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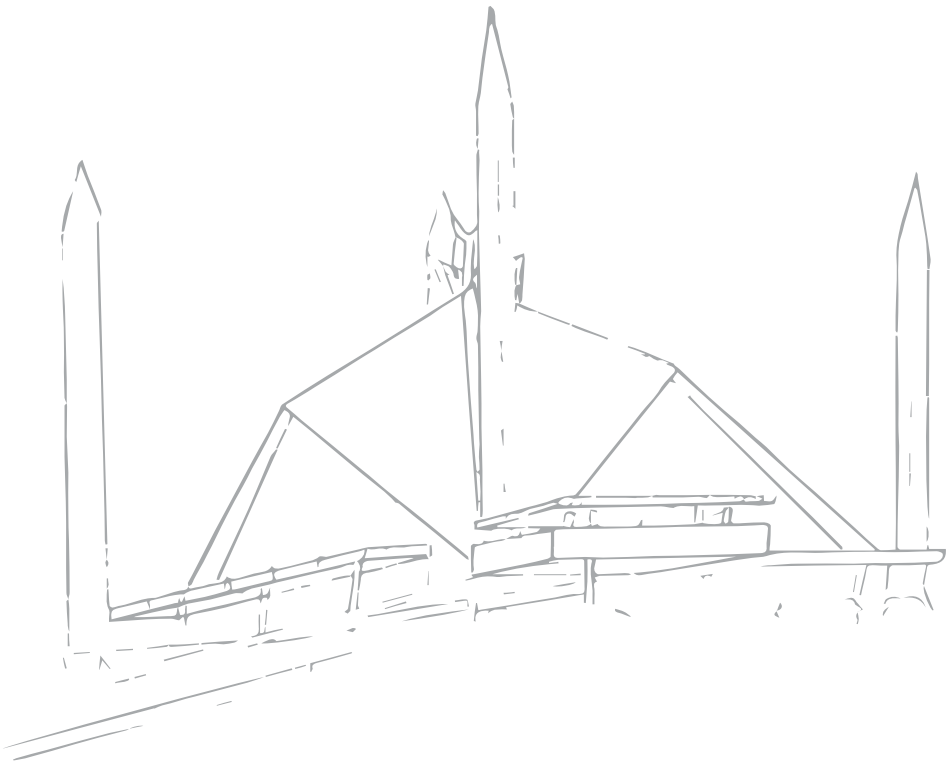

Islamization or de-islamization? Deviations of the Higher Courts from Muslim Family law in Pakistan

Mudasra Sabreen*

Abstract

According to the constitution of 1973, Pakistan is an Islamic Republic in which any law against the Qur'ān *and* Sunnah *is void. In Pakistan, family law to a large extent is based on Islamic law but the law is not detailed. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions. According to authors like Martin Lau, in Pakistan islamization has been a judiciary lead process. It is noticed that while interpreting the law and exercising discretion Pakistani courts have sometimes deviated from Islamic law, have exercised ijtihād and have occasionally extended or modified Islamic law.* Khul' *cases can be cited as example where khul' is granted without consent of the husband although it is against the views of mainstream Islam. There have been cases where children are granted legitimacy despite the fact that conditions of legitimacy according to Islamic law had not been fulfilled. (*Hamida Begum v. Murad Begum*, PLD 1975 SC 624). Other examples are to award custody to the mother despite her remarriage (*Muhammad Bashir v. Ghulam Fatima*, PLD 1953 Lahore 73) and extension of the rule of disqualification of the mother upon remarriage to father (*Feroze Begum v. Muhammad Hussain*, 1983 SCMR 606). Court decisions in Pakistan have been pro women rights and human rights. Pakistan i judiciary keeps into consideration social needs and values while determining family law cases. A detailed study of case law will help to understand approach of Pakistan i judiciary regarding interpretation and application of Muslim family law. Deviations from Muslim family law have been criticised by scholars as courts are considered incapable to exercise ijtihad. The main issue is that the contribution of judiciary has been towards islamization or de-islamization? Study of the deviations of higher courts from Muslim family law in Pakistan is needed to take forward the debate of 'islamization as a judiciary lead processes. This paper will analyse the approach of Pakistan's judiciary in application of Muslim family law along with analysis of deviations.*

Keywords: *Islamization, De-Islamization, Khul', law, Islamic law, Pakistan*

1. Introduction

The Pakistan i legal system is based on English common law and Islamic law. English common law is more influential in

* The Author serves as Chairperson Department of Shari'ah, Faculty of Shari'ah and Law, International Islamic University, Islamabad and can be accessed at: mdsabreen@yahoo.com

commercial law whereas Islamic law is more influential in the area of personal law. Pakistan initiated a process of slamization to bring its laws into conformity with Islamic law. In this process not only were amendments made to laws by the legislature but the judiciary also played an important role. Islamization of laws is considered a judge led process by some scholars.[1]

According to the constitution of Pakistan 1973 Pakistan is an Islamic republic in which any law against the *Quran* and *sunnah* is void.[2] Family law to a large extent is based on Islamic law but the law is not detailed so the courts have to exercise discretion. While interpreting the law and exercising discretion Pakistan i courts have sometimes deviated from Islamic law, have exercised *ijtihād* and have occasionally extended or modified Islamic law. This paper will analyse the approach of Pakistan's judiciary in application of Islamic law along with analysis of deviations.

This research will be a qualitative study. Primarily precedents of higher courts will be analysed. As Pakistan is a common law country so precedents of higher courts are binding upon lower courts to follow so these decisions become law. This study will highlight the approach of the judiciary regarding Islamization. A study of the deviations of judiciary from Islamic law shows the way courts have used their discretion in several matters.

