

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

Dr. Shahbaz Ahmad Cheema*

Sir Dinshah Fardunji 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

* Assistant Professor, Punjab University Law College, University of the Punjab, Lahore.

¹ The Constitution of Islamic Republic of Pakistan 1973, art. 1.

² Ibid, *inter alia*, art. 2, 2A, 20, 31, and 227.

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

⁴ Michel R. Anderson, 'Islamic Law and Colonial Encounter in British India' (*Women Living Under Muslim Laws*, June 1996) <<http://www.wluml.org/node/5627>> accessed 27 January 2018.

⁵ Dr Shahbaz Ahmad Cheema and Samee Ozair Khan, 'Genealogical Analysis of Islamic Law Books Relied on in the Courts of Pakistan,' (2013) *Al-Adwa* 23-36.

⁶ Ibid.

⁷ Scott Alan Kugle, 'Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia' (2001) 35(2) *Modern Asian Studies* 257, 259.

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’.⁹ 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 (ie, *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 Rahman¹⁰ 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.¹¹ 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

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

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2170464> accessed 27 January 2018.

¹¹ Elisa Giunchi, ‘The Reinvention of Shari’a Under the British Raj: In Search of Authenticity and Certainty’ (2010) 69(4) *The Journal of Asian Studies* 1119.

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 Giunchi¹² 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.¹³

Another salient feature, according to Elisa Giunchi,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 formalistically without being conscious to the spirit and ethos of Islamic law. In this regard, Fyzee¹⁵ 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.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).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)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 17th and early part of 18th centuries, the colonisers transposed themselves as agents of the Mughals. Thereafter, in the late 18th and first half of 19th 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

¹⁵ Asaf A. A. Fyzee, ‘Muhammadan Law in India’ (1963) 5(4) *Comparative Studies in Society and History* 401, 406.

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.

¹⁷ *Ibid.*

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.¹⁹ 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

¹⁹ (n 7) 301.

colonised people. 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 Law²⁰

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.²¹ Mulla (1868-1934) produced ten editions of the book during his life: the 1st edition was published in 1905²² and the 10th in 1933²³ 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

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.

²¹ *Mst. Zaitoon Begum v The Central Exchange Book Ltd. Lahore* PLD 1961 Lah 888; *Mushtaq Ahmad v Mirza Muhammad Amin* PLD 1962 Karachi 442; *Abdul Ghani v Mst. Taleh Bibi* PLD 1962 Lah 531; *Muhammad Sadiq v Mrs Sadiq Safoora* PLD 1963 Lah 534; *Pathana v Wasai* PLD 1965 SC 134; *Ghulam Qadir v Ghulam Hussain* PLD 1965 Lah 200; *Razia Bibi v District Judge, Bahawalnagar* 1992 CLC 1981; *Barkat Ali v Aftab Ahmad* 1992 CLC 1490; *Sher Muhammad v Mahmood Bakhsh* 2000 SCMR 672; *Muhammad Alam v Zarina Bibi* 2000 YLR 1449; *Jaffar Hussain v Main Muhammad Hanif* 2001 CLC 628; *Mst. Raj Bibi v Mst. Shahzadi* PLD 2003 Quetta 53; *Balqees Bibi v Khan Begum* 2003 MLD 185; *Muhammad Suleman v Public At Large* 2013 CLC 395.

²² D. F. Mulla, *Principles of Mahomedan Law* (1st edn, Thacker & Company, Bombay 1905). This edition is the earliest published edition of Mulla <<http://archive.org/details/principlesofmaho00mulluoft>> accessed 29 May 2017. Some claim that Mulla's book was first published in 1906. See Iqbal Ali (ed), *Mulla Principles of Mahomedan Law* (20th edn, LexisNexis, Haryana 2012).

²³ D. F. Mulla, *Principles of Mahomedan Law* (10th edn, The Eastern Law House Calcutta 1933).

in 1938²⁴ and another by Sajba Rangnekar in 1944.²⁵ After the partition, numerous editions of the book were updated by various authors in both India and Pakistan.²⁶

Mulla was a renowned author of his time and wrote commentaries on some enacted laws as well, eg, Civil Procedure Code 1908,²⁷ Transfer of Properties Act 1882.²⁸ 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'.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*.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.³¹ While articulating various section-like propositions in the book, Mulla preferred simplicity over complexity,

²⁴ Iqbal (n 22).

²⁵ Sajba Rangnekar (ed), *Principles of Mahomedan Law* (12th edn, The Eastern Law House Calcutta 1944).

²⁶ Some editions are following: M. Hidayatullah & Arshad Hidayatullah (eds), *Mulla's Principles of Mahomedan Law* (18th edn, N. M. Tripathi Private Ltd., Bombay 1977); Dr M. A. Mannan (ed), *D. F. Mulla's Principles of Mahomedan Law* (PLD Publishers, Lahore 1995); Syed Ali Hassan (ed), *D. F. Mulla's Principles of Mohamadan Law* (Civil & Criminal Law Publications, Lahore 2010); M. Hidayatullah (ed), *Mulla's Principles of Mahomedan Law* (Mansoor Book House, Lahore 2012); Professor Iqbal Ali Khan (ed), *Mulla's Principles of Mahomedan Law* (LexisNexis, Haryana 2013).

