Islamic Studies 59:2 (2020) pp. 203–223

The Judiciary-led Islamization of Family Law in Pakistan: An Analysis

MUDASRA SABREEN*

Abstract

According to the Constitution of Pakistan 1973, Pakistan is an Islamic Republic in which any law against the Qur'ān and sunnah *is void. In Pakistan, Muslim family law is largely based on Islamic law, but the law is not detailed. Lack of detailed legislation gives the courts huge discretion, which sometimes results in contradictory decisions. According to Martin Lau and others, Islamization in Pakistan has been a judiciary-led process. While interpreting the law and exercising discretion, Pakistani courts sometimes differ with the established schools of Islamic law, exercise* ijtihād*, and occasionally extend or modify Islamic law. The examples include the cases related to the* khul'*, legitimacy of children, and custody of children by mother or father after separation between the spouses. While some scholars have criticized the deviations of the courts from the established schools of Islamic law, considering the courts incapable of exercising* ijtihād*, the court decisions in Pakistan have been pro women and human rights. They take into consideration social needs and values while deciding family law cases. This paper analyzes a number of case law to help us understand the approach of Pakistani judiciary to interpretation and application of Muslim family law.*

Keywords

Muslim family law, Pakistan, *ijtihād*, Islamization, judiciary, *'ulamā'*.

Introduction

The Pakistani legal system is based on English common law and Islamic law. English common law is more influential in commercial law, whereas Islamic law is more influential in the area of personal law. Pakistan initiated a process of Islamization to bring its laws into conformity with Islamic law. In this process, not only the legislature made amendments to laws but the judiciary also played an important role. Even some

* Assistant Professor, Faculty of Shariah and Law, International Islamic University, Islamabad, Pakistan.

scholars consider Islamization of laws in Pakistan a judiciary-led process.[1]

According to the Constitution of Pakistan 1973, Pakistan is an Islamic Republic in which any law against the Qur'ān and *sunnah* is void.[2] Muslim family law of Pakistan is largely based on Islamic law, but the law is not detailed, so the courts have to exercise discretion. While interpreting the law and exercising discretion, Pakistani courts have sometimes differed with the established schools of Islamic law, exercised *ijtihād*, and occasionally extended or modified Islamic law. This paper analyzes the approach of Pakistani judiciary to the application of Muslim family law. The research question relates to the courts' approach and contribution to Islamization of family law in Pakistan. The study focuses on those decisions in which the courts chose a different path and differed with the established schools of Islamic law.

This research is a qualitative study that analyzes primarily precedents of the higher courts. Since Pakistan is a common-law country, precedents of higher courts are binding upon lower courts to follow and become law. A study of the disagreements of judiciary with the established schools of Islamic law shows the way courts have used their discretion in several matters. Before embarking upon precedents, we discuss the role of the judge as a *mujtahid*.

The Judge as a *Mujtahid*

Literally, the word "*ijtihād*" means exertion, effort, striving, and searching.[3] 'Abd Allāh b. 'Umar al-Bayḍāwī (d. 685/1286) defines it as follows: "*Ijtihād* means to exhaust (one's) exertion in understanding the rules *(aḥkām)* of the *sharī'ah*."[4] Muḥammad b. Muḥammad al-Ghazālī (d. 505/1111) gives the following definition of *ijtihād*: "*Ijtihād*, according to the opinions of the learned scholars (*'ulamā'*), is to make every effort by a *mujtahid* (who applies individual judgement) in seeking knowledge regarding the rules of the *sharī'ah*."[5] This definition indicates that *ijtihād*

[1] Martin Lau, *The Role of Islam in the Legal System of Pakistan* (Leiden: M. Nijhoff, 2006), 211.
[2] The Constitution of the Islamic Republic of Pakistan, Article 227(1), last modified February 28, 2012, http://www.na.gov.pk/uploads/documents/1333523681_951.pdf.
[3] Muhammad Athar 'Ali, *Shah Wali Allah's Concept of Ijtihad and Taqlid: With Special Reference to 'Iqd-al-Jid Fi Ahkam al-Ijtihad wa 'l-Taqlid* (Bangladesh: Bangladesh Institute of Islamic thought, 2001), 27.
[4] 'Abd Allāh b. 'Umar al-Bayḍāwī, *Minhāj al-Wuṣūl ilā 'Ilm al-Uṣūl* (Beirut: Mua'assasat al-Risālah, 2006), 124.
[5] Muḥammad b. Muḥammad al-Ghazālī, *al-Mustaṣfā* (Beirut: Dār al-Kutub al-'Ilmiyyah, 1993), 342.

means exerting one's utmost effort to seek "knowledge." This knowledge may be related to definitive as well as probable matters.[6] The definition given by Sayf al-Dīn al-Āmidī (d. 631/1233) in which he says, "Ijtihad means exerting utmost extent in searching a hypothetical opinion (*al-zann*) in a matter as to the rules of shari'ah so that one may feel himself unable ('ajz) to search any further,"[7] indicates that the knowledge or ruling gained through *ijithād* is probable and not definitive.[8] The most comprehensive definition of *ijtihād* is "exercising utmost capacity by a jurist to form an opinion *(zann*) as to the practical or demonstrable ('amali) rule of Shari'ah in such a manner that he (jurist) feels himself quite unable ('ajz) to do excess therein."[9] This definition comprises all the elements necessary for *ijtihād.* The *ijtihād* is to be done in demonstrable rules of the *sharī'ah.* It also indicates that the *ijithād* leads to an opinion, which is probable and not definitive.