2. 'Religiously inspired judicial activism'[3]

Javaid Rehman, an eminent scholar, while discussing the nature and development of Islamic family law has said in his paper '*sharīah, Islamic family laws and international human rights law*' that while the *Quran* and *sunnah* remain the principal foundations of the *sharīah*, the formulation of a legally binding code from primarily ethical and religious sources has not been an

[1]Martin Lau, *The Role of Islam in the Legal System of Pakistan*, (Leiden; Boston: M. Nijhoff, 2006), 211.

[2] The Constitution of Pakistan 1973, Article 1, 227.

[3] This term is used by Charles H. Kennedy in his "Repugnancy to Islam: Who Decides? Islam and Legal Reforms in Pakistan," *The International and Comparative Law Quarterly*, Vol. 41(4), (Oct. 1992), 188.

uncontested matter.[4] Family laws emerged in 2nd and 3rd centuries were influenced by the socioeconomic, political and indigenous tribal values of the time. A constant review and reinterpretation of the *sharīah* is therefore of utmost significance.

In Pakistan family law is not detailed. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions. In some cases judges have applied Islamic law, in others they have deviated. Occasionally they have done *ijtihād* and have extended or modified Islamic law. Pakistan i judiciary keeps into consideration social needs and values while determining family law cases. In family matters detailed codification based on Islamic law is needed to curb discretion.

If we look at the history, under the Umayyad dynasty, when schools of law were not fully established, judges enjoyed more independence with regards to *ijtihād* and would resort to caliph only if they face any kind of difficulty. In the early period of the Abbasids limitations were imposed upon authority of independent *ijtihād* of the judges due to development of schools of law as judges were expected to follow established views of these schools.[5] To make judges bound to follow a particular school has always been a contested matter. According to al- Māwardī a judge is not bound to follow any particular school and he must exercise his own *ijtihād*. Al-Māwardī permits appointment of a judge from a different school than the appointing authority. According to him a judge has authority to follow any other school than his own if he considers it a sound opinion based on his own *ijtihād*. Strict adherence to the judge's own school is not required. A condition binding the judge to follow a particular school is invalid according to al-Māwardī whether it is a general condition or relates to some specific case or category of decisions. A judge is supposed to

[4] For a detailed discussion see Javaid Rehman, Shariah, "Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq", *International Journal of Law, Policy and Family,* Vol. 21(1), (2007).

[5] Muhammad Hashim Kamali, "The Limits of Powers in an Islamic State", *Islamic Studies,* Vol. 28(4), (1989), p. 331.

exercise his reason and to decide about the right solution of the case so he is not bound by such conditions.[6]

There is difference of opinion among scholars whether a *qādī* should be a *mujtahid*? According to al-Shāf'ī a *qādi* must be a *mujtahid* and should be able to exercise his reason/opinion in legal questions. Abu Hanīfa considers capability of *ijtihād* of a *qādī* recommended but not necessary.[7] In the case of difference of opinion the judge must take the best view and if he is not capable to form an opinion regarding Islamic law, he must seek a *fatwā* and then should decide accordingly.[8] in current judicial setup where mostly judges are not well versed in *sharīah* they are more prone to commit mistakes. *Fuqahā* have authority to derive and formulate rules in Islamic law. Judges are there to interpret and apply these rules. Every judge is not capable to do *ijtihād* which in itself is a very daunting task. They must possess qualifications of a *mujtahid* for it.

In Pakistan Federal Shariat Court (hereafter FSC) is one of the institutions which has contributed in the process of islamization. The FSC has resorted to *ijtihād* at several occasions in cases related to women and family law. *Ijtihād* of Federal Shariat Court has been pro women's rights, and family rights. These *ijtihād* have been gender sensitive. The FSC does not favour *taqlīd* it resorts to *ijtihād* wherever needed.[9] The FSC has said in *Huzoor Bakhsh v. Federation of Pakistan* that

> 'the expression 'injunctions of Islam' is a comprehensive one which will include all injunctions of Islam of every

[6] Abū al Hasan 'Alī b. Muhammad b. Habīb Al-Basrī Al-Māwardī, *Al-Ahkām-al-Sultānīyah,* Translated as The Laws of Islamic Governance, Asadullah Yate (Translator), (London: Ta-ha Publishers Ltd., 1996), 102-103.

[7] Tanzil-ur-Rehman, "Adab Al-Qadi", *Islamic Studies,* Vol. 5(2), (1996), 204; Al-Merghinani, *Hedaya,* English Translation by Charles Hamilton, (Lahore: 1957), 334.

[8] Ibid., 202.

[9] Ihsan Yilmaz, "Pakistan Federal Shariat Court's Collective Ijtihad on Gender Equality, Women's Rights and the Right to Family Life," *Islam and Christian-Muslim Relations*, Vol. 25(2), (2014), 124.

> school of thought and sect etc; but article 203-d of the constitution has restricted its meaning and application and confined it to only two sources for which no Muslim can have any valid objection. These sources ... Are (a) the holy Quran (b) the *sunnah* of the holy prophet'.[10]

In *Muhammad Riaz v. Federal government of Pakistan* the following *ijtihad* methodology was decided by FSC for future decisions: first of all to look for relevant verses and then *ahādīth*; to discover intent of Quranic verse with help of *ahādīth*, to examine opinions of jurists and their reasoning for determining their harmony and compatibility with contemporary needs, if needed modulate them to the demand of the age, to discover and apply as a last resort any other opinion which is compatible with Quran and *sunnah*. According to the FSC the judges should not strictly adhere to literal meaning of the verse rather should consider spirit of the verse by considering the Qur'an as a whole.[11] Qur'an and *sunnah* should be interpreted in the light of evolution of human society but this process should not negate intent and purpose of the *qurān*.[12] While claiming their right for resorting to *ijtihād* the superior courts have asserted their right to independently interpret Qur'an and *sunnah* and while doing so they can disagree with established opinions in Islamic law.[13] in *Abdul Majid v. Government of Pakistan* the Shariat Appellate bench of the supreme court said that where *ijtihād* has already been done matters should not directly to be referred to *Qur'an* and *sunnah*. If direct evidence has been quoted in *Qur'an* and *sunnah* that can be referred to as *Qur'an* and *sunnah* but for implied and indirect evidence this should not be termed so and should be termed as *ijtihād*. If *Qur'an* and *sunnah* are silent about some issue the state can make *ijtihād* about it. Silence of *Qur'an* and *sunnah* does not mean that that thing is *harām*.[14] Here a very important question is regarding capability of these judges to exercise *ijtihād* but it is outside the scope of this paper.