²⁷ Dr M. A. Mannan (ed), *D. F. Mulla on the Code of Civil Procedure* (PLD Publishers, Lahore 1981); P. M. Bakshi (ed), *The Code of Civil Procedure* (13th edn, Butterworths, New Delhi 2000).

²⁸ G. C. Bharuka (ed), *The Transfer of Property Act* (10th edn, LexisNexis Butterworths, New Delhi 2005).

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’.³² In his later editions of the book, the applicability of Islamic law to British India was more accurately explained.³³ 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.³⁴ 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,³⁵ but later on considering the significance of the issue in socio-legal milieu of British India was converted into a full-fledged chapter.³⁶ 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

³² *Ibid*, 1.

³³ D. F. Mulla, *Principles of Mahomedan Law* (8th edn, Messrs M. N. Tripathi & Co. Kalbadevi Road, Bombay 1926) 1-2.

³⁴ (n 22) v.

³⁵ (n 22) 4-7.

³⁶ (n 33); (n 23).

'judgments to be found in recognised reports'.³⁷ Where he could not find the judgments sufficiently instructive, he relied on 'the Hedaya and the Fatwa Alungiri'.³⁸ These books were not consulted in original rather their translations were relied upon by him. In case of Hedaya, his reference was Hamilton³⁹ and for Fatwa Alungiri, he turned towards Baillie.⁴⁰

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 circular 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.⁴¹ 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.⁴²

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*⁴³ as it was the law applicable at that time.⁴⁴ Considering two legislative instruments namely the Mussalman Wakf Validating Act 1913 and 1930, he incorporated the changes made in its later edition.⁴⁵ 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 unknotting the marital tie.⁴⁶ 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.⁴⁷ This process of updating and incorporating the changes into the book was continued by various editors even after the demise of the colonial enterprise.⁴⁸

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.

⁴² Dr Tanzil-ur-Rahman, *A Code of Muslim Personal Laws* (Hamdard Publications, Karachi 1978) 102-183.

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 deference 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*.⁴⁹ In this case, the court had to decide whether the disputed property formed part of a *wakf*. For settling this issue, the court had to first describe the contours of *wakf* as set out in Islamic law. In this regard, the court exclusively as well as extensively relied on the section-like

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 judgment⁵¹ 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.

⁵¹ *Mst. Khan Bibi v Mst. Safia Begum* PLD 1969 Lah 338.

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*⁵³ for determining that distant kindred are not entitled to inheritance in the presence of sharers and residuaries; *Ghazala Sadia v Muhammad Sajjad*⁵⁴ 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*⁵⁵ 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*⁵⁶ 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*⁵⁷ 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*⁵⁸ to ascertain the three ingredients of gift/*hiba* under Islamic law; and *Tauqeer Ahmed v Bashir Ahmed*⁵⁹ 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*⁶⁰ 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

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*⁶⁴ has relied on both the last mentioned cases of the Supreme Court⁶⁵ 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.

*Firdous Iqbal v Shifaat Ali*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 *Gakhar Hussain v Surrayya Begum*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

⁶⁴ Writ Petition No. 3149 of 2014.

⁶⁵ *Shabana Naz v Muhammad Saleem* 2014 SCMR 343; *Mehmood Akhtar v DJ Attock* 2004 SCMR 1839.

⁶⁶ 2000 SCMR 838.

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.⁶⁸ He did not contemplate the situation of a divorcee daughter and the responsibility of her maintenance. The Pakistani courts⁶⁹ 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'.⁷⁰ 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.⁷¹

Mulla described deferred dower as exclusively payable on dissolution of marriage either by death or divorce.⁷² 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 abovementioned 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

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.

⁷¹ *Muhammad Shareef v ADJ* 2007 SCMR 49; *Abdul Razzak v Shabnam Noonani* 2012 SCMR 976; *Zahid Hussain v Mst. Mehmooda* 2011 YLR 350; *Rasheed Ahmad Khan v ADJ Layyah* 2011 MLD 1012; *Mst. Shazia v Muhammad Nasir* 2014 YLR 1563.

⁷² (n 22) 156; (n 23) 191.

over many intricacies and subtleties. The Pakistani courts⁷³ 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,⁷⁴ but this judicial approach is gaining ground progressively.

According to Mulla,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*,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*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;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

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.

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

⁷⁵ (n 23) 220.

⁷⁶ PLD 2002 Lah 283.

⁷⁷ PLD 2015 Lah 336.

⁷⁸ *Jamshed v Saleemuddin* PLD 2014 Kar 120.

his right to inheritance in *Saadullah v Gulbanda*⁷⁹ 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 residuary⁸⁰ 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.⁸¹ 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,⁸² 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*.⁸³ 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*.⁸⁴ The apex court observed that *khula* was a charter granted to wives

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 mono-directional 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 recently⁸⁶ 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 disinheritance of daughters either by custom and statutory law⁸⁹ 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*.⁹⁰ 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.