Under the Umayyad dynasty when the schools of law were not fully established, judges enjoyed more independence with regard to *ijtihād* and resorted to the caliph only if they faced any kind of difficulty. In the early period of the Abbasids, limitations were imposed on the *ijtihād* of the judges due to the development of schools of law and they were expected to follow the established views of these schools.[10] To make judges bound to follow a particular school has always been a contested matter. According to Abū 'l-Ḥasan al-Māwardī (d. 450/1058), a judge is not bound to follow any particular school and he must exercise his own *ijtihād.* He permits appointment of a judge from a school of law different from that of the appointing authority. According to him, a judge has the right to follow any school of law if he considers it a sound opinion based on his own *ijtihād.* Strict adherence to the judge's own school of law is not required. Al-Māwardī also holds that a condition binding the judge to follow a particular school is invalid regardless of whether it is a general condition or relates to some specific case or category of decisions.[11]

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[6] 'Ali, *Shah Wali Allah's Concept of Ijtihad and Taqlid*, 29.
[7] Ibid., 30; 'Alī b. Abī 'Alī al-Āmidī, *al-Iḥkām fī Uṣūl al-Aḥkām* (Beirut: al-Maktab al-Islāmī, n.d.), 4:162.
[8] 'Ali, *Shah Wali Allah's Concept of Ijtihad and Taqlid*, 30.
[9] Ibid.
[10] Muhammad Hashim Kamali, "The Limits of Power in an Islamic State," *Islamic Studies* 28, no. 4 (1989): 331.
[11] Abu'l-Hasan al-Mawardi, *al-Ahkam as-Sultaniyyah: The Laws of Islamic Governance*, trans. Asadullah Yate (London: Ta-Ha Publishers, 1996), 102-03; A. A. A. Fyzee, "The *Adab al-Qadi* in Islamic Law," *Malaya Law Review* 6, no. 2 (1964): 408.

There is a difference of opinion among scholars whether a judge should be a *mujtahid*? According to al-Shāfiʿī, a judge must be a *mujtahid* and should be able to exercise his reason/opinion in legal questions. However, Abū Ḥanīfah (d. 150/767) considers capability of a judge to do *ijtihād* recommended but not necessary.[12] In the case of difference of opinions, a judge must take the best view and if he is not capable of forming an opinion regarding Islamic law, he must seek a *fatwā* and decide accordingly.[13] In the contemporary judicial setup where judges are mostly not well versed in the *sharīʿah*, they are more prone to commit mistakes. The competent Muslim jurists have the authority to derive and formulate rules in Islamic law. The judges should interpret and apply these rules because not every judge is capable of doing *ijtihād*.

Journey towards Islamization

Pakistan, being an Islamic state, started its journey towards Islamization of its laws right after independence. The legislature and judiciary both contributed to the Islamization of laws in Pakistan. However, this paper focuses on the role of judiciary.

A lot of legislation has been done in Pakistan to Islamize the laws borrowed from the British system. The major legislation forming an integral part of the Islamization scheme of Pakistani laws was introduced in the family laws and Hudood Laws.[14] It is pertinent to note the underlying approaches to this Islamization of laws and the laws deemed not contrary to the Islamic injunctions. There are two broad approaches to anything addressed or left out under the Islamic law. The first approach enunciates the idea that every matter that has been expressly provided for in the *sharīʿah* to do or not to do is to be followed as per the command or prohibition respectively and the rest of the matters are to be considered permissible (*mubāḥ*).[15] The proponents of this view include the jurists of majority schools. Some Ḥanafī jurists also adopted this approach in some special cases.[16] The second approach propounds the

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[12] Tanzil-ur-Rahman, "*Adab al-Qāḍī*," *Islamic Studies* 5, no. 2 (1966): 201; Charles Hamilton, trans., *The Hedaya or Guide: A Commentary on the Mussulman Laws* (Lahore: Premier Book House, 1957), 334; Fyzee, "*Adab al-Qadi*," 408.

[13] Tanzil-ur-Rahman, "*Adab al-Qāḍī*," 202.

[14] Alamgir Muhammad Serajuddin, *Cases on Muslim Law of India, Pakistan, and Bangladesh* (New Delhi: Oxford University Press, 2015), 490.

[15] The rule reads, "*al-Aṣl fī 'l-ashyā' al-ibāḥah*" (The original state of things is permissibility).

[16] Imran Ahsan Khan Nyazee, *Theories of Islamic Law: The Methodology of Ijtihad* (Islamabad: International Institute of Islamic Thought and Islamic Research Institute, 1994), 293.

idea that whatever that is not expressly provided for is prohibited (*maḥdhūr*), unless its permissibility is expressly provided in the *sharīʿah*. The proponents of this view are Ḥanafī jurists.[17]

These two approaches have important practical implications. In the Islamization scheme of Pakistani laws, the first approach has been followed which states that the original rule of everything is permissibility unless expressly provided for in the *sharīʿah* to be prohibited. The laws repugnant to Islam were amended according to the principles of the *sharīʿah*. However, many other laws that were not considered repugnant to the *sharīʿah* expressly were allowed to remain intact on the presumption that they were valid and permissible.[18] The problem with this strategy is that these laws contain within them Western concepts and in case of interpretations, Western principles are applicable to them, which is not at all a justification of conformity with the *sharīʿah*.[19]

Religiously Inspired Judicial Activism[20]

Javaid Rehman, an eminent scholar, argues that while the Qur'ān and *sunnah* remain the principal foundations of the *sharīʿah*, the formulation of a legally binding code from primarily ethical and religious sources has not been an uncontested matter.[21] In Pakistan, family law is not detailed. This gives the courts huge discretion, which sometimes leads to contradictory decisions. In some cases, judges applied Islamic law, in others they did not. Occasionally, they did *ijtihād* and extended or modified Islamic law. Pakistani judiciary keeps into consideration social needs and values while determining family law cases. In family matters, therefore, detailed codification based on Islamic law is needed to curb judicial discretion.

The Federal Shariat Court (FSC) is one of the institutions, which have contributed to the process of Islamization of laws. The FSC has resorted to *ijtihād* at several occasions in cases related to women and family law. The *ijtihād* of the FSC has been pro women's rights and family

[17] Ibid.
[18] Ibid.
[19] Ibid., 294.
[20] This term was used by Charles H. Kennedy in "Repugnancy to Islam - Who Decides? Islam and Legal Reforms in Pakistan," *The International and Comparative Law Quarterly* 41, no. 4 (1992): 188.
[21] For a detailed discussion, see Javaid Rehman, "The 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* 21, no. 1 (2007): 108-27.

rights. The FSC does not favour *taqlīd*. Rather it resorts to the *ijtihād* wherever needed.[22] According to Article 203-D of the Constitution of Pakistan 1973, the FSC has jurisdiction to declare any law null and void if it is repugnant to the injunctions of Islam as laid down in the Qur'ān and *sunnah*. The term "injunctions of Islam" has not been defined by the Constitution. The FSC has said in *Huzoor Bakhsh v. Federation of Pakistan*,

> The expression "injunctions of Islam" is a comprehensive one which will include all injunctions of Islam of every 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 and (B) the Sunnah of the Holy Prophet.[23]

The FSC, however, has failed to develop a comprehensive framework for determining injunctions of Islam.[24] In *Mrs. Ambreen Tariq v. Federal Government of Pakistan*, the FSC observed that its jurisdiction was restricted to consideration of repugnancy of a law only in light of injunctions of Islam as contained in the Qur'ān and *sunnah* of the Prophet (peace be on him). The FSC was not authorized to decide Shariat petitions in the light of juristic opinions of *fuqahā'*.[25] In *Pakistan v. Public at large*,[26] the Shariat Appellate Bench (SAB) of the Supreme Court of Pakistan decided that no law could be declared repugnant to Islamic injunctions without specific reference to the primary sources. This approach confers wide legislative authority to the state in matters, which are not explicitly dealt within the Qur'ān and *sunnah*.[27] In *Muhammad Riaz v. Federal Government of Pakistan*, the following *ijtihād* methodology was decided by FSC for future decisions: First of all to look for relevant verses and then *aḥādīth*; to discover intent of a Qur'ānic verse with help of *ahādīth*, to examine opinions of jurists and their

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[22] Ihsan Yilmaz, "Pakistan Federal Shariat Court's Collective *Ijtihād* on Gender Equality, Women's Rights and the Right to Family Life," *Islam and Christian-Muslim Relations* 25, no. 2 (2014): 124.

[23] PLD 1983 FSC 255. In Imtiaz Begum v. Tariq Mehmood 1995 CLC 800, the term "injunctions of Islam" were defined as those injunctions which are contained in the Qur'ān and *sunnah*. Also see Sher Bahadur Khan v. Haji Wali Bat Khan 1992 MLD 46.

[24] Shahbaz Ahmad Cheema, "The Federal Shariat Court's Role to Determine the Scope of Injunctions of Islam and Its Implications," *Journal of Islamic State Practices in International Law* 9, no. 2 (2013): 92–111.

[25] 2013 MLD 1885.

[26] PLD 1986 SC 240.

[27] Also see Nadeem Siddique v. Islamic Republic of Pakistan, PLD 2016 FSC 4; Muhammad Akram v. Federation of Pakistan, PLD 2017 FSC 32.

reasoning to determine their harmony and compatibility with contemporary needs and modulate them to the demand of the age if needed; and to discover and apply as a last resort any other opinion which is compatible with the Qur'ān 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'ān as a whole.[28] The Qur'ān and *sunnah* should be interpreted in the light of evolution of human society, but this process should not negate intent and purpose of the Qur'ān.[29] While claiming their right to do *ijtihād*, the superior courts have asserted their right to independently interpret the Qur'ān and *sunnah* and disagree with the established schools of Islamic law.[30] In *Abdul Majid v. Government of Pakistan*, the SAB said that where *ijtihād* has already been done matters should not be directly referred to the Qur'ān and *sunnah*. If evidence has explicitly been found in the Qur'ān and *sunnah*, it may be referred to as the Qur'ān and *sunnah* but implied and indirect evidence should not be termed so; rather, it should be termed as *ijtihād*. If the Qur'ān and *sunnah* are silent about some issue, the state can exercise *ijtihād* about it. Silence of the Qur'ān and *sunnah* does not mean that a particular thing is prohibited (*ḥarām*).[31] One may question the capability of the judges, who are trained only in conventional legal system in Pakistan, to exercise *ijtihād*. However, this question is outside the scope of this paper.

In *B. Z. Kaikaus v. President of Pakistan*, the Supreme Court held that Islamization is a task of the government and not of the judiciary. The state has the authority to enact and implement laws. Islamization of laws, *ijtihād*, and the school of law to be followed are matters that should be decided by the legislature and not by the judiciary.[32] The court adopted this approach in 1980s. However, in 1990s a shift in the approach of the judiciary regarding Islamization and *ijtihād* was noticed. The development of public interest litigation in 1990s in Pakistan has been linked with the 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

[28] PLD 1980 FSC 1.
[29] Muhammad Riaz v. Federal Govt. of Pakistan, PLD 1980 FSC 1.
[30] See Syed Muhammad Ali v. Musarrat Jabeen, 2003 MLD 1077; Rashida Begum v. Shahab Din, PLD 1960 Lahore 1142; Zohra Begum v. Sh. Latif Ahmed Munawwar, PLD 1965 Lahore 695.
[31] PLD 2009 SC 861.
[32] B. Z. Kaikaus v. President of Pakistan, PLD 1980 SC 160. Also see Keith Hodkinson, Islamicisation of Law in Pakistan: Ways, Means and the Constitution," *The Cambridge Law Journal* 40, no. (1981): 248–49.

of interpretation of fundamental rights.[33] It does not mean that one cannot find cases favouring application of Islamic law before 1990's. However, during this period an increase in the use of arguments based on Islamic law not only by the *sharīʿah* courts (i.e., FSC and SAB) but also by the High Courts was noticed. It is important to note that Islamic law arguments mentioned in these cases were often not core legal arguments. Rather they were given to show legitimacy of the court's position and as a moral consideration.[34] This was a shift of Islamization stimulus from the executive to the judiciary. In a large number of cases, the high courts referred to un-codified principles of Islamic law and often tried to interpret statutory provisions in the light of the *sharīah*. It has been observed that the High Courts have been more enthusiastic regarding Islamization as compared to the *sharʿīah* courts. *'Ulamā'* judges have been thought to be more flexible in issues related to Islamic law probably due to their deep-rooted knowledge of Islamic law.[35]

One of the reasons of this shift of Islamization stimulus was the promulgation of Section 2 of the Enforcement of Shariah Act 1991, which equates the *sharīʿah* with "the injunctions of Islam as laid down in the Holy *Quran and Sunnah*." This section says that while interpreting the s*harīʿah,* opinions of Muslim jurists may be taken into consideration. According to section 4 of the Act, if more than one interpretation of a statute are possible, it is the duty of the judge to adopt the interpretation, which is closer to the *sharīʿah*. It was also noticed that the petitioners considered the regular appellate courts moderate and raised questions related to Islamic law in cases to be heard by such courts.[36] Occasionally, the courts themselves took up questions related to Islamic law. However, the regular courts took Islamic law as morality of an Islamic republic.[37]

As the Qur'ān and *sunnah* do not give detailed account of every case and every rule, an Islamic state and its judiciary have to either depend on *fiqh* (Islamic law) or adopt a semi-legislative role by interpreting and

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[33] Ibid.

[34] 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.

[35] Elisa Giunchi, "Islamization and Judicial Activism in Pakistan: What Šarīʿah?" *Oriente Moderno* 93, no. 1 (2013): 197.

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

[37] Moeen H. Cheema, "Beyond Beliefs: Deconstructing the Dominant Narratives of the Islamization of Pakistan's Law," *The American Journal of Comparative Law* 60, no. 4 (2012): 882, 902–03.

extending the law itself. In *fiqh* manuals, several opinions and interpretations are given and each opinion is considered legitimate. However, an opinion is preferred due to strong arguments or its suitability for a particular situation. Review of case law shows that Qur'ānic verses, *aḥādīth,* and *fiqh* manuals mostly *Hidāyah* and *Fatāwā 'Ālamgīrī* have been used. It also shows influence of Ḥanafī school of law on the court judgements.[38] In *Sher Muhammad and others v. Mst. Fatima and others*, the court noted that all Muslims were governed by Ḥanafī law unless proved to the contrary.[39]

In the presence of Western procedures and systems, it is difficult to completely implement Islamic law. The judges are not experts in the *sharīʿah*. Often the *'ulamā'* judges work with the judges trained in the conventional legal system. The FSC is an example of such a combination. In Pakistan, state-made laws, codified and un-codified Islamic law, and custom run together.[40] In such a scenario, an attempt to reinterpret Muslim family law and differ with the established schools of Islamic law becomes controversial, but is at the same time significant, as it determines the course of future judicial Islamization of laws in Pakistan.

Analysis of Case Law

Where the courts enjoy discretion, they get a chance to show their inclinations and preferences. As Pakistan has *sharīʿah* courts as well as regular courts in its judicial system, it is interesting to look into their decisions and analyze whether they are contributing to 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 the High Court judges have been more inclined towards interpretation of statutes in the light of the principles of Islamic law. Even occasionally they replaced codified principles of statutes with un-codified principles of Islamic law.[41] In *Nizam Khan v. Additional District Judge*, the Lahore High Court stated that if the statute did not deal with a particular issue it should be decided in the light of the *sharīʿah*.[42] In *Muhammad Naseer v. the State*, the FSC said that reference

[38] Giunchi, "Islamization and Judicial Activism in Pakistan," 189, 200.
[39] 2016 MLD 185. Also see Mst. Rashidan Bibi through Legal Heirs and 2 others v. Mst. Jantay Bibi through Legal Hiers, 2005 MLD 1202, PLD 1954 Lahore 480; PLD 1965 SC 134.
[40] Giunchi, "Islamization and Judicial Activism in Pakistan," 189–90.
[41] Ibid.
[42] PLD 1976 Lahore 930.

would be made to the principles of Islamic law if the statute were silent about some issue.[43]

In the 1960s, a new trend was noticed which was use of the methodology of *takhayyur* (eclecticism).[44] *Takhayyur* is a process in Islamic law of "crossing the boundaries of the various schools in an effort to find juristic opinions that support reform in many aspects of the law of personal status."[45] This concept sparked differences among Muslim jurists and there was much debate over legitimacy of this practice. As far as the methodology of reform is concerned, there is no consistency in the Pakistani legislature/judiciary's approach as it has practiced *takhayyur* as well as *ijtihād* in the past. There have been instances when Pakistani legislature/judiciary practiced *takhayyur*, but it claimed to do *ijtihād*.[46] The Section 4 of the Muslim Family Laws Ordinance 1961 is a good example of this. In this section, the legislature adopted the *shīʿah* law of inheritance to give relief to an orphan child.[47] According to the section 2 of the Shariat Application Act 1991, it is not necessary to follow a specific school of Islamic law while interpreting the Qur'ān and *sunnah*. Rather opinions from different schools can be preferred for this purpose.[48] 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 Pakistani family law, which have been borrowed from other schools of Islamic law despite the fact that the majority in Pakistan belongs to the Ḥanafī school of law. In the Indian subcontinent, the device of *takhayyur* was for the first time used in drafting the Dissolution of Muslim Marriages Act 1939. This act was based on the Mālikī school of law.[49] Pakistani courts also follow this approach. In 1967, the Supreme Court of Pakistan said in *Khurshid Bibi v. Muhammad Amin*,

> It is permissible to refer to those opinions [of other *sunnī* sects other than Hanafīs] which are consistent with the Quranic injunctions. A certain amount of fluidity exists, even among orthodox *Hanafis* in certain matters. In the case of a husband who has become *mafqood-ul-khabar,* for instance, *Maliki* opinion can be resorted to by a *Hanafi qazi* as is mentioned in *Raddul*

[43] PLD 1988 FSC 58.
[44] Giunchi, "Islamization and Judicial Activism in Pakistan," 200.
[45] Azhar Niaz, "Sunni Schools of Law," http://islamicus.org/sunni-schools-law/.
[46] Noel J. Coulson, "Reform of Family Law in Pakistan," *Studia Islamica* 7 (1957): 136.
[47] Lau, *Role of Islam in the Legal System of Pakistan*, 138.
[48] Muhammad Munir, "Precedent in Islamic Law with Special Reference to the Federal Shariat Court and the Legal System in Pakistan," *Islamic Studies* 47, no. 4 (2008): 452, 458.
[49] Anees Ahmed, "Reforming Muslim Personal Law," *Economic and Political Weekly* 36, no. 8 (2001): 618.

> *Mukhtar*. . . . The learned *imams* never claimed finality for their opinions, but due to various historical causes, their followers in subsequent ages invented the doctrine of *taqlid* under which a *sunni* Muslim follows the opinion of only one of their *imams*, exclusively, irrespective of whether reason be in favour of another opinion.[50]

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*,[51] 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*,[52] the Lahore High Court held that testimony of close relatives would be admissible if some other evidence corroborated it. The court said that there was difference of opinion among schools regarding this issue. The Ḥanafī school of law does not accept the testimony of close relatives but according to other three *sunnī* schools of law such testimony is admissible. The court was of the view that it was 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 Pakistani courts do not consider following a particular school mandatory and consequently have made the use of various juristic opinions available in Islamic law.

In *Allah Rakha v. Federation of Pakistan*, the FSC declared the requirement of registration of marriage in accordance with Islam.[53] The 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. It further observed that the Qur'ānic verse,[54] which permits polygamy itself, prescribes the precondition of *'adl* (justice or just treatment) along with emphasis on the difficulty of fulfilment of this condition. Section 6 does not prohibit polygamy. Rather, it only requires that the condition of *'adl* should be met by the husband if he wants to have more than one wives.[55] This was an example of deviation of the court from traditional Muslim family law, but the approach of the court was pro women rights.

There are several cases, in which the courts decided that the consent of *walī* was not required for validity of *nikāḥ.* In the case of a marriage without consent of *walī,* opinion of the Ḥanafī school of law has

[50] PLD 1967 SC 97.
[51] PLD 1964 Lahore 558–612.
[52] PLD 1977 Lahore 328.
[53] PLD 2000 FSC 1 at 48–51.
[54] Qur'ān 4:3.
[55] Also see Ishtiaq Ahmed v. the State, PLD 2017 SC 187.

been followed. The courts consistently held that an adult Muslim woman did not need consent of her *walī* to contract marriage.[56] The most important case regarding this issue is *Abdul Waheed v. Asma Jahangir*.[57] In this case, the Supreme Court laid the rule that an adult Muslim woman can contract her marriage without consent of her *walī*.[58] Opinion of the Ḥanafī school of law has been followed regarding the right of an adult Muslim woman to contract her marriage but interestingly the conditions, which the Ḥanafī school of law attached to this right, were ignored by the court. The Ḥanafī school of law 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 (*kufw*) or dower is less than the dower of equivalence (*mahr al-mithl*). However, Pakistani courts seem not interested in giving such right to the guardian.

The courts held in several cases that in Islamic law *khul'* was a right of the wife and she can exercise it without the consent of the husband.[59] 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 no right of *rujū'*, and the latter right of the husband.[60] In 1959, the Lahore High Court in *Balqis Fatima v. Najm-ul-Ikram Qureshi* revisited the law related to *khul'* and interpreted the verse 2:229 of the Qur'ān as giving authority to the state or the court to dissolve the marriage if it considers the parties incapable of maintaining

[56] 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.

[57] Abdul Waheed v. Asma Jahangir, PLD 2004 SC 219. For a detailed discussion of the case, see Shaheen Sardar Ali, "Is an Adult Muslim Woman *Sui Juris*? Some Reflections on the Concept of 'Consent in Marriage' without a *Wali* (with Particular Reference to the *Saima Waheed* Case)," *Yearbook of Islamic and Middle Eastern Law* 3, no. 1 (1996): 156-74.

[58] 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.

[59] According to the majority of Muslim jurists namely Ḥanafīs, Shāfi'īs, and Ḥanbalīs *khul'* can only be obtained with consent of the husband. The Mālikī school, however, disagrees and gives the arbitrators authority to effect separation between spouses in the case of irretrievable breakdown of the marriage. Approach of Pakistani courts regarding *khul'* is partially in conformity with the Mālikī school of law. For a detailed discussion, see Muhammad Munir, "The Law of *Khul'* in Islamic Law and the Legal System of Pakistan," *LUMS Law Journal* 2 (2014-2015): 33-62.

[60] 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.

the limits of Allah.[61] This decision was endorsed in *Khurshid Bibi v. Muhammad Amin*.[62] 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*[63] the Supreme Court has drawn a different conclusion from verses of the Qur'ān and *aḥādīth* while exercising its power to do *ijtihād*. The said case declared the law related to *khul'*. Thus, the husband's contention was rejected/dismissed.[64] In 2014, the Quetta High Court decided in *Bibi Feroze v. Abdul Hadi*[65] that divorce was the husband's initiative and *khul'* was the wife's initiative. The court said that consent of the husband was not required for *khul'*. *Khul'* does not depend on his consent. Rather, it 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'*.[66] 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.[67] This shows failure of the courts to distinguish between 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 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 *fatvā*s of scholars.

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[61] PLD 1959 Lahore 566.
[62] PLD 1967 SC 97.
[63] Ibid.
[64] Syed Muhammad Ali v. Musarrat Jabeen 2003 MLD 1077.
[65] 2014 CLC 60; Also see Muhammad Faisal Khan v. Mst. Sadia, PLD 2013 Peshawar 12.
[66] Also see Muhammad Arshad v. Judge Family Court, Kot Addu, 2014 YLR Lahore 1686.
[67] 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 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.

The court held that the said provision was not against any verse of the Qur'ān or *sunnah*. Thus, it is a valid piece of legislation.[68]

The only protection, which a child has in a child marriage, is the right to exercise the option of puberty (*khiyār al-bulūgh*). 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.[69] In the case of the exercise of the option of puberty, Pakistani courts do not consider the intervention of the court necessary for repudiation of marriage. The Lahore High Court in *Noor Muhammad v. the State*[70] and the FSC in *Sajid Mehmood v. the State*[71] decided that if a woman contracts a second marriage after attaining puberty her first marriage will get automatically dissolved. The courts were of the view that if the option is exercised and the marriage is repudiated there is no requirement to communicate this decision to the court. Judicial approval is not a requirement for exercising 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.[72] In *Mst. Irfana Tasneem v. Station House Officer and others*[73] and *Mst. Sardar Bano v. Saifullah Khan*,[74] the Lahore High Court decided that second *nikāh* itself was a valid repudiation of the first *nikāh.* The court observed that the law only required the repudiation to be made before the girl attains eighteen years of age. It did not require any specific age, time, or mode of exercise of the option of puberty. According to the courts, the institution of the suit itself annuls the marriage if the conditions for the option of puberty are fulfilled.[75] In Islamic law, the exercise of the option of puberty is a

[68] PLD 2014 FSC 43.

[69] 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," in *Studies in Islamic Law, Religion and Society,* ed. H. S. Bhatia (New Delhi: Deep and Deep Publications, 1996), 379–84.

[70] PLD 1976 Lahore 516.

[71] PLD 1995 FSC 1.

[72] 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.

[73] PLD 1999 Lahore 479.

[74] PLD 1969 Lahore 108. Also see Tasawar Abbas v. Judge Family Court and others, 2004 YLR 1415; Muhammad Iqbal v. Mst. Siani, 2004 PCr.LJ 193.

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

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 differed with 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 are cases in which a girl 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. 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 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 could not be a consideration for *khul‘*. Rather benefits received by the girl were considered consideration for *khul‘*.[76] 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.[77] In the case of *khul‘*, the wife has to return her dower or 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‘*.[78]

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[76] 2004 YLR Lahore 1415. Also see Liaquat Hussain v. Zil-e-Huma, 2012 CLC SC AJK 1386.
[77] 1988 CLC Lahore 436.
[78] Muhammad Akram v. Shakeela Bibi, 2003 CLC Lahore 1787; Muhammad Rashid v. Judge, Family Court, Chishtian, 2001 CLC Lahore 477.

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, and physical, mental and psychological development. The minor's comfort and spiritual and moral wellbeing along with his/her religion is also considered.[79] The courts while applying welfare principle 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. David Pearl observed that in these deviations "stress is always laid from a Muslim point of view.'[80] The presumption is that to award custody according to the rules of personal law of the minor is in the minor's welfare. However, this presumption is rebuttable. In *Atia Waris v. Sultan Ahmad Khan*,[81] and *Munawar Jan v. Muhammad Afsar Khan*,[82] the Lahore High Court said that if it were evident from the circumstances of the case that to follow personal law was not in the interests of the child, the decision would be in accordance with his/her interests. In *Mst. Rabia Bibi v. Abdul Qadir*,[83] the Lahore High Court opined that Islamic law was subservient to the welfare of the minor.[84] 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*,[85] the Supreme Court of Pakistan recognized 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 eliminate the stigma of illegitimacy. The dictum in this case is that Islamic law is the substantive law to determine the legitimacy of children, but interpretation of the court was different from opinions of *fuqahā'* regarding minimum period of gestation. In this case, the

[79] 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 1985 SC 436; Abdul Razzaque v. Dr. Rehana Shaheen, PLD 2005 Karachi 610.

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

[81] PLD 1959 Lahore 205.

[82] PLD 1962 Lahore 142.

[83] 2016 CLC 1460.

[84] Also see Muhammad Aslam v. Additional District Judge, 2004 CLC Lahore.

[85] PLD 1975 SC 624.

Supreme Court declared that a child born within six months was legitimate if acknowledged by the husband. This approach is against Islamic law, as in Islamic law a child born after six months and not before six months is considered legitimate. In this case, the judge awarded status of legitimacy to the child probably because of social stigma attached to the concept of illegitimacy. Illegitimate children in Pakistani society not only lose respect and dignity but quite often lose their life too.

In *Mst. Imtiaz Begum v. Tariq Mehmood*,[86] the Lahore High Court said that if the mother refused to suckle the child, she would 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. 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 until the child attained the age at which it was 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 was not a requirement of Islamic law.[87] 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 until the child becomes three and a half years old as that is the age at which a child starts going to school in most of Pakistani 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 until seven years and a girl until puberty.[88]

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[86] 1995 CLC Lahore 800.

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

[88] Ali Akhtar v. Mst. Kaniz Maryam, PLD 1956 Lahore 484; 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.

In Islamic law, a mother disqualifies to become a custodian if she remarries with a person who is non-*maḥram* (not related in prohibited degree) to the child. This rule is based on the presumption that the mother after her remarriage with a non-*maḥram* of the child will not be able to give complete love, affection, and care to the child. The stepfather not being related to the child will not be concerned with the child's welfare and may preclude the mother from looking after the child.[89] This rule is based on a Prophetic tradition.[90] In *Muhammad Bashir v. Ghulam Fatima*,[91] 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.[92] 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 the Qur'ān. However, the court ignored the fact that this rule was based on a Prophetic tradition. The court observed that according to Islamic law the order of custodians was subject to the welfare of the minor. There are cases in which custody of even a female child was given to the mother despite her remarriage.[93]

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

[89] Charles Hamilton, trans., *The Hedaya: A Commentary on the Mussulman Laws*, 2nd ed. (London: W. M. Allen, 1870), 138.

[90] According to a tradition a woman came to the Prophet Muḥammad (Peace be on him) and said, "O Prophet of God! This is my son, the fruit of my womb, cherished in my bosom, and suckled at my breast and his father is desirous of taking him away from me into his own care. The Prophet replied, "You have a right in the child prior to that of your husband, so long as you do not marry with a stranger." Abū Dāwūd Sulaymān b. al-Ashʿath al-Sajistānī, *Mukhtaṣar Sunan Abī Dāwūd* (Beirut: Dār al-Maʿrifah, 1980), 3:185.

[91] PLD 1953 Lahore 73.

[92] Also see Mst. Sobia Shaheen v. Muhammad Riaz, 2018 YLR 1730; Mst. Rukhsana Begum v. Additional District Judge Multan, 2011 YLR 2796; Mst. Yasmin Bibi v. Mehmood Akhter, 2004 YLR 641.

[93] 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.

with stepmother and her children.[94] The rule of forfeiture of the right of custody of the mother upon remarriage is an Islamic law rule but Pakistani courts extended this rule to the remarriage of the father. In *fiqh* literature, we do not find mention of disqualification of a father upon remarriage. Pakistani courts have tried to bring parity between genders regarding child custody rules.

In *Zohra Begum v. Latif Ahmad Munawwar*,[95] the Lahore High Court gave custody of a minor boy aged seven years to the mother and said that as the rules of custody were not given by the the Qur'ān or *sunnah*, it was permissible for the courts to differ from the textbooks on Islamic 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 of doing *ijtihād*.[96] Tanzil-ur-Rahman while criticizing this approach of the Lahore High Court suggested that although the courts are incapable of doing *ijtihād*, where there is a very strong ground, the court may substitute one rule of Islamic law by adopting another rule. For instance, the rule that "the mother shall lose her right if she remarries with a stranger" can be substituted by the rule that "the paramount consideration is welfare of the child." In the case of contradiction between these two rules, Pakistani courts follow the second rule.[97] 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 child law. When detailed legislation is not there, the courts have to rely on case law or to use their discretion. Ali and Azam rightly observed that "the lack of clarity and uniformity of rules relating to custody and guardianship is perhaps the single most important factor used to justify deviation from the general

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[94] 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.

[95] PLD 1965 Lahore 695.

[96] Tanzil-ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Islamic Publishers, 1978), 744–45; 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.

[97] Tanzil-ur-Rahman, *Code of Muslim Personal Law,* 744–45.

principles of personal law regulating this area."[98] 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, the courts adopted Islamic principles and jurisprudence while interpreting statutory provisions[99] whereas in others they 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.[100]

It is evident from the above-mentioned cases that Pakistani courts do not consider it mandatory to follow a particular school and consequently have made use of varying opinions available in Islamic law.[101] On several occasions, the courts have claimed to do *ijtihād*. As mentioned above, Pakistani family law is based on Islamic law but as the law is not detailed, the courts enjoy great discretion. It results in moving from one school to another and contradictory decisions. Overall courts' approach has been pro women rights and socio-religious family values.[102] Courts also keep into consideration social needs while deciding such cases. Another reason for the courts' disagreement with the classical judicial views in custody cases is that many of these rules are not divine rather they are presumptions, which can be rebutted in specific circumstances of a case. For instance, it is presumed that it is in the interest of the child to live with the mother during tender years of his/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 the *sharīʿah*, they sometimes make mistakes while interpreting and applying Islamic law.

Conclusion

In Pakistan, family law is largely based on Islamic law, but the law is not detailed. Lack of detailed legislation gives the courts huge discretion,

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[98] Shaheen Sardar Ali and M. Nadeem Azam, "Trends of the Superior Courts of Pakistan in Guardianship and Custody Cases (1947–92)," in *A Handbook on Family Law*, ed. Cassandra Balchin (Lahore: Shirkatgah, 1994), 158.

[99] Mst. Imtiaz Begum v. Tariq Mehmood, 1995 CLC Lahore 800.

[100] Ali and Azam, "Trends of the Superior Courts," 161.

[101] This trend can be seen in other Muslim countries as well. See Kenneth M. Cuno, "Reorganization of the Shariah Courts of Egypt: How Legal Modernization Set back Women's Rights in the Nineteenth Century," *Journal of the Ottoman and Turkish Studies Association* 2, no. 1 (2015): 85-99.

[102] It is argued that judicial deviations do not bring or enforce new rights rather Muslim women get back the same rights, which they already had under Islamic law.

which results in contradictory decisions. According to some authors, in Pakistan Islamization has been a judiciary-led process. It is noticed that while interpreting the law and exercising discretion Pakistani courts sometimes differed with established schools of Islamic law and exercised *ijtihād*. Court decisions in Pakistan have been pro women rights. Pakistani courts keep into consideration social needs and values while determining family law cases. They have used an interpretative methodology, which has served the purpose of protection of women rights and socio-religious family values. Analysis of case law shows that deviations of the courts from Islamic law in these cases are always justified on the basis of general principles of Islamic law and the concept of welfare *(maṣlaḥah).* 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.

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