiciary examines public emergencies within two spheres, known as ‘macro’ and ‘micro’ respectively.\textsuperscript{69} The former deals with its ‘maximalist’ locus of judicial review of legislation, whereas the latter deals with its ‘minimalist’ locus of judicial review of administrative actions.\textsuperscript{70} Yet, Dyzenhaus indicates further that neither the ‘maximalist’ nor ‘minimalist’ locus is capable of avoiding human rights abuses in either the ‘black hole’ or ‘grey hole’. The latter with its ‘partial legality’ is even more perilous to civil liberties as governments are usually capable of incorporating indemnities and executive discretions in to exceptional legislations and providing them with constitutional protections. Moreover, governments have extensive discretion to declare pre-emergency exceptional situations or to declare a public emergency. Likewise, it is always up to the subjective satisfaction of governments, first to determine the scope and threshold of the crisis and second, to legislate accordingly. In this scenario, the judiciary can neither invalidate such special laws on the touchstone of the constitution nor scrutinize the vires of executive prerogatives, as the law itself gives them protection. Thus, he believes that neither Rossiter’s nor Ackerman’s model can assert itself in the presence of legislative supremacy to declare a ‘rule by law’ exceptionalism.\textsuperscript{71}

**Indigenous Contextualization of Exceptionalism**

The question arises: has Pakistan experienced or is experiencing a mild or severe “state of exceptionalism”? If yes, then should it be comprehended through pro-administrative responses like Schmitt’s political necessity and Dicey’s doctrine of ‘rule by law’ or should it be confronted with the pro-people rule of law paradigm? An examination of the preambles, statement of objects and reasoning of different special criminal laws indicate that Pakistan is not only facing crisis based exceptional circumstances but also has a ‘rule


\textsuperscript{67} (n 38) 2014-2016.

\textsuperscript{68} Ibid, 2018.

\textsuperscript{69} Ibid, 2019-2029 – With such ‘judicialization of politics,’ judiciary not only tilts away from the established norm of separation of powers but also leans in to a controversial domain of political question through public interest litigations.

\textsuperscript{70} Ibid, 2038.

\textsuperscript{71} Ibid, 2035-2040.
Countering Legal Voids of Exceptionalism in Pakistan

by law’ paradigm to confront these circumstances.\textsuperscript{72} The same has been reiterated in the Rawalpindi Bar case, in which there were indictments of a large number of civilian victims of terror attacks and presence of armed conflict and insurrections.\textsuperscript{73} However, it has been observed in the same case that momentary pressure to implement the Protection of Pakistan Act 2014 (‘’ and to establish military courts for the trials of insurrectionists and terrorists has distorted rational and fair judgment.\textsuperscript{74} The next question that arises from this observation is whether Pakistan’s ‘rule by law’ approach contains a mechanism for procedural fairness to endure a bare minimum of the constitutionally protected due process of law? As the Lahore High Court observed, ‘when a law visits a person with serious penal consequences, extra care must be taken to ensure that those whom the Legislature did not intend to be covered by the express language of the statute are not roped in by stretching the language of the law’.\textsuperscript{75} Similarly, the Lahore High Court also declares, ‘unless a case falls squarely within special jurisdiction, the forum created under special jurisdiction cannot even touch those matters’.\textsuperscript{76} Likewise, being aware of the extent of statutory powers J. Isa acknowledged the emergence of ‘dark holes’ in legal systems during exceptional periods in the case of District Bar Association Rawalpindi.\textsuperscript{77} Nevertheless, to sustain reasonability, fair play and justice he relied upon the due process clause as enshrined in Article 4 of the Constitution of Pakistan, 1973 (‘Constitution’) to fill these ‘dark holes’. It was held, ‘the best response to terrorists- to isolate, thwart, and defeat them, is to uphold the principles and rights that terrorists trample underfoot. Those accused of terrorist acts must be subjected to legal due process, an impartial court and evidence based convictions. If we sacrifice our principles and slip, we shall come to face them in their swamp of infamy’.\textsuperscript{78} Similarly, to operate due process in


\textsuperscript{73} District Bar Association, Rawalpindi and others v Federation of Pakistan PLD 2015 SC 401, 990-992.

\textsuperscript{74} Ibid, 993.

\textsuperscript{75} Usman Bhai Dawood Bhai Memon v State of Gujarat AIR 1988 SC 922; Muhammad Afzal and other v S.H.O. and others, 1999 PCrLJ 929.

\textsuperscript{76} Muhammad Afzal and other v S.H.O. and others 1999 PCrLJ 929.


\textsuperscript{78} (n 73); (n 77) 897.
indigenous exceptionalism, J. Bandial relies upon some criterions of fair trial as discussed in *F.B Ali and another v The State.*\(^7^9\)

**Impact of Special Laws on Violent Extremism and Radicalization in Pakistan**

The question of the actual effectiveness of special yet stringent laws on actors of violent extremism is very crucial before their constitutional appraisal, as Glazzard indicates while shedding light on the dichotomy of counter terrorism laws and measures. He states that rational men with rational approaches draft such laws and policies with appropriate cost effectiveness, political practicalities and constitutionality but they usually ignore the irrationality of ideologically motivated men who are supposed to be the subject matters of special measures. Resultantly, rule by law approaches lose their efficacy to deter suicide bombing and suicidal attacks during ethnic or religious extremism as also evident in Pakistan during the black turban violent unrest. To curb this structural flaw in counter terrorism initiatives he focuses on holistic pro-people measures such as academic inputs to formulate philosophical counter narratives, media campaigns to expose the atrocities of armed groups, equity based fair implantation of criminal laws and protection of education during armed conflicts through informal means.\(^8^0\)

**Appraisal of the Protection of Pakistan Act (PPA) 2014 in the light of the Military Court Case**\(^8^1\)

In conformity with the conventional pro-administrative ‘rule by law’ approach, PPA is seemingly contrary to the spirit of procedural fairness. Instead of focusing on capacity building of prosecutors, to better equip them to construct evidences in ‘hard cases’, under the ordinary rule of law,\(^8^2\)

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\(^7^9\) *F.B Ali and another v The State* PLD 1975 SC 506 – ‘Include (1) the right to know before the trial the charge and the evidence against him; (2) the right to cross-examine the prosecution witnesses; (3) the right to produce evidence in defense; (4) the right to appeal or to apply for revision; (5) the right to be represented by counsel; (6) the right to have the case decided by the Judge who heard the evidence; (7) the right to trial by jury or with the aid of assessors[However observes that trial by jury is not applicable in Pakistan, as by construing the right to fair trial court in the *F.B Ali* case had riled upon foreign jurisprudence as applicable in Anglo-American Jurisdictions]; (8) the right to certain presumptions and defenses; and (9) the right to apply for transfer of the case to another Court’.

\(^8^0\) Andrew Glazzard, ‘Losing the Plot: Narrative, Counter-Narrative and Violent Extremism’ (International Center for Counter Terrorism 2017) 3-16; Arun Kundnani, *A Decade Lost: Rethinking Radicalization and Extremism* (Claystone 2015) 22-30.

\(^8^1\) (n 73).

\(^8^2\) Ibid; *Sh. Liaquat Hussain v Federation of Pakistan* PLD 1999 SC 504, 848-853.
Sections 5(5) and 15 of the PPA stringently enhance strict liability and the presumption of guilt. The presence of in camera proceedings under Section 10, the severity of punishment under Section 16 and the non-availability of pre or post arrest parole under Subsections 5(1) and 18,\(^8\) leads to a ‘legal black hole’ with a susceptibility of core human rights protections.\(^8\) Such presumption seems true due to an extensive duration of partially secretive custody and physical remand of an accused in designated internment centers under Subsections 5(4), 6(2) and 9(2) (a) and (b). This is especially emphasized in the absence of writ of habeas corpus under Section 18 of the PPA.\(^8\) Custody under Section 9 is also ambiguous, in the sense that terms like ‘detainee’, ‘accused’ and ‘interned’ are not only used synonymously but have also been used without a proper definition in the entire statute. The most debatable among them is the expression of ‘interned’, because it neither explains its contextualization nor elaborates its applications. It is as imprecise as the failure to indicate whether it means a person who is preventively detained under Section 6 (1),\(^8\) or is arrested under Section 15 of the PPA on a presumption of guilt. The latter is also contrary to Art.14 (1) and (2) of the ICCPR.\(^8\)

Moreover, the entire statute of the PPA lacks precise definitions and thresholds of waging war, insurrection and raising arms. Apparently, these can be construed as demonstrations of extreme violence against life and property but they ought to be classified in their entirety for construction of evidences and respective sentencing. The Supreme Court of Pakistan observed that a journalistic and political use of the term ‘war’ creates a hindrance for legal reasoning to evaluate the conduct of hostilities. It was held that the war could be divided into two domains, as ‘public war’ and ‘civil war’. The former connotes an external aggression whereas the later implies insurgency.\(^9\) Similarly, the expression of ‘militant’ as used in PPA creates ambiguities because it does not explain how a militant is different from a terrorist with regards to his alleged involvement in the scheduled

\(^8\) Ibid, s. 10.
\(^8\) The Protection of Pakistan Act 2014, s. 5(4), s. 6(2) and s. 9(2).
\(^8\) Ibid, s. 6(1).
\(^8\) (n 73) 1002-1004.
At this juncture, J. Azmat, in the *Rawalpindi Bar* case seems to follow the Indian perspective on waging war and relies upon Article 245 of the Constitution for his argumentation. J. Azmat indicates that the expression of ‘threat of war’, as incorporated in Article 245(1) is not meant for international armed conflict, which has already been mentioned in the preceding expression of external aggression. In fact, the connotation of ‘war’ in clause (1) of Article 245 construes as waging war against the state in form of armed rebellion or insurgency. Moreover, J. Bandial in the same case indicates that contemporary internal armed conflict in the Federally Administered Tribal Areas (‘FATA’) cannot be dealt with ordinary criminal laws, as it attracts special and stringent administrative measures even beyond the scope of Article 8 of the Constitution. However, to avoid violations of core human rights values the majority of judges maintain the pro-people forum of judicial review of administrative actions in this regard.

J. Bandial also indicates that the application of international humanitarian law may function as a law of armed conflict in Pakistan. He indicates further that the contemporary scale of violence in tribal and urban areas, coupled with the quantity of suicide blasts that occur in the wake of perfidy, and the magnitude of sabotage, require an urgent military response under Article 245 of the Constitution. Yet such military response must be coupled with principles of proportionality as enshrined in the four Geneva Conventions to avoid undue collateral damage. Keeping in line with the pro-people approach, to avoid the miscarriage of justice in the case of detained militants, J. Bandial focuses on the Common Article 3, which is

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92 District Bar Association, Rawalpindi and others v Federation of Pakistan PLD 2015 SC 401, 1154-1157.
93 Ibid, 721-746.
common in all the four Geneva Conventions of 1949.\textsuperscript{95} Hence, to accomplish such purpose and to extend judicial guaranties to the interns, he relies upon Article 4 along with Articles 184(3), 187 and 190 of the Constitution.\textsuperscript{96}

**Conclusion**

If a judicial connotation for shielding of due process during grave crises in Pakistan is analyzed under Dyzenhaus’s perspective, then it illustrates that the judiciary is merely bound to follow the enacted law. As the court observes, ‘during martial law when fundamental rights stood suspended, Article 4 of the Constitution, 1973 furnished the only guarantee or assurance to the citizens that no action detrimental to the life, liberty, reputation, or property of any person would be taken except in accordance with law’.\textsuperscript{97} The question that remains is if the law itself infringes upon fundamental rights, restricts the powers of the judiciary or alters the Constitution itself, then, what kind of remedial powers lay with the judiciary to protect fundamental rights?

The entire supra debate indicates that the security laws of Pakistan uphold executive prerogative in face of a crisis and the executive professes purpose conformity not justice. Hence, in this scenario, what is left for the judiciary to enlarge its scope under the pro-people approach to ensure complete justice under Article 187 of the Constitution. How can the judiciary assert itself to uphold the positive morality of the due process of law in Pakistan in a way that ‘due process’ and ‘law’ complement each other at least to achieve the right to a fair trial? The notion of egalitarianism as incorporated in the second last paragraph of the preamble of the Constitution along with its other aims and objectives are identical to the contractual paradigm. Moreover, the primacy of fundamental rights is given in Articles 9-28, read with the due process clause of Article 4. These rights are guaranteed with the aid of the writ jurisdiction of the High Court under Article 199(1) and (2) as well as the ‘writ of amparo’ under Article 184(3). The importance accorded to fundamental rights is similar to the Kant’s perspective of the categorical imperative. It is also identical to Locke’s and Hobbes’s perceptive to form a civil and political society solely to protect fundamental rights of the egalitarians.\textsuperscript{98} Besides the placement of the

\textsuperscript{96} (n 73) 1144-1147.
\textsuperscript{97} Federation of Pakistan and another v Malik Ghulam Mustafa Khar PLD 1989 SC 26.
\textsuperscript{98} Haji Lal Muhammad v Federation of Pakistan PLD 2014 Peshawar 199; Foundation for Fundamental Rights v Federation of Pakistan and 4 others PLD 2013 Pesh 94 – Reliance
objectives resolution as a substantive part of the Constitution through Article 2A is implicitly identical to contractual parameters. It seems that the objectives resolution, as a categorical imperative of Pakistan, binds all constitutional and procedural amendments to follow its values.

Moreover, the constitutional emphasizes on the elimination of all forms of exploitation as incorporated in Article 3 of the Constitution is an attempt to promote socio economic justice. It is quite identical to Rawls perspective of institutional justice through equality and equity. A compatible interpretation of Articles 3 and 4 of the Constitution, if read with fundamental rights and principles of policy provides a pragmatic rationale of Pound’s sociological jurisprudence to avoid conflicts of interests in Pakistan. It is mainly to establish a new contract under the egalitarian philosophy as is stated in the preamble of the Constitution to accomplish the Hobbesian ‘bare minimum of the natural law’. Subsequently, a harmonious interpretation of the Articles 4, 184(3), 187 and 190 of the Constitution elaborates a judicial obligation to materialize a just society based upon due process of law.99 Resultantly, the court construes the notion of due process of law as enshrined in Article 4 of the Constitution, as it observes, ‘connotation of the word ‘Law’is restricted to positive law that is to say a formal pronouncement of the will of a competent law-giver and did not include what were mere legal precepts or theories’.100 It seems accordingly that due process of law means protection of natural rights as incorporated in the chapter on fundamental rights through the force of positive law to curb the probability of internal unrest.101 It is because the pro-people strategy of counter violent extremism, along with judicial review of administrative actions has the legitimacy to subdue executive prerogatives as well as address the troubles of the segregated classes. Such voids not only create national identity crises but also subdue the political integrity of a country due to which non-state elements and forces thrive to impose their vested agendas.102 Consequently, ideological polarizations and clashes of values confound the political will of a country to maintain order that may lead to surfacing of internal armed conflicts owing to contested legitimacies.103

has been placed on international bill of rights to protect fundamental rights of citizens of Pakistan.

99 Kamran Murtaza v Federation of Pakistan 2014 SCMR 1667.
102 Ahmed Rashid, Descent into Chaos: How the war against Islamic extremism is being lost in Pakistan, Afghanistan and Central Asia (London: Allen Lane, Penguin Books, 2008), 34-36.
103 Peter Singer, One World: The Ethics of Globalization (Orient Longman 2004), 144-149.
The Mustafa Impex Case: ‘A Radical Restructuring of the Law?’

Mustafa Impex, Karachi v The Government of Pakistan
PLD 2016 SC 808

Kamran Adil*

Introduction

Since 2016, the judgment passed in the Mustafa Impex case¹ is all pervasive on the judicial landscape of the country. The reasons are obvious; by expanding the meaning and scope of the Federal Government - which was referred to as a ‘cabinet form of government’ - the judgment drastically reordered the internal dynamics of the federal government and the provincial governments.² Using the language of Article 90 of the Constitution,³ the judgment stated that in the capacity of the Chief Executive of the country, the Prime Minister ‘executes policy decisions, but does not take them by himself’.⁴ The Supreme Court held that the Prime Minister could not move any legislation, finance or fiscal bill, or approve any budgetary or discretionary expenditure, without consulting and obtaining approval from the Cabinet.⁵ As was expected, the Federal Government filed a review, which was also dismissed.⁶ This case note outlines the facts of the case, the reasoning and findings of the judgment, and the consequences that might follow from it.

Facts of the Case

Certain companies which imported cellular phones and textile related items were exempted from sales tax in 2008, through a Federal Government

* The author has served as head of the legal affairs division of the Punjab Police and has done his BCL from the University of Oxford, UK.
2 Ibid, 846.
3 The Constitution of the Islamic Republic of Pakistan 1973, art. 90:
   ‘The Federal Government. — (1) Subject to the Constitution, the executive authority of the Federation shall be exercised in the name of the President by the Federal Government, consisting of the Prime Minister and the Federal Ministers, which shall act through the Prime Minister, who shall be the chief executive of the Federation.
   (2) In the performance of his functions under the Constitution, the Prime Minister may act either directly or through the Federal Ministers.’
4 (n 1) 866.
5 (n 1) 867.
6 Review petitions No. 380 and 393 to 395/2016. The Review Petition was dismissed on a technical ground by discussing the scope of review in the Supreme Court of Pakistan.
notification\textsuperscript{7} - signed by a government official\textsuperscript{8} – and issued under Sections 3(2) (b), 3(6), 13 and 71 of the Sales Tax Act, 1990.\textsuperscript{9} However, through two later notifications\textsuperscript{10} in 2013, the earlier notification issued in 2008 was dismissed,\textsuperscript{11} withdrawing the exemptions and leading to the imposition of sales tax on cellular phones and textile items at different rates. The two notifications issued in 2013 were signed by an Additional Secretary of Finance\textsuperscript{12} under the same statutory framework who, during the litigation, revealed that approval for the same had been sought from an advisor of the Prime Minister.

A company styled as M/S Mustafa Impex, along with other companies, challenged the 2013 notifications in the Islamabad High Court on the grounds that the notifications could only be issued by the Federal Government, and that an Additional Secretary was not competent to issue such notifications. The challenge failed in the High Court. An Intra-Court Appeal was filed, which also failed. The companies then filed a Civil Leave to Appeal to the Supreme Court of Pakistan, which was accepted, leading to the judgment under consideration. The case was heard by a three-member bench of the Supreme Court, comprising Mian Saqib Nisar J. (now the Chief Justice), Iqbal Hameedur Rahman J. and Maqbool Baqar J. Mr. Syed Ali Zafar, a senior advocate of the Supreme Court of Pakistan, was appointed as \textit{amicus curiae} in the case.

**The Judgment**

Authored by Justice Mian Saqib Nisar, the judgment demonstrates a painstaking attempt to interpret the words of the Constitution. After recording the averments of the petitioners, the representative of the Attorney General for Pakistan, and the \textit{amicus curiae}, it discusses different issues such as the definition of the term ‘Federal Government’ and the meaning of the word ‘business’ in the Rules of Business. The constitutional law of the US, the UK and India is also looked at for a comparative perspective. In his analysis, the point of emphasis was the constitutional history of the country,

\textsuperscript{7} SRO No. 452(I)/2008 dated 11\textsuperscript{th} June 2008.
\textsuperscript{8} The Notification was issued by Mr. Abdul Wadood Khan, Additional Secretary, Revenue Division, the Ministry of Finance, Economic Affairs, Statistics and Revenue, Government of Pakistan.
\textsuperscript{9} (n 1) 808.
\textsuperscript{10} SRO No. 280(I)/2013 dated 4\textsuperscript{th} April 2013; and SRO No. 460(I)/2013 dated 30\textsuperscript{th} May 2013.
\textsuperscript{11} As stated in SRO No. 460(I)/2013 dated 30\textsuperscript{th} May 2013.
\textsuperscript{12} (n 1) [1].
especially the constitutional enactments passed in the colonial era. Tracing the origins of the legal and constitutional basis of power from the East India Company Act, 1773, to the Government of India Act, 1935, the learned judge elucidated that the powers of the Crown, the Secretary of State and the Council of Ministers, had always differed and remained distinct. With this basic premise, Justice Nisar then discussed the definition of the term ‘Federal Government’. Disagreeing with the submission that there was no definition of the term in the law, he reproduced verbatim the definition of the term ‘Federal Government’ as stated in the General Clauses Act, 1897, before analysing it and connecting it to the 1973 Constitution. The gist of his discussion was that in the post-1973 Constitution era, the Prime Minister and the Federal Ministers in the Cabinet constituted the Federal Government. In an impassioned piece of writing, Justice Nisar noted that while the Prime Minister was the single-most important person in the Cabinet, he could not stand in the Cabinet’s position. Deeming the office of the Prime Minister equivalent to the Cabinet would amount to holding the Prime Minister, a single individual, the entire Federal Government. Such an inference, according to the Court, was the ‘antithesis of democracy’. He then utilized the ‘template’ of the Government of India Act, 1935, and explained how the ‘architectural framework’ of the 1973 Constitution was framed in the light of the ‘template’ that dealt with the ‘Federal Executive’. The Federal Executive, in his view, was a synonym of the term ‘Federal Government’. The ‘template’, he described, clearly distinguished between the powers of the Governor General and the Council of Ministers. It also explained the process of authentication and constitutional rule-making which dealt with the business of the Federal Government. Justice Nisar then analysed the analogous constitutional provisions of the 1956, 1962 and 1973 Constitutions; specifically, in the context of the 1973 Constitution, he discussed Articles 90 and 99.

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13 (n 1) 837.
14 (n 1) 865.
15 (n 1) 835.
16 Ibid.
17 Government of India Act 1935, s. 7.
18 Ibid, s. 9.
19 Ibid, s. 17.
20 J. Nisar did not elaborate much on the 1962 Constitution due to its presidential form of government.
21 Article 99 of the Constitution reads:
   ‘Conduct of business of Federal Government. (1) All executive actions of the Federal Government shall be expressed to be taken in the name of the President. (2) The Federal Government shall by rules specify the manner in which orders and other instruments made and executed in the name of the President shall be
Justice Nisar presented different versions of the two constitutional provisions: the pristine form of Articles 90 and 99 in the period from 1973 to 1985, the form of the Articles in the era after 1985, and finally the post-Eighteenth Amendment form. Interpreting the language of the extant form of Article 99, he drew two conclusions:

(a) Unlike the earlier language of Article 99, the post-Eighteenth Amendment text conspicuously omitted the delegation clause that enabled delegation of functions to officers and subordinate authorities;

(b) The insertion of the word ‘may’ instead of ‘shall’ in the latest version of Article 99 made the Rules of Business mandatory.

The aforementioned two conclusions, in his view, introduced ‘radical restructuring’ of the law.

After examining the constitutional provisions, Justice Nisar discussed the latest version of the Rules of Business. In the first place, he accorded wide interpretation to the term ‘business’ and included ‘all’ work done by the Federal Government within the ambit of the term. He stated that both the executive action (which was coterminous to the federal legislative authority) and the delegated law-making (which was conferred by some statutory instruments) were amply covered under the term ‘Business’. This necessarily implied that the applicable legal framework vis-à-vis the working of the Federal Government was the Rules of Business. Any deviation from the Rules of Business, in his judgment, was ‘fatal to the exercise of executive power’. Justice Nisar specifically dealt with the constitutional provision

authenticated, and the validity of any order or instrument so authenticated shall not be questioned in any court on the ground that it was not made or executed by the President.

(3) The Federal Government shall also make rules for the allocation and transaction of its business.’

23 (n 1) 841.
24 Ibid.
25 Before the judgement was passed, the Rules of Business were last revised in July 2016 vide SRO 634(I)/2016 (F. No. 4-2/2016-Min-I) dated 22nd July 2016.
27 (n 1) 852.
28 (n 1) 841.
dealing with fiscal law-making\textsuperscript{29} that required the levying of tax to be backed by the law. After detailed discussion of the Rules of Business, Justice Nisar discussed comparative constitutional law of the jurisdictions of the United States, the United Kingdom, and India, evaluating it with respect to Pakistan’s constitutional regime. Towards the end, the judgment addressed the question of law-making through ordinances\textsuperscript{30} by the President. Once again employing the technique of literal interpretation, Justice Nisar held that the ordinance-making power could only be exercised after prior consideration by the Cabinet.\textsuperscript{31} An Ordinance issued without the prior approval of the Cabinet would be invalid. Similarly, no bill could be moved in the Parliament on behalf of the Federal Government without the prior approval of the Cabinet. Rule 16(2) of the Rules of Business - which allowed the Prime Minister to bypass the Cabinet - was held to be \textit{ultra vires} of the Constitution. On the principle so established, and in concurrence with its earlier judgment in \textit{Case of Ex-Prime Minister Raja Pervaiz Ashraf},\textsuperscript{32} the discretionary spending by the Prime Minister was also held to be unlawful.

