
The Role of the Judiciary in Protecting Women's Rights in Pakistan

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Abstract

This article examines the role of Pakistan's judiciary in protecting women's rights within a complex legal landscape shaped by Islamic law, constitutional norms, colonial legacies, and international human rights obligations. Following Pakistan's ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1996, courts have increasingly been called upon to reconcile domestic legal frameworks with evolving standards of gender equality. Focusing primarily on family law, where women's legal vulnerability is most pronounced, the article undertakes a detailed doctrinal analysis of judicial decisions concerning marriage, consent, maintenance, divorce, inheritance, and polygamy. It critically evaluates how superior courts have interpreted statutory law and Shariah principles to advance, limit, or condition women's rights. Particular attention is paid to the judiciary's selective engagement with CEDAW within Pakistan's dualist legal system and the emergence of what the authors conceptualize as a "women protection principle" in judicial reasoning. While judicial activism has, in several instances, mitigated discriminatory practices and expanded women's legal agency, this article argues that such progress remains uneven, discretionary, and structurally constrained. This research article concludes that sustainable protection of women's rights in Pakistan requires meaningful legislative reform and institutional cooperation, as judicial interpretation alone cannot substitute for comprehensive legal transformation in line with constitutional guarantees and international human rights standards.

Keywords: Judiciary, CEDAW, Women Protection Principle, Islamic law, legal pluralism

Introduction

The ratification of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by Pakistan in 1996 took place during the second government of Benazir Bhutto, reflecting a formal commitment to align domestic laws, policies, and practices with international human rights standards. At the Fourth World Conference on Women, Benazir Bhutto underscored this commitment by emphasizing her particular responsibility toward women as the first woman elected to lead an Islamic nation.¹ Her political leadership carried both symbolic and substantive significance: she was not only the first female Prime Minister of Pakistan but also the first woman to head a government in the Muslim world. In a deeply patriarchal social context, where women's mobility and participation in public life remain constrained, Bhutto's political agenda consistently emphasized women's empowerment and legal equality.

Following independence in 1947, Pakistan's judicial system faced the complex task of establishing legitimacy within a predominantly Muslim society in which the inherited legal framework was widely perceived as a colonial legacy. Courts were expected to function effectively as state institutions while simultaneously responding to societal expectations rooted in religious and cultural norms. To address this tension the judiciary adopted a balanced approach in attempt to reconcile modern legal principles derived from contemporary state law with classical norms associated with the Shariah legal system, to which significant public attachment persists. This duality has continued to shape judicial reasoning, particularly in cases involving personal status and family laws.

CEDAW's provisions obliges States Parties to ensure that judicial authorities apply the principle of equality as embedded in international human rights law and interpret domestic legislation, to the greatest extent possible, in conformity with those obligations.² Where harmonized interpretation is not feasible, courts are required to identify and highlight inconsistencies between national laws or practices including religious and customary norms and international commitments, thereby signposting any inconsistency to the legislature. With respect to binding international legal standards, domestic law cannot be invoked to justify non-compliance with international obligations. In the Pakistani context, judicial engagement with CEDAW principles has generally been constructive and progressive. Nonetheless, persistent shortcomings on the part of the legislature and executive particularly in enacting comprehensive reforms and ensuring non-discriminatory implementation have significantly constrained the realization of women's rights.

The effective incorporation of international human rights standards into Pakistan's domestic legal framework continues to face multiple structural, institutional, and socio-cultural challenges. Against this

backdrop, examining the judiciary's interpretative role becomes especially pertinent, as courts often serve as the primary forum for advancing women's rights in the absence of robust legislative action. Family law disputes constitute the largest category of litigation in Pakistan, directly affecting women's legal status and access to justice. A survey conducted under the European Union-funded Punjab Access to Justice Project indicates that family-related cases account for approximately 30 per cent of all litigation in Punjab province.³ Consequently, this study primarily analyses judicial decisions in the field of family law, where case law is both extensive and illustrative of broader judicial attitudes toward women's rights. While issues concerning women's rights to education and employment are equally significant, they are addressed only selectively, in order to maintain analytical focus and avoid overburdening this research article.