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[10] PLD 1983 FSC 255.

[11] PLD 1980 FSC 1.

[12] *Muhammad Riaz v. Federal Govt. Of Pakistan*, PLD 1980 FSC 1.

[13] See *Rashida Begum v. Shahab Din*, PLD 1960 Lahore 1142; *Zohra Begum v. Sh. Latif Ahmed Munawwar*, PLD 1965 Lahore 695.

[14] PLD 2009 SC 861

In *b. Z. Kaikaus v. President of Pakistan*, PLD 1980 SC 160 the supreme court held that islamization is a task of government and not of judiciary. The state has authority to enact and implement laws. Islamization of laws, *ijtihād* and to decide which school of law should be followed is a matter to be decided by the legislature and not by the judiciary.[15] This was the approach of the court in 1980 but in 1990s a shift in approach of the judiciary regarding islamization and *ijtihād* has been noticed. The development of public interest litigation in 1990s in Pakistan has been linked with judiciary's thirst for islamization. It is noticed that in 1990s there was a trend in the judiciary to refer to Islamic law in cases of interpretation of fundamental rights.[16] During this period an increase in use of arguments based on Islamic law was noticed not only by the *sharīah* courts (Federal Shariat Court and shariat appellate bench of the Supreme Court) but by high courts as well. Quite often Islamic law arguments in these cases were not core legal arguments but were given to show legitimacy of court's position and as a moral consideration.[17] This was a shift of islamization stimulus from executive to the judiciary. In a large number of cases the high courts have referred to un-codified principles of Islamic law and quite often tried to interpret statutory provisions n the light of *sharīah*. It has been observed that the high courts have been more enthusiastic regarding islamization as compared to *sharīah* courts. *Ulamā* judges have been proved more flexible in issues related to Islamic law probably due to their deep rooted knowledge of Islamic law.[18]

One of the reasons of this shift of Islamization stimulus was promulgation of section 2 of the enforcement of *Sharī'ah* Act 1991 which defines S*harīah* as meaning 'the injunctions of Islam as laid

[15] Also see Keith Hodkinson, "Islamicisation of Law in Pakistan: Ways, Means and the Constitution," *The Cambridge Law Journal*, Vol. 40, No. 2, (Nov. 1981), 248-249.

[16] Ibid.

[17] *M. D. Tahir v. Provincial Govt.* 1995 CLC 1730; *Muhammad Shabbir Ahmed Khan v. Federation of Pakistan*, PLD 2001 SC 18; *Mrs. Anjum Irfan v. LDA*, PLD 2002 Lahore 555; *Hasan Bakhsh Khan v. Deputy Commissioner, DG Khan*, 1999 CLC 88.

[18] Elisa Giunchi, "Islamization and Judicial Activism in Pakistan: What Shariah?," *Oriente Moderno,* Anno 93, Nr. 1, (2013), 197.

down in the holy *Qur'an and sunnah'*. This section says that while interpreting s*harī'ah* opinions of Muslim jurists may be taken into consideration. According to section 4 of the act if more than one interpretations of a statute are possible it is a duty of the judge to adopt that interpretation which is closer to *sharīah*. Probably the trend towards islamization among the judiciary was a result of promulgation of this act. It was also noticed that the regular appellate courts were considered moderate by petitioners so they raised questions related to Islamic law in cases to be heard by such courts.[19] Occasionally the courts themselves took up questions related to Islamic law but regular courts took Islamic law as morality of an Islamic Republic.[20]

As the *Qur'an* and *sunnah* do not give detailed account of every case and every rule, an Islamic state and its judiciary has to either depend on *fiqh* or has to adopt a semi-legislative role by interpreting and extending the law itself. In *fiqh* manuals different opinions and interpretations have been given and each opinion is considered equally legitimate. Review of case law shows that Qur'anic verses, *ahādīth,* the *fiqh* treatise mostly the *hedāya* and *fatāwā alamgīrī* have been used. It shows influence of Hanafī School on the judgements as well.[21] In *Sher Muhammad and others v. Mst. Fatima* and others the court noted that all Muslims were governed to be by Hanafī law unless proved to the contrary.[22]

In the presence of western procedures and systems it is quite difficult to implement Islamic law. The judges are not experts in *sharīah*. Quiet often *ulamā* have been involved along with lay judges as lay judges do not have deep knowledge of Islamic law. The FSC is an example of such a compromise. In Pakistan state made laws, Islamic law, codified and un-codified, and custom run together.[23] in such a scenario the attempt to interpret, deviate from

[19] *Haq Nawaz v. State*, 2001 SCMR 1135; *Fayyaz Ahmed v. Lahore Stock Exchange (Guarantee) Ltd.* 1996 CLC 1469.

[20] Moeen H. Cheema, "Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law", *The American Journal of Comparative Law*, Vol. 60(4), (Fall 2012), 882, 902-903.

[21] Giunchi, Islamization, 189, 200.

[22] 2016 MLD 185; also see *Mst. Rashidan Bibi through Legal Heirs and 2 others, 2005 MLD 1202*, PLD 1954 Lah 480, PLD 1965 SC 134.