\textbf{Analysis}

The significance of this judgment cannot be emphasised enough; unlike other court rulings, the impact of this judgment will not be merely rhetorical. Any government action that does not conform to the judgment will be susceptible to a challenge issued upon its validity. Moreover, although the case arose out of a decision of the Federal Government, its ruling applies equally to the provincial governments because the constitutional provisions governing both are phrased similarly.

This judgment is likely to have a significant impact on the tax regime in Pakistan. Imposition and variation of tax rates is usually carried out through Statutory Regulatory Orders (SROs) issued by either the Prime Minister or the Finance Minister at the behest of the Federal Board of Revenue officials. However, this judgment essentially invalidates this entire procedure. It was held that ‘all statutory rules, including those of a fiscal nature, are subordinate legislation. The power to enact subordinate legislation has to be conferred by substantive law. The Rules of Business, which merely regulate procedural modalities, cannot conceivably do so’.\textsuperscript{33}

\textsuperscript{29} The Constitution of the Islamic Republic of Pakistan 1973, art. 77.
\textsuperscript{30} The Constitution of the Islamic Republic of Pakistan 1973, art. 89 (dealing with temporary law making, i.e. when the Parliament is not in session).
\textsuperscript{31} (n 1) 871.
\textsuperscript{32} PLD 2014 SC 131.
\textsuperscript{33} (n 1) 853.
This means that the power assumed by government to frame rules or regulations needs to be grounded in clear statutory provisions, and wherever such power has been delegated to the executive by the legislature, the Cabinet must authorise such rules. The ripples this judgment has caused among the ranks of government officials can be judged by the officials’ actions with regards to the proposed constitutional and legislative amendments. To neutralize the effect of the judgment on the working of the government, two constitutional amendments bills were initiated,\(^{34}\) which are still pending on the agenda of the National Assembly of Pakistan. The Twenty-Sixth Constitutional Amendment Bill aims to amend Article 99 to allow the government to delegate its business to subordinate authorities and functions. Similarly, amendments were made, through Finance Bill 2017, in Customs Act, 1969 (section 221A), Sales Tax Act, 1990 (section 74A), Income Tax Ordinance, 2001 (section 241), and Federal Excise Act, 2005 (section 43A), to nullify the effect of the judgment. The amendment, virtually the same for all statutes, is a validation clause which stipulates that, ‘All notifications and orders issued and notified in exercise of the powers conferred upon the Federal Government, before the commencement of Finance Act, 2017, shall be deemed to have been validly issued and notified in exercise of those powers, notwithstanding anything contained in any judgment of the High Court or Supreme Court’. Although it is unclear whether these amendments, designed to bypass Article 77 of the Constitution, would stand a test of constitutional validity, their inclusion in the finance bill demonstrates the inhibitive impact the judgment has had on the functioning of the government.

Justice Nisar’s reasoning was detailed, but literal; he interpreted the constitutional provisions on a textual basis. While there is nothing unusual about literal interpretation, the problem is that, in his analysis and reasoning, he tends to be both a positivist and a naturalist simultaneously. In the larger jurisprudential debate about whether the judges should apply the black letter law (the positivist approach) or the high morals and ideals (the naturalist approach), he features on both sides. He stated that compliance to the constitutionally-sanctioned rules of business would result in ‘good governance’.\(^{35}\) Likewise, at another place\(^{36}\) - while elaborating the role of the Cabinet and negating the centrality of the office of the Prime Minister to the


\(^{35}\) (n 1) 848.

\(^{36}\) (n 1) 865.
system of government in Pakistan - he offered the protection of the ‘hard won liberties of the people of Pakistan’ as one of the reasons for his judgment. However, the positivist undertones of the judgment, if any, are secondary to the strictly textual approach taken with regards to the interpretation of the Constitution. Justice Nisar exhibited judicial creativity by interpreting the Constitution in an unprecedented manner, which resulted in the placement of restrictions on the power of the Prime Minister without any judicial overreach on his part.

From a political science perspective, the judgment noted that the theory of separation of powers, as understood in the United States, was not rigidly adhered to in the Constitution of Pakistan. The judgment is in line with an earlier judgment of the Supreme Court, in which the Court held that the ‘executive primarily emanates out of the legislative branch of the state…’ Justice Nisar took pains to elaborate the relationship of the Prime Minister with the Cabinet. In his reasoning, the Cabinet’s primacy was at the heart of the constitutional democracy, and any tendency opposing the primacy was the ‘antithesis’ of democracy. He pegged his reasoning in the interpretation of Article 91 of the Constitution of Pakistan, which deals with the responsibilities of the Cabinet. Emphasizing the principle of collective responsibility, as enshrined in the Constitution of Pakistan, he noted that Pakistan’s system was ‘based’ on the British system, where the Prime Minister was treated as ‘primus inter pares’ (a first among equals). The diffusion of executive power, as envisaged by this judgment, is arguably valuable in the context of our society; a tendency towards authoritarianism is particularly pronounced amongst government officials and the style of governance is personalized. Spreading power more widely amongst cabinet members offers hope for a more deliberative and inclusive decision-making culture.

Finally, a discussion about whether the ‘law’ was indeed ‘radically restructured’, as noted by the judgment, is warranted. The statement begs many questions. First, which ‘law’ was under discussion? Was it the law relating to the devolution of the ‘law-making authority’, or was it the law relating to the devolution of the ‘executive authority’? If it were the law relating to the devolution of the ‘law-making authority’, what was its source:

37 Ibid.
38 (n 1) 859.
39 M/S MFMY Industries Ltd. and Others vs. Federation of Pakistan 2015 SCMR 1550.
40 (n 1) 865.
42 (n 1) 866.
the constitutional law, the primary legislation, or the constitutionally sanctioned rules of business? If the source were the primary legislation i.e. the Sales Tax Act, 1990, as in the present case, how could constitutionally sanctioned rules of business dealing with ‘allocation’ and ‘transaction’ control the primary legislation? Without addressing these issues neatly, the judgment has applied interlocking reasoning of construing a broad definition of the word ‘Business’ and lumping all the authority of the executive power under it. The confounding situation is not unique to Pakistan. Similar debate about the very source of law ensued in *R (On the Application of Miller and another) v Secretary of State for Exiting the European Union* in the United Kingdom (UK), which decided whether the government could initiate the UK’s withdrawal from the EU without reference to Parliament. The UK Supreme Court, in a majority decision, found that the matter was to be referred to the Parliament. One of the questions, at the heart of the *Miller Case*, was the constitutional value of the European Communities Act, 1972 (the ECA). Was the ECA an independent source of law unto itself? Therefore, the Supreme Court of Pakistan deserves to be given a discount for not unequivocally discussing the issues. It is hoped that, sooner rather than later, the issues might be addressed by the apex court and the law shall definitely stand settled in order to be categorized as ‘radically restructured’.

**Conclusion**

The significant impact of this landmark judgment of the Supreme Court is far from being realized. The judgment not only rebukes but also completely abolishes the personalized style of governance adopted by both elected and non-elected officials in Pakistan. Its far-reaching impact is visible in how the Federal Government is trying to circumvent it by proposing constitutional and statutory amendments. Similarly, the ratio set out in the judgment has become a touchstone against which the actions of the government are being challenged in the superior courts on a regular basis. Recently, the Lahore High Court struck down the devolution of the Sheikh Zayed Postgraduate Medical Institute (SZPMI), which had been effected through a 2012 notification issued by the Cabinet Division. This notification was issued on the direction of the then Prime Minister, transferring the administrative control of the institute to the provincial government of Punjab. One of the reasons set out in the judgment was that the impugned notification was issued by the Prime Minister, to the exclusion of his Cabinet, and did not

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43 (n 1) 848.
44 [2017] UKSC 5.
45 *All Pakistan Paramedical Staff Federation Unit, SZPMI, Lahore v Federation of Pakistan* PLD 2017 Lah 640.
carry any legal sanction. The *Mustafa Impex* judgment thus also serves to demonstrate how the Supreme Court, without indulging in any anti-government rhetoric or display of judicial outreach, is still capable of having a significant impact on the governance structures of the country.
Inheritance Rights of a Childless Widow of a Shia Husband

*Khalida Shamim Akhtar v Ghulam Jaffar*

PLD 2016 Lahore 865

Nimra Arshad*

**Introduction**

Inheritance laws, unlike other areas of Islamic family law, are particularly well-defined and explained in the primary sources of Islamic law – the Qur’an and the Sunnah. The Qur’an significantly transformed the law regarding women’s right to inheritance. In pre-Islamic Arabia, females were not allowed to inherit property; rather, females were themselves considered property, inheritable by males. Under Islamic reforms of inheritance, females were generally given half the share of the males. Despite the relatively more detailed instructions provided in the Qur’an, room for interpretation regarding various provisions remained, which led to the development of the Sunni and Shia schools, both providing complete and coherent schemes of Islamic inheritance law. With reference to the inheritance of females, the Shia school is generally more favourable and gender-sensitive. However, under the Athna Asharia Shia School, a childless widow is not entitled to any share in immovable property. This rule has been perpetuated by frequently-cited books on Islamic family law and has been consistently relied upon by the judiciary in South Asia. The Supreme Court of Pakistan (‘SC’) deliberated upon this matter in two cases. In the first case, it held that it did not have the authority to reform this rule;¹ and in another case it held that a childless widow of a Shia husband is not entitled to any share in the immovable property of her husband.² In *Khalida Shamim Akhtar v Ghulam Jaffar*,³ Justice Ibad-ur-Rehman Lodhi of the Lahore High Court (‘LHC’), took a different position, holding that such a widow is entitled to a one-fourth share in the immovable property of her deceased husband.

This case note examines the LHC judgment in the *Khalida Shamim* case, in light of the judgments of the SC on the same issue. It argues that the judgment of the LHC in this case is the latest in a string of judgments whereby judges have disregarded principles of classic Islamic family law to

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* BA-LL.B (Hons), LUMS.
¹ *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue* PLD 1972 SC 346.
³ PLD 2016 Lah 865.
creatively interpret the Qur’an and Sunnah for the protection of the rights of women and children.

**Facts and Judgment**

In the *Khalida Shamim* case, a childless widow of a Shia man was not granted her share of inheritance in the immovable property of her deceased husband. The civil court declared the widow to be entitled to the share in her deceased husband’s estate, but the first appellate court reversed the decree of the civil court by following the traditionally applicable law. Consequently, the case came up in appeal before the LHC. The counsel for the respondents mainly based his contentions on a pamphlet entitled ‘*Beevi Ki Meeras*’ by Allama Mufti Syed Tyeb Agha Musavi Jazairi. Reliance was also placed on a case from the SC, *Syed Muhammad Munir v. Abu Nasar, Member (Judicial) Board of Revenue*, wherein the issue of whether an issueless Shia widow is entitled to inheritance was discussed in detail.

In the *Syed Muhammad Munir* case, the heirs of the respondent, Mst. Fatima, had been allotted land in Pakistan after the Partition in lieu of the land she had inherited after her husband’s death in Patiala. Counsels for the appellants contended that Mst. Fatima, being a childless widow of Syed Ghulam Shabbir, who was an Athna Asharia Shia, could not inherit any portion of her husband’s lands under Shia law. The respondents argued that the meaning of the term ‘childless widow’ has not been settled, and that a childless widow was someone who had borne no children in a marriage, not a person who had no living child at the time of her husband’s death. Reliance was primarily placed on Fyzee’s *Outlines of Muhammadan Law*, Tayabji’s *Muhammadan Law* and Shama Churun Sircar’s *Tagore Law Lectures on*

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4 PLD 1972 SC 346.  
5 Asaf Ali Asghar Fyzee, *Outlines of Muhammadan Law* (5th edn, Oxford University Press 1949) 354. Fyzee cites Tayabji to observe: ‘A childless widow does not take her share from the immovable property of her husband; but she is entitled to her proper share in the value of household effects, trees, buildings, and movable property, including debts due to the deceased. The exact meaning of the expression 'childless widow' is in doubt. Does it mean a woman who has had no children, or does it merely imply that the widow has no children living at the time of the death of her husband? This question has not yet been finally settled’.  
6 Faiz Badruddin Tyabji, *Muhammadan Law* (3rd edn, N. M. Tripathi & Co. 1940) 908. Tayabji quotes Baillies’ translation of the ‘Sharai-ul-Islam’ to observe: ‘This passage indicates a conflict of opinion. If the translation is accurate the rule is limited to cases where the widow has had no child by the deceased. But the Allahabad High Court has followed Syed Ameer Ali's dictum that "when she has no child, or when a child was born but died before the decease of her husband, then she is entitled to 1/4th share in the personal estate only, including household effects, trees, buildings etc., she takes no interest in the landed property. On referring to the mere wording of the Shahrai-ul-Islam in the original Arabic, it
Muhammadan Law,⁷ to demonstrate the uncertainty regarding the implications of the term ‘childless widow’. It was further argued that the exclusion of issueless widows was not in conformity with the text of the Qur’an.

According to the court, the main difference of opinion regarding the first argument had arisen due to Bailie’s translation of the Sharai-ul-Islam.⁸ The court, however, relied on Mst. Asloo v Mit. Umdutoonissa⁹, where the correctness of Bailie’s translation was questioned and ultimately rejected in favour of the Official Court Translator’s version and Syed Ameer Ali’s opinion.¹⁰ Accordingly, it held that a widow who had no living children from her marriage to the deceased at the time of his death was not entitled to inherit his estate. The court, thus, preferred Ameer Ali’s opinion, who was an eminent Shia scholar himself, over that of Bailie and Shama Churun’s, both of whom were non-Muslims. In response to the second argument, the court examined various translations of verse 12:4 of the Qur’an¹¹ and Shia works, and found that it could not issue a ruling on the matter. It was held:

In view of this difference in the interpretation of the Quranic text itself, we feel that it would not be proper on our part at this stage to attempt to put our own construction in opposition to the express ruling of commentators of such great antiquity

seems that the point may not be without some doubt; and there is little to throw light on it even in the very exhaustive commentary, the Jawahir-ul-Kalam’.

⁷ Shama Churun Sircar, Tagore Law Lectures on Muhammadan Law 1874 (Rare Books Club 2012) 260. ‘If there is no such child, she takes nothing out of the (deceased’s) land (arz), but her share of the household effects (alat), and buildings is to be given to her’.
⁸ Neil B. E. Bailie, Digest of Moonummudan Law (Premier Book House 1958) 295. ‘When the wife has had a child by the deceased she inherits all that he has left; and if there was no child she takes nothing out of the deceased's land, but her share of the value of the household effects and buildings is to be given her. It has been said, however, that she is to be excluded from nothing except the mansions and dwellings; while Moortuza (may God be pleased with him) has expressed a third opinion to the effect that the land should be valued and her share of the value assigned to her. But the first opinion is that which appears to be best founded on traditional authority’.
⁹ 20 WR 297.
¹⁰ Syed Ameer Ali, Mahommedan Law (Imran Law Book House 2012) 972. ‘The husband takes a share in all kinds of property left by his deceased wife and so does the widow when she has a child "born of her womb", or child's child. But when she has no child, or when a child was born to her, but died before the decease of her husband, then she is entitled to a fourth share in the personal estate only, including household effects trees, buildings, etc. She takes no interest in the landed property.’
¹¹ The Holy Qur’an 12:4: ‘And for them shall be a fourth of what ye leave if ye have no issue, and if ye have an issue then for them (shall be) the eighth of what ye leave after paying the bequest ye had bequeathed and the debt’.
and high authority. To depart from a rule of succession which the Shia community has universally been following ever since the days of Imam Jafar Sadek, as evidenced by the unanimous opinions of the Shia jurists on this point, would be wrong. It is not open to us to change a settled rule of succession, having the force of Ijma' behind it at this late stage. If a change is desired to be made this work should be undertaken by the Legislature itself after consulting the Shia Community.\(^{12}\)

The court further noted that such a question had been raised in the West Pakistan Legislative Assembly, but no amendment was made in the relevant law because the Shia community had opposed it. It is noteworthy that it was Allama Jazairi, author of the above-cited pamphlet titled ‘Beevi Ki Meeras’, who had seriously controverted against the Parliament’s efforts to legislate on the issue; consequently, the Parliament did not promulgate any law on this matter.

The LHC, in *Khalida Shamim* case, observed the failure of the legislature to resolve the issue, which had led to the deprivation of an entire class from their inheritance. It issued a public notice inviting Shia ulema to assist the court. In response, Allama Syed Iftikhar Hussain Naqvi Najafi, a sitting Member of Council of Islamic Ideology, Government of Pakistan, appeared and rendered assistance to the court. He referred to his own collection on this point, *Kitab-e-Meera*, which states that a childless widow belonging to *Fiqa-e-Jafariya* is entitled to inherit one-fourth share from the leftover estate of her deceased husband. Allama Najafi argued that those who belong to the *Ahl-e-Tashih* or *Fiqa-e-Jafariya* sect place a higher regard on their identity as Muslims and cannot deviate from a ruling in the Qur’an.

The LHC observed that the applicable law which excludes a childless widow of a Shia husband from inheritance to immovable property is against the explicit injunctions of verse 12:4 of the Qur’an.\(^{13}\) The verse does not differentiate based on the nature of property to which the widow would be entitled. D. F. Mulla’s often-cited book, the *Principles of Muhammadan Law*, declared that a childless widow takes no share in her husband’s lands. However, she is entitled to one-fourth share in the value of trees and buildings standing thereon as well as in his movable property including the debts due to him, though they may be secured by a usufructuary mortgage or

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\(^{12}\) (n 1) 353.

\(^{13}\) (n 11).
otherwise.\textsuperscript{14} It is peculiar that Mulla provides no explanation for this rule except stating that it is a rule of Shia \textit{fiqh}. However, it has continuously been held as an authority on this issue. With reference to Mulla and its articulation of the impugned rule, the LHC, relying on a judgment of the Federal Shariat Court,\textsuperscript{15} observed that this book should not be considered as an enacted law, particularly when any of its articulations are found to be contrary to the injunctions of Islam. It was further held that the propositions in the book are not applicable, if in the opinion of the court, they are found opposed to justice, equity and good conscience. Finally, Justice Lodhi, noting that neither the Parliament had legislated on the issue nor the judiciary had issued a definitive ruling, declared that a childless widow belonging to \textit{Fiqa-e-Jafariya} would be entitled to claim one-fourth share from the leftover estate of her husband.\textsuperscript{16} Before parting with the decision, Justice Lodhi further observed:

\begin{quote}
It is expected that, the Government of Pakistan in Ministry of Law, would take legislative measures to promulgate a codified law in this regard in order to protect the rights of childless widows from Ahl-e-Tashih, in getting their due shares from the inheritance of their deceased husbands.\textsuperscript{17}
\end{quote}

\textbf{Analysis}

\textit{Khalida Shamim} case is significant for many reasons. Firstly, the LHC bypassed decades old precedents including that of the SC, to deliver its ruling. Judgments upholding this principle can even be found in various cases from colonial India.\textsuperscript{18} The Privy Council had also discussed this issue in the case of \textit{Aga Mahomed Jaffer Bindanim v Koolsom Beebee}\textsuperscript{19} where the Privy Council had to deal with issues arising out of the administration of the deceased husband’s estate. The testator’s nephew, the plaintiff in that case, had been appointed as the executor and trustee of the estate. Along with other instructions, the plaintiff had been instructed to pay the respondent’s dower amount and any inheritance which she would be entitled to under


\textsuperscript{15} Muhammad Nasrullah Khan v The Federation of Pakistan and another (Shariat Petition No.06/I of 2013).

\textsuperscript{16} (n 3) 871.

\textsuperscript{17} (n 3) 872.

\textsuperscript{18} Umardaraz Ali Khan v Wilayat Ali Khan (1896) ILR 19 ALL 169; Mir Alli Hussain v Sajuda Begum (1897) ILR 21 Mad 27; Muzaffar Ali Khan v Parbati (1907) 29 All 640; Durga Das v Muhammad Nawab Ali Khan (1926) ILR 48 All 557.

\textsuperscript{19} (1897) 25 Cal 9.
Inheritance Rights of a Childless Widow of a Shia Husband

Muhammadan law. One of the questions before the Privy Council was: whether a widow, under Shia law, was entitled to a share from land and the value of building upon that land. In accordance with this question, one of the arguments put forth by the counsel of the respondent, who had relied on Baillie’s translation of the *Fatawa Alamgiri*, was that the principle of non-inheritance of a childless Shia widow only applied to the extent of agricultural land. The Privy Council rejected this argument, holding thereby that the widow of the testator was not entitled to any share in the immovable property of her husband. Even though the question of the exclusion of widows of Shia husbands was only briefly discussed, this case went on to become an authority on the matter in both Pakistan and India.20

As explained above, the SC, in *Muhammad Munir* case, declared that the rule disentitling a Shia widow from her husband’s estate had gained the force of an *ijma*; therefore, it was not proper for the court to issue a ruling on the matter. In *Mst. Noor Bibi v. Ghulam Qamar*,21 a full bench of the SC affirmed this principle by referring to the works of Mulla, Syed Ameer Ali and N.J. Coulson. In *Mst. Noor Bibi*, an appeal from a judgment of the LHC, the court discussed whether a Shia widow was entitled to inheritance from the estate of the husband. The LHC had erroneously relied on *Syed Muhammad Munir*22 to hold that the appellant, the widow of the deceased who had borne children during the marriage, was not entitled to any inheritance from her husband’s estate. The SC reversed the judgment, clarifying and further affirming that the *Muhammad Munir* judgment was in reference to the principle of non-inheritance by a childless widow. Widows, under the Shia school, who were not issueless, were entitled to receive inheritance. Mian Saqib Nisar, J., wrote a concurring note and relied on the work of Ameer Ali and N.J. Coulson to further explain that even if a widow had given birth to a child out of her wedlock with the deceased, but such a child had died prior to the death of the husband, the widow would not be entitled to inherit the immovable property of the deceased, as she would be considered a childless widow under Shia personal law. This principle has continuously been recognized and upheld in other judgments of the superior Courts.23 However, in this instance, the LHC disregarded this well-settled precedent to hold that childless Shia widows are entitled to inherit from their

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20 *Syed Muhammad Munir v Abu Nasar, Member (Judicial) Board of Revenue* PLD 1972 SC 346. In India, the case has been cited as an authority in *Syid Murtaza Husain vs Musammat Alhan Bibi* 2 Ind Cas 671.
21 2016 SCMR 1195.
22 (n 1).
23 *Ghulam Shabbir v Bakhat Khatoon* 2009 SCMR 644; *Muhammad Hussain v Ghulam Qadir* 2012 CLC 298.
husband’s estates. In other instances, a lower court’s divergence from well-established precedent could have perhaps signaled a worrying trend. However, the manner in which the LHC arrived at its decision is sufficient to dispel any concerns regarding its divergence from precedent. The LHC not only based its decision on the primary source of Islamic law – the Qur’an, but also relied on the expertise of the sitting Shia scholar of the Council of Islamic Ideology who supported the court’s eventual interpretation.

This case also serves as another example of the growing trend in the decisions of cases of Islamic family law, whereby the Pakistani courts have moved beyond the renowned works on the subject, and have relied directly upon the Qur’an and the Sunnah to deliver rulings. This principle of a childless Shia widow not being entitled to inheritance from her husband’s estate has most notably been articulated by Fyzee, Baillie, Coulson, Syed Ameer Ali, and Mulla. The SC, in the Noor Bibi case, treated the articulations in these books as authorities and did not make an effort to examine the original sources of the law, i.e. the Qur’an and the Sunnah. However, in the case of Khalida Shamim, Mulla’s book was only used as a reference. It was observed by the LHC that the book was in fact just a reference book and not statutory law applicable in Pakistan. It is an option for the court to consult the same on the basis of equity and refer to the principles mentioned therein at rare occasions. The LHC completely disregarded Mulla’s book and held it in contravention to the Qur’an with regard to the principle of denying the childless widow her share of inheritance in immovable property. Instead, the LHC relied on the Qur’anic verse itself to deliver its ruling. This approach has been consistently relied upon for the past few years by various courts in the country, demonstrating

24 (n 5).
25 (n 8).
27 (n 10).
28 (n 4).
29 (n 7).
30 (n 3) 870.
31 Mst. Balqis Fatima v Najmul Ikram Qureshi PLD 1959 (W.P.) Lah 566. The West Pakistan High Court diverged from Mulla on the issue of the wife’s right to seek khula through the court without the consent of her husband. According to Mulla, a khula could not be affected unless the husband consented to it. The Court interpreted the verse 2:229 of the Qur’an to hold that the consent of the husband was not required for khula. The Supreme Court affirmed the LHC’s divergence from Mulla on this issue in Mst. Khursheed Bibi v Muhammad Amin PLD 1967 SC 97. The court held that in cases where the husband disputes the right of the wife to obtain separation by khula, it is obvious that a third party has to decide the matter and, consequently, the dispute will have to be adjudicated upon by the
their intent and ability to creatively interpret principles of Islamic family law or to move away from them if needed in order to secure the rights of women and children.