I. Judiciary while dealing with women rights cases

Section 4 of MFLO made an attempt to eradicate the deficiency of an orphan's grandchildren to be sharer in the inheritance of his grandfather in case where his/her mother/father predeceased during the lifetime of his grandfather.⁴ This legal provision drew enormous criticism from the traditionalist segment of Pakistan and resulted in a petition before the Shariah Bench of Peshawar High Court challenging Section 4 of MFLO for its repugnancy to the rules as laid down by Shariah Law of Inheritance. The ostensible protections offered by MFLO were further undermined when Peshawar High Court in Farishta case declared the section 4 of MFLO as un-Islamic and repugnant to the injunction of Islam.⁵

● Women freedoms within marriage:

Marriage in Muslim law is a contract entered into with free consent by both the man and women. According to the Quran, marriage is a sacrosanct, 'mithaw ghaliz.' This implies that marriage according to the Quran is not only a civil contract but also it has religious aspects as well. It is a sunnah and an important part of the completion of the Muslims' faith. Marriage is therefore considered as the combination of ibadat (worship) and muamalat (worldly affairs), a sacrosanct as well as civil contract.

In the Shahida Parveen v. Samiullah case the wife left the husband's house because she disliked her husband.⁶ She filed a petition for the dissolution of marriage through her right to khula and the Court passed a decree in favour of the wife. The husband in this case filed a suit for damages. The damages were relating to the expenses that were made by the husband for the marriage and for the defamation caused to the husband. The damages sought in this respect by husband were PKR. 2,400,000 (equivalent of 11,000 euros), a huge amount for the common inhabitant of Pakistan. The trial court awarded him PKR. 1,000,000 (equivalent to 4,000 euros). Both the parties approached Lahore High Court.

The High Court found the damages of PKR. 1,000,000 were punitive in nature, therefore, the Court reduced the damages amount to PKR. 100,000 (equivalent to 400 euros). The Court held that though that marriage in Islam is a civil contract, however this civil contract must not be equated with ordinary civil contract because of which either of the party to the contract of marriage may unjustly suffer.⁷ According to our understanding, demanding the wife for the payment of expenses incurred for the marriage arrangements is unjust even if the wife is seeking no-fault based divorce.

In Muhammad Masood Abbasi, V. Mamona Abbasi case, the question for the court to be answered was, whether the husband's right to divorce can be restricted within the contract of marriage. The husband expelled the wife from his house and then later divorced her without any justification. On the basis of nikahnama stipulation which restricted husband's right to divorce or in case if husband contracted a second marriage the husband was legally bound to pay the amount of PKR 100,000 (equivalent of 4,000 euros), the wife prayed for the execution of the contract stipulations.

The Trial Court dismissed the wife's suit. The Appellate Court set aside the decision of the Trial Court and decided the case in the favour of the wife. The husband approached High Court against the decision of the appellate court, claiming that restricting the husband's right to divorce was against the injunctions of Islam as well as against the public policy and morals.

The High Court however also dismissed the petition in limine, and it declared the restriction on the husband's right to divorce as valid. The court held that if there are any stipulation within the contract of marriage that are intended for the protection of the contract of marriage and for the protection of the wife against despotic dissolution of marriage without any justification, such stipulation is not against the injunctions of Islam. According to the Court, if Islam on the one hand provides for the dissolution of marriage by husband without assigning any reason or justification, the same stresses on the preservation and protection of marriage.⁸ In practice not every Nikahnam (marriage certificate) contains such stipulations/restrictions as the common women of Pakistan are not aware of her rights.