[23] Ibid., 189, 190.

or modify muslim family law becomes controversial but is of utmost significance as it determines the course of future of judicial islamization or de-islamization in Pakistan .

3. Analysis of case law

Where the courts enjoy discretion they get a chance to show their inclinations and preferences. As Pakistan has *sharīah* courts as well as regular courts in its judicial system it is interesting to have a look into their decisions and to analyse whether it will be a contribution towards islamization or de-islamization. Following is a detailed analysis of case law regarding deviations of judiciary from Muslim family law.

It is interesting to note that high court judges have been more inclined towards interpretation of statutes in the light of the principles of Islamic law even occasionally they have replaced codified principles of statutes with un-codified principles of Islamic law.[24] in *nizam khan v. Additional district judge* the Lahore High Court stated that if the statute has not dealt with any issue it should be decided in the light of *sharīah*.[25] In *Muhammad Naseer v. The state* the Federal Shariat Court said that reference will be made to the principles of Islamic law if the statute is silent about some issue.[26]

If we look at the case law we notice that Qur'anic verses and *ahādīth* are referred to by the courts. Various treatise of *fiqh* especially *Hidāya* and *Fatāwā 'Ālamgīrī* has been relied on which belong to the *Ḥanafī* school. In 1960's a new trend was noticed which was use of the methodology of *takhayyur*.[27] eclectism or *takhayyur* denotes choosing opinions from different schools of thought with in Islamic law. This process sparked difference of opinion among jurists in Islamic law and there is a huge debate over legitimacy of this practice. *Takhayyur* (eclecticism) is defined as a process in Islamic law of *'crossing the boundaries of the various schools in an effort to find juristic opinions that*

[24] Giunchi, Islamization, 189-190.
[25] PLD 1976 Lahore 930.
[26] PLD 1988 FSC 58.
[27] Giunchi, Islamization, 200.

support reform in many aspects of the law of personal status'.[28] As far as methodology of reform is concerned there is no consistency in Pakistan 's approach as it has practiced *takhayyur* as well as *ijtihād* in the past. There have been instances when Pakistan actually practiced *takhayyur* but claimed it to be *ijtihād*.[29] Section 4 of the Muslim family laws ordinance 1961 is a good example here. In this section the legislature adopted the *shī'ah* law of inheritance to give relief to an orphan child.[30] According to section 2 of the shariat application act 1991 in interpretation of the *qur'an* and *sunnah* to follow one school is not necessary and opinions from different schools can be used for this purpose.[31] In Pakistan *takhayyur* is used not only by the state in the process of islamization but also by the courts. There are certain rules in Pakistan i family law which are borrowed from other schools despite the fact that the majority in Pakistan belongs to the *hanafī* school. In the Indian subcontinent the device of *takhayyur* was for the first time used in drafting of the dissolution of Muslim marriages act 1939. This act was based on the *Mālikī School.*[32] Pakistan i courts also follow this approach. In 1967 in *khurshid bibi v muhammad amin* the supreme court of Pakistan said:

> '…it is permissible to refer to those opinions [of other *sunnī* sects other than *hanafis*] which are consistent with the Qur'ānic injunctions. A certain amount of fluidity exists, even among orthodox *hanafis* in certain matters. In the case of a husband who has become *mafqūd-ul-khabar,* for instance, *Mālikī* opinion can be resorted to by a *hanafi qāzī* as is mentioned in *raddul mukhtār*. … the learned *imāms* never claimed finality for their opinions, but due to various historical causes, their followers in subsequent ages invented the doctrine of *taqlīd* under which a *sunnī* Muslim follows the opinion of only one of their *imams*, exclusively,

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[28] *The Oxford Encyclopedia of Islamic World* at:
www.oxfordislamicstudies.com/article/opr/t125/e2323?_hi=0&_pos=16, Last visited 16th February 2010.

[29] Coulson, 1957, 136.

[30] Lau, 138.

[31] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan," *Islamic Studies*, Vol. 47(4), (2008), 452, 458.

[32] Anees Ahmed, "Reforming Muslim Personal Law," *Economic and Political Weekly,* Vol. 36(8), (2001), 618.

irrespective of whether reason be in favour of another opinion.'[33]

As the doctrine of precedent prevails in Pakistan the decision of the Supreme Court is binding on lower courts. In *Mst. Khurshid Jan v. Fazal Dad*[34] the Lahore High Court clearly said that in the case of conflicting views of earlier jurists the court is free to adopt any opinion. In *Fida Hussain v Naseem Akhtar*[35] where admissibility of testimony of close relatives was in question the Lahore High Court held that testimony of close relatives will be admissible if it is corroborated by some other evidence. The court said that there is difference of opinion among schools regarding this issue. The *Hanafī School* does not accept the testimony of close relatives but according to other three *sunnī* schools such testimony is admissible. The court was of the view that it is not bound to follow any particular school on a particular issue and can adopt opinions from other schools.

It is evident from these cases that Pakistan i courts do not consider it mandatory to follow a particular school and so they have made use of the wealth of juristic opinions available in Islamic law. In *Allah Rakha v. Federation of Pakistan*, the FSC has declared the requirement of registration of marriage in accordance with islam.[36] the Federal Shariat Court held that the provisions of section 6 of the Muslim family laws ordinance, which is related to obtaining permission from the first wife for contracting second marriage, is not against injunctions of Islam. The Federal Shariat Court observed that the Qur'ānic verse (4: 3) which permits polygamy itself prescribes the precondition of *'adal* (justice or just treatment) along with emphasis on the difficulty of fulfilment of this condition. Section 6 does not prohibit polygamy it only requires that the condition of *'adal* should be met by the husband if he wants to have more than one wives.[37] This was an example of deviation of the court from traditional Muslim family law but the approach of the court was pro women rights.

[33] PLD 1967 SC 97.
[34] PLD 1964 Lahore 558-612.
[35] PLD 1977 Lahore 328.
[36] PLD 2000 FSC 1 at 48-51.
[37] Also *see Ishtiaq Ahmed v. The state,* PLD 2017 SC 187.

There have been several cases in which the courts have decided that consent of *walī* is not required for validity of *nikāh.* In the case of a marriage without consent of *walī,* opinion of the Hanafī School has been followed. The courts have been consistent that an adult Muslim woman does not need consent of her *walī* to contract marriage.[38] The most important case regarding this issue is *Abdul Waheed v. Asma Jahangir,* PLD 2004 SC 219. In this case the Supreme Court laid the rule that an adult Muslim woman can contract her marriage without consent of her *walī*.[39] Opinion of the Hanafī School has been followed regarding right of an adult Muslim woman to contract her marriage but interestingly the conditions which the Hanafī School has attached to this right were ignored by the court. The Hanafī School gives the guardian right to go to the court to annul the marriage contracted without his consent if the husband is not the wife's social equal or dower is less than the dower of equivalence. Pakistan i courts seem not interested in giving such authority to the guardian.

It has been approach of the courts in several cases that in Islamic law *khul'* is a right of the wife and she can exercise it without consent of the husband.[40] if she satisfies the court that to ask her to live with her husband will be tantamount to force her to live in hateful union she can claim *khul'* the courts distinguish *khul'* from *ṭalāq* stating the former right of the wife in which the husband has

[38] *Muhammad Imtiaz v. The state*, PLD 1981 FSC 308; *Arif Hussain and Azra Perveen v. the state,* PLD 1982 FSC 42; *Muhammad Ramzan v. The state*, PLD 1984 FSC 93; *Mumtaz Imtiaz and others v. The state,* PLD 1981 FSC 308; *Muhammad Basher v. The State and another*, PLD 1981 Lahore 41.

[39] Also see *Muhammad Imtiaz v. The State,* PLD 1981 FSC 308; *Arif Hussain and Azra Parveen v. The State*, PLD 1982 FSC 42; *Muhammad Yaqoob v. The State*, 1985 PCr.LJ 1064e; *Muhammad Ramzan v. The State,* PLD 1984 FSC 93.

[40] According to the majority of Muslim jurists namely Hanafis, Shaf'is and Hanbalis khula can only be obtained with consent of the husband. The Maliki School of thought disagrees and give the arbitrators authority to effect separation between spouses in the case of irretrievable breakdown of the marriage. Approach of Pakistani courts regarding khula is partially in conformity with the Maliki School. For a detailed discussion see Muhammad Munir, The Law of *Khul'* in Islamic Law and the Legal System of Pakistan, available at http://ssrn.com/abstract=2441564. Last visited on 10th January, 2019.

no right of *ruju'*, and latter right of the husband.[41] in 1959 the Lahore High Court in *Balqis Fatima v. Najm-ul-Ikram Qureshi* revisited the law related to *khul'* and interpreted verse 2:229 of the Qur'an giving authority to the state or the court to dissolve the marriage if it considers the parties incapable to keep in the limits of allah.[42] This decision was endorsed in *khurshid bibi v. Muhammad Amin*, PLD 1967 sc 97. For interpretation of verse 2:229 the court did not rely on interpretation of jurists rather it came up with its own *ijtihād*. In *Syed muhammad ali v. Musarrat Jabeen* the petitioner argued that the court has no authority to grant *khul'* without consent of the husband. The court said that although according to muslim jurists *khul'* should be granted with consent of the husband but in *khurshid bibi v. Muhammad Amin*[43] the supreme court has drawn a different conclusion from verses of Qur'an and *ahādīth* while exercising its powers to do *ijtihād*. The said case declared the law related to *khul'* so husband's contention was rejected/dismissed.[44] In 2014 the quetta high court decided in *bibi Feroze v. Abdul Hadi*[45] that divorce is the husband's initiative and *khul'* is wife's initiative. The court said that consent of the husband is not required for *khul'. Khul'* does not depend on his consent but depends on the court reaching at the conclusion that the husband and wife could not live within the limits of allah. Return of gifts is not a condition precedent to *khul'*.[46] In most of such cases women apply for dissolution under the dissolution of muslim marriages act 1939 and apply for *khul'* as an alternative remedy. There have been cases where the judges have granted *khul'* despite the wife having a ground for dissolution of marriage.[47] This shows failure of courts to distinguish between

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[41] *Khursheed Bibi v. Muhammad Amin*, PLD 1967 SC 97; *Mst. Bilqis Fatima v. Najm ul Ikram Qureshi,* PLD 1959 Lahore 566; *Syed Muhammad Ali v. Musarrat Jabeen* 2003 MLD 1077.

[42] PLD 1959 Lahore 566.

[43] PLD 1967 SC 97.

[44] *Syed Muhammad Ali v. Musarrat Jabee*n 2003 MLD 1077.

[45] 2014 CLC 60; Also see *Muhammad Faisal Khan v. Mst. Sadia*, PLD 2013 Peshawar 12.

[46] Also see *Muhammad Arshad v. Judge Family Court, Kot Addu*, 2014 YLR Lahore 1686.

[47] Mst. *Hakimzadi v. Nawaz Ali*, PLD 1972 Karachi 540; *Bashiran Bibi v Bashir Ahmed*, PLD 1987 Lahore 376; *Bibi Anwar v. Gulab Shah*, PLD 1988

judicial dissolution and *khul'*. Judicial dissolution is awarded on establishing a valid ground whereas there is no such requirement for grant of *khul'*.

Section 10(4) of the family courts act 1964 was amended in 2002 to give the court authority to pass decree of dissolution of marriage by way of *khul'* if there was no possibility of reconciliation. The wife will have to return her dower in this case. The provision was challenged in front of the FSC in *Saleem Ahmed v. The Govt. of Pakistan* . The court declared that a law cannot be declared invalid on the basis of opinions, views and *fatwās* of scholars. The court held that the said provision is not against any verse of *Qur'an* or *sunnah* so is a valid piece of legislation.[48]

The only protection which a child has in a child marriage is the right to exercise the option of puberty. The dissolution of Muslim marriages act 1939 gives the right to exercise the option of puberty to a girl who is contracted in marriage by her guardian before the age of sixteen years. In this case she can repudiate the marriage before reaching the age of eighteen years.[49] in the case of the exercise of the option of puberty Pakistan i courts do not consider the intervention of the court necessary for repudiation of marriage. The Lahore High Court in *Noor Muhammad v. The State*[50] and the Federal Shariat Court in *Sajid Mehmood v. The state*[51] decided that if a woman has contracted a second marriage after attaining puberty her first marriage will get automatically dissolved. The courts were of the view that if the option is

Karachi 602. There are also cases where the courts have corrected these misconceptions: *Mst. Zahida Bibi v. Muhammad Maqsood*, 1987 CLC 57; *Khalid Mehmood v. Anees Bibi,* PLD 2007 Lahore 626; *Munshi Abdul Aziz v. Noor Mai*, 1985 CLC 2546; *Anees Ahmed v. Uzma*, PLD 1998 Lahore 52; *Karim Ullah v. Shabana*, PLD 2003 Peshawar 146.

[48] PLD 2014 FSC 43.

[49] The Dissolution of Muslim Marriages Act 1939, Section 2(vii). Also see *M Amin v. Surayya Begum*, PLD 1970 Lahore 475; *Ghulam Qadir v. Judge Family Court, Murree*, 1988 CLC 113. For a discussion on laws related to child marriage in South Asia see Lucy Carrol, 'Marriage – Guardianship and Minor's Marriage at Islamic Law', *Studies in Islamic Law, Religion and Society,* Ed. H. S. Bhatia, (New Delhi: Deep and Deep Publications, 1996, 379-384.

[50] PLD 1976 Lahore 516.

[51] PLD 1995 FSC 1.

exercised and the marriage is repudiated there is no requirement to communicate this decision to the court. Judicial approval is not a requirement for exercise of the option of puberty. If the decision is communicated and the court issues a decree such decree will be just a confirmation of the decision.[52] In *Mst. Irfana Tasneem v. Station House Officer and others*[53] and *Mst. Sardar Bano v. Saifullah khan*[54] the Lahore High Court decided that second *nikāh* itself is a valid repudiation of the first *nikāh.* The court observed that the law only requires the repudiation to be made before the girl attains eighteen years of age and no specific age, time or mode of exercise of the option of puberty is required by the law. According to the courts the institution of the suit itself annuls the marriage if the conditions for the option of puberty are fulfilled.[55] In Islamic law the exercise of the option of puberty is a two-step procedure which means that after repudiation the decision must be communicated to the court and then the court declares the child marriage null and void. The courts have deviated from this approach for protection of the woman who has contracted second marriage, to save her from accusation of *zinā* and her children (from second marriage) from stigma of illegitimacy.

It is noticed that when girls after puberty file suits for dissolution of marriage by exercise of the option of puberty they also ask for dissolution of marriage on the basis of *khul'* as an alternative prayer. There have been cases where a girl has exercised the option of puberty before attaining the age of eighteen years but the court dissolved the marriage by *khul'* and not by the option of puberty. In 2004 in *Tasawar Abbas v. Judge, family court and others* the girl was married off by her father during minority. The father gave an undertaking to the bridegroom that if he will not be able to give his daughter's hand to him after majority he will pay Rs.

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[52] Also see *Mst. Farangeza v. the State*, 1995 MLD 1439; *Mst. Jannat v. Additional District Judge,* PLD 1981 Lahore 68; *Mst. Aslam Khatoon v. Muhammad Azeem Khan and others,* 1991 CLC 177; *Mulazim Hussain v. Mst. Amina Bibi and another*, 1994 CLC 1046.

[53] PLD 1999 Lahore 479.

[54] PLD 1969 Lahore 108.

[55] *Mst. Farangeza v. the State*, 1995 MLD Peshawar 1439; *Abdul Sattar v. Mst. Wakila Bibi*, PLD Peshawar 1965 1.

100,000. The girl repudiated her marriage after puberty and filed a case for dissolution of marriage on the basis of the option of puberty. The family court considered the undertaking to pay Rs. 100,000 as a consideration and awarded her *khul'*. The Lahore High Court did not declare the marriage void as a result of exercise of the option of puberty but said that the undertaking cannot be a consideration for *khul'* rather benefits received by the girl were considered consideration for *khul'*.[56] In 1988 in *manzoor ahmed v. Addition District Judge III, Rahimyar khan* the Lahore High Court said that where a marriage was performed during minority and the marriage was not consummated the marriage should be dissolved by the exercise of the option of puberty as the rule of *khul'* is not applicable here.[57] In the case of *khul'* the wife has to return her dower or to pay compensation whereas in the case of exercise of the option of puberty she does not need to pay compensation. To dissolve a marriage on the basis of *khul'* where it can be dissolved on the basis of the option of puberty is against the interests of the wife. If the wife could not prove that her marriage was contracted during minority the court may grant *khul'* as in such a case the wife cannot exercise the option of puberty. There have been cases where the wife demanded dissolution of marriage on the basis of the option of puberty and not on the basis of *khul'* but could not prove that the marriage was repudiated before attaining the age of eighteen years so the court granted *khul'*.[58]

As far as child law is concerned according to the guardians and wards act 1890 the primary consideration in matters related to custody and guardianship is welfare of the minor. According to the case law 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.[59] The courts while applying

[56] 2004 YLR Lahore 1415. Also see *Liaquat Hussain v. Zil-e-Huma,* 2012 CLC SC AJK 1386.