**Conclusion**

In the *Khalida Shamim* case, the LHC delivered a landmark judgment: it made a significant contribution towards the protection of the right of inheritance of widows of Shia husbands by diverging from an authoritative precedent. It is the latest in a string of judgments delivered by the Pakistani superior courts where judges have refused to blindly follow the opinions of classical jurists and the judicial precedents laid down during the colonial period. Pakistani judges have relied upon the original sources of Islamic law – the Qur’an and Sunnah, to resolve issues in Islamic family law in a manner that best protects the rights of women and children. While this judgment is undoubtedly a positive step, there is no certainty that this judgment will be upheld by the SC. Therefore, this issue is far from resolved, and the childless widows of Shia husbands may still be at risk of not receiving inheritance in the immovable properties left behind by their husbands. However, considering that the LHC interpreted a Qur’anic verse to deliver its ruling, future rulings on the same issue will require an alternative interpretation of what is a fairly clear verse of the Qur’an. Hence, the possibility that this ruling has conclusively altered the law on this issue cannot be denied. However, an authoritative judgment from the SC that affirms the ruling of the LHC or, preferably, legislation on this matter as directed by the LHC is still required to conclusively determine the inheritance rights of issueless widows of Shia husbands in Pakistan.

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Qazi. Any other interpretation of the Qur’anic verse regarding *khula* would deprive it of all efficacies as a charter granted to the wife. Finally, the Federal Shariat Court adjudicated upon the same issue in *Saleem Ahmad v Government of Pakistan* PLD 2014 FSC 43. The Court relied upon various verses of the Qur’an and multiple Ahadith to hold that none of these sources barred a Qazi to decree a *khula* without the consent of the husband.
Challenge to the Industrial Relations Act 2012: Two High Courts Respond

*KESC v NIRC* 2015 PLC 1
*Pakistan Workers Federation v Government of Pakistan* 2014 PLC 351

Naima Qamar and Siraat Younas*

Introduction

The Industrial Relations Act 2012 (‘IRA’) was enacted to regulate the formation of trade unions, trade union activities, relations between employers and workmen, the settlement of industrial disputes, and ancillary matters. However, after the 18th Amendment, several constitutional petitions challenged the validity of the IRA since the regulation of labour no longer remained within the legislative competence of the Majlis-e-Shura (‘Parliament’). In *KESC v NIRC*¹ and *Pakistan Workers’ Federation v Government of Pakistan*,² the Sindh and Baluchistan High Courts, respectively, upheld the validity of the IRA on the ground that its provisions apply only to trans-provincial concerns which the Parliament is empowered to regulate. They also tackled other pertinent questions regarding the power of provincial legislatures in the regulation and legislation of trans-provincial industries and the extent of provincial autonomy after the 18th Amendment. This case note revisits these landmark cases and underlines the important principles that the courts have adopted to resolve disputes concerning legislative competence of the federal and provincial legislatures following the 18th Amendment. For this purpose, this case note explores the background of the IRA, the prior law, and the judgments of the Sindh High Court (‘SHC’) and the Baluchistan High Court (‘BHC’) in the *KESC* and the *Pakistan Workers’ Federation* (‘PWF’). It also includes brief observations on how the law, if applied prospectively, can help resolve labour-related disputes.

Background and Prior Law: The Controversy around the IRA – A Legal Conundrum

The 18th Amendment to the Constitution of Pakistan 1973 (‘Constitution’) led to substantial changes in the structure of the State, transferring significant

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¹ 2015 PLC 1.
² 2014 PLC 351.
powers from the President to the Parliament and from the Federal legislature to the Provincial legislatures. The 18th Amendment abolished the Concurrent Legislative List (‘CLL’) which enumerated subjects on which both the federation and the provinces were empowered to legislate. Consequently, all items previously listed under the CLL fell into the exclusive domain of the Provincial legislatures by virtue of Article 142 of the Constitution. Entry no. 27 (‘Trade unions; industrial and labor disputes’) of the CLL, for instance, entitled the federation to legislate on matters related to settlement of industrial disputes and the formation of trade unions. However, after the 18th Amendment, such matters fall within the domain of provincial legislatures. Therefore, when the Federal legislature enacted the IRA, it initiated a debate which culminated in the KESC and the Pakistan Workers’ Federation (PWF) case.

The IRA was enacted to regulate industrial relations with regard to trans-provincial enterprises and those operating in Islamabad territory. Section 2 (xxxii) of the IRA defines ‘trans-provincial’ as ‘any establishment, group of establishments, or industry having its branches in more than one province’. Section 87 provides that the IRA will have an overriding effect where trans-provincial industries are concerned. It was promulgated as an amendment to the problematic Industrial Relations Act 2008, which followed the similar restrictive pattern of the 1969 and 2002 industrial relations statutes. For instance, in the previous industrial relations statutes, the term ‘worker’ constituted the entire class of supervisors and apprentices, but failed to include those employed as security or fire-service workers at airports, sea ports, oil refineries, and government hospitals. In this context, the IRA was promulgated to rectify the defects of preceding enactments.

Moreover, the IRA established National Industrial Relations Commission (‘NIRC’) as a parallel legal forum for resolution of disputes in trans-provincial establishments in addition to the Labour Courts established under provincial industrial relations statutes. In the KESC case, the court ordered the transfer of cases from the NIRC to Labour Courts, and thus put an end to any confusion pertaining to matters of jurisdiction.

Critics of the 18th Amendment and the IRA have claimed that the former violates the right to association as well as ‘the international
obligations undertaken by the Government of Pakistan by ratifying ILO Conventions Nos. 87 and 98’. These obligations relate to the right to freedom and the right to collective bargaining, respectively. This criticism stems from the vulnerabilities of the common worker who is faced with powerful corporations in the courts of law.

Proponents of the IRA, on the other hand, argue that Article 137 of the Constitution permits concurrent jurisdiction and authorizes both provincial and federal assemblies to legislate on a subject. The abolishment of the CCL resulted in confusion as to which laws would apply to trans-provincial industries since applicants could approach both the NIRC and the Labour Courts. The central issue discussed in both the KESC case and PWF case is regarding the legality of the IRA under the Constitution.

**Facts, Arguments and Holdings**

This section not only explores the arguments made before the SHC and BHC regarding the IRA, but it also discusses and comment on the reasoning adopted by these courts in deciding the respective cases.

**KESC v NIRC**

After a number of petitions challenging the validity of the IRA were filed in the court, the Division Bench referred the matter to the Chief Justice with a request to constitute a larger bench to deliberate upon the important constitutional issues therein.

KESC argued that its employees could not get legal recourse through the IRA because it enumerated on subjects that were outside the jurisdiction of the Federal legislature and therefore was an invalid law after the 18th amendment. The employees, on the other hand, argued that the Federal legislature did have the authority to legislate on matters such as the formation of trade unions and settlement of industrial disputes relating to establishments that operated at trans-provincial level. They posited that the

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8 The Constitution of Islamic Republic of Pakistan 1973, art. 137 – ‘Subject to the Constitution, the executive authority of the Province shall extend to the matters with respect to which the Provincial Assembly has power to make laws: Provided that, in any matter with respect to which both [Majlis-e-Shoora (Parliament)] and the Provincial Assembly of a Province have power to make laws, the executive authority of the Province shall be subject to, and limited by, the executive authority expressly conferred by the Constitution or by law made by [Majlis-e-Shoora (Parliament)] upon the Federal Government or authorities thereof.’
Provincial Assemblies were not empowered to legislate on matters that were in operation beyond its territories; therefore, the Federal legislature was competent to promulgate the IRA.

The Sindh High Court addressed two primary issues in its judgment:

1. Whether the IRA was *ultra vires* of the Constitution? and
2. What legal remedies were available to workers employed in corporations established in more than one province?

In its decision, the Sindh High Court applied the doctrine of pith and substance which entails an inquiry into the essence of the law that is under dispute. In determining whether the IRA was *intra vires*, the court focused on the purpose behind the Federal Law and the objective it aimed to achieve. One of the arguments discussed by the court was that if the provincial government were to legislate on matters pertaining to trans-provincial establishments, it would be a violation of Article 141\(^9\) of the Constitution which prevents provincial governments from making laws concerning rights relating to trans-provincial establishments. Hence, the right to form a trade union in trans-provincial establishments, it was argued, could not be secured and regulated by a provincial law. The court subsequently examined Article 137 of the Constitution, which provides concurrent jurisdiction to both the Federal and the provincial assemblies, allowing them to legislate on a subject even after the 18th Amendment. Further, the court opined that formulating a federal law to deal with a situation which could not be addressed through provincial legislation, was not an infringement of provincial autonomy. This meant that since provinces could not make a law for trans-provincial establishments, it was imperative for the Federal legislature to promulgate a law to fill the gap that the provinces did not have the power to fill themselves.

Moreover, the court held that the purpose of the IRA was to allow citizens to exercise their right of association under Article 17\(^{10}\) of the Constitution while being employed in trans-provincial organizations. The regulation of such an organization and securing rights for workers in a trans-provincial establishment is out of the purview of a provincial government,

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\(^9\) Art. 141 – ‘Subject to the Constitution, [Majlis-e-Shoora (Parliament)] may make laws (including laws having extra-territorial operation) for the whole or any part of Pakistan, and a Provincial Assembly may make laws for the Province or any part thereof.’

\(^{10}\) Art. 17 – ‘Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.’
since provincial law is unenforceable beyond the territorial limits of the province. These rights include the right to organize on an inter-provincial level, form trade unions, elect Collective Bargaining Agents (‘CBA’), and to have industrial dispute resolution mechanisms at an inter-provincial level.

The court referred to *Air League of PIAC Employees v Federation of Pakistan*\(^{11}\) where the Supreme Court had upheld the Industrial Relations Act 2008, even after the 18\(^{th}\) Amendment. The SHC relied on the court’s analysis of Article 144\(^{12}\) whereby the provincial assemblies could adopt Federal laws even for matters outside the purview of any Entry in the Federal Legislative List. Article 144\(^{13}\) did not apply to the *KESC* case because the court deemed the provisions of Entry 58 of Part I\(^{14}\) of the Federal Legislative List as sufficient grounds to vest legislative authority in the Parliament to enact the IRA.

As far as the interpretation of laws is concerned, the court laid down the principle that where two views on the constitutionality of an enactment are possible, the one making the enactment constitutional is to be adopted. The same principle was also upheld in *Lahore Development Authority v Ms. Imrana Tiwana*,\(^{15}\) where Justice Saqib Nisar summarized the rules which must be applied when deciding the constitutionality of laws. Thus, it was held that it is better for a subject to be regulated by the Federal Government than for it to remain unregulated because the provincial legislatures lack the authority to make a law on that subject.

According to the court, the IRA aims to provide a forum for employers and employees of trans-provincial establishments to resolve their disputes including even the most basic concerns such as the issue of registration of trade unions. However, in the absence of the IRA, if no law exists to regulate trade unions at trans-provincial level, the court will be ‘putting an embargo’\(^{16}\) on the fundamental right of freedom of association as provided by Article 17 of the Constitution. In light of the foregoing reasons, the SHC upheld the constitutionality of the IRA.

*PWF v Govt of Pakistan*

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\(^{11}\) 2011 SCMR 1254.

\(^{12}\) (n 1).

\(^{13}\) Ibid.

\(^{14}\) Art. 144 – ‘Matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation.’

\(^{15}\) 2015 SCMR 1739.

\(^{16}\) (n 1) 15.
Just like the SHC, the BHC\(^{17}\) was also called upon to determine the constitutionality of the IRA. The court found it to be \textit{intra vires} – albeit for different reasons. The court discussed precedents and case law from other jurisdictions to explain that some significant laws, due to their overarching effects, need to be legislated upon by the Parliament, even when they do not fall within the federal domain.

The BHC upheld the validity of the IRA based on the ground that the power of the state to regulate inter-provincial trade and commerce included the power to regulate trade unions and employment conditions. The court also reviewed American case law in detail. The United States had dealt with a similar question by way of the Commerce Clause: Article I(8)(3)\(^{18}\) of the US Constitution, which allows Congress to regulate commerce with other countries as well as between states within the US. Similarly, the case at hand deals with the issue whether the authority to legislate vests with the Federal government or with the provincial government. Furthermore, the BHC referred to Oliver Wendell Holmes’ dissent in \textit{Hammer v Dagenhart},\(^{19}\) especially since Justice Holmes’ dissent was referred to by the majority’s decision in a subsequent overruling judgment, \textit{United States v Darby Lumber Co.}\(^{20}\) In \textit{Hammer},\(^{21}\) the question before the court was whether Congress could legislate and subsequently place a prohibition on the inter-state trade of any good made by children under the age of fourteen years – a prohibition imposed by the Keating-Owen Act of 1916. The court distinguished between inter-state commerce and manufacturing, holding thereby that manufacturing does not come within the purview of inter-state commerce; and, therefore, Congress did not have the power to legislate on the respective matter. Holmes, on the contrary, stated that the states ‘may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line, they are no longer within their rights’.\(^{22}\) In this way, a seemingly inter-state subject became a concern for the Federal Government as will be seen in the following case.

The unanimous decision in \textit{United States v Darby Lumber Co}\(^{23}\) overruled \textit{Hammer} and preferred the dissenting view of Justice Holmes from

\begin{flushright}
\begin{tabular}{c}
\textsuperscript{17} (n 2). \\
\textsuperscript{18} The Constitution of the United States of America, art. 1(8)(3) – ‘To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.’ \\
\textsuperscript{19} 247 US 251 (1918). \\
\textsuperscript{20} 312 US 100 (1941). \\
\textsuperscript{21} (n 19). \\
\textsuperscript{22} Ibid. \\
\textsuperscript{23} (n 20).
\end{tabular}
\end{flushright}
the now-overruled case. A Georgian lumbar company was alleged to be in violation of Fair Labour Standards Act of 1938, a federal law enacted to ensure that fair labour standards were regulated and that states did not use substandard labour practices to benefit financially from inter-state commerce. The law was declared valid, allowing Congress to regulate inter-state commerce, since an authority for the Congress could ‘neither be enlarged nor diminished by the exercise or non-exercise of state power’. Therefore, Congress was recognized as the legitimate authority which could exercise power over inter-state activities as a means of regulating inter-state commerce.

The court discussed the Commerce clause further with reference to *NLRB v Jones and Laughlin Steel Corp.* In this case, the National Labour Relations Board found that the Steel Corporation had violated the National Labor Relations Act of 1935 by discriminating and firing workers who wished to join a trade union. The Steel Corporation argued that it was involved in the business of manufacturing and not inter-state commerce, thus Congress did not have authority within the Commerce clause to legislate on this issue. Chief Justice Hughes held that Congress might have the command to legislate where industrial activity, having a significant link to interstate commerce, needed protection from ‘burdens and obstructions’ and where matters need to be regulated between workers and the management. A reference was also made to *McCulloch v Maryland* where Chief Justice John Marshall had held that the authority was not specifically granted to Congress unless it was, ‘a right incidental to the power (of carrying into execution the sovereign powers), and conducive to its beneficial exercise’.

The court referred to the persuasive arguments made in relation to the American jurisprudence and applied them on the matter at hand. The court next discussed the view that labour laws in trans-provincial establishments may be incidental or ancillary to the inter-provincial clause. It referred to *Messrs Haider Automobile Ltd. v Pakistan* to explain that items in the legislative list must be read broadly to encompass ‘all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended within it’. Ultimately, the BHC also reached the same conclusion that the IRA was validly enacted by the Parliament.

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24 Ibid.
25 301 US 1 (1937).
26 17 US 316 (1819).
27 Ibid.
29 2014 PLC 351 (16).
Additionally, the BHC gave a detailed background of the history of the IRA and the Federal and Concurrent Legislative Lists. Senator Raza Rabbani, Chairman of the committee working on the 18th Amendment, was heard in the court. In his view, under Article 154, the Parliament had the authority to make laws for inter-provincial matters. He also referred to Article 38(a), which includes the State’s task to guarantee ‘equitable adjustment of rights between employers and employees’. Moreover, Senator Rabbani argued that the term ‘State’ could be used for both the Parliament and the Provincial Assembly; and since ‘inter-provincial matters and coordination’ fell within the ambit of the Parliament, i.e. the State, the IRA was validly enacted. The BHC discussed the arguments presented by Senator Rabbani supporting the validity of the IRA. Particularly for trans-provincial establishments, forcing different trade unions to register in different provinces would cause division in trade union movements which would in turn harm country-wide unions created and strengthened over the years. It would also adversely affect them in their negotiations with separate factory managements. Administratively, factory managements would have to monitor different trade unions under different laws and would need to sign the Charter of Demands separately with each union, as they would be registered separately in each province. Significantly, Senator Rabbani gave the example of the Drug Regulatory Authority as an organization that needed to be formed by the Federal Government for the welfare of the country and to be operated in a unified manner irrespective of other laws or circumstances that could vary in the four provinces. For these reasons, the necessity of federal control of trade unions was demonstrated in order for their effective management as well as ensuring fair labour practices in industries.

Similarly, in the KESC case, the SHC discussed similar issues and analysed a scenario in which, by declaring the IRA to be ultra vires, the court would leave workers more vulnerable to exploitation and it would amount to denial of their fundamental rights. Without the IRA, employers

30 (n 9) art. 154 – ‘The Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions.’
31 (n 9) art. 38(a) – ‘The State shall secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants’
32 (n 2) 7.
33 (n) 10.
would be able to resist and clamp down trade unions in trans-provincial establishments and make access to justice more difficult by forcing workers to seek redress under various labour laws. Furthermore, workers in each unit would be counted separately, reducing their strength, and thus, hampering the perks they may obtain as a result of the rights provided to them under certain labour laws.

Hence, in trans-provincial establishments, workers are more susceptible to problems than the factory management due to the dangers of not having legislation like the IRA. Both the superior courts agreed that the Parliament had the legislative authority to enact the IRA under the Constitution of Pakistan 1973.

**The Impact of IRA: Other Issues Examined by SHC and BHC**

The IRA affects all industry-related concerns. One issue addressed by the court in *KESC*\(^34\) related to the legal remedies available to the workers employed in trans-provincial enterprises. It is highly problematic that workers’ grievances were left unaddressed till the time this judgment clarified the matter – an issue that only concerned the jurisdiction of the NIRC. The court explained that factories in the same province could resolve their disputes under provincial laws, while trans-provincial industry disputes were to be addressed under the IRA.

In *PWF*,\(^35\) another concern was whether under Baluchistan IRA (‘BIRA’), the Provincial Trade Union Registrar could have registered the NADRA Employees Union Baluchistan in respect of a Federal body (‘NADRA’) whilst a Federal law, i.e. the IRA, also existed. Under section 25 of the BIRA, the government was directed to make an Industrial Relations Commission to aid the implementation of the IRA. In this regard, the court stated that the government needed to either to create the Commission or make amendments to the BIRA.

The court held that the Registrar Trade Unions Baluchistan did not have the authority to register NADRA Employees Union Baluchistan since it was only within the purview of the IRA to register inter-provincial establishments. To further strengthen this claim, Article 143\(^36\) of the

\(^{34}\) (n 1).
\(^{35}\) (n 2).
\(^{36}\) Art. 143 – ‘If any provision of an Act of a Provincial Assembly is repugnant to any provision of an Act of Majlis-e-Shoora (Parliament) which Majlis-e-Shoora (Parliament) is competent to enact, then the Act of Majlis-e-Shoora (Parliament), whether passed before or
Constitution was cited, which provides for Federal laws to prevail over provincial laws irrespective of whichever law was enacted first. The registration of the NADRA Employees Union Baluchistan was, therefore, invalid.

**Failure of Labour Law**

Labour related issues are given little attention in Pakistan. This has been reflected in the lack of implementation of labour laws and the non-compliance of employers across the country. The issue of non-payment or under-payment of wages below the minimum wage, for example, was brought to light by the Lahore Sunder Industrial Estate factory disaster, the brick-kiln workers, and the Labour Qaumi Movement in July 2015.

Moreover, Pakistan failed to ratify any of the ILO conventions relating to occupational health and safety of workers in 2015. In Karachi, the factory fire in Ali Enterprises claimed the lives of 258 workers in 2012. The incident better known as Baldia Factory Fire gained prominence because over 50% produce of the factory was being purchased by an international corporation. The Baldia Factory Fire demonstrated the lack of occupational health and safety measures which directly contributed to the high death toll.

These instances highlight the neglected state of labour rights and the accepted exploitation of workers in Pakistan. In light of these circumstances, it can be argued that perhaps the approach adopted by the BHC was better since it did not focus on Pakistani precedents that have not been in favour of workers. A detailed analysis of other jurisdictions might have been the more progressive method to reach the most favourable decision for workers.

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37 The catastrophe occurred on 4th November 2015 when a shopping bag factory collapsed killing 45 workers. The cause was said to be the weakening of the foundations after an earthquake which was ignored by the owners who continued to construct the building further.


The IRA is a labour-friendly law which provides a forum to employers and employees to resolve their industrial disputes amicably. By upholding the IRA, the KESC and PWF cases have safeguarded many rights of workers including restrictions on unfair labour practices and granting powers to the NIRC including the authority to refer cases to the Provincial Labour Courts. This aims to expedite the process of settlement of cases and is immensely beneficial to workers especially since there were as many as 6,862 cases pending before the NIRC in July 2014.41

Furthermore, the KESC and PWF cases also illustrate the inadequacies of the 18th Amendment in effectively defining the domain of the provinces and the federation in many areas. Another instance, highlighting the inadequacies of the 18th Amendment, is the devolution of higher education from the Federal to Provincial legislatures. The Higher Education Commission (‘HEC’) was previously under the executive authority of the Federal government; however, removal of higher education from the CLL led to the creation of the provincial Higher Education Commissions (PHECs) in Punjab, Sindh, KPK, and Baluchistan. It is interesting to note that the establishment of PHECs did not abolish the Federal HEC, meaning thereby that the intent of the legislation was to devolve only a few functions of higher education to the provinces, not all. These functions have still not been clearly defined and Federal HEC is still performing functions, which fall within the domain of provinces.42 The deficiencies of the 18th Amendment are emphasised due to a lack of implementation in various government sectors. The boundaries of control between the centre and the provinces remain blurred even after eight years of its passing by the Parliament in 2010.

Conclusion

The regulation of industrial establishments is usually a priority for every government because of their impact on the economic growth of the country and the amount of revenue that they generate for the State. This prioritising often comes at the expense of healthy working conditions and other labour rights of poor workers. Considering that labour complaints are already sidelined by the employers, it is imperative for labour legislation to be in the interest of workers. This can only be achieved when in addition to the

Federal legislature, provinces also play their part in enacting laws to protect the interests of labourers. Thus, the passing of the provincial IRAs must be seen as a progressive move, though only time will tell how far it promotes justice at the grass-roots level.

The verdicts in the KESC and the PWF cases have paved the way for the resolution of industrial disputes under the provincial IRAs without completely dismissing the power of the Parliament to make laws where they are required. With the legality of the IRA established, it is hoped that the workers will be able to obtain some relief, and further case law will reflect the significance of these judgments by upholding decisions of the Labour Courts.

Even though the validity of the IRA is no longer in question, confusion persists in other departments where there is still a lack of clarity regarding control and authority between the federation and the provinces. The federal government has not taken any concrete steps to implement the 18th Amendment. The only step forward is to complete the implementation phase through improved coordination between the federal and provincial governments, and by introducing a comprehensive policy that focuses not just on improving legislation but also on its implementation.
Assisted Reproduction in Pakistan and the Alternative Discourse

Farooq Siddiqui v Mst. Farzana Naheed
PLD 2017 FSC 78

Ayesha Ahmed*

Introduction

The first In Vitro Fertilization (‘IVF’) baby was born in 1978. Since then, there has been immense development in assisted reproduction. The discourse surrounding this issue in the Sunni Schools has been relatively stable, but in Shi’ite Schools, it has been nothing short of contentious. The debate has consistently weighed the preservation of lineage in contrast with overcoming infertility within a marriage. The complex and nuanced underpinnings of this discussion have given rise to a plurality of views amongst the Muslim jurists. A majority of jurists equate third party assisted reproduction as infringing upon the clarity of lineage. However, some Shi’a scholars prioritize preservation of marriage over preservation of lineage and, as a result, have allowed the use of certain third party assisted reproduction techniques in Iran and Lebanon. The law in Pakistan, however, has remained unconcerned with this debate until the recent judgment of the Federal Shariat Court (FSC) in Farooq Siddiqui v Mst. Farzana Naheed. This case note discusses the complexities underlying the Farooq Siddiqui judgment, and subsequently compares its reasoning with the discourse surrounding assisted reproduction in other Muslim countries.