In Muhammad Zaman v Mst Irshad Begum case, an agreement was concluded between husband and wife to the effect that if the husband concluded a second marriage, the present wife will be entitled to maintenance either at separate house or at her parental house as she may wish. The husband pleaded to the trial court for the restitution of the conjugal rights upon the wife leaving the husband's house as he contracted a second marriage. The wife maintained that the husband did not pay her the prompt dower, he failed to maintain her as well as he had mistreated her.⁹

The central debate of the case was the contract of maintenance concluded between the two. The Court in this case concluded that within the

marriage contract, the husband unconditionally bound himself for not contracting a second marriage and if such is the case then the wife was entitled to live separately from husband according to her wish. The plaintiff's suit for the restitution of the conjugal rights was therefore dismissed. The district court held the same decision of the trial court. Aggrieved against these decisions the plaintiff reached the High Court, taking the stance that the stipulations of the agreement were against the public policy. The High Court however also upheld the decisions of the subordinate courts.

Free consent to a marriage is one of the most essential elements for the validity of the marriage. In Pakistan however, especially in the rural areas, it is the elders of the family and the guardians who have the final say for the marriage which more often disregard the willingness and consent of the parties to the contract of marriage. The superior judiciary on the other hand stressed on the principle of mandatory free consent of the parties to the marriage.

In the case of Issa Khan v. Mst Razman,¹⁰ the Supreme Court of Pakistan held that the free consent of the parties to the contract of marriage is an essential requirement. If free consent to a marriage contract is missing, the contract of engagement will be invalid. The court in this case dismissed the contention that the consent of the guardian is sufficient for the marriage contract to be valid. Rather the court held that the absence of the consent of the wali (guardian) will not invalidate the contract of marriage. The agreement of engagement concluded by the Wali without the consent of the husband will not be binding on the parties. Therefore, in this case the Supreme Court dismissed the suit of the petitioner for the restitution of the conjugal rights.

In Muhammad Aslam v. the State case the consent for marriage was acquired through coercion and causing fear.¹¹ In this case, Ayesha Bibi, mother of the victim Parveen Akhtar, lodged a complaint. Parveen Akhtar was under the Nikah (marriage contract) of Muhammad Zaheer. According to the complainant, her daughter was abducted by Muhammad Tanvir, Muhammad Aslam and others. The Court summoned Parveen Akhtar to confirm whether she was forcefully abducted or she went with the alleged abductor with her free consent. The abductee stated in court that she was forcefully abducted and subjected to rape several times by Tanvir Ahmad. The accused claimed that he is in valid contract of marriage with Parveen Bibi. However, the victim contended that she was forced to sign on a blank paper which was later claimed by the accused as Nikahnama, the marriage deed.

The court convicted the accused under sections 10(3) and 11 of the offences of Zina (Enforcement of Hudood) Ordinance 1979. Secondly, at the time of abduction and alleged Nikah, the age of the victim was below 16 years. This was against the legal provisions of the Child Marriage Restraint

Act 1929. Keeping in view the fact that the age of the accused was 44 years whereas the age of the abductee was below 16 years, there seemingly can be no probability that the abductee had consented to marriage with her own free will. Therefore, the court reached the conclusion that it was Zina bil Jabr, rape or forced sex. The court held that for giving free will, it is in the first place necessary to have the capacity to give free will and the capability to use such capacity.

The Hafiz Abdul Waheed V. Asma Jahangir, famously known as Saima Waheed case was concerning a common question of law that whether the consent of the wali is an essential element for the validity of the marriage of an adult female Muslim?¹² In this case the appellant, Saima Waheed, with her own free will, contracted a marriage without her father's consent. She left her father's house and started to live in a women's protection centre. The father of Saima Waheed was forcing her to enter into a marriage contract with a much older man. She contracted marriage with a person of her own liking. Lahore High Court held that marriage without the consent of Wali is valid.