[57] 1988 CLC Lahore 436.

[58] *Muhammad Akram v. Shakeela Bibi*, 2003 CLC Lahore 1787; *Muhammad Rashid v. Judge, Family Court, Chishtian*, 2001 CLC Lahore 477.

[59] *Feroz Begum v. Muhammad Hussain*, 1979 SCMR 299; *Ms. Christine Brass v. Javed Iqbal*, PLD 1981 Peshawar 110; *Mrs. Marina Pushong v. Derick Noel Pushong*, PLJ 1974 Lahore 385; *Aisha v. Manzoor Hussain,* PLD

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. While following interests of the minor the courts have quite often deviated from Islamic law. David pearl observed that in these deviations *'stress is always laid from a Muslim point of view'*.[60] The presumption is that to award custody according to the rules of personal law of the minor is in the minor's welfare but this presumption is rebuttable. In *Atia Waris v. Sultan Ahmad khan,* PLD 1959 Lahore 205 and *Munawar Jan v. Muhammad Afsar khan*, PLD 1962 Lahore 142 the Lahore High Court said that if it is evident from the circumstances of the case that to follow personal law is not in the interests of the child the decision will be in accordance with his/her interests. It means that the best interests of the minor will be decided after considering circumstances and facts of each case. Personal law of the minor will not be a primary consideration.

In 1975 in *Hamida Begum v. Murad Begum*, PLD 1975 SC 624 the supreme court of Pakistan recognised the principle of the conjugal bed and considered it a conclusive proof unless evidence to prove the contrary is produced. Pakistani courts are very lenient in application of the rules of legitimacy to avoid the stigma of illegitimacy. In this case the Supreme Court declared that a child born within 6 months is legitimate if acknowledged by the husband. This approach is against Islamic law as in Islamic law a child born after 6 months and not within 6 months is considered legitimate. In this case the judge awarded status of legitimacy to the child probably because of social stigma attached the concept of illegitimacy. Illegitimate children in Pakistan i society not only lose respect and dignity but quite often lose their life too.

In *Mst. Imtiaz Begum v. Tariq Mehmood*, 1995 CLC Lahore 800 the Lahore High Court said that if the mother refuses to suckle the

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1985 SC 436; *Abdul Razzaque v. Dr. Rehana Shaheen*, PLD 2005 Karachi 610.

[60] David Pearl, *A Note on Children's Rights in Islamic Law, Children's Rights and Traditional Values*, Ed. Gillian Douglas and Leslie Sebba, (Aldershot: Ashgate PublishingLtd., 1998), 90.

child she will lose her right to custody. The court considered the right of *raḍā'ah* and the right of custody interdependent. In this case the Lahore High Court was probably considering breastfeeding a reason for awarding custody to the mother. This approach is against Islamic law as in Islamic law if a mother after divorce refuses to suckle the child the father is obliged to hire a wet nurse and the mother cannot be deprived of the right of custody on this basis. To provide maintenance is a duty of the father and not of the mother. The father is obliged to pay for the wet nurse in this case and the mother shall retain custody. In the same case while deciding the dispute of custody the Lahore High Court allowed the mother to keep the child after the period of fosterage till the child attained the age at which it is ready to receive formal education. According to the court this age would be determined according to the custom of the area of the parent's residence. The court said that to set the age at seven or nine is not a requirement of Islamic law.[61] In Islamic law the age at which custody is transferred from the mother to the father is seven for a boy and puberty for a girl. 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 the most of Pakistan i cities. In a village probably this age will be around five years which is far less than the age fixed by the jurists. Mostly the courts have not followed this approach in later cases and have considered the mother entitled to custody of a boy till seven years and a girl till puberty.[62]

In Islamic law a mother disqualifies to become a custodian if she remarries with a person who is non-*mahram* (not related in prohibited degree) to the child. This rule is based on the presumption that the mother after her remarriage with a non-*mahram* of the child will not be able to give complete love, affection and care to the child. The stepfather not being related to

[61] *Imtiaz Begum v. Tariq Mehmood*, 1995 CLC Lahore 800.

[62] *Ali Akhtar v. Mst. Kaniz Maryam*, PLD 1956 Lahore 484. In *Sardar Hussain and others v Mst. Parveen Umer*, PLD 2004 SC 357; *Mian Muhammad Sabir v. Mst. Uzma Parveen*, PLD 2012 Lahore 154; *Muhammad Zaman v. Ameer Hamza*, 2009 CLC Shariat Court Azad Kashmir 230; *Muhammad Faraz v. Mehfeez* PLD 2012 Islamabad 61; *Ms. Hina Jillani, Director of A. G. H. S. Legal Aid Cell v. Sohail Butt,* PLD 1995 Lahore 151.

the child will not be concerned with the child's welfare and may preclude the mother from looking after the child.[63] This rule is based on a *hadīth*.[64] In *Mhammad Bashir v. Ghulam Fatima,* PLD 1953 Lahore 73 the Lahore High Court gave custody of a child to her mother who had remarried to a stranger. The court justified this deviation by stating that in Islamic law consideration of the welfare of the child is paramount and all rules of personal law are subject to the application of welfare of the minor.[65] If in any case there are contradictions between welfare of the minor and the rules of personal law the former prevails. The court observed that the rule of disqualification of the mother upon remarriage is not based on Qur'an but the court ignored the fact that this rule is based on a *hadīth.* The court observed that according to Islamic law the order of custodians is subject to the welfare of the minor. There have been cases where custody of even a female child is given to the mother despite her remarriage.[66]

Sometimes remarriage of the father and his having children from such marriage is considered an impediment to custody and courts consider it against the welfare of the child to award custody to the father even after lapse of the period of custody with the mother. The Supreme Court in *Feroze Begum v. Muhammad Hussain* gave custody of the minor to the mother as it was considered against the welfare of the child to live with step mother and her

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[63] Burhan-ul-Din Abi Al-Hasan, *The Hedaya: Commentary on the Islamic Laws,* Charles Hamilton (Translator), New Delhi: Kitab Bhawan, 1870), 138.