Before dealing with substantive issues, there are some Assisted Reproductive Technique (‘ART’) terms which require clarification at the outset. IVF is a process where a woman’s egg is removed, fertilized with sperm in a lab setting, and the fertilized egg (embryo) is subsequently transferred back into the woman’s uterus to impregnate her. This technique is often used to overcome female infertility. Similarly, Intracytoplasmic Sperm Injection (‘ICSI’) is for combating male infertility whereby previously collected sperm is introduced into the woman’s uterus in order to fertilize the egg. Third party donation can include eggs, sperm, and embryos. Gestational Surrogacy is where an embryo is transferred into the surrogate (also referred to as gestational carrier) so that she can carry the pregnancy to full term. Cryopreservation is where sperm and embryos are frozen for later use.

* B.A LL.B (Hons) LUMS.
2 PLD 2017 FSC 78.
**Part I - Farooq Siddiqui v Mst Farzana Naheed**

In *Farooq Siddiqui v Mst Farzana Naheed*, the FSC discussed various types of assisted reproduction and their legal validity in the backdrop of the injunctions of the Qur’an and Sunnah. Farooq Siddiqui and his wife were unable to have children. As a result, Mr. Siddiqui published an advertisement in the newspaper for a surrogate. Ms. Farzana Naheed responded to the advertisement and offered her services for a certain amount of consideration. Pursuant to this agreement, she gave birth to a baby girl. According to Mr. Siddiqui, this was an oral contract, and in order to avoid public speculation regarding the private affairs of the individuals involved, a false cover story of marriage was concocted. After the birth of the child, Ms. Naheed refused to fulfill her contractual obligation of giving custody of the child to Mr. Siddiqui, and instead claimed that she was his wife; the child was the result of the union; and Mr. Siddiqui was bound to pay for the maintenance of the child. The main issues before the FSC were, firstly, whether the contract between Mr. Siddiqui and Ms. Naheed was valid under the Contract Act 1872; and secondly, whether it was in conformity with the injunctions of the Qur’an and Sunnah.

The FSC discussed several scenarios within assisted reproduction. First, the FSC held that the child belonged to the sperm donor and to the egg donor. The husband of a woman who had given birth through third party sperm donation could not claim paternity of the child. Such an arrangement would be illegal and against the injunctions of Islam as laid down in the Qur’an and Sunnah. Second, the sperm donation from the husband and egg donation from the wife when the egg was fertilized in the test tube and transferred into the womb of the wife would be legal and legitimate. This would not be against the injunctions of Islam as laid down in the Qur’an and Sunnah. Third, an embryo being transferred into the surrogate who would then give birth to the child would be illegal and against the injunctions of the Qur’an and Sunnah. The FSC reasoned that surrogacy was exploitative and cruel as the surrogate mother would develop emotional attachment with the child; it would open Pakistan to exploitation. People from the developed countries would come to Pakistan to take advantage of low costs and would possibly abandon the child if s/he was disabled or disadvantaged in some

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3 Ibid.
4 Ibid, [16].
5 Ibid, [17].
6 Ibid, [18].
7 Ibid, [19].
8 Ibid, [19].
way. Moreover, the court held that assisted reproduction would lead to the destruction of inheritance laws as provided under Islamic law. The FSC referred to the family unit as a basic building block of a healthy society and equated surrogacy to an axe which would destroy the family unit.\(^9\) The FSC emphasized that the object of sexual relations is reproduction, but even then, it had to be within the institution of marriage.

The FSC proposed a few changes to the law. First, it suggested that an amendment needed to be made to section 2 of the Contract Act 1872,\(^{10}\)

\(^9\) Ibid, [23].
\(^{10}\) Contract Act 1872, s. 2:

‘Communication, acceptance and revocation of proposals. The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it. Communication when complete. The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made. The communication of an acceptance is complete,— as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor; as against the acceptor, when it comes to the knowledge of the proposer. The communication of a revocation is complete,— as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.

Illustrations
(a) A proposes, by letter, to sell a house to B at a certain price. The communication of the proposal is complete when B receives the letter. (b) B accepts A's proposal by a letter sent post. The communication of the acceptance is complete,— as against A, when the letter is posted; as against B, when the letters received by A
(c) A revokes his proposal telegram. The revocation is complete as against A when the telegram is despatched. It is complete as against B when B receives it. B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched, and as against A when it reaches him.

Revocation of proposals and acceptances. A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards. An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.

Illustrations
A proposes, by a letter sent by post, to sell his house to B. B accepts the proposal by a letter sent by post. A may revoke his proposal at any time before or at the moment B posts his letter of acceptance, but not afterwards.
whereby any agreement concerning surrogacy would not be enforceable.\footnote{11} Second, the Pakistan Penal Code 1860 (‘PPC’) should be amended to include the definition of surrogacy.\footnote{12} It should be declared an offense punishable with imprisonment and fine for the couple, the individual who arranges such a procedure, the surrogate, and the doctor who conducts the procedure. Third, the PPC should be amended to prescribe punishment for doctors who maintain an egg and/or a sperm bank to be used in the future.\footnote{13}

The judgment reflects the current discourse with regards to third party assisted reproduction amongst Sunni scholars. This is reflected in the concurring opinion of Justice Allama Fida Muhammad Khan, who – in support of his arguments – cites the resolution of the Islamic Fiqah Academy, Jedda, wherein the interference of a third party in assisted reproduction was prohibited. However, the strict interpretation of the injunctions of the Qur’an and Sunnah has led to illogical underpinnings within Pakistani law that the FSC has not effectively addressed. In the following paragraphs, I analyze the various arguments of the FSC from this lens.

\textit{Emotional Attachment of the Surrogate}

Here, the FSC presumes that once the child is born, the surrogate would not have the right to the child and would suffer from emotional detachment. This can be substantiated by rising awareness in India of women who have become surrogates for financial consideration in order to escape poverty.\footnote{14} But, because they signed the surrogacy contract, the child is taken from them as soon as s/he is born. Rising awareness of this sort of exploitation has triggered a debate about assisted reproduction regulations.\footnote{15}

Law in other jurisdictions is also not entirely ignorant of these concerns. In the United Kingdom, the surrogate mother is considered to be the legal mother.\footnote{16} According to Human Fertilization and Embryology Act

\begin{quote}
B may revoke his acceptance as any time before or at the moment when the letter communicating it reaches A, but not afterwards.’
\end{quote}

\footnote{11}{(n 2) [33].}
\footnote{12}{Ibid, [34].}
\footnote{13}{Ibid.}
\footnote{16}{Human Fertilisation and Embryology Act 2008, s. 33:}
2008, the second parent of the child will be either the husband of the mother or, in case she is in a same-sex relationship, the mother’s wife or civil partner. The English courts do not enforce surrogacy agreements. If, for example, the intended parents refuse to make the payment for general expenses to the surrogate or if the legal mother refuses to give the custody of the child to the intended parents as per the contract, the courts will not enforce such contracts. The reasoning of the FSC is similar; however, while the FSC uses possible emotional attachment by the surrogate as a disqualification for the third party assisted reproduction, the English courts have responded with the welfare principle. The welfare principle is used to decide the living situation of the child with the paramount focus being upon its wellbeing. In the United States, there is a well-known case – *In Re Baby*

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**Meaning of ‘mother’**

1. The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child.

2. Subsection (1) does not apply to any child to the extent that the child is treated by virtue of adoption as not being the woman's child.

3. Subsection (1) applies whether the woman was in the United Kingdom or elsewhere at the time of the placing in her of the embryo or the sperm and eggs.

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17 Human Fertilisation and Embryology Act 2008, s. 35:

‘Woman married to a man at time of treatment

(1) If—

(a) at the time of the placing in her of the embryo or of the sperm and eggs or of her artificial insemination, W was a party to a marriage with a man, and

(b) the creation of the embryo carried by her was not brought about with the sperm of the other party to the marriage, then, subject to section 38(2) to (4), the other party to the marriage is to be treated as the father of the child unless it is shown that he did not consent to the placing in her of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1)(a).’

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18 Human Fertilization and Embryology Act 2008, s. 42:

‘Woman in civil partnership or marriage to a woman at time of treatment

(1) If at the time of the placing in her of the embryo or the sperm and eggs or of her artificial insemination, W was a party to a civil partnership or a marriage with another woman, then subject to section 45(2) to (4), the other party to the civil partnership or marriage is to be treated as a parent of the child unless it is shown that she did not consent to the placing in W of the embryo or the sperm and eggs or to her artificial insemination (as the case may be).

(2) This section applies whether W was in the United Kingdom or elsewhere at the time mentioned in subsection (1).’

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The facts here are remarkably similar to those of the *Siddiqui* case. William Stern and his wife entered into a surrogacy contract with Mary Beth Whitehead. Under this contract, Ms. Whitehead agreed to bear their child and then give it up for adoption to the biological father (Mr. Stern) and his wife. In consideration, Ms. Whitehead would receive $10,000. After the birth of the child, Ms. Whitehead developed emotional attachment for the child and sought custody. The Supreme Court of New Jersey declared the surrogacy contract to be unenforceable as it violated statutory law and public policy. Payment of financial consideration was held to be degrading to women and, as a consequence, the agreement to terminate the parental rights of Ms. Whitehead was void. However, custody was decided on the basis of the best interest of the child. Mr. Stern was granted custody as the biological father while Ms. Whitehead was allowed visitation rights.

The Pakistani courts have employed the welfare principle consistently as well. In *Iram Shahzad v Additional District Judge*, the Lahore High Court held that the welfare of the child has paramount significance for the court. This principle of welfare of child has also been held by the Supreme Court of Pakistan to take precedence over any agreement between parties with regards to custody. In *Feroze Begum v. Lt. Col. Muhammad Hussain*, the Supreme Court defined the welfare of the child to include the financial, moral, spiritual, and intellectual health of the child. This principle can be developed to incorporate the nuances of third party assisted reproduction. The FSC has taken steps towards such a development in *Mrs Ambreen Tariq Awan v Federal Government of Pakistan* wherein it was held that since the Qur’an and Sunnah have not provided comprehensive rules regarding the appointment and removal of guardians, the government may make rules as to how this is to be done.

In the *Siddiqui* case, the FSC held surrogacy and other types of third party assisted reproduction to be contrary to the injunctions of Islam. In order to reach this conclusion, the FSC referred to several verses from the Qur’an. However, these injunctions do not expressly refer to third party

\[ \text{\textit{M} of 1988.} \]

\[ \text{\textit{In Re Baby M} 109 N.J. 396 (1988).} \]

\[ \text{(n 2).} \]

\[ \text{PLD 2011 Lahore 362.} \]

\[ \text{PLD 2002 SC 267.} \]

\[ \text{1983 SCMR 606.} \]

\[ \text{2013 MLD 1885 [FSC].} \]

\[ \text{(n 2).} \]

\[ \text{The Qur’an 4:24:} \]

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assisted reproduction. Shi’ite scholars have found a way around this conundrum by considering the admission of an embryo into the surrogate’s womb to be different from sperm and, as a consequence, the surrogate is contextualized as a milk mother. The egg donor is considered to be the actual mother for inheritance purposes. This view is based on the jurisprudential principle of *isaliat-ol-ibaha* under which everything is permissible unless expressly stated otherwise in the Qur’an and Sunnah. This reasoning is not entirely foreign to Sunni jurists. Surrogacy was accepted in 1984 by the Fatwa of the Fiqh Council where the father (sperm donor) had to be married to the egg donor as well as the surrogate. However, this allowance was withdrawn in the next year.

The groundwork for third party assisted reproduction has already been set by the Pakistani courts through the welfare of child principle in *Ambreen Tariq Awan v Federal Government of Pakistan*. The welfare of the child is paramount and this can allow the child to be placed under the custody of the biological mother (egg donor), biological father (sperm donor), or the surrogate. Granting custody to a non-relative is not entirely foreign concept as seen in *Bashir Ahmad v Incharge (Female) Darulman, District Mianwali*. In this case, a non-relative was granted the custody of the child as he was the *de facto* guardian and the mother could not effectively provide for the child.

**Exploitation from Developed Countries**

The FSC argues that third party assisted reproduction should be banned because it may result in the exploitation of women by foreign nationals from

> ‘But it is lawful for you to seek out all women except these, offering them your wealth and the protection of wedlock rather than using them for the unfettered satisfaction of lust’.

The Qur’an 23:5-7:

> ‘Who strictly guard their private parts save from their wives, or those whom their right hands possess; for with regard to them they are free from blame – As for those who seek beyond that, they are transgressors –’

The Qur’an 2:223:

> ‘Your wives are your tilth; go, then, into your tilth as you wish but take heed of your ultimate future and avoid incurring the wrath of Allah. Know well that one Day you shall face Him. Announce good tidings to the believers’.


30 2013 MLD 1885 [FSC].

31 2011 SCMR 1329.
developed nations. These concerns are not baseless. A similar controversy is currently raging in India. In April 2015, news reports emerged of an Australian couple who left a baby boy born through surrogacy in India.\textsuperscript{32} The surrogate had given birth to twins but the couple returned to Australia with one baby as they could not afford to care for both children. News reports have also shown that neither the surrogates are given enough time to read the surrogacy contract,\textsuperscript{33} nor are they allowed to see the children they have borne.\textsuperscript{34} Furthermore, financial consideration for the surrogates is decreased if they exceed their stay in the hospital or if the birth is premature.\textsuperscript{35} Indian government has recently stated in the affidavit submitted before the Supreme Court of India that the government does not support commercial surrogacy.\textsuperscript{36} Under the Assisted Reproductive Technology (ART) Regulation Bill 2014, the Indian government proposed to make it illegal for foreign nationals to enter into a contract for commercial surrogacy.\textsuperscript{37} The United Kingdom, on the other hand, has set a more firm ban. Commercial surrogacy, for both its own citizens and foreign nationals, is not allowed.\textsuperscript{38} As a consequence, only

\begin{footnotes}
\item[34] Ibid.
\item[35] Ibid.
\item[37] Ibid.
\item[38] \textit{Surrogacy Arrangements Act} 198, s. 2:
\begin{enumerate}
\item Negotiating surrogacy arrangements on a commercial basis, etc.
\begin{enumerate}
\item No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—
\begin{enumerate}
\item initiate any negotiations with a view to the making of a surrogacy arrangement,
\item take part in any negotiations with a view to the making of a surrogacy arrangement,
\item offer or agree to negotiate the making of a surrogacy arrangement, or
\item compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangements; and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.
\end{enumerate}
\item A person who contravenes subsection (1) above is guilty of an offence; but it is not a contravention of that subsection—
\begin{enumerate}
\item for a woman, with a view to becoming a surrogate mother herself, to do any act mentioned in that subsection or to cause such an act to be done, or
\end{enumerate}
\end{enumerate}
\end{enumerate}
surrogacy for altruistic purposes is sanctioned by law. Hence, it is not altogether necessary to ban surrogacy in order to avoid exploitation of women in Pakistan. Improved regulation can weigh the needs and requirements of donors with those of the intended parents more effectively as technological developments allow individuals to take advantage of the solutions that were not previously available.

In 2015, the Council of Islamic Ideology (‘CII’) of Pakistan declared the act of renting a womb (i.e. surrogacy) to be against Islam.\textsuperscript{39} CII is not alone in this view. Judith C. Areen has also argued against commercial surrogacy – albeit on a different basis. She points out that the objective of contract law and family law is different.\textsuperscript{40} Contract law is a representation of the market place where self-interested behavior is not only acceptable but also is assumed to benefit society. This is in contrast with familial relationships which are built upon providing care as well as self-satisfaction. The surrogacy contracts, as seen from the cases of child abandonment by intended parents, have led to the commodification of the child as a product where the buyer has the right to abandon ‘damaged goods’. This is coupled with the fact that the surrogate and the intended parents’ experiences with the developing fetus would be entirely different. Areen proceeds to argue that the surrogacy contracts should be denied recognition as otherwise it would lead to exploitation of economically vulnerable women. For this, she recommends that the surrogacy contracts be given no recognition by the courts. Hence, only surrogates who are motivated by altruistic motives would participate in such a venture.

Moreover, the FSC has proposed certain steps such as the non-enforceability of surrogate contract, criminalizing the maintenance of a sperm/egg bank, and the act of arranging such an agreement. Furthermore, the FSC has suggested additional measures of imprisonment and a fine for the intended parents as well as the surrogate engaging in third party assisted reproduction. According to Areen, this would be going a step too far as it would interfere with ‘private reproductive conduct’. This may be so in English and American law where the reproductive conduct is usually kept out of the purview of the state. This is not so in Pakistan. Under the the Offence of Zina (Enforcement of Hudood) Ordinance 1979, any sexual

\textsuperscript{40} Judith C. Areen, ‘Baby M Reconsidered’ (1988) \textit{Georgetown Law Faculty Publications and Other Works} 1439.
contact outside marriage is unlawful and, hence, such conduct comes within the purview of the state. This instead emphasizes the danger of equating sexual contact with surrogacy where the embryo has been transferred into the surrogate in a lab setting; the *mens rea* and *actus rea* for the act of *zina* is not present.

**Destruction of Inheritance Laws**

In the judgment, the FSC presumes that the confusion over the lineage would cause destruction of the inheritance laws. However, it is uncertain as to how this would be so. According to Article 128 of the Qanun-e-Shahadat Order 1984, if a child is born after six months into a marriage and before the end of two years after the dissolution of marriage then it will be presumed that the child resulted from the marriage. This provides a perspective for sperm donation. The child given birth to by the wife will be presumed to be of the husband unless the husband himself denies the paternity. However, even then, according to *Ghazala Tehsin Zohra v Mehr Ghulam Dastagir Khan*, paternity has to be denied within 40 days of the birth of the child. In this context, the child would be able to inherit from the intended father and the biological mother in cases of sperm donation.

Furthermore, even if the husband chooses to exercise his right to divorce through *li’an*, the child under Sunni inheritance law would be

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41 (n 2) [22].

42 Qanun-e-Shahadat Order 1984, art. 128:
Birth during marriage conclusive proof of legitimacy:

(1) The fact that any person was born during the continuance of a valid marriage between his mother and any man and not earlier than the expiration of six lunar months from the date of the marriage, or within two years after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate child of that man, unless—

(a) the husband had refused, or refuses, to own the child; or

(b) the child was born after the expiration of six lunar months from the date on which the woman had accepted that the period of iddat had come to an end.

(2) Nothing contained in clause (1) shall apply to a non-Muslim if it is inconsistent with his faith.

43 2015 SC 327.

44 Divorce by *li’an* is where the husband accuses the wife of committing adultery and is unable to produce witnesses. The husband swears an oath four times regarding the truthfulness of his accusation. He then swears a fifth oath where he invites God’s wrath upon him if he is lying. This is then followed by the wife swearing an oath four times in which she proclaims her innocence. She then takes the fifth oath where she invites God’s wrath upon herself if her husband’s accusation is true. Upon taking of this oath, the wife is divorced from the husband. The husband, on the other hand, gives up any right to paternity over any children born after the oaths taken. John L. Esposito (ed.) ‘Lian’ (*The Oxford
attributed to the mother. In this case, Sunni schools recognize the right of inheritance of the illegitimate child from the mother and the child’s maternal relatives. In surrogacy cases, presuming that the egg donor and the sperm donor are married, the child would inherit from both of his biological parents. This was even noted so by the FSC in the surrogacy judgment that the child belongs to the sperm donor and to the egg donor.\textsuperscript{45} Under Islamic law, a person cannot claim to be a father of a child unless the child was produced from lawful intercourse.\textsuperscript{46} Jurists apply the principle that the male adulterer should not benefit from his own acts and, as a result, he cannot be declared the legal father of the child. The illegitimate child belongs to the bed and would only be able to inherit from the mother.\textsuperscript{47} It does appear quite unnecessary to punish the illegitimate child (or in this case, a child resulting from assisted reproduction) by depriving him/her of their inheritance simply because of the acts committed by their parents. But even so, it should be noted that assisted reproduction through non-traditional methods does not lead to an act of zina (unlawful sexual intercourse).\textsuperscript{48} This leads to a question as why a biological father should not be allowed to claim the paternity of the child if his contribution was a sperm donation in a lab setting. The act of sexual intercourse has not occurred nor is the intent present.

This also brings one to the principle of acknowledgment. In \textit{Asma Naz v Muhammad Younas Qureshi}, the Supreme Court held that the child can be granted legitimacy and paternity through acknowledgment.\textsuperscript{49} The court provided an understanding of the distinction between adoption and acknowledgment. Adoption occurs when the line of ancestors of the child is not hampered with. In contrast, acknowledgment occurs when a child of unknown paternity is integrated into the family as if s/he was born through a legitimate wedlock. Under this principle, the law of inheritance would apply as it applies to a legitimate child. This principle of acknowledgment can be developed for the use of intended parents in the circumstance of a child

\textsuperscript{45} (n 2) [16].
\textsuperscript{47} PLD 2015 SC 327.
\textsuperscript{48} The Offence of Zina (Enforcement Of Hudood) Ordinance, 1979, s. 4:
‘A man and a woman are said to commit ‘Zina’ if they wilfully have sexual intercourse without being married to each other.
Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of Zina.’
\textsuperscript{49} 2005 SCMR 401.
resulting from third party assisted reproduction in order to integrate the child into the family. A child born from third party assisted reproduction would be claimed by the intended parents as long as there is no objection by the biological parent(s). Confusion over the lineage would not lead to the destruction of the inheritance laws. Against this backdrop, the principle of acknowledgment already provides a mechanism within the Pakistani case law as to how to avert discrimination in inheritance law when it comes to non-legitimate children.

Shi‘ite Discourse on Third Party Assisted Reproduction

The various interpretations of the Sunni Schools have remained remarkably tame and unwilling to ignite any controversy. The first birth from IVF was in 1978.\(^{50}\) In 1980, the Grand Sheikh of the reputed Al-Azhar University of Egypt issued a \textit{fatwa} declaring IVF to be permissible as long as the egg and sperm of the fertilized embryo was of a husband and wife.\(^{51}\) No third party could infringe upon the sexual relation and procreation within the marriage contract.\(^{52}\) This reasoning appeared to have its basis in protection of sanctity of life,\(^{53}\) to restrict conception outside marriage,\(^{54}\) to prevent confusion of family lineage,\(^{55}\) to check the mixture of genealogy,\(^{56}\) and to stop the equation of the status of motherhood to the gestational surrogate.\(^{57}\) Since then, this particular \textit{fatwa} has obtained widespread acceptance from Sunni jurists. The Fatwa Council of Malaysia approved the use of frozen embryos in 1982 but only where the couple in question was married.\(^{58}\) At the same time, it denounced pregnancy through preserved sperm or embryo after the marriage had ended either through divorce or death. Similar view was reflected in Saudi Arabia at 1985 when Fiqh Academy of Makkah decreed that \textit{vivo} (within the body) and \textit{vitro} (outside the body) fertilization to be allowed by the Sharia.\(^{59}\) But, again, this acceptance did not extend to the third party assisted fertilization. Furthermore, the Fiqh Academy of Makkah opined that assisted reproduction should only be used in cases of necessity.


\(^{51}\) Ibid.

\(^{52}\) Marcia C. Inhorn, “‘He Won’t Be My Son”: Middle Eastern Muslim Men’s Discourses of Adoption and Gamete Donation’ (2006) 20 (1) \textit{Medical Anthropology Quarterly} 94-120.

\(^{53}\) The Qur‘an, 17:33.

\(^{54}\) The Qur‘an, 24:54.

\(^{55}\) The Qur‘an, 33:4-5, 25:54.

\(^{56}\) The Qur‘an, 33:4-5, 25:54.

\(^{57}\) The Qur‘an, 58:2.


\(^{59}\) Ibid, 143.
due to possibility of error. The stance adopted by the Sunni Scholars has prioritized lineage above all else. The basis of this reasoning appears to be that third party assisted reproduction would cause confusion as to the lineage of the child, which could result in problems regarding kinship, inheritance, and can possibly lead to incestuous relationships due to anonymity of donors.

The vast majority of Muslim countries have either followed the Sunni school of thought or have remained unclear regarding their own position. There are two exceptions, i.e., Iran and Lebanon. Both of these countries have a comparatively larger Shi’a population, which has resulted in an alternate discourse.

**Iran**

The Shi’a and Sunni positions on third party assisted reproduction were indistinguishable until 1999. In 1999, Ayotollah Khamene’i, the Supreme Leader of Islamic Republic of Iran, issued a *fatwa* allowing egg and sperm donation to be permissible.\(^{60}\) He did not consider third party assisted reproduction to constitute *zina* as the element of sexual intercourse was not present. The child would be legitimate and his/her legal relations would be the egg and the sperm donor. The child would not inherit from the intended parents. The male child would also become *na-mehrum* to the intended mother upon reaching puberty. It should be noted that the child being a *mehrum* to his intended mother due to her ‘milk-mother’ status was not considered by Ayotollah Khamene’i. This *fatwa* was considered to be quite liberal and his critics seem to be of the opinion that he was creating a movement of his own.\(^{61}\) While Ayotollah Khamene’i’s *fatwa* was impactful, the denial of third party sperm donation among Shi’ite scholars has since become prevalent. Ayotollah Yusef Madani-Tabrizi (1928-2013) was of the opinion that it was not permissible to artificially inseminate a woman with the sperm of a man who was not her husband.\(^{62}\) This would be so even if she or her husband had given the permission. However, even Ayotollah Yusef Sane’I did not consider sperm donation by a stranger to be permissible.\(^{63}\) He did follow the reasoning of Ayotollah Khamene’i and Ayotollah Madani-Tabrizi that the child belonged to the sperm and egg donor. However, from this point he diverged. He held that the sperm donor could only be considered the father if he was recognizable and not if he has given up his

\(^{60}\) (n 50).


\(^{62}\) Ibid.

\(^{63}\) Ibid.
ownership by giving his sperm to the sperm bank. The intended father’s relationship with the child was that of a stepfather, and the former could be *mehrum* to the latter if the intended father had engaged in intercourse with the mother. By implication, he allowed artificial insemination if the egg is fertilized *in vitro*, i.e. outside the body and within the lab setting where an embryo is created and transferred into the woman’s body.

Identification of the egg donor and sperm donor as the legal parents of the child implies that the surrogate would not have a right to the child. Grand Ayotollah Hossein Ali Montazeri declared gestational surrogacy to be permissible as long the surrogate was unmarried. The surrogate mother was equated to a milk-mother, and as pointed out by K. Aramesh, this reasoning reflected the jurisprudential principle of *isaliat-ol-ibaha* where everything is considered permissible unless explicitly declared forbidden by the Qur’an and/or the Sunnah. It should be noted that the issue of being a non-*mehrum* may not arise specifically in Iran which passed the Protecting Unprotected Children Act 1975 in order to allow legal adoption of a child by a family. Under this Act, the family would at the very least need to constitute a husband and a wife who have been together for at least five years. This shows that the welfare of the child and happiness of the married couple has been prioritized above the presumed illicitness of a non-*mehrum* raising the child.

Following Ayotollah Khamene’i’s *fatwa* regarding the permissibility of IVF, the Iranian Parliament passed a bill in 2002, allowing sterile married couples to take advantage of third party assisted reproduction. However, the bill was not approved by the Guardian Council that supervises legislation’s conformity with the Islamic principles. In 2003, the Embryo Donation to Infertile Couples Act 2003 was passed. The Act allowed egg donation under the arrangement of *mut’a*. *Mut’a* is a temporary marriage contract between an unmarried woman and a married or unmarried man for a specific time period and in return for some financial provision. Under this Act, the husband would have to enter into a *mut’a* agreement for the entire period of the procedure with the egg donor. This would then avoid the implications of *zina*. Under this reasoning, sperm donation was not allowed. While

64 (n 28).
65 Ibid.
polygamy is allowed in Islam and in Iran, polyandry is not; hence, the wife cannot contract a *mut’a* agreement with another man in order to take advantage of sperm donation. Furthermore, sperm donation has been marred with controversy as it would call into question the paternity of the child. This Act made embryo donation permissible as long as the donation was from one married couple to another. However, this appears to be in contradiction with the reasoning for allowing egg donation and for disallowing sperm donation. As pointed out by Abbasi-Sharvazi et al., in embryo donation, the paternity of the father is still disrupted and does cause the acceptance by the woman of the foreign sperm when the embryo is transferred into her. These points in contention do not appear to have been considered by the relevant authorities while passing the legislation. Since then, legal loopholes have been employed in Iran to bypass certain limitations upon third party assisted reproduction. The lack of effective enforcement coupled with discrepancy between religious rulings has created ‘legal-moral-medical ambiguities’. According to Tremayne, women for the purpose of being morally correct and to take advantage of sperm donation facilities at the same time, divorce their infertile husbands before going through the artificial insemination procedure and then upon expiration of the *iddat* period, they remarry their previous spouse. The plurality of juristic opinions coupled with the legislature’s high regard for the success of marriage over clear lineage lines has led to availability of third party ART in Iran. Any restriction imposed by legislation upon third party assisted reproduction has been carefully circumvented.

**Lebanon**

The stance in Lebanon on the third party assisted reproduction is the same as in Iran. Grand Ayotollah Fadhaltallah of Lebanon declared egg donation to be permissible as long as it took place within the *mut’a* arrangement. However, he does not allow sperm donation. He argues that there is no formal institution regarding adoption in Islam which would give the position of intended father any validity. The intended father would be *na-mehrum* to the female child. Furthermore, the child would have a legal relationship with

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69 Ibid.
70 Ibid.
the biological donor and this can pose as a contradiction for the infertile parents when having children of their own. While majority of the Lebanese Shi’ite Muslims have followed the lead of Ayotollah Fadhallah, the political party of Hizbullah has also commanded a great deal of social and religious influence within the region. Hizbullah has followed the direction of Ayotollah Khamene’i of Iran, and, as previously noted, he issued a fatwa in 1999 in which he held egg donation, sperm donation, and gestational surrogacy to be permissible. Even more so, he did not consider the mut’a arrangement to be necessary. This has allowed two interpretations of third party assisted reproduction to exist simultaneously in Lebanon. The Lebanese Parliament, unlike Iran, has not passed any legislation that would admit a particular fatwa into the realm of legal validity. The plurality of juristic opinion and the lack of legislation has allowed the average Lebanese to take advantage of third party assisted reproduction without any restrictions.

**Conclusion**

The FSC in *Farooq Siddiqui v Mst Farzana Naheed* has followed the traditional view of Sunni scholars who regard artificial insemination with the aid of an external donor contrary to the injunctions of the Qur’an and Sunnah. As a result, principles such as welfare of the child and acknowledgment, developed by the Pakistani courts, have been sidelined. The FSC has declared third party assisted reproduction illegal on the grounds that it will lead to emotional attachment, exploitation of the surrogate mother, and destruction of inheritance laws. In the process, the FSC has not considered as to how different jurisdictions have tackled the same issues by considering the welfare of the child to be the paramount concern for the court. In order to avoid exploitation, the United Kingdom has refused to recognize surrogacy contracts while India has also considered banning gestational surrogacy where foreign nationals are concerned. As for destruction of inheritance law, it should be noted that the principle of acknowledgment has been used by the courts in Pakistan to integrate non-legitimate children into the family. Even otherwise, the child would still be able to inherit from the egg donor as an illegitimate child.

On the other hand, the plurality of opinions among Shi’a scholars is evidently visible ever since Ayotollah Khamene’i issued a fatwa in this regard. Since then, muta arrangement has been consistently relied upon which, as a consequence, precludes the option of sperm donation for a

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72 (n 52).
married couple. One can observe a similar pattern in Lebanon. The FSC has prioritized the preservation of lineage over reproduction within a marriage and has suggested criminalization of the acts concerned with third party assisted reproduction. The extremity of the response appears to be somewhat unwarranted, given that in the Shi‘ite school, no conclusive interpretation has been adopted with regards to third party assisted reproduction. Furthermore, to criminalize such acts would be to suggest illicitness where none exists as sexual intercourse outside of marriage has not occurred. Unfortunately, in the 
Faroog Siddiqui case, a strict interpretation has been followed and, as a result, the avenues available to those suffering with infertility have been restricted.
Pakistan’s Need for Amicable Resolutions Concerning Foreign Investment Disputes: The Reko Diq Case

Maulana Abdul Haque v Government of Balochistan
PLD 2013 SC 641

Abdul Rafay Siddiqui*

Introduction

This case note explains that Pakistan should domestically resolve its foreign investment disputes through a multi-tier dispute resolution mechanism. Pakistan is an emerging market in terms of attracting foreign investment. In this regard, a robust dispute resolution mechanism concerning foreign investment disputes should be established and enforced. This will provide a solution to escalating international arbitrations which Pakistan confronts. In this case note, the judgment of the Supreme Court of Pakistan (‘SC’) in Maulana Abdul Haque v Government of Balochistan1 is explained and critically analyzed.

In this case, the SC held that the ‘Chagai Hills Exploration Joint Venture Agreement’ (‘CHEJVA’) signed between the Balochistan Development Authority (‘BDA’) and Broken Hill Properties Minerals Intermediate Exploration Inc. (‘BHP’) in 1993 was void ab initio. The CHEJVA granted exploration and mining licenses to BHP in the Reko Diq area, which is located in the Chagai District of Balochistan. Public concern regarding CHEJVA increased in subsequent years as amendments were made to the agreement, leading to the involvement of the Balochistan High Court and the SC in the matter. The Balochistan High Court validated the agreement, but this ruling was reversed by the SC. Aggrieved by this decision, the foreign companies that were party to the litigation referred the dispute to the International Centre for Settlement of Investment Disputes (‘ICSID’) for arbitration. The ICSID gave its verdict on 21 March 2017, holding Pakistan liable for breaching a bilateral investment treaty.2

This case note explains the facts of the case, elaborates the parties’ arguments, describes the ruling of the SC, and provides an analysis of the ruling. The analysis explains that recourse to international arbitration was avoidable had that the SC adequately deliberated on the differences between

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* B.A LL.B (Hons) LUMS.
1 PLD 2013 SC 641.
2 Tethyan Copper Company v Islamic Republic of Pakistan, ICSID Case No. ARB/12/1.
public and private international law. A deliberation of this nature would have given the SC an opportunity to consider an amicable settlement for safeguarding Pakistan’s commercial and indigenous concerns. Although the Reko Diq area is valuable for its natural wealth, it is equally significant for the local indigenous population because of their cultural attachment to the land. The case note recommends other approaches for resolving foreign investment disputes which Pakistan can take into consideration.

**Case Background & Facts**

In 1993, BDA entered into a joint-venture agreement with BHP Minerals for the development of mining capabilities in Chagai Hills, located in the Tethyan Belt. The Tethyan belt stretches from Turkey and Iran into Pakistan and is considered to be amongst the world’s top five goldmine reserves, in addition to bearing a vast amount of copper resources. Even though the area has an abundance of valuable natural resources, this supply has remained untapped due to Pakistan’s lack of financial and technical expertise required to mine these areas. Consequently, contracts are signed with foreign mining companies, which in return claim a huge share of the benefits. In this case, BHP Minerals was entitled to a 75% interest, whereas BDA would have 25% interest. In the years subsequent to its signing, the CHEJVA was amended multiple times in favor of the mining companies.

The amendments to the CHEJVA concerned the substitution and addition of new parties and the relaxation of the Balochistan Mining Concession Rules 1970 (‘BMCR’) for ease of exploration in the area. The BMCR 1970 provided special facilitation for mining companies in exceptionally difficult cases. It was relaxed in 1994 as per BHP’s request to the Government of Balochistan. However, on 4th March 2000, an addendum to the CHEJVA was executed which replaced the BDA with the Balochistan Government as the new contracting party and allowed the addition of new mining companies to the contract. Consequently, through an Option Agreement, BHP formed an exploration alliance and a new company called the Tethyan Copper Company (‘TCC’) was formed. In such circumstances, the creation of a new company is a means of allocating risk, as it has a separate legal personality, distinct from its parent company. The new company will bear any losses, whereas the parent company can still benefit from the profits. TCC then conducted further explorations and concluded

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3 (n 1) [2].

4 Chagai Hills Exploration Joint Venture Agreement, art. 3.

5 An ‘Option Agreement’ entitles one of the parties’ to purchase, sell or benefit from an asset at a specific price in the future.
that the area had substantial amounts of copper and gold resources. For ease of further explorations, the Balochistan Minerals Rules 2002 (‘BMR’) were promulgated in light of BMCR 1970’s relaxation in 1994. After the promulgation of BMR, TCC applied for new exploration licenses as the new rules granted TCC complete control over the prospection and exploration of the area. In 2006, through the signing of a Novation Agreement,\(^6\) TCC was officially granted 75% interest in the project. Although the adjustments made to the CHEJVA intended to accommodate the substitution and addition of contracting parties and the relaxation of BMCR 1970, the constitutionality of such changes was called into question.

In 2006, petitions were filed before the Balochistan High Court challenging the validity of the CHEJVA and ensuing agreements. The Balochistan High Court held the CHEJVA to be valid, and considered the relaxation of the BMCR 1970, the enactment of BMR and other acts of the respondents to be legal. Constitutional petitions were then filed before the SC challenging the Balochistan High Court decision. The petitions questioned the validity of the licenses granted to the mining companies, on the basis of being non-transparent and unfair since national laws protecting vital interests of the people of Balochistan and Pakistan had allegedly been violated.

**Parties’ Arguments**

The petitioners contended that the agreements were illegal, as the process of granting the mineral rights was marred by corruption. As the mining companies’ were not eligible for the grant of licenses under the BMCR 1970, therefore, they lobbied for relaxing the rules in 1994. According to rule 98 of the BMCR 1970, the requirement for the grant of relaxations is that *individual hardship*\(^7\) needs to be proven. In the present case, no details of any hardship were submitted by the mining companies and the relaxations were granted arbitrarily as per the requests of BHP. Moreover, relaxations can only be granted to those companies which are incorporated or registered in Pakistan; however, BHP was neither incorporated nor registered in Pakistan. The effect of the relaxations was that the mining companies were granted a larger area and additional time to prospect, contrary to what was allowed under the BMCR 1970. Additionally, the petitioners asserted that the Balochistan Government’s actions were *ultra vires*, as only the Federal

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\(^6\) A ‘Novation Agreement’ can replace an original party to a contract with a new party.

Government had the authority to exempt and relax the rules. After the relaxations, the new rules promulgated under the BMR 2002 were heavily influenced by the respondent companies’ lobbying. The authority which the respondent companies exerted through lobbying was undemocratic and an act of corruption. Furthermore, the grant of complete exploration rights to TCC as per the Novation Agreement was illegal since there was no public advertisement for call of tenders. Therefore, it was argued that the CHEJVA and all the ensuing agreements were void \textit{ab initio}.

The respondents, on the other hand, argued that the CHEJVA was the creature of a democratic process, as it resulted from negotiations involving the Government, Chief Minister of Balochistan, the departments of Law, Planning & Development and Finance, and had been executed by the Governor of Balochistan. The relaxations were also granted after thorough deliberation by the Balochistan Government through an inter-ministerial committee. They were needed in order to facilitate the mining operations for the benefit of Pakistan. Moreover, the foreign mining companies operating in Pakistan were not mandated to be registered or incorporated in Pakistan for carrying out mining operations and the BMCR 1970 allowed the Balochistan Government executive authority to relax any rules.\footnote{Balochistan Mining Concession Rules 1970, rule 3 and 98.} TCC argued that the allegations in the present case had to be construed as being against BHP since TCC had not been formed when the relaxations took place in 1994. The Novation Agreement which led to the formation of TCC was a separate agreement and not subject to the CHEJVA. Therefore, even if CHEJVA was void \textit{ab initio}, that did not result in the Novation Agreement being the same. There was also no need for public bidding for grant of licenses as the Novation Agreement was not a transfer of rights. Therefore, all the relaxations which took place - the succeeding agreements, the formation of TCC and other actions of the parties - were lawful.

\textbf{Judgment}

The Honorable judges comprising the bench in this case were Chief Justice Iftikhar Muhammad Chaudhry, Justice Gulzar Ahmed and Justice Sheikh Azmat Saeed. The SC examined the records relating to the various clauses of the CHEJVA and the relaxation of rules. It held that the relaxations were unlawfully granted and consequently the contract was void \textit{ab initio} since the mining companies were not registered in Pakistan.
The SC stated in its judgment that in accordance with rule 98 of the BMCR 1970, relaxations had to be granted on an *individual hardship* basis.\(^9\) As per this basis, parties have to show what difficulty has arisen that allows for grant of relaxations.\(^10\) The SC noted that the standard of hardship is an exceptional one, where the parties’ need to prove that extreme suffering had compelled them to request for relaxation of rules as their last possible option. A mere request without any justification of hardship by BHP Minerals did not meet the standard for hardship. All relaxations granted were, thus, *ultra vires* and beyond the scope of the provisions of the law.

The mining companies benefited from the relaxation of rules since they were granted prospecting licenses which covered a larger area and longer time duration than was allowed according to rule 42 of the BMCR 1970.\(^11\) The licenses could only be renewed for a period of three years; however, in this case, they were renewed for five years as per the companies’ requests. When the BMR 2002 came into force, the prospecting licenses had lapsed by then and the Balochistan Government became obligated to call for competitive bids in a transparent manner. However, there were no bids for tender through public advertisement and exploration licenses were arbitrarily granted to TCC. The licenses were granted for further nine years which the SC noted as an extraordinary and undue favour.\(^12\)

The SC held that the licenses were unlawfully granted since the companies were not registered in Pakistan. Despite the fact that they were repeatedly ordered to produce their certificates of registration, the companies failed to do so. The SC noted that since the mining companies could not prove that they were registered in Pakistan, they were not competent to be granted mineral licenses to explore and mine. In case of non-registration, the transfer of interest which led to the creation of TCC was also void. Similarly, the CHEJVA was also not registered as per section 17(1)(b) of the Registration Act 1908. The CHEJVA was the base on which the superstructure of the ensuing agreements was grounded on; therefore, the Addendum No.1, Option Agreement, the Mincor Option, the Alliance Agreement, the Novation Agreement, and the subsequent share-purchase agreements were also considered unregistered and void *ab initio*. The SC further noted that the BDA arbitrarily formed the agreement without the Balochistan Government’s authorization and therefore, all actions carried out

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\(^9\) (n 1) [34].


\(^11\) As per the rule, lease shall not be granted for more than 5 sq. miles area, but in the instant case, it was granted up to 1000 sq. km.

\(^12\) (n 1) [17].
by the BDA had no legal value. Finally, the SC reasoned that although foreign investment is vital for Pakistan’s growing economic interests, foreign investment agreements cannot be entered in disloyalty to the state and in breach of the law as provided in Article 5\textsuperscript{13} of the Constitution of Pakistan 1973. As a result, the CHEJVA and the ensuing agreements were declared void \textit{ab initio}, since they were entered into in violation of the ordinary and constitutional laws of Pakistan. During the course of the SC proceedings, arbitration before the International Chamber of Commerce (‘ICC’), and the ICSID were initiated by the respondent companies as per the dispute resolution clause of the CHEJVA.\textsuperscript{14}

**The ICSID Award**

A bilateral investment treaty claim against the Pakistan Government was instituted before the ICSID and a contract based claim before the ICC against the Balochistan Government. TCC claimed that it was wrongfully denied a mining license after its submission of a feasibility report in 2011, which was made after years of intensive research and investment. It sought provisional measures against the Government of Pakistan. The Government of Pakistan sent requests to the ICC and ICSID that the matter was already being adjudicated in the SC therefore arbitration proceedings should be stopped. The arbitral tribunals accepted Pakistan’s request and dismissed TCC’s request for provisional measures. However, the tribunals did not deny their jurisdiction on merits and ordered the parties to provide regular reports concerning their activities.

The ICSID proceedings resumed after the SC verdict. Pakistan argued that the CHEJVA was made unlawfully and therefore, any plea for damages by TCC had no legal effect. However, the ICSID ruled in favor of TCC by deciding the case on its own merits, notwithstanding the SC verdict. The ICSID held that Pakistan was liable for the breach of a bilateral agreement which resulted in damages to the respondent companies.

**Analysis**

\textsuperscript{13} The Constitution of Islamic Republic of Pakistan 1973, art 5:

‘(1) Loyalty to the State is the basic duty of every citizen.
(2) Obedience to the Constitution and law is the inviolable obligation of every citizen wherever he may be and of every other person for the time being within Pakistan.’

\textsuperscript{14} (n 4) art. 15.
Pakistan’s Need for Amicable Resolutions Concerning Foreign Investment Disputes: The Reko Diq Case

A thorough understanding of international law was crucial for settling the matter domestically, rather than providing an opportunity for the respondent companies to proceed with international arbitration. The SC in its judgment, however, overlooked the primary difference between the two branches of international law, which are public and private. Public international law concerns only the conduct of states as individual actors, whereas private international law regulates private relationships such as those of individuals and multi-national corporations (MNCs) across borders. Since public international law does not consider private parties’ as subjects, therefore they cannot institute cases in forums like the International Court of Justice (ICJ), nor can a case be brought against them. In this regard Article 34(1) of the ICJ Statute provides, ‘Only states may be parties in cases before the Court’. However, MNCs can institute cases against contracting states in forums like the ICSID. The differences between forums like the ICJ and ICSID are manifold. Firstly, ICJ considers that the sovereignty of states concerning their jurisdiction over disputes is vital, as cases are generally brought to the ICJ after exhaustion of domestic remedies. On the other hand, international arbitral tribunals do not consider exhaustion of domestic remedies as an essential requirement. Since the arbitration clause is a separate agreement, therefore, arbitral tribunals can be directly approached regardless of exhaustion of domestic remedies. Secondly, whereas the proceedings in the ICJ are held in the open, international arbitral proceedings are not open, and the standards applicable to many matters concerning evidence and witnesses are different from those employed in domestic courts. Since Pakistan was involved in a private international dispute, recourse to the ICSID was going to be invoked even without exhaustion of domestic remedies. Therefore, the SC should have considered that the respondents would invoke the arbitration clause for their foreign investment claims.

As foreign investment increases, especially in developing economies, arbitration clauses are an increasingly prominent and major part of any

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15 ‘International Law Defined’ in Diane Marie Amann (ed) Benchbook on International Law § I.A
16 Statute of the ICJ, Chapter II - Competence of the Court, art. 34.
17 ICSID Convention, Regulations and Rules, art. 1(2):
The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.
18 This is as per the separability clause. This means that, even if a contract is considered void, the arbitration clause is still treated as a separate agreement and is not considered void, since it provides for dispute resolution.
bilateral investment treaty. This has exponentially increased the number of cases being referred to the ICSID. For instance, the average number of cases being registered before the ICSID every year from 1972 to 1996 was 1.5. From 1997 to 2012 the average significantly increased to 23.8. Developing economies, like Pakistan, must endeavor to resolve foreign investment disputes domestically in order to avoid liability imposed by international arbitral tribunals. Furthermore, the separability clause is generally unenforceable if the contract is considered void ab initio. This is, however, more applicable in a domestic context. The ICSID can still be referred to for arbitration since it is an independent international forum as per Article 41 of the ICSID Convention, which provides that it is a judge of its own competence. For instance, in AMCO v Indonesia, the Tribunal stated that the verdicts of the domestic courts are not binding on ICSID since it is a separate and an impartial forum for dispute resolution. These are important distinctions between private and public international law, which the SC in the Reko Diq case did not take into serious consideration. It wrongly believed that exhaustion of domestic remedies is important for international arbitral tribunals to have jurisdiction. Moreover, since there are different standards for evidence in international arbitrations, the evidence concerning the corruption of TCC was deemed insufficient. ICSID did not consider itself bound or influenced in any manner by the SC verdict, as it considers itself an independent and impartial tribunal. However, this assertion that international arbitral tribunals are impartial is a contentious one.

A critical inquiry from an ‘indigenous peoples’ perspective indicates that the ICSID is not inclined towards indigenous concerns. It looks at the dispute as a mere contractual one between the parties; rather than impartially inquiring into the impact on the local population. In this way, human rights discourse concerning indigenous peoples can potentially be overlooked in international arbitrations. The UN defines indigenous peoples as those who consider themselves culturally distinct from other groups of people living in the same territories and who have a vital cultural interest to protect their

20 ICSID Case No. ARB/81/1, [63].
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identity for transmission to future generations. The ‘UN Declaration on the Rights of Indigenous Peoples’ (‘Declaration’) is a seminal document in this sense, as it incorporates customary international law regarding indigenous people. Article 18 of the Declaration provides that the indigenous people have an inherent right to the use of their lands and in the decision-making process affecting their territories. The state has to provide protective mechanisms to ensure that the local population’s right over the natural resources is not exploited. As per the Constitution of the Islamic Republic of Pakistan every Pakistani citizen is equal, but the state has to ensure that the cultural values of each group of people are also safeguarded. This is according to a holistic reading of Article 25 of the Constitution, which provides for equality of citizens, and Article 28 of the Constitution, which provides for the right to culture. It is important to see the Baloch people as an indigenous population. The Baloch people comprise an association of various tribes and clans, and even though those tribes have their own cultural differences, they see each other as part of one unique Baloch identity, sharing common culture, land, ancestors, traditions, and language.

Therefore, it is an international and constitutional obligation of the State of Pakistan to consider indigenous peoples’ claim over their land in Pakistan. It is these important practical aspects concerning jurisdiction and impact on indigenous people which the SC should have been cognizant of in order to consider an amicable resolution.

The main focus of the SC should have been to settle the dispute amicably within Pakistan in order to protect indigenous and national concerns. It is important to consider what steps the SC could have taken into account before declaring the CHEJVA and all the subsequent agreements as void ab initio. Had the SC considered that the ICSID is a private international law forum which is not bound by its decision, a different approach to resolving the dispute could have been adopted. It could have foreseen that the respondent companies had invested around half a million US dollars into the project and the denial of the mining license would put them at a huge loss. Specific directions to a commission for further inquiry

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23 The Article reads: ‘Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions’.
or investigation were needed so as to specify the source of the dispute and take corrective measures rather than terminating the contract. The SC mentioned that foreign investment is needed for the growing economy of Pakistan, but it cannot be at the cost of the state’s sovereignty. Chief Justice Iftikhar Chaudhary stated, ‘… Only State power can authoritatively influence and, when necessary, exercise coercion on all aspects of life in human society. State power is in effect universal and sovereign in nature’. On the other hand, this sovereignty is not an arbitrary one.

The sovereignty of any country is not absolute and is subject to its international obligations. In this regard, Pakistan has ratified the United Nations Convention on the Recognition and Enforcement of Arbitral Awards 1958 (‘New York Convention’) and the ICSID Convention, 1966 in 2011 by enacting the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act 2011 and the Arbitration (International Investment Disputes) Act 2011. Article III of the New York Convention provides, ‘Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.’ Article 54(1) of the ICSID Convention also provides, ‘Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.’ Therefore, since Pakistan is a party to the Conventions it is legally obligated to follow their rules and procedures concerning the enforcement of foreign and international arbitral awards. The SC, on the other hand, stated that in case of an adverse award by the ICSID the award shall not be enforced in Pakistan on the grounds of public policy. This pre-determined approach by the SC is significantly detrimental to Pakistan’s economic concerns. It sets a bad precedent for foreign investors who will hesitate to invest millions of US dollars in a country which is unable to resolve matters domestically and demonstrates a reluctance to follow its international obligations. Hence, the SC should have taken into account the aforementioned factors concerning the differences between private and public international law, the impact on the local indigenous population, and Pakistan’s commitment to its international obligations. By being cognizant of these circumstances, the SC should have pursued a domestic settlement rather than providing an opportunity for international arbitration.

25 (n 1) [132].
26 (n 1) [58].
Pakistan’s Need for Amicable Resolutions Concerning Foreign Investment Disputes: The Reko Diq Case

For future instances, policy-makers and the courts can learn a lot from the Reko Diq fiasco. Dispute resolution mechanisms, other than arbitration, can be envisaged for settling foreign investment disputes. Mediation is an effective means of alternative dispute resolution between the parties. It is primarily a voluntary mechanism in which the parties settle their disputes through the help of a mediator. Mediation as a dispute resolution methodology is a more favorable approach for indigenous groups, like the Baloch, who resolve their disputes through mediatory processes. The role of an arbitrator is to render an award to one party after the oral proceedings have been conducted, whereas the mediator aims to achieve a viable solution and settlement through negotiations. Most bilateral investment treaties do include such preliminary measures, as did the CHEJVA, however as noted by the United Nations Conference on Trade and Development (‘UNCTAD’), the time frame for such negotiations ranges from three to six months which has proven to be inadequate. In order for such preliminary measures to be effective there is a need for the relevant government authorities to monitor the implementation of the agreement, conduct fact-finding missions and exchange information so that the escalating conflicts between the investors and the state may be prevented. The state should endeavor to establish an effective multi-tier dispute resolution mechanism.

Furthermore, sustainable development needs to be undertaken, keeping in view the interests of the indigenous people of Pakistan. The United Nations General Assembly has adopted the 2030 Agenda for Sustainable Development titled ‘Transforming Our World: the 2030 Agenda for Sustainable Development’. The Agenda addresses that sustainable development must ensure eradicating poverty, protecting planet and ensuring prosperity for all. States are also encouraged to include contributions of indigenous people in national policy-making. Keeping sustainable development in view, Pakistan should consider the participation of indigenous peoples in international investment agreements. In this way, the concerned parties will be provided more opportunities to engage with each other in an amicable manner concerning foreign investment disputes.

28 (n 4) art. 15.1.
31 Ibid, 79.
Conclusion

In the coming years as foreign investment increases, Pakistan can, and should, take valuable lessons from the *Maulana Abdul Haque v Government of Balochistan*, famously known as the *Reko Diq* case. This case note has explained the judgment of the SC, keeping in view the ruling of the ICSID in 2017. State institutions need to take note of the increasing reference to international arbitral tribunals. Holding contracts which involve huge sums of investments to be void *ab initio* is not the right move for future instances; since arbitral tribunals can still be approached regardless of the court decisions. In this regard, a multi-tier dispute resolution mechanism will allow the concerned parties to mutually engage and resolve their disputes, rather than exacerbate them. Such a mechanism can be inspired by indigenous people’s methods of dispute resolution and involve them as equal stakeholders. Since Pakistan is an emerging economy, policy-makers need to consider the various possibilities on how to domestically resolve foreign investment disputes in an effective and transparent manner.
Corporate Reorganizations: Debating the Adoption of Pakistan’s Draft Corporate Rehabilitation Act 2004

Salman Ijaz*

For over a decade, the Securities and Exchange Commission of Pakistan (‘SECP’) has been soliciting proposals and comments on iterations of a Draft Corporate Rehabilitation Act (‘DCRA’) that aims to provide companies facing bankruptcy with a legislative scheme to restructure their debts in order to return to productivity. The 2004 version of the DCRA, which until very recently was the most current form of the Act, attempted to enact the functional equivalent of Chapter 11 of the US Bankruptcy Code in Pakistan. Though many material aspects of the proposal have been finally shelved,¹ the current draft being considered by the parliament still retains some worrying features. Further, and more materially, the 2004 DCRA raised some interesting broader questions related to the viability and desirability of legal transplantation in the context of corporate law generally.

To examine some of these inquires, I examine: i) whether the enactment of the 2004 DCRA would have sufficiently emulated the benefits of Chapter 11 proceedings as conducted in the US; and ii) whether Pakistan’s institutions are sufficiently similar to the US in order to sustain Chapter 11-type proceedings. In doing so, I posit: i) that the nature of Chapter 11 proceedings and its attempt to mitigate particular kinds of conflicts of interests are ill-suited to Pakistani firms; ii) that Pakistan, in fact, does not possess the necessary institutions to sustain the benefits of such a regime; and iii) that an open-market based approach to reorganization provides better answers.

Further, by comparing the 2004 DCRA and Chapter 11 reorganization, I also hope to discuss whether conventional corporate governance appropriately caters for the specific nature of financially distressed companies in Pakistan. A lot of the work on corporate governance has focused on the management of conflicts of interests in corporations that are going concerns. However, there is comparatively sparse academic

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* B.A LL.B (Hons), LUMS.
literature on what happens to these conflicts when the company is failing, i.e. moving towards liquidation or reorganization. Insolvency laws impose a new paradigm of regulation and structural constraints on the actions of corporate stakeholders, and it is important to understand how these interests are realigned. This paper is an attempt to begin a discussion on the matter.

Structurally, I first briefly discuss the nature of Chapter 11 proceedings under the US Bankruptcy Code and the ways in which the Code aims to structure and mitigate the conflicts of interests arising between creditors and shareholders. I subsequently move on to examine the framework of the 2004 DCRA, the extent to which it emulated Chapter 11 proceedings, and whether or not this made it a viable scheme for the Pakistani market. Finally, I suggest alternative strategies available, and give my opinion on whether a market-based approach to reorganization can prove more successful.

Reorganization under Chapter 11 of the US Bankruptcy Code

Insolvency proceedings are largely a settlement of affairs between shareholders and creditors. Once a business venture (in the form of a company) has proven to be financially unviable, the creditors are interested in recovering what they can of their investment, while shareholders are interested in preserving their equity. Needless to say, the classical third category of conflict of interests (arising between ‘insiders’ and ‘outsiders’) is most prominently evident in such situations.

Chapter 11 reorganization is a voluntary process for failing companies. Reorganization allows a debtor company to obtain stays on its obligations to its creditors, and invites the intervention of Bankruptcy Courts to act as mediators as the debtor company renegotiates its liabilities, while at the same time attempting to restructure its capital to make the company financially viable again.\(^2\) There are two major components of a Chapter 11 reorganization: the Business Plan\(^3\) and the Reorganization Plan.\(^4\)


\(^3\) The Business Plan is the proposal of the Debtor-in-Possession to the Court demonstrating the measures and strategies the management plans to adopt to proceed with the business of the company once its reorganization is confirmed. Its purpose is to demonstrate to the Court that the company can sustain financially viable operations.

\(^4\) The Reorganization Plan is also proposed by the Debtor-in-Possession.
Chapter 11 reorganizations are substantially pro-debtor; they include the creation of entitlements that water down the secured interests of creditors, suspend personal guarantees, and create the right to write-offs of unsustainable debt. Beyond this, the debtor company has the first right to file a Reorganization Plan, usually during a period of exclusivity, and the creditors seldom oppose these plans. This is not to say that the ownership and control paradigm of the company remains the same as it was before the filing of Chapter 11 proceedings; the supervision of the company is either handed over to the US Trustee, or the existing management, or a debtor-in-possession. A significant benefit that the Chapter 11 route confers on the debtor company is that it reduces the transaction costs of negotiating settlements with creditors, especially in the cases of big, public companies. In certain circumstances, even the Reorganization Plans not agreed to by a majority of creditors can be implemented.

This is not to suggest that the creditors have no protections under Chapter 11. Perhaps the most important limitation placed on the ability of shareholders to influence the Business Plan and the Reorganization Plan is the court’s right to enjoin shareholder meetings when they result in ‘clear abuses’. This rule is in place to prevent the replacement of the management in order to leverage their bargaining position. Further, all creditors have a right of appearance before the court and can ask for relief against the automatic stay, or that the proceedings be converted to Chapter 7 Insolvency. The responsibility of determining whether or not to accept the restructuring plan falls on the shoulders of the Bankruptcy Court. Further, the creditor committees have a significant role in steering both the Reorganization Plan and the Business Plan. The biggest impediment to their interests, of course, remains the automatic stay of recovery proceedings and the suspension of their ability to recover as soon as a filing is made under Chapter 11. This includes the claims of both secured lenders as well as trade creditors. In addition to this, the absolute priority rule is also suspended, with senior creditors gaining priority over junior creditors during recovery.

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6 This is known as a ‘cramdown’. It allows courts to employ a standard of fairness and equity to selectively modify the terms of loans in order to improve the outcomes for all parties involved.


8 11 U.S.C. § 1109 (b).
Numerous institutional complementarities enable Chapter 11 proceedings to have some degree of viability, the most important of which is the existence of specialized Bankruptcy Courts, which possess a high level of judicial sophistication to operate successfully within the complex statutory scheme laid out by the Bankruptcy Code.\textsuperscript{9} Despite this, the activism of judges in Chapter 11 Reorganization cases has little correlation with the success of reorganization.\textsuperscript{10} Further, owing to the cumbersome process, and the need for constant judicial intervention/approval, the average time span for Chapter 11 proceedings to conclude is about 4-5 years.\textsuperscript{11}

**Reconciling Conflicts of Interests: The Creditors or the Shareholders?**

Reorganization emphasizes the disparity between the interests of shareholders, creditors, and management in financially distressed companies. Creditors are interested in securing the repayment of their dues; and, in the particular circumstances of firms that have filed for insolvency or reorganization, they stand to lose the most because they bear the brunt of the risk when it comes to new business ventures. Shareholders, on the other hand, bare lesser risk, particularly under Chapter 11 proceedings, owing to the termination of personal guarantees and the stay on recovery proceedings. It is in their interest for the company to opt for riskier investments that can revive the fortunes of the firm/company. For these reasons, the most important issues concerning governance and management that tend to surface concern the relative autonomy of managers to make decisions during a reorganization, the risk the firm ought to undertake during a reorganization, and for whose benefit should the management make decisions.\textsuperscript{12}

Owing to the termination of most contractual obligations upon the filing of Chapter 11 reorganization, most management compensation arrangements that attempt to tie shareholder interest to management self-interest become non-binding, and can be rejected.\textsuperscript{13} As a result, the post-filing process creates an opportunity for creditors and other stakeholders to capture management loyalty. The management’s duty of loyalty to the firm still remains intact; however, because the priorities of interest concerning the firm’s capital change, there is a degree of ambiguity as to whether the

\textsuperscript{10} (n 1).
\textsuperscript{11} (n 9).
\textsuperscript{12} Ibid.
management is being loyal to the company by mitigating risk to ensure recovery for the creditors, or by attempting to maximize shareholder value. Creditors may still find it viable to tie management compensation to the success of the company, particularly because courts are likely to abide by the wisdom of conventional fiduciary duty of the manager to the company, rather than the shareholders. On the other side, the autonomy of the management depends significantly on their incentive to stay in office and maintain favorable standing with the stakeholders who have the power to dismiss them. Managers have little employment incentives beyond the maintenance of their jobs because the stigma of being associated with a company going into reorganization/liquidation means their employability depends significantly on their ability to perform during the reorganization proceedings. In the ordinary course of events, this would have meant that the management acts in the interest of shareholders because they possess the means to discipline them through proxy contests etc., but, as discussed earlier, Bankruptcy Courts have placed a significant restriction on shareholder activism during reorganization proceedings. Simultaneously, creditors possess the means of displacing the management by petitioning for the appointment of a trustee, and despite being a rare practice, it remains a looming threat.

As far as the autonomy of the creditors and shareholders is concerned, it is possible for both classes to resist the Business Plan proposed by the management through their respective committees. Their success, though, is highly dependent on the degree of leverage that they have. Creditors, for instance, have far more leverage when the company requires additional finance to fund its Business Plan, and must enter into a new arrangement with its pre-existing creditors to provide new financing. This leverage is also greater with respect to the Reorganization Plan, which usually requires the consent of a majority of creditors, with the interests of equity holders taking a back seat.

On the other hand, shareholders are more successful in marshaling the loyalty of the management in circumstances where there is block shareholding by an activist shareholder. The threat of replacing management is more imminent and pressing in circumstances where the escalated transaction costs of organizing a proxy contest are absent.  

15 (n 1) 778.
16 Ibid, 785.
In either case, however, there is a notable neglect of other stakeholders’ interests, such as those of the company’s employees, suppliers, and the public at large. Scholars have suggested that the management ought to also consider the ramifications of the Business Plan on the society-at-large, owing to the fact that corporations also play a role as social institutions.\(^\text{17}\)

In all of these cases, the issue of loyalty and to whom it ought to be owed arises from the separation of the risk of future loss from the probability of gain, both in insolvent and marginally insolvent companies.\(^\text{18}\) In both circumstances, creditors stand to lose substantial portions of their investment, while they benefit only marginally from any potential gains, because the gains benefit ‘underwater’ shareholders. However, at the same time, too conservative Business Plans foreclose the possibility of rehabilitation because the creditors are interested in cutting their losses and recouping their investment through the liquidation of any remaining value.\(^\text{19}\)

**The Draft CRA in Pakistan: A Cause for Concern?**

The 2004 DCRA circulated by the SECP drew on many of the prominent features of Chapter 11 reorganizations. There was a procedure for both voluntary filing on behalf of the company,\(^\text{20}\) and involuntary cases on behalf of ‘interested parties’.\(^\text{21}\) The High Court had original jurisdiction to hear matters under the DCRA.\(^\text{22}\) To assist the Court in its dealings with the business aspects of the reorganization, a Technical Assistance Committee (‘TAC’) was proposed, which would be composed of financial experts ‘from the fields of accountancy, banking, economics, finance, insolvency, law or management’.\(^\text{23}\) Much like Chapter 11 proceedings, there were two procedures that the court could opt for. It could either appoint an administrator to take over the operations of the company,\(^\text{24}\) or appoint the existing management as the debtors-in-possession.\(^\text{25}\) The DCRA also


\(^{18}\) (n 1) 787.

\(^{19}\) Ibid.

\(^{20}\) Draft Corporate Rehabilitation Act (DCRA) 2004, s. 11


\(^{21}\) Ibid, s. 12.

\(^{22}\) Ibid, s. 4.

\(^{23}\) Ibid, s. 9.

\(^{24}\) Ibid, s. 24.

\(^{25}\) Ibid, s. 22.
incorporated the much dreaded Automatic Stay provision through section 15, which lasted until either the dismissal of the case, the finalization of the reorganization, the expiry of 180 days after the TAC had submitted its expert opinion, or upon conversion of proceedings to winding up proceedings.\footnote{Ibid, s. 15(3).}

Much like its American counterpart, the court was given substantial powers to mediate between and deal with the various stakeholders in the company, including creating exceptions to the Automatic Stay, ordering the delivery up of assets, and ordering appointments to assist the administrator etc.

The DCRA also mandated the creation of Creditor and Shareholder Committees,\footnote{Ibid, s. 33 and s. 34.} but the pro-debtor regime seemed to remain intact, especially in the cases of voluntary filing, where the debtor has the exclusive right to file a reorganization plan.\footnote{Ibid, s. 48.} The acceptance of a plan required the approval of ‘creditors holding at least two-thirds in value of the allowed claims of such class’,\footnote{Ibid, s. 51(2).} though under section 53, the court could still enforce a plan despite its rejection under the provided formulae if it comes to the conclusion that ‘(a) the plan does not discriminate unfairly; (b) the plan is accepted by at least one class of creditors; and (c) is fair and equitable with respect to each class of claims or interests’, much like a cramdown under Chapter 11. In addition, the DCRA established two new types of entities: the Corporation Rehabilitation Board, which is tasked with devising standards of administrations for distressed companies, and Corporate Restructuring Companies, whose purpose would be to acquire, restructure, manage or other deal with companies described above so as to restore them to financial health.

To assess the viability of importing Chapter 11 provisions into Corporate Insolvency law in Pakistan, it is important to evaluate whether the institutional configurations, ownership and control patterns, and the incentives of stakeholders are similar in both jurisdictions. The work that already exists in this respect suggests that this is not the case. The majority of large companies are closely-held family corporations with concentrated shareholding and a strong fusion of ownership and control.\footnote{Ali Cheema, Faisal Bari and Osama Siddique ‘Corporate Governance in Pakistan: Ownership, Control and the Law’ in Sobhan Farooq and Wendy Werner (eds), Comparative Analysis of Corporate Governance in South Asia (Bangladesh Enterprise Institute, 2003); Attiya Y. Javid and Rubina Iqbal, ‘Ownership Concentration, Corporate Governance and Firm Performance: Evidence from Pakistan' (2008) 47 The Pakistan Development Review 643.} For this reason,
there is a substantially higher risk of pro-shareholder expropriation at the expense of creditors and the company through proceedings under the 2004 DCRA. While the court may still maintain discretion to block board actions or shareholder meetings that can be shown to be clear abuses, it has been demonstrated that even in the US, there is no predictability concerning the kinds of actions the court will block or allow, thereby giving a management strongly aligned with the shareholders ample room to maneuver.

A problem raised specifically in the context of family firms where family members are both owners and managers of the company is the release of personal guarantees. Creditors often demand personal guarantees from managers of corporations as collateral for the extension of credit, but since the managers of family-owned companies are also shareholders, they benefit from the windfall of the cancellation of personal guarantees. This drastically distorts the incentives of the existing shareholders/management to provide a financially viable, rather than an inflated, optimistic Business Plan, knowing that they will not have to bear the consequences of it failure.

Related to the issue of state capacity and institutional complementarity, one of the major issues related to implementing the 2004 DCRA is the absence of an efficient apparatus to implement the complex arrangements that come about under Chapter 11-type proceedings. While there are specialized Bankruptcy Courts that deal with Chapter 7 and 11 cases in the US, the DRCA tasked the High Courts with this responsibility. Despite the creation of the TAC to aid the courts, it is foreseeable that proceedings under the 2004 DCRA would have been even more protracted and cumbersome than those in the US. Even if that concern could be remedied by instituting specialized courts, the 2004 DRCA had a mechanism for several appeals, the determination of which could delay the finalization of reorganizations far beyond the time-scales envisioned by the DCRA. The delay of proceedings would create an incentive for debtor companies to use the statute to defeat debt-recovery proceedings by their creditors, and take full advantage of the Automatic Stay provision to postpone restructuring indefinitely. Rather than facilitating the realization of Non-Performing Loans, the DCRA would have provided for the means to even further delay their recovery and conversion.

31 (n 1) 776.
Looking Elsewhere: Private Corporate Restructuring

The discontentment with the broad, ill-defined, and open-ended process under sections 284-287 of the Companies Ordinance 1984 spurred the need for more clearly defined procedures for corporate rehabilitation, but the 2004 DCRA represented too significant a departure from convention. As the current version of the DCRA also reflects, any legislation on the subject should aim to build on existing structures and conventions rather than attempt to reinvent the wheel. For this purpose, there are many other models that can be consulted.

A majority of jurisdictions around the world find out-of-court settlements to be much more viable. Iterations of the UK model of Company Voluntary Arrangements (‘CVA’) have been adopted in many common law jurisdictions such as Canada and Australia. The UK Insolvency Act provides that a company propose a scheme of arrangement for restructuring to its creditors, through which the creditors accept some variation of an immediate settlement, in combination with write-offs and equity interest in return for a deferral in making all debts immediately due and payable. Owing to the contractual nature of the arrangement, it is highly flexible, and can be tailored to the terms and circumstances of the imminent default. Further, it minimally involves the court apparatus and is thus much speedier and expeditious. The proposal needs to be approved by creditors who hold three-fourths of the value of the debt, and binds dissenting creditors to the plan. A licensed insolvency practitioner mediates the CVA, and while a company is under administration, there is a bar on creditor proceedings against the company except with the court's permission. This model has proven fairly successful in the UK.

By contrast, corporate rehabilitation in India is largely state-driven and has had mixed results. The process of identifying and dealing with ‘industrial sickness’ is laid out in the Sick Industrial Companies Act 1985 (‘SICA’). The SICA established a Board for Industrial and Financial Reconstruction (‘BIFR’), which acts as a quasi-judicial body tasked with devising appropriate strategies for identifying, taking control of, and reviving

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32 (n 3) 17.
34 (n 20); In the UK, about 75 percent of companies that open a CVA procedure survive.
35 (n 3) 18.
sick industrial units. The SICA regimen is also voluntary in nature, and shares similarities with the American system in that there is an Automatic Stay on recovery proceedings and executive contracts. The biggest problem with the SICA is the inherent procedural and legal time delays built into the statute that prolong proceedings to well beyond the 4-5 years estimate under Chapter 11 proceedings. As a matter of fact, it can take up to a year just to determine whether or not a particular company falls within the definition of a ‘sick unit’ under SICA. Further, because the scheme places the determination of the Rehabilitation Plan on the shoulders of the state, the incentive to enable better coordination between creditors and debtors is undermined, leading to inefficient outcomes. Rent-seeking and political pressure further complicates proceedings. Cumulatively, these problems have disabled SICA from becoming an efficient way of solving India’s rampant industrial sickness.

Studies conducted by the World Bank, too, have concluded that the State should have a minimal role in the resolution of corporate reorganization and asset management. One such study proposes 12 principles around which countries should plan their Insolvency Laws. These principles include restricting the role of the government to facilitation, coordination and leadership (Principle 1), the need for speedy recognition and enforcement mechanisms (Principle 2), prompt recognition of losses (Principle 4), supervision and regulation (Principle 6), legal frameworks for creditors rights during insolvency (Principle 7), informal corporate workouts and restructuring (Principle 8), and involvement of the private sector (Principle 12).

At the same time, it would be helpful to institute minor corporate governance reforms that are specifically targeted towards companies opting for reorganization. LoPucki and Whitford suggest that the best course of action regarding corporate governance is to adopt a rule mandating that the management aims to maximize the value of the company's assets instead of pursuing the interests of any one class of stakeholders while contracting to provide. They argue that while wealth maximization may create the possibility of greater loss, it has significant distributional effects such as creating countervailing influences to discipline company management.
They simultaneously argue that in order to deter excessive risk taking, there should be schemes of risk compensation payments\textsuperscript{42} for such creditors so that management is disincentivized from excessive risk-taking. While it is difficult to predict accurately where the loyalties of the management will swing during reorganization proceedings, there is data to suggest that management gains more from avoiding the question of loyalty altogether.\textsuperscript{43}

It is also important to consider whether the law should treat business of different sizes the same way. Undoubtedly, a developing country like Pakistan ought to create legal regimes that enable small and medium businesses to thrive. Jurisdictions across the world, including the US and the UK, have special provisions for the reorganization of small enterprises, and the DCRA should provide for special considerations and relaxations for small businesses. The same argument may also be applied to infant industries and emerging markets, such as IT. It would not be appropriate to comment on the viability of these measures given the limitations and constraints of this paper, but this area of inquiry requires further research.

**Conclusion**

It seems that the more viable route to take concerning the DCRA is to move in the direction of lesser state intervention, and adopting stronger corporate governance practices, rather than putting even more pressure on an already strained judicial system. Some of the newer drafts of the DCRA appear to be moving in this direction. Chapter 11 proceedings are extremely sophisticated and cumbersome and are only suitable for jurisdictions that have developed all the necessary complementarities to make it effective. Further, while Chapter 11 proceedings operate in a paradigm where they aim to curb the influence of strong financial institutions so that companies can be given room to recover, the balance of power in Pakistan is substantially different. Here, the volume of non-performing loans is excessive, and any measures that will exacerbate that problem ought to be avoided.

As an afterthought, I think it may be helpful to be cognizant of the political determinants influencing the passage of the 2004 DCRA. After all, it was strongly resisted by a number of large commercial banking establishments and financial institutions for over 12 years.\textsuperscript{44} The pressure to

\textsuperscript{43} Ibid.
introduce Chapter 11 proceedings, on the other hand, appeared to come from industrialists, who evidently have sizeable influence. While an investigation of the political determinants of corporate law with respect to corporate rehabilitation is beyond the scope of this review, it may be worthwhile to investigate how the relative powers of these two stakeholders in various jurisdictions determine the nature of rehabilitation law a jurisdiction adopts. From the pace of things, such an inquiry and a corresponding prediction will probably precede the legislation that confirms or rebuts it. At any rate, the fight over the DCRA appears to be far from over.

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45 Ibid.
The Hindu Marriage Act 2017: A Review

Sara Raza*

Ever since Pakistan gained independence in 1947, the Hindu community has been subject to severe discrimination and marginalization. Hindu women, especially, have had to face the brunt of this unjust treatment and are regularly subjected to forced conversions, rape, and oppression within the domestic sphere.1 According to a report released by the Movement of Solidarity and Peace in Pakistan, up to 300 Hindu women are forced to convert and marry Muslim men every year in Pakistan.2 In this context, Hindu Personal Law and, specifically, law regulating marriages had been largely ignored as a legislative matter by the Parliament until two years ago, reflecting the Pakistani state’s extended failure to provide legal protection to the basic social institution of family for its Hindu citizens. The Hindu Marriage Act 2017 marked a breakthrough as the first legislation dealing with personal law of Pakistani Hindus. This review will discuss ancient Hindu beliefs about marriage, problems that were caused by the lack of legislation in this respect, the Sindh Hindu Marriage Registration Act 2016, the Hindu Marriage Act 2017, its purpose, and analyze its provisions.

Introduction

Physical attacks, social stigmatization, psychological insecurity, forced conversions and continued institutional degradation shape the lived experiences of religious minorities in Pakistan.3 Hindus have particularly been a distressing target of discrimination which has left them feeling unsafe and insecure. Despite this, Pakistan is home to the world’s fourth largest Hindu population. Hinduism, followed by 4% of a population of 200 million, constitutes the second largest religion in Pakistan after Islam.4

* B.A. LL.B (Hons.) 3rd Year Candidate, Lahore University of Management Sciences (LUMS).


While forced conversions take place with different methods every month, two common forms in Pakistan for Hindus are through bonded labor and forced marriage.\textsuperscript{5} The incidents of reported cases of non-Muslim girls being forced to marry Muslim men and convert to Islam has noticeably increased in the past few years. Hindu girls and women have lived in the constant fear of being kidnapped, forced to abandon their faith, and convert and re-married to someone not from their religion. According to the patron-in-chief of the Pakistan Hindu Council, Ramesh Kumar Vankwani, ‘It is the responsibility of the state to provide all sorts of protections to the country’s minority groups including Hindus from all sorts of atrocities meted out to them, and ensuring they enjoy the same rights as any other person in the country’.\textsuperscript{6}

The Objectives Resolution, now a substantive part of the Constitution of Pakistan through Article 2A sets out protection of the legitimate interests of minorities and their ability to profess their religion freely as one of the guiding principles for governance.\textsuperscript{7} This principle is also reflected in Article 36 of the Constitution of Islamic Republic of Pakistan 1973 (‘Constitution’), which enshrines the policy of protection of minorities. The lack of a law that regulated the institution of family for Hindus was, therefore, in direct contravention of the obligations set out for the state in the Constitution.

\textbf{Problems caused by Absence of Legislation}

The problems faced by Hindu women demonstrate the dire need for effective legislation. Before the current law was enacted, no specialized legal mechanism existed in the law to register a Hindu marriage. The Hindu community used to get their marriages recognized with the help of guidelines present in the Special Marriage Act 1872: the local panchayat, the Pakistan Hindu Council, and the local union council. Numerous Hindus, from Bheel and Meghwar groups, used to get to sign an affidavit before an oath commissioner to prove their marital unions. Some time ago, National Database and Registration Authority (‘NADRA’) had additionally started registration of marital unions. Despite the fact that the Supreme Court had asked NADRA to register the marital unions of the Hindu group and


\textsuperscript{7} The Constitution of Islamic Republic of Pakistan 1973, art. 2A.
encouraged the issuance of Computerized National Identity Cards (‘CNIC’), still the certification itself kept overflowing with many issues. For instance, the terms used were *nikkah* rather than *shaadi*, *nikkahkhwan* rather than *maharaj* or *pundit*; and these formed only a small part of the problems that were not being catered to. However, registration with *pundits* and *panchayats* failed to provide any substantial lawful grounds to prove the marriage.

Prior to the enactment of this law, no mechanism existed to regulate the registration and other aspects of Hindu marriages, including divorce. This created problems with regards to identity documents, documents required for travel, and transfer of property (mutation). In cases of bigamy, without any proof of marriage, the aggrieved spouse had no way to establish the bigamous nature of the second marriage contracted by the other spouse. Women were much more likely to be affected by the lack of registration of marriage documents. Husbands used to enter into second marriages during the subsistence of a valid marriage. However, the lack of documentation meant that the wife had no recourse against the husband. Another problem caused by the lack of proof of marital documents was the constant distress faced by Hindu women of being thrown out of their matrimonial homes. Hindu men could deny their first marriage due to the absence of evidence; the unfortunate wife would be left with no maintenance and no financial security. The need for a law was also felt as the lack of marriage registration papers failed to adequately provide for the property rights of wife and children after the husband had died. If the wife or children were unable to provide a solid proof of the marriage, the marriage was essentially considered invalid and the children classed as illegitimate. Such cases would result in both wife and children losing their legal status as the heirs of the

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property of the deceased. The lack of legislation on this matter meant that young Hindu girls were in greater danger of being forced into marriage.\textsuperscript{13} Perpetrators of child marriages could not be punished for violating any law as the marriage was not registered and no record existed to be presented later in front of a court. Hence, due to an increased in the rate at which these problems were spreading, it became essential to cater to the needs of the Hindu community and enact a legislation that could benefit their family system.

The issue of the lack of a Hindu Marriage Bill was first highlighted in 1970s in the Parliament, but unfortunately could not be formalized into a law.\textsuperscript{14} Civil society and women rights activists have also been long advocating for legislation on this issue. In 2011, the fourth National Commission on the Status of Women put forward the Hindu Marriage Bill 2011, but the effort did not bear fruit. The Parliament also tried to pass the Hindu Marriage Bill thrice: once in 2008, then in 2011, and finally in 2012; however, to no avail.

With the passing of the 18th Amendment in April 2010, the issue of family law legislation was delegated to the provinces. Hence, the law under consideration in the National Assembly in 2012 would have been just been applicable to Islamabad.\textsuperscript{15} It was not until the provincial assemblies of Baluchistan, Khyber Pakhtunkhwa (‘KPK’) and Punjab passed their resolutions under Article 144 of the Constitution extending the jurisdiction of the federal law to their provinces that the law became expansive in its application.\textsuperscript{16} The final Act that was passed in 2017 extends to Khyber Pakhtunkhwa, Baluchistan and Punjab, accommodating the most important requirements of a marriage and equips itself with well-written laws that will be implemented for all Hindus.\textsuperscript{17} However, Sindh, which is home to the majority of Pakistani Hindus, seemed removed from the overall process and had formulated its own Hindu Marriage Law earlier in 2016. The Pakistan People’s Party (‘PPP’) in Sindh considers Hindus as their vote bank; and hence, its apprehension about the success of a PML-N initiative on such an


\textsuperscript{15} Ibid.

\textsuperscript{16} The Hindu Marriage Act 2017.

important matter led it to work towards an even broader non-Muslims’ marriage bill for the province.\(^\text{18}\) It considered PML-N’s attempt as detrimental to its political wellbeing.

The Supreme Court also seems to be involved since the past few years in the discussions of the adoption of a bill for the minorities. The landmark Supreme Court judgment on the rights of religious minorities that was passed in June 2014 was followed by an order directing the government to enact a law within two weeks.\(^\text{19}\) The case had earlier been brought up by a bench headed by Chief-Justice Iftikhar Muhammad Chaudhry in 2012. It took \textit{suo moto} notice of the matter, issuing ‘instructions to NADRA to amend the rules to register Hindu marriages’.\(^\text{20}\) Hence, issues regarding Hindus obtaining passports and CNICs were being taken into proper consideration.

\textbf{The Sindh Hindu Marriage Registration Act 2016}

Sindh, home to the majority of the Hindu population in Pakistan, became the first province to pass legislation for the registration of Hindu and other non-Muslim marriages through the Sindh Hindu Marriage Bill, which was later enacted as the Sindh Hindu Marriage Registration Act 2016.\(^\text{21}\) With the realization that the Muslim Family Laws Ordinance 1961 gives Muslims a complete legal umbrella to solemnize and register marriages, the Hindu Marriage Bill passed by Sindh was appreciated as a milestone in the direction of protecting minorities.

Moreover, some common elements can be easily seen in the bills passed by the federal government and Sindh itself. While both require the minimum age of marriage to be set at 18 and there to be witnesses present at the time of marriage, there is a difference between the numbers of days within which the solemnized marriage should be registered. In Sindh, the law allows for the provision of 45 days, but also imposes a fine of Rs. 1000 if the individuals fail to register the marriage within the given time period.\(^\text{22}\) While the Hindu Marriage Act 2017 provides for provisions of a divorce, the Sindh Hindu marriage law does not mention such provision.


\(^{19}\) (n 14).

\(^{20}\) Ibid.

\(^{21}\) (n 18).

\(^{22}\) The Sindh Hindu Marriage Registration Act 2016.
The bill moved in the assembly by Parliamentary Affairs Minister Nisar Khuhro is applicable to the entire province of Sindh\(^{23}\) and helps observe how the Eighteenth Amendment has allowed for provinces to take up marriage and minority affairs under their jurisdiction and make laws.

**The Landmark Hindu Marriage Act 2017**

Pakistan’s Parliament finally passed the Hindu Marriage Bill on 9 March 2017 after a lengthy process of deliberation and enactment.\(^{24}\) Kamran Michael who is Pakistan Muslim League – Nawaz (PML-N’s) Christian lawmaker and the Minister of the Human Rights, reiterated that there was no law to regulate the registration of Hindu marriages and ancillary matters; and hence, it was a constitutional obligation to legitimately safeguard rights and interests of minorities.\(^{25}\) This legislation holds great significance for the Hindu community because it allows the regulation of marriages of one of the largest minorities in Pakistan. The National Assembly unanimously adopted the bill in September 2016 but due to a few amendments made by the Senate, the National Assembly had to pass the bill again after the Senate adopted it on Friday, 17 February 2017. The bill, after being signed by President Mamnoon Hussain became law, and is officially known as the Hindu Marriage Act 2017.

This Act vividly supports the notion of women also having a documentary proof of their marriage as pointed out by Michael when he said, ‘the incumbent government was committed to protecting and promoting human rights, including the rights of women and minorities’.\(^{26}\) According to him, the Ministry of Human Rights also ‘took the initiative to protect the rights of the minorities after obtaining a no-objection certificate from the Ministry of Religious Affairs’.\(^{27}\) This Act acts as a breakthrough document that protects and empowers women, as the process of marriage registration

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\(^{27}\) Ibid.
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highlights them as much as it highlights men and allows for Hindu women to keep marriage records in their possession too.

The Act serves as a milestone for Hindus because of its most important mechanism for the registration of Hindu marriages that includes the terms on which the marriage may be contracted, the proceedings for dissolution of the marriage, and the basis on which such marriage may be dissolved. The Act provides provisions for divorce allowing women the freedom to leave a marriage on the ground of oppression or for reasons mentioned in the analysis section. The Act also provides for judicial separation which entails keeping the marriage intact, but both the parties no longer being obliged to cohabit with each other.\textsuperscript{28}

Moreover, the Act most significantly helps to prove marriage in cases of property inheritance, and bigamy by any of the partners, at police stations, public offices, and while applying for any business deals. The CNICs of the partners may be matched with the marital document known as the \textit{Shaadiparaat} that will provide evidence of the authentic biographical information required in any family law related matters in the future.

\textbf{Analysis of the Act along with Hindu Customary Law}

Along with different kinds of legislations that pertain to the Hindu marriages, Hindus hold their customs and traditions in high regard. The old customs that they follow comprise many rituals and emphasize on the relationship a bride may have with the bridegroom. It is important to note how married Hindu people embrace the life-long bond flourishing their relationship as commanded in religious provisions. Ramayana, one of the holy books of the Hindus, refers to woman as half of that of man and she may be called \textit{dharmapatni} ‘a friend and adviser to be associated by the husband in all religious rites and ceremonies’.\textsuperscript{29} However, in Mahabharata, it is clearly mentioned that those who have wives may be able to ‘fulfill their obligations in the world’, may be able to live a true ‘family life’, and may be able to stay ‘happy and lead a full life’. Hence it is noted how prudent it is for both husband and wife to be faithful to each other and not be separated. In the Act, a Hindu Marriage has been defined as:

\begin{itemize}
\item[28] The Hindu Marriage Act 2017, s. 9.
\end{itemize}
The union of Hindu male and Hindu female solemnized under this Act and includes the marriage solemnized before commencement of this Act in accordance with the law, religion and customs having force of law relating to Hindu persons.\(^{30}\)

The law requires Hindus to follow this Act not only for marriages taking place after the implementation of this Act but also for marriages that took place before the Act was adopted. The Act is not valid for a Hindu marrying a non-Hindu, which was initially acceptable as part of the Hindu customary law.

Along with many customs that the Hindus staunchly believe in, those that hold mystical importance and are significant marriage obligations for them are the rites and rituals they follow in their religious realm. Consequently, far more uniformity of behavior than of belief is found among Hindus, as they follow the guidance scripted in Vedas – the ultimate canonical authority for all Hindus – and observe the teachings over the generations they have lived in.\(^{31}\) However, in the Act, Customs and Customary Rites have been defined as:

> Any tradition which is not unlawful and the same has been continuously and uniformly observed for a long time among Hindus in any local area, tribe, community, group or family.\(^{32}\)

Hindu customary law is required to be observed and practiced during the procedure of a Hindu marriage. However, any law that rejects or contradicts the Hindu beliefs may not be continued with or allowed within the religious domain. Moreover, this definition also applies to the rules and regulations that the Hindus have been following for years now and passing them on from one generation to another. Whether they are beliefs of a tribal community or just a local panchayat, Hindus are expected to believe in the sayings and follow them religiously.

Analyzing the two definitions mentioned above, it can be clearly observed that just as the Constitution of Islamic Republic of Pakistan focuses on and follows Shariah, the word of Allah, the Hindu Marriage Act obeys the

\(^{30}\) The Hindu Marriage Act 2017, s. 2(2)(e)


\(^{32}\) The Hindu Marriage Act 2017, s. 2(2)(b)
religion, and abides by the law compressed within Hinduism. The statutory law is intertwined with its customary law and exists as an addition to the religious word by their gods and goddesses. The Hindu marriage is required to be a religious ceremonial matter between a Hindu man and Hindu woman, unlike Islam where Muslim men are even allowed to marry the ‘Women of the Book’ and not only Muslim women.

Furthermore, Shaadiparat has been defined as the:

Certificate of marriage issued by marriage registrar, which certifies the solemnization of Hindu marriage.33

The final text which was approved by both the Houses included the Shadi Parath – a document similar to the Nikahnama of the Muslims.34 The Shaadiparat had been mentioned in almost all potential Hindu Marriage Bills but it only became an official legal document in 2017. This important document needs to be signed by the pundit and has to be registered with the concerned government department. Due to this registration process, a Hindu may now have a marriage solemnized with an adequate, authentic record and its credibility may not be doubted anymore since this document serves as an evidence for marriage. The information asked for in the Shaadiparat first is the date of the marriage, followed by a blank for the name of the union council, tehsil, town, and district. The document further allows the particulars of the bridegroom and the bride to be noted down respectively; such as their full names, fathers’ names, mothers’ names, and the mentioned people’s CNIC numbers. The date of birth, temporary address and permanent address are also asked for. It then requires for both the groom and the bride to mention their matrimonial status by choosing one of the four boxes provided: Single, Married, Divorced, Widower. It may then separately ask for the number of dependents for both the partners. The date and place of solemnization of marriage must also be provided in the Shaadiparat as it holds great significance under the law and religion both. The document is concluded with the signature of both the groom and the bride, along with the two witnesses of the marriage ceremony and the signature of the registrar.35

Women have been given their own space under this Hindu family law, where not only their identity matters, but also the identity of their guardians is taken into account for the marriage to take place. The particulars that a bride needs to submit are equal and the same as the ones a groom has to submit, clearly

33 The Hindu Marriage Act 2017, s. 2(2)(i)
34 (n 25).
35 The Hindu Marriage Act 2017, Schedule A.
indicating towards the impartiality and equality of treatment this document pertains to. This set of basic biographical data indicates the importance of record-keeping in a solemnized marriage for not only further religious ceremonies but also other legal affairs.

**Conditions for a Hindu Marriage**

Traditional customs made Hindus believe that they must get their daughter married before she attains puberty. Vedas, Brahmans and *Kama-sutra* strongly abide by the law that the bride is to have a lesser age than the bride groom at the time of their marriage. As Brahmans have been the most influential and reputable caste in Hindu religion, many Hindus in other caste systems began following the Brahman pattern of pre-puberty marriage.\(^{36}\) Under the Hindu customary law, old traditions encompassed peculiar Hindu notions of consanguinity and caste. Neither inter-caste marriages nor inter-sub caste marriages were allowed. However, marriage with a non-Hindu was not considered to be invalid or unacceptable. *Sagotra* and *sapravara* marriages were also prohibited.\(^{37}\)

Before 1955, a vast majority of Hindus and Muslims in India used to practice polygamy, with unlimited number of wives for Hindus and number of marriages restricted to four for Muslim men. Though ever since the enforcement of the Hindu Marriage Act in India, in 1955, polygamy became a criminal offense punishable by imprisonment for up to seven years. However, if the first marriage is kept a secret from the spouse, the punishment may increase up to ten years of imprisonment.\(^{38}\)

Moreover, mate selection also holds special significance in the concrete procedural order of the Hindu Marriage in the present day. Where endogamy stands as a mate selection procedure of choosing a spouse from within the community or group, it also serves as the purpose of preserving community bonds and relationships and making marital adjustments easier.\(^{39}\) However, exogamy, also called out-marriage is described as a custom enjoining marriage outside one’s own group.\(^{40}\) Although this is known as the other mate selection procedure, it is still out rightly banned in the Hindu society. With encouraging and perpetuating endogamous customs in society,

\(^{36}\) (n 30) 428.


\(^{38}\) Ibid, 89.

\(^{39}\) (n 30) 428.

cross cousin marriages are being more inclined towards and customary laws are supporting these ‘rather than religious sanctions’.41

However, according to section 4 of the Act, the conditions of the marriage are set such that both the parties are to have a sound mind and must be capable of giving valid consent.42 Any person who is not mentally capable of making a decision or granting consent shall not be forced into marriage and this is applicable to both Hindu men and women. The age at the time of marriage for both the parties is set at eighteen (18)43 and the parties are prohibited from being in any sort of an illegal or adulterous relationship as forbidden by their law, religion and customs.44 The fourth condition is that none of the parties must have a spouse living at the time of marriage.45 This clearly shows how in modern day polygamy or polyandry is strictly forbidden in Hindu culture, unlike Islam, where polygamy is commonly practiced to up to four wives at the same time.

**Registration of Hindu Marriages**

Section 6 of the Act clarifies that the registration of the marriage must be done in accordance with the provisions of this Act and every marriage must be registered within fifteen days of solemnization of Hindu Marriage.46 Moreover sub-section (2) of Section 6 mentions that the marriage register shall be open for inspection and shall be admissible as evidence of the contents contained therein or certified extracts there from shall, on application, be given by the marriage registrar on payment of such fee, as may be prescribed.47 This means that the original register’s information may be put on the extract in order to be shared with the applicant on provision of the fee. The purpose of such inspection may be a verification that needs to be done and the reason of such verification would be required in the application so as to get a copy of the details of the marriage mentioned in the *Shaadiparat*.

Further, according to sections 4 and 6 of the Act, the legal age and the registration of marriage prove to be an important purpose of the bill because the Convention on Elimination of All forms of Discrimination

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41 (n 30) 428.
42 The Hindu Marriage Act 2017, s. 4(a).
43 Ibid, s. 4(b).
44 Ibid, s. 4(c).
45 Ibid, s. 4(d).
46 The Hindu Marriage Act 2017, s. 6(1).
47 Ibid, s. 6(2).
against Women (‘CEDAW’) that Pakistan has signed and ratified includes both. Article 16 (2) of CEDAW says:

The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.\(^{48}\)

Hence, for the individuals to be 18 or above and for there to be an official document such as the *Shaadiparat* is extremely necessary for the marriage registration to take place. The registration cannot be done by a fake or unauthorized marriage registrar who may be doubtful in his actions or be involved in a fraud. Under the legal umbrella of CEDAW, any child marriage will not be considered valid and may instead be discontinued.

**Appointment and Function of Marriage Registrar**

According to section 7 of the Act, the marriage registrar is also required to make three copies of the *Shaadiparat*, one for the bride, other for the bridegroom, and the third for the marriage registrar to keep it as a record. The peculiarity of such a section comes out to be seen as women having a right to distinctively protect their marriage and keep a proof of it. Hindu women before this law were ‘unable to produce a legal document to substantiate their relationship with their spouse in police stations and courts, at NADRA kiosks, visa counters and all governance windows that require CNICs’.\(^{49}\) However with the advent of the Act, women are now able to possess a legal document and may stand up for their rights whenever denied, in public places or private realms.

**Void and Voidable Marriages**

According to section 10, any Hindu marriage may be null and void if the conditions of section 4, clauses (c) and (d) stand true. Clause (c) indicates

\(^{48}\) UN Convention on the Elimination of All forms of Discrimination Against Women (CEDAW), art. 16 (2). It was adopted in 1979 by the UN General Assembly and is often described as an international bill of rights for women. It defines what constitutes discrimination against women and sets up an agenda for national action to end such discrimination. The Convention also defines discrimination against women as ‘...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field’.

\(^{49}\) (n 14).
any prohibited relationship between the two parties, and clause d) talks about another spouse living at the time of marriage. Moreover, for Hindus there also exists a concept of Voidable Marriage as explained in section 11 of the Act. Any marriage before or after the commencement of the Act may be nullified by the court if: (a) the marriage has not been consummated owing to impotence of the respondent; (b) there is breach of clause (b) of section 4; (c) consent of the petitioner was obtained by force, coercion, or by fraud; or (d) the respondent was at the time of marriage pregnant by someone other than the petitioner. However, there exist conditions of cases when such petitions may not be entertained by the court: if the petitioner lodges complaint after one year of being forced into marriage, or one year after the fraud has been discovered. Furthermore, the case in which the petitioner was ignorant of the facts alleged, and the proceedings have been instituted one year before the commencement of the Act and after the commencement within one year of such marriage, the petition may be entertained.

Termination of Hindu Marriage

One of the most important sections of the Act is about the termination of marriage. Any Hindu marriage under section 12 of this Act may be terminated if the petitioner has been treated with cruelty, or if the petitioner has been deserted for a period of not less than two years. ‘Desertion’ under this law means that the petitioner, either the husband or the wife, has been isolated without any reasonable cause, or without their consent, and includes willful neglect of petitioner by the other party. Moreover, the marriage may also be terminated on the basis of either the husband or wife converting to some other religion, or having an unsound mind that would inevitably lead to the petitioner not being expected to live with the respondent. The mental disorder referred to is defined as some mental illness that may lead to seriously irresponsible or abnormally aggressive conduct. However, suffering from other diseases such as leprosy or HIV/AIDS may also be a cause to terminate marriage. If either of the parties renounces the world by entering into any form of religious order, then too the marriage is not

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50 The Hindu Marriage Act 2017, s. 10.
51 The Hindu Marriage Act 2017, s. 11.
52 The Hindu Marriage Act 2017, s. 12(1)(a)(i).
53 Ibid, s. 12(1)(a)(ii).
54 Ibid, s. 12(1)(a)(iii)
55 Ibid, s. 12(1)(a)(iv).
56 Ibid, s. 12(1)(a)(v).
57 Ibid, s. 12(1)(a)(vi).
required to be continued with.\textsuperscript{58} This section also successfully provides for the rights of Hindu women. If the wife finds out that the husband married again, or there is a wife still alive from the marriage before the commencement of this Act, such a marriage can by be terminated.\textsuperscript{59} Hence, under this marital legislation Hindu women are allowed to end the marriage if their husbands are committing the crime of bigamy and are given the right to be the first one to file for a termination. Therefore, under section 20, any marriage solemnized after commencement of this Act is considered to be void if any of the partners had a spouse living at the date of marriage and the provisions 494 and 495 of the Pakistan Penal Code 1860 (‘PPC’) shall apply accordingly for the punishment to be given. Under section 494 of PPC:

\begin{quote}

Whoever, having a husband or wife living, marries in any case in which, such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.\textsuperscript{60}
\end{quote}

And under section 495 of PPC:

\begin{quote}

Whoever commits the offence defined in the last preceding section having concealed from the person with whom the subsequent marriage is contracted, the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.\textsuperscript{61}
\end{quote}

Moreover in other cases, if the husband failed to provide for her needs for more than two years,\textsuperscript{62} or if he is sentenced to imprisonment for a period of four years or more,\textsuperscript{63} or if her marriage—whether consummated or not—had been solemnized before she attained the age of 18, the marriage is subject to termination.\textsuperscript{64}

\textsuperscript{58} Ibid, s. 12(1)(a)(vii).
\textsuperscript{59} Ibid, s. 12(2)(a).
\textsuperscript{60} The Pakistan Penal Code 1860, s. 494
\textsuperscript{61} The Pakistan Penal Code 1860, s. 495
\textsuperscript{62} The Hindu Marriage Act 2017, s. 12(2 b)
\textsuperscript{63} Ibid, s. 12(2)(c).
\textsuperscript{64} Ibid, s. 12(2)(d).
In the case *Jagsi v Shr. Marwan*, the Family Court, under the West Pakistan Family Courts Act 1964, decided in favor of the respondent who instituted a suit for the dissolution of marriage on the grounds that she belonging to Hindu Menghwar community was subjected to the custom providing for dissolution of marriage; she was treated with cruelty and was not provided maintenance. After expulsion respondent left the house of petitioner while the fact of belonging to Menghwar community; custom of dissolution of marriage and the marriage itself were admitted by the petitioner in his written statement.

**Financial Security of Wife and Children**

Section 13 looks after the financial security of the wife and the children born out of marriage and clearly emphasizes on the role the Court plays in order to make sure the wife and children are compensated for, and any financial hardship is met with before the marriage is terminated. It is ensured that both the parties will make adequate provisions for the maintenance of the children, within the financial capacity of the parties to the marriage.

**Termination by Mutual Consent**

Section 15 talks about the mutual consent of the parties to terminate a marriage. The condition for such an action is that both the parties must be living separately for more than a year, and must agree that they cannot live together; hence, the marriage should be terminated.

**Fresh Marriage after Separation**

The Act also provides respect and dignity to especially the Hindu women in accordance with section 16 that allows for separated people to marry again. Any party, who wishes to marry another person after the said expiration period of six months from the final decision of termination, may do so in order to live a happy and peaceful life they choose for themselves. Widows only need to complete a period of six months after their husband’s death, and then may remarry. This is one another step towards women empowerment that the Hindu Marriage Act 2017 strongly endorses.

**Legitimacy of Child in Void and/or Voidable Hindu Marriage**

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65 PLD 2005 Karachi 334.
66 The Hindu Marriage Act 2017, s. 13.
67 Ibid, s. 16.
Moreover, the Act also defines the identity of the children born out of void or voidable marriage. Under section 18, it clearly mentions how children born out of such marriages are legitimate. This provides for the innocent children to be taken care of even after the marriage is terminated. Hindu culture widely promotes the protection of illegitimate children and considers them equally important to the children conceived without any nullifying consequences. Such laws flourish the society with tolerance, awareness, and a much more mature identity.

**Punishment for Contravention of Certain Conditions for Hindu Marriage**

According to section 21, any person who gets his or her marriage solemnized under this Act in violation of the conditions specified in section 4, clause (b) – forcing someone to get married or forcibly marrying someone under the age of 18, or clause (c) – are parties to the marriage within degrees of prohibited relationship – shall be punishable by imprisonment which may extend to six months but will not be less than three months, or with fine which may extend to five thousand rupees, or with both imprisonment and fine.68

**Jurisdiction of the Courts**

Furthermore, according to section 22, every petition under this Act shall be presented to the Family Court.69

**Penalty for Violating the Provision of the Act**

The penalty, according to section 23, is that of simple imprisonment that may extend up to three months or a fine of one thousand rupees, or both. Such punishment may be given to anyone who rejects the law, or tries to take it in their own hands.

**Cognizance of Offences under the Act**

‘Notwithstanding anything contained in the Code of Criminal Procedure 1898 (Act V of 1898), all offences under this Act shall be non-cognizable and

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68 The Hindu Marriage Act 2017, s. 21.
69 The West Pakistan Family Courts Rules, rule 6(b).
non-compoundable and the same shall be triable by a Magistrate First Class on a complaint in writing by a marriage registrar”.\textsuperscript{70}

**Conclusion**

Ever since independence, Hindus have desired to obtain their own marriage law under which their marriages could be solemnized and legally registered. This landmark Act has now brought minority rights under the spotlight and serves to protect the Hindus that have lived in Pakistan for years now, waiting for this breakthrough to take place. With the country’s legislature taking a step towards the protection of the interests and rights of minorities, both in statutory and customary law, a positive light is emerging out of the Hindu-Muslim relations. It can be hoped that such laws help Hindu women and men both to stand up against the oppression they face every day, and live as equal citizens within Pakistan. The marriage registration documents may now help Hindus to prove their marriage whenever it requires them to, and will surely benefit Hindu women as it will hopefully lower the rate of forcible marriages, rape, kidnapping, and forced religious conversions. Whether it is their domestic or the public sphere, this Act has encouraged Hindus to raise their voice, as the society is moving towards better and fair lawfulness.

\textsuperscript{70} The Hindu Marriage Act 2017, s. 24
Rights of the Child in Islam: A Book Review

Mustafa Khan*

Introduction

Prof. Dr. Munir is the Vice President of Higher Studies and Research at the International Islamic University, Islamabad. He is also the Director of the Shariah Academy, and a Professor in the Department of Law at the same institution. At the request of the Federal Shariat Court, he has been known to give his legal opinion in seminal cases.¹ His book, Rights of the Child in Islam, conducts a comprehensive analysis of the rights of children under Islamic law.² Herein, he also analyzes the issue of adoption as traditionally approached by Islamic jurists and the role of International Covenants such as the Convention on the Rights of the Child (‘CRC’) in this regard. Thus, he attempts to focus on the responsibilities of the State in providing for the realization of these rights within a society. This book review briefly discusses the contents of each chapter of the book. After outlining Dr. Munir’s major findings as elucidated in these chapters, this review shall critically appraise the book in respect of the conclusions drawn and recommendations made.

Overview of the Rights of the Child in Islam

The Rights of the Child in Islam revolves around a fundamental contention that the study of the rights and protections of children in Islam is a sphere that has not attracted serious scholarship.³ The author contends that most scholars have focused on the rituals dealing with the birth of a Muslim child; these rituals, among others, include the ‘aqiqa’ (slaughtering of goats on the birth of children) and the shaving of a baby’s hair. Such scholarship has failed to focus on more significant issues regarding the role of the State in enforcement and protection of the child rights in Islam.⁴ Structurally, the book is comprised of several chapters that may be read independently, with each chapter focusing on a separate issue in Islamic jurisprudence. The

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* The author is a Legal Associate at Axis Law Chambers, Lahore. He is mainly involved in matters of family law, corporate law, and civil litigation.


³ Ibid, 2.

⁴ Ibid, 3.
conclusion summarizes the author’s findings and provides recommendations that may be followed in an effort to encourage proper realization of rights as envisaged in an Islamic polity.⁵

Chapter 1 critically evaluates the existing literature, demonstrating how development has been sparse in this sphere. It begins with a discussion of what is perhaps the earliest work on children’s rights in Islam – the Jami Ahkam Al Singhar, penned by Mohammed b. Mahnod b. Husain Astroshni (1234 C.E). This detailed work discusses the rules of Islamic law regarding activities such as prayers, fasting, Hajj, and marriage. Dr. Munir points to the comprehensive nature of the text by highlighting the presence of chapters on adoption and the rules of paternity. Interestingly, the book also discusses the role of the court and the Islamic state in aspects involving a child.⁶ The chapter provides brief accounts of other works such as the Tuhfatul Mqdud fi Ahkam al-Mawlud, written by Shamsuddin Muhammd ibn Abi Bakr ibn Qaiyam al-Jawziyah, a text consisting of the rules and various rituals found in Islamic law regarding the birth of a Muslim child.⁷ In addition to Arabic texts, the chapter also touches upon some literature published more contemporaneously in English and Urdu. Viewing this body of literature as a whole, Dr. Munir posits that most publications regarding rights of children in Islam focus only on the various rituals and discuss the issue from the point of assuming parental responsibility of children.⁸ None of these treatises analyze the role of the State with regards to more substantive rights of children under Islamic law. Furthermore, contemporary issues regarding child vaccinations, polio drops, and lifesaving injections are barely mentioned.

Chapter 2 proceeds to provide a framework of Sharia for the rights and protection of children in Islam. Within this framework, it seeks to accommodate the often-neglected role of the Muslim State under the maqasid al sharia in creating and enforcing mechanisms that provide for the actualization of these rights. In describing these maqasid (objectives), it delves into a discussion of the doctrine of ‘Maslahah’ and its further subdivision into ‘Durat’ (necessary interests), ‘Hajat’ (supporting interests), and ‘Tahsinat’ (complementary interests). The necessary interests are the ones which, if left unprotected, result in chaos in society. These include life, faith, progeny, intellect, and property.⁹ It is the duty of the Islamic state to play a substantial part in the protection of these objectives through promulgation of

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⁵ Ibid.
⁶ (n 2) 12.
⁷ Ibid, 13.
⁸ Ibid, 27.
⁹ Ibid, 32.
laws against the taking of life and punishing those individuals who carry out such actions. The chapter also discusses the importance of the family unit in Islam and details the concept of rights or ‘Haqq’ as provided under Islamic law. After establishing this theoretical foundation, the chapter systemically details the rights of a child to life, health, and education. It substantiates its findings mainly by relying on the sayings of the Prophet (peace be upon him) and his actions in a particular situation. Since the hadith of the Prophet forms a fundamental tenet of Islamic law, reliance on these sayings effectively substantiates the point that Dr. Munir is making.

Chapter 3 explains the various rites which are practiced when a baby is born. The rights of orphans and illegitimate children are also discussed. Furthermore, it details the rights and equality of female children in Islam, pointing to Islamic injunctions that forbid practices such as celebrating the birth of a boy and mourning the birth of a girl. Interestingly, the chapter not only deals with the rights that children have over their parents and the State, but also explains the rights parents have over their children and the duties and responsibilities children owe to their parents. To substantiate this point, it provides reference to the relevant Qur’anic injunctions as follows:

Your Lord has decreed: (i) Do not worship any but Him, (ii) Be good to your parents and should both or any one of them attain old age with you, do not say to them even ‘fie’ neither chide them but speak to them with respect and be humble and tender to them.

The next two chapters deal with violence. Chapter 4 tackles the controversial issue of female genital mutilation (‘FGM’). The practice has been roundly condemned by international human rights organizations, but is still carried out in many Middle Eastern and African countries. According to the author, the involvement of international organizations has resulted in some Muslim communities feeling culturally insecure. Such condemnations have been considered by some as an attack on traditional Islamic values, galvanizing some clerics into giving fatwas (religious edicts) in support of FGM. In an attempt to rationalize this debate, Dr. Munir turns to the Qur’an and Sunnah to point out that Islam does not condone FGM in the slightest. He argues that

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10 Ibid, 55.
there is no direct evidence in the Qur’an to support FGM. Those in favor of the practice usually place reliance on Surah Al Nahl which states:

Follow the way of Abraham with exclusive devotion to Allah. He was not one of those who associated others with Allah in his divinity.13

The argument then is that since Abraham was circumcised, all other Muslims should also undergo similar treatment since his conduct is to be followed. The author disputes this interpretation of the verse. He argues that the verse is in reference to the duty upon Muslims to follow the model of Abraham in establishing and preaching monotheism, not to circumcision. Moreover, even if that is what the verse intended, it makes no reference to FGM. Therefore, a logical extension may only be made to men, not to women. As regards the hadith put forward in support of FGM, Dr. Munir argues that these verses are either weak or unreliable. The rules of Islamic law cannot be based on such weak foundations.14 Amongst the four Sunni schools of thought, only the Shafi School considers FGM obligatory. Proponents of the other schools, even when supporting the practice, the author argues, fail to prove that a pre-Islamic custom is inherited by Islamic law and cannot point to a Qur’anic verse or an authentic hadith to back up their assertions.15 The chapter thus comes to the conclusion that female genital mutilation is a cultural practice that outdates Islam. It was practiced in counties like Egypt and Sudan before the advent of Islam in these regions. Under Islamic law, only that custom is considered valid which does not clash directly with Islamic law. Since the Qur’an explicitly prohibits the disfiguring of the human body, FGM cannot be regarded as a valid Islamic injunction in any way whatsoever.16 Consequently, the author maintains that the State must ensure that the practice is condemned and stamped out through its statutory powers.17

Chapter 5 tackles the issue of violence against children at home and at school. It delves into issues such as corporal punishment and how such actions are to be avoided, and points to the serious emotional disadvantages of inflicting such punishments on children. Even blaming the child should be

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12 (n 2) 97.
13 The Qur’an 16:123.
14 (n 2) 116.
15 Ibid.
16 Ibid, 118.
17 Ibid.
avoided. Instead, the child should be advised in a polite way in order for them to realize their mistake. The second half of the chapter approaches the issue of the rights of children during an armed conflict and the nature of juvenile justice. Relying on the words of the Holy Prophet who forbade the killing of women and children during a conflict, it makes the point that such actions are prohibited.\(^{18}\) On the issue of juvenile justice, the author points out that the Prophet exonerated children who had not reached the age of maturity from the responsibility of their actions.\(^{19}\) Within the judicial process, principles such as the presumption of innocence and the non-retroactivity of criminal law are fundamental tenants of the Islamic justice system and must be adhered to.\(^{20}\)

In Chapter 6 of the book, Dr. Munir embarks upon a discussion regarding the similarities and differences between the rights of children provided in International instruments and the relevant injunctions of Islamic law. Ever since its adoption in 1989, the CRC has become the focal point of reference for the obligations of states to their populations in the realm of children’s rights. This chapter first seeks to demonstrate the place of Islamic law within the International legal regime. It points to the role of Muslim states like Turkey in the creation of the International legal regime and to documents such as Article 9 of the Statute of the Permanent Court of Justice which provides that the ICJ shall represent the main forms of civilization and the principal legal systems of the world.\(^{21}\) The chapter then proceeds to discuss the similarities and differences between Islamic law and the CRC such as the existence of rights of the fetus which are provided for under the former, but have no corresponding provision in the latter. Stress on the family unit in Islamic law is very strong as compared to the milder approach to familial relations taken by the CRC. Both doctrines also share similarities such as prohibiting discrimination and principles such as that of the best interests of the child are present in both regimes.\(^{22}\) The chapter concludes by pointing out the reservations that have been placed by Muslim countries on the CRC. The author points out the lack of uniformity amongst Muslim states with regard to what articles are to be reserved, implying that the process is essentially a political, rather than a religious exercise.\(^{23}\)

\(^{18}\) Ibid, 128.

\(^{19}\) Ibid, 130.

\(^{20}\) Ibid, 131.


\(^{22}\) (n 2) 158.

\(^{23}\) Ibid, 165.
Chapter 7 provides a brief outline of the concept of guardianship or *Waliyah* in Islamic law. It explains the different forms of guardianship that exist – of the person and of the property, and how different rules apply in each circumstance. It also discusses the principle of the best interests of the child, demonstrating how the principle is an important tool used in Islamic law with regard to custody issues and protection of children in case of split families.

The last chapter of Dr. Munir’s book compares and contrasts legal systems of Jordan and Pakistan. It discusses relevant Pakistani case law that represents the principle of the best interests of the child and points to statutes such as the *Restraint of Marriage Act 1929* which fixes a minimum age before two individuals may be married. Attention is also drawn to the *Pakistan Penal Code 1860* (‘PPC’) which prescribes punishments for practices such as *Wanni* and *Swara* – the un-Islamic custom where the offending party gives females, mostly minors, in marriage to the relatives of the victim party as compensation. With regards to Jordan, the author discusses the *Personal Status Law of 2010* which defines the age of marriage as 18 years. The labor and education laws in the country which seek to provide additional protections to children have also been reviewed. Collectively, great stress has been placed on the importance of the State in regulating and protecting the rights of children under Islamic law.

**Analysis**

Dr. Munir’s book, in its language and structure, is easily accessible. His approach is laudable in the fact that it does not seek an overly textual and jurisprudentially complicated approach to these issues. This becomes especially important since a number of issues discussed in the book are those that are controversial in their nature and have rarely been subjected to open discussions in Muslim countries. For instance, the issue of FGM is one that has plagued many Muslim societies. This practice, according to the World Health Organization (WHO), can have long term consequences such as urinary tract infections, excessive bleeding, and can even result in death. The WHO has issued a number of declarations against the practice. In 2012, the United Nations General Assembly, adopted a resolution against the
procedure, calling for an outright ban worldwide.\textsuperscript{29} However, despite these global efforts, FGM procedure is still greatly practiced in Africa and the Middle East. Data from 2008 suggests that nine out of ten women in Djibouti, Egypt, Guinea, Mali, Northern Sudan, Sierra Leone, and Somalia have undergone some form of FGM.\textsuperscript{30} An added complication in efforts to eradicate FGM has been a sense in some Muslim societies that a ban would be an attack on their religious freedom. Fatawa in favor of the procedure have only severed to strengthen this belief. For Dr. Munir to dedicate a full chapter in the book to this issue is a bold step.

Furthermore, by tracing the history of FGM, he demonstrates how it is a custom that has been practiced in many countries even before the advent of Islam. By seeking to break the link between religion and procedure, Dr. Munir makes an important contribution to the efforts for the eradication of this harmful practice. Additionally, by individually refuting the interpretations of the verses of the Qur’an and the sayings of the Holy Prophet that are most often used in support of FGM, the book takes a bold stance in the face of certain controversy. By unequivocally declaring the procedure un-Islamic and suitable for a ban, Dr. Munir plays his part in the global eradication efforts against FGM.\textsuperscript{31}

The book is comprehensive with regard to the issues that are barely discussed within the Islamic community. The issue of immunizations is one such example. The debate regarding vaccines is currently on the forefront in not only the Muslim world, but also in Europe and especially in the United States. Many parents refuse to have their children inoculated due to the false perception that vaccinations cause disorders such as autism. Even though organizations such as the Center for Disease Control (‘CDC’) have explicitly stated that there is no scientific link between immunizations and the disease, many parents choose to ignore or distrust these findings.\textsuperscript{32} By placing a duty upon the Muslim state to educate and encourage people with regards to the benefits of immunizations, the author seeks to start a discussion that has been sorely lacking, especially within the Muslims. In a country like Pakistan where many communities still grapple with widespread doubt and fear in relation to polio vaccines, this discussion can ultimately make a significant

\textsuperscript{29} UN General Assembly Resolution 67/146 (5 March 213) UN Doc A/RES/67/146.
\textsuperscript{31} (n 2) 207.
and tangible impact on the health systems and the infant mortality rate in the country.

Notwithstanding these impressive efforts to write a text which is not only accessible but also tackles issues that are rarely discussed in Islamic societies, the book does not seem to go far enough in its critique and analysis. Perhaps this is due to Dr. Munir’s approach of seeking to give weight to all sides of the argument. For instance, when discussing the issue of FGM, he mentions that the Shafi‘i School considers the procedure obligatory while proponents of the other schools consider it a Sunnah or a mustahab or a permissible act.33 Dr. Munir avoids directly criticizing the schools for this view, dedicating only a few paragraphs to discussing how each school has historically developed its doctrine. A more in-depth study and analysis of the positions, at this juncture, may have further added to the literacy and legal contribution of the book since the issue is one that is controversial and hotly contested, on both religious and social grounds.

Another issue with this book is that while the author repeatedly stresses the importance of the State in ensuing the protection of the rights of children as enshrined in Islamic law, he does not comprehensively interact with the development of Islamic law through the judiciary. The role of the judiciary has been especially noteworthy in Pakistan where the courts have repeatedly upheld and strengthened principles like the best interest of the child. They have, for instance, allowed a mother to retain the custody of a child after a divorce, even though on a strictly textual basis, due to the age of the child, the father as wali (guardian) was entitled to custody.34 The best interests of the child – a standard that Dr. Munir refers to numerous times in his book – has been very progressively defined by the Pakistani courts. In this regard, the judiciary has held that welfare of a minor means his/her financial, moral, spiritual, and intellectual well-being.35 This welfare has been given great importance inasmuch as it supersedes all private settlement agreements between the parties regarding the custody of children.36

With regards to the delicate issue of legitimacy, the Pakistani state has tried to ensure that children’s interests are protected, and have enacted legal presumptions against a child’s illegitimacy. Article 128 of the Qanun-e-Shahadat Order 1984 incorporates this rule by stating that any child born during the continuance of a valid marriage between his mother and any man

33 (n 2) 103.
34 Iram Shahzad v Additional District Judge, Lahore PLD 2011 Lah 362.
36 Mehmood Akhtar v District Judge, Attock 2004 SCMR 1839.
and not earlier than the expiration of six lunar months from the date of the marriage, or within two years after its dissolution, while the mother remains unmarried, shall be conclusive proof that he is the legitimate child of that man. While it is quite clear that no pregnancy subsists for two years, the rule is intended to avoid declarations of illegitimacy and ensure that children are provided their due rights such as those of inheritance. Analysis of case law and legislations in Muslim countries with reference to efforts to protect children’s rights would have added to Dr. Munir’s work, demonstrating the actual role that the Pakistani state have played in this field. It would have also provided empirical proof to his central thesis of the State responsibility.

In Chapter 8 of the book, the author discusses the role of International instruments such as the CRC and seeks to compare two different jurisdictions in their approach to the issues of child rights. He stresses the need to have greater enforcement of covenants such as the CRC by the State. However, he stops short of discussing the nature of reservations that have been raised by Muslim countries to its various provisions. These reservations – many of which are arguably political, not religious in nature – must be highlighted so that the public is aware of the measures (relating to children’s’ rights) that are being adopted. He also undertakes a comparative analysis of the Jordanian and Pakistani legal systems in this context. However, the legal and historical experiences of both these countries are not similar. It is not clear why the author chose to compare these two nations in order to get a snapshot view of the legal position in the Muslim world. It would have been helpful if some similarities in the historical experiences of the two countries were provided in order to provide as to why a common yardstick is applicable to both.

**Conclusion**

The *Rights of the Child in Islam* is an important contribution to Islamic jurisprudence. It demonstrates the breath of protections that Islam has historically and scripturally afforded to those in society who need the most protection. By covering a wide variety of subjects, Dr. Munir provides a guide for both Muslims and Islamic states, so that they can order their behavior in accordance with their Islamic obligations. This roadmap is helpful in not only the realization of the rights provided in Islam, but acts as a foundation for further discourse and development of the subject.