Aggrieved against the decision of the Lahore High Court, the father of Saima Waheed approached the Supreme Court of Pakistan. The Supreme Court, while deciding the case, took into consideration the standing of the Federal Shariat Court regarding this legal subject. The standing of the Federal Shariat Court was that a sui juris girl can contract a marriage with her own free will without the consent of her parents. The Court observed that relying on the *Mauj Ali v. Safdar Hussain Shah* case it had previously decided, the Lahore High Court was bound to follow its decision. Therefore, the Supreme Court upheld the decision of the Lahore High Court and the appeal of the father regarding the custody of the girl to her father was therefore refused by the Supreme Court.

The Courts in Pakistan also dealt with the validity of a marriage that is contracted during iddat period;¹³ a tool used against divorced or widowed women who contract marriage with their own free will. In the *Allah Dad v. Mukhtar* case, the petitioner Allah Dad, filed a complaint against the respondents, Mukhtar and Rashida Akhtar, under section 10 and 16 of the offences of zina (Enforcement of Hudood) Ordinance 1979.¹⁴ The complainant alleged that Rashida Akhtar was his lawfully wedded wife. On the persuasion of Mr. Mukhtar, Rashida Akhtar fled from her house. According to the petitioner, the respondents therefore had committed the offences of Zina/adultery. The trial and the appellate courts dismissed the petition and acquitted the respondents based on the fact that they contracted marriage after the wife was divorced by her former husband, the complainant Allah Dad.

The complainant in its appeal to Supreme Court argued that since he failed to give notice of talaq to the chairman of the union council, which is an important condition for the validity of divorce under section 7 of MFLO, therefore even if the complainant proved that she was divorced by the

complainant, such divorce in itself cannot be considered as complete and legally effective. According to the counsel of the complainant, the subsequent marriage contract between the respondents was therefore invalid. Justice Taqi Usmani, a renowned Islamic jurist, observed that zina/adultery has not been defined within the Ordinance. Therefore, the term zina has to be defined in accordance with the injunctions of Quran and sunnah. In case of the controversy between the injunctions of Islam and the state law, then it is the shariah law or the injunctions of Islam which will prevail over the state law (Hudood Ordinance and MFLO in the present case). Therefore, if a marriage contracted subsequent to divorce from the first marriage, the subsequent marriage is valid under the shariah legal system, and thus within the Pakistani legal system.

Interestingly, the counsel of the petitioner further argued that even if the contracted marriage is valid from other aspects, it is not valid from the perspective of the fact that it was contracted earlier than the minimum duration four lunar months and ten days which is a condition for the validity of second valid marriage under the shariah legal system. The purpose of observing the iddat period is to ascertain if the woman is pregnant or not so that the issue of parentage may not arise at a later stage.

Justice Taqi Usmani observed that the iddat period laid down in the Quran consists of three menstrual periods, which could possibly occur within a minimum of 39 days, and the maximum duration of three menstrual periods can be 90 days or four months and ten days. In the present case, since the marriage of the respondents was contracted after 79 days of the divorce, therefore, the marriage was legally valid in the light of Quran and Sunnah. The petition was therefore dismissed by the Supreme Court.

In *Ameer Bakhsh vs. Additional Sessions Judge, etc.* case, as recently as January 8th, 2022, the husband aggrieved against the dismissal of his case before the Session Court, approached the Lahore High Court complained that his former wife, Amna contracted a second marriage after getting judicial khula without observing the iddat period. According to the complainant, since the iddat period was not observed, the dependent was legally not allowed to enter into a second marriage. According to the complainant, the subsequent marriage of Amna is void and she has committed the offence of Zina (extramarital sex). The Lahore High Court held in this case that if a woman contracts a subsequent marriage without observing iddat after getting khula will not amount to Zina and the subsequent marriage is not void, rather irregular.¹⁵

The issue of the validity of the husband's second marriage in contravention of MFLO was addressed in *Muhammad Aslam v. Ghulam Muhammad Tasleem*, filed under section 491 of the Code of Criminal Procedure 1898 by a family friend for the recovery of the girl who was detained by her father in house as she was unwilling to marry the person of her father's liking.¹⁶ That person with whom the father was forcing her

daughter to marry, happened to be much older than the girl. It was revealed during the Court proceedings that the detainee intended to marry another person of her liking which was already married. The respondent/father raised two objections against her marriage to the person of her liking. The first was that she was less than 18 years old. Secondly, the person she wishes to marry was already married and polygamy, according to the counsel of the respondent, was prohibited under MFLO.