[64] According to a tradition a woman came to the Prophet Muhammad (Peace be upon him) and said: O Prophet of God! This is my son, the fruit of my womb, cherished in my bossom and suckled at my breast and his father is desirous of taking him away from me into his own care;' to which the Prophet replied, 'thou hast a right in the child prior to that of thy husband, so long as thou dost not marry with a stranger.' Abi Daud Sulaiman b. Al-Ash'ath b. Ishaq Al-Uzri Al-Sajistani, *Mukhtasar Sunan Abi Daud*, (Beirut: Dar-al-Ma'rafah, 1980), Vol. 3, 185.

[65] Also see *Mst. Rukhsana Begum v. Additional District Judge Multan*, 2011 YLR 2796; *Mst. Yasmin Bibi v. Mehmood Akhter*, 2004 YLR 641.

[66] *Rashida Begum v. Shahabuddin*, PLD 1960 Lahore 1142; *Mst. Nazir Begum v. Abdul Sattar*, PLD 1963 Karachi 465; *Jannat Bibi v. District Judge*, 1989 MLD Lahore 2231.

children.[67] The rule of forfeiture of the right of custody of the mother upon remarriage is an Islamic law rule but Pakistan i courts have extended this rule to the remarriage of the father. In *fiqh* literature we do not find mention of disqualification of the father upon remarriage. Pakistan i courts have tried to bring parity between genders regarding child custody rules.

In *Zohra begum v. Latif Ahmad Munawwar*[68] the Lahore High Court gave custody of a minor son aged seven years to the mother and said that as the rules of custody are not given by the *Qur'an* or the *sunnah* it is permissible for the courts to differ from the text books on Muslim law. The courts can come to their own conclusions by the way of *ijtihād*. 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 do *ijtihād*.[69] Tanzil-ur-Rahman while criticizing this approach of the Lahore High Court suggested that although the courts are incapable to do *ijtihād* but 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 Pakistan i courts follow the second rule.[70] The practice to claim *ijtihād* by courts is discouraged by the scholars of Islamic law.

The reason for claim to do *ijtihād* in such cases is the extensive discretion on the part of the courts in the child law. The reason is that when detailed legislation is not there, the courts have to rely

[67] *Feroze Begum v. Muhammad Hussain*, 1983 SCMR 606. Also see: *Muhammad Jameel v. Azmat Naveed*, 2010 MLD Lahore 1388; *Humayun Gohar Khan v. the Guardian Judge Okarah*, 2010 MLD Lahore 1313; *Muhammad Zulqarnain Satti v. Mst. Ismat Farooq*, 2010 CLC 1281 Lahore; *Abdul Razzaque v. Pari Jaan*, 1989 MLD Karachi 1285; *Mansoor Hussain v. Additional District Judge Islamabad*, 2011 CLC Islamabad 851.

[68] PLD 1965 Lahore 695.

[69] Rahman, 1978, 744-745; Abdul Ghafur Muslim, "Islamisation of Laws in Pakistan: Problems and Prospects," *Studies in Islamic Law, Religion and Society,* Ed. H. S. Bhatia, (New Delhi: Deep and Deep Publications, 1996), 146.

[70] Rahman, 744-745.

on case law or to use their discretion. *'ali* and *a'zam* 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.'*[71] 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 of custody. In some decisions Islamic principles and jurisprudence have been adopted by the courts while interpreting statutory provisions[72] whereas 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.[73]

It is evident from the above mentioned cases that Pakistan i courts do not consider it mandatory to follow a particular school and so they have made use of the wealth of opinions available in Islamic law. On several occasions the courts have claimed to do *ijtihād*. As mentioned above, in Pakistan family law is based on Islamic law but as the law is not detailed the courts enjoy huge discretion. It results in deviations from Islamic law and contradictory decisions. Overall courts' approach has been pro women rights and family values. Courts keep into consideration social needs as well while deciding such cases. Another reason for deviation from the rules of personal law in custody cases is that most of these rules are not divine and these are presumptions which can be rebutted in specific circumstances of a case, for instance it is a presumption that it is in the interests of the child to live with the mother during tender years of her age but this presumption can be rebutted by proving bad character of the mother. As most of the judges are not well versed in *sharīah* they sometimes make mistakes while interpreting and applying Islamic law.

[71] Ali and Azam, 158.
[72] *Mst. Imtiaz Begum v. Tariq Mehmood*, 1995 CLC Lahore 800.
[73] Ali and Azam, 161.

4. Conclusion

In Pakistan, family law to a large extent is based on Islamic law but the law is not detailed. Lack of detailed legislation gives the courts huge discretion which results in contradictory decisions. According to authors like martin Lau, in Pakistan islamization has been a judiciary lead process. It is noticed that while interpreting the law and exercising discretion Pakistan i courts have sometimes deviated from Islamic law, have exercised *ijtihād* and have occasionally extended or modified Islamic law. Court decisions in Pakistan have been pro women rights and family rights. Pakistan i judiciary keeps into consideration social needs and values while determining family law cases. The courts have been indulged in gender sensitive interpretative methodology which has served the purpose of protection of women rights and family values. Analysis of case law shows that deviations of courts from Islamic law in these cases have always been justified on the basis of general principles of Islamic law and the concept of welfare *(maslaha).* This is judicial islamization which is done by assuming the authority to exercise *ijtihād.* From methodological perspective it has always been controversial but it shows judiciary's thirst for islamization. While doing so the judiciary has challenged the authority of established schools and traditional Muslim family law.