The Court held that since the girl has attained the age of majority as per the Pakistani law, she was at freedom to contract her marriage with the person of her liking. Secondly, MFLO do not prohibits polygamy, it rather regularizes the polygamy by making it conditional to the permission of the first wife and that of the Arbitration Council. According to the Court, the absence of these two elements will not invalidate the marriage, rather it will attract penal actions against the husband.¹⁷

This case revealed two flaws within Muslim Family Law Ordinance 1962. Firstly, the mandatory age for marriage as per MFLO is 16 years for females, while for male the minimum age is 18 years. Secondly, as highlighted before, that MFLO do not prohibit polygamy, it only regularizes it.

In the cases of *Azra Bibi v. S.H.O, Police Station district vehari*,¹⁸ *Hira Mahmood v. The State*,¹⁹ and *Farzana Siddique v. the State* through Advocate General Azad Jammu and Kashmir,²⁰ the respective Courts held that in the cases where the husband and wife are accused by the family for having committed adultery or extra marital sex, due to the fact that the women entered into marriage without the consent of parents or guardians, a simple statement of the spouse will be sufficient to prove the validity of the marriage. The statement of the woman specially will be of vital importance for the court in deciding the case. For a Nikahnama to be considered valid, it must be confirmed and acknowledged by the spouse, if such will not be the case, the nikahnama will not be considered as valid.

● **Maintenance of wife and children:**

Section 2 (ii) of Dissolution of Muslim Marriage Act 1939 provides that in those cases where a judicial divorce is sought by wife from husband, the wife is entitled to maintenance from her husband for two years. By virtue of section 9 of MFLO, the wife can seek maintenance from her husband through the Arbitration Council in cases where the husband fails to maintain her or where the husband has more than one wife and he fails to maintain them adequately. The wife's right to maintenance can also be realized through section 7 of the Family Courts Act 1964, before family Courts. The maintenance is to be determined by the courts in accordance with needs of the maintenance and the financial position of the maintainer. The courts therefore are required to take into account all the factual circumstances of each individual case.

The wife's right to maintenance is however not an absolute right. This right can be denied in some cases. It can also be suspended/denied in the cases where husband acquires the restitution of conjugal rights decree from the Court, or if wife refuses to join her husband, without justified and valid reason. The liability of husband to maintain his wife also extinguishes upon giving her divorce, as divorce under shariah legal system is the unilateral right of the husband, which he can use without giving any justification of his action. In the case of talaq, the husband is under the obligation to maintain his wife during her period of iddat. Therefore, in the cases where the Court ordered the husband to maintain his wife, the husband in a number of instances escaped this obligation by simply divorcing his wife.

In the cases of no-fault divorce cases, the wife alongside deferred dower and maintenance is entitled to mata'a. Mata'a is a parting gift given as consolation to the wife by husband. Mata'a is intended to lessen the hardships of a wife after divorce, and it is different from maintenance. In the Quran the concept of mata'a has been referred to in numerous instances, such as Q. 2:235, 2:240-41 and 33:49. The mata'a is to be paid in accordance with the financial status of the husband.²¹

In *Shazia v. Muhammad Nasir* case, however, the Peshawar Court held that maintenance is neither gift nor benefit, rather this is a justified right of wife and an obligation of husband which is enforceable by law. The Court in this case decided that the wife was entitled to be maintained by the husband.²²

Similarly, *Ghazala Sadia v. Muhammad Sajjad* case was related to the legal question of wife's right to maintenance in the cases where she exercises her right to khula. The question was, can khula deprive wife from her right to be maintained during the iddat period?²³ In this case the Court held that not only to maintenance, but the wife was also entitled to dowry. And the maintenance right of the wife was to be in effect from the date of Nikah, the date on which the marriage contract was made. The decision was challenged in the Appellate and High Courts, the Appellate Court modified the decision of the family court, however, the High court restored the decision of the family court and ordered the husband to maintain the wife during her iddat period as this was the legal right of the wife and an obligation of the husband. Similarly, *Syed Abu Talib Shah v. Bibi Rukhsar Zahra* case provides for the right to maintenance of a wife who was residing separately from husband due to justified reason.²⁴

● **Dissolution of marriage:**

Within the shariah legal system, both the spouses have the right to divorce. The husband has the right to pronounce talaq (divorce) unilaterally and without assigning any reason or fault which is called no-fault based divorce. Literal meaning of the term Talaq is 'freedom from bondage'. The wife has

the right to dissolve the marriage through khula. There exists a procedural difference between khula by wife and divorce by husband. In cases where husbands do not agree to khula, the wife can get khula through judicial intervention. Whereas for the husband the agreement of the wife or accessing the court and engagement of judicial forums is not mandatory. The husband can pronounce effective divorce unilaterally. Third possibility for the termination of the marriage contract is dissolution of marriage through mutual agreement of spouses. This kind of dissolution is called mubarat. In mubarat, the spouses can agree to the dissolution of marriage without judicial intervention.

Moreover, under certain circumstances, either of the spouses can reach the court for the dissolution of marriage. Since the husband's right to divorce is absolute, therefore it is mostly the wife who approaches the judicial forums for the dissolution of marriage under section 2 of the Dissolution of Muslim Marriage Act 1939. This section provides for the dissolution of marriage on the following grounds: disappearance of husband for four years; failure of the husband to maintain his wife and to perform marital obligations for three years; husband's impotence; insanity for two years; where the husband is imprisoned for more than seven years; where the wife is given within marriage without her free consent before attaining puberty, she can repudiate her marriage upon getting majority age; in case of Li'an, where the husband accuses wife of zina and wife do not accept the accusation; and cruel treatment of wife by husband.

In the *Malik Tanveer Khan v. Amber Liaquat* case, a wife filed a case for the dissolution of marriage on the ground that her husband was homosexual, relying on the principle of the cruelty of husband as justified ground for the dissolution of marriage.²⁵ The Court in this case held that the dissolution of marriage can be ordered by the court on the basis of the homosexuality of husband. The wife's suit for the dissolution of marriage alongside the recovery of the dower and dowry articles and maintenance was accepted by the trial court and sustained by the High Court at the appeal of the husband.

Section 8 of Muslim Family Law Ordinance 1961 provides that the husband can delegate to the wife the right of divorce (Tafwid Al-Talaq). Through delegation, this right can be used by the wife or authorised third person on the wife's behalf. This right to divorce can be delegated absolutely or conditionally, permanently or for a specific period of time.

In *Khawar Iqbal v. the Federation of Pakistan*, the Federal Shariat Court ruled that the delegated right to divorce is recognized within Islamic Law.²⁶ This case was contested against section 8 of MFLO for its inconsistency with the Shariah Law and legal principles. It contested the legality of Column No. 18 of the standard nikahnama form on the ground of its inconsistency with Islamic legal system. Column No.18 of standard nikahnama provides for the option of delegated right of wife for divorce.

In this case the litigant husband delegated the right of divorce to the wife which was later on used by her. The use of delegated right to divorce was contested before the High Court, however the lawsuit was dismissed by the High Court and then by the Supreme Court subsequently. The petitioner filed a petition before the Federal Shariat Court on the ground that the delegation of talaq right and its use is repugnant to the injunctions of Islam, Quran and sunnah. The Federal Shariat Court observed that the talaq al tafwid is a check on the husband's obligation not to be cruel to the wife and children and the obligation of the husband to maintain his children and wife. If the husband does not fulfil these obligations as well as refuse the wife's right to khula the wife should have this option. This position according to the Federal Shariat Court was agreed upon by all the Sunni Schools.

In the Ali Abbas Khan v. Palwasha Khan case, the Court ruled that the delegation of the right to divorce to the wife must be made in clear terms and there must be no ambiguity.²⁷ In this case within column 18 of the standard nikahnama a statement was made that the wife will have all the Sharia rights available to her (written as: شرعی حقوق حاصل ہیں). In this case the Court held these words do not imply that the wife has been delegated with the right to talaq al tafwid because generally in the shariah legal system, the wife is not entitled to the right to divorce. The court further held therefore that only in cases where it is explicitly stated in the column 18 of the standard nikahnama that the wife is delegated with the right of talaq e tafwid, the wife will be considered entitled to the right to divorce. Otherwise, whatever is incorporated within column 18 will be presumed as the right of the wife to delegated divorce. We can see from the case law that the wife can only have the delegated right to divorce in the cases where it is explicitly mentioned within the nikahnama at the time of the marriage.

II.Domestication of CEDAW standards within Superior Judiciary

Given that CEDAW constitutes the most relevant international human rights treaty for the purposes of this study, it is necessary to examine the extent to which Pakistan's superior judiciary has engaged with and relied upon its provisions within the country's dualist legislative and judicial framework. As discussed above, Pakistan has ratified CEDAW in 1996 and up until 2010 the Superior Judiciary of Pakistan referred to CEDAW only within four of its judgements. Out of these four judgements where references were made to CEDAW, two judgements were given by Justice Tassadaq Hussain Jilani of Lahore High Court. Third judgement was given by the High Court of Azad Jammu and Kashmir by making a reference to the judgement of Tassadaq Hussain Jilani. The Federal Shariat Court in its Judgement of 2007 in a suo moto declared article 10 of Pakistan Citizenship Act 1951, in violation of

Article 2-A and 25 of the Constitution of Pakistan 1973, against Shariah law, and international commitments of Pakistan, particularly CEDAW.²⁸

In the first case before the Lahore High Court, *Mst. Humaira Mehmood v. The State*,²⁹ the husband and wife were lawfully married with their free consent but without the consent of the girl's father. The father of the girl, a sitting member of Punjab provincial assembly, filed a case of abduction and zina against the husband of his daughter, despite being aware of the fact that his daughter and her husband were lawfully married. The girl and boy fled, were caught by police, and forcefully taken aback home. Girl's family claimed in the Court that the girl was already married and as evidence produced videos of the girl's marriage, which were contested by the girl for being faked.

The Court in this case passed a landmark decision in the favour of the girl, against her father. The decision was based on plural legal rules and norms of Islamic, constitutional, and international human rights. The Court emphasised on the protection of fundamental rights of every individual that are enshrined in Islamic legal system as well as enjoining upon Pakistan by the virtue of Pakistan's ratified international human rights treaty regimes. The Court specifically made a reference to article 16 of CEDAW which ensures women rights and freedoms within marriage and family institution. Reference was also made to article 5 of Cairo Declaration on Human Rights in Islam.

Mst. Saima and 4 others v. The State was the second case where the Superior Judiciary made a reference to CEDAW.³⁰ In this case, the marriage of a Christian couple was contested by the mother of the girl on the ground that the Methodist minister who performed the marriage was not in the position of a valid licence to do so, despite the fact that the couple were both willing to get married. The couple was accused of zina within the Hudood Ordinance 1979. According to Justice Tassadaq Hussain Jilani, if the couple in good faith believed themselves to be married, the case of zina does not arise even from the perspective of Hudood Ordinance. Justice Jilani referring to article 16 of CEDAW stated that protection to the marriage and institution of family is given within the Constitution of Islamic Republic of Pakistan as well as within CEDAW. Article 16 and 25 of CEDAW and the Constitution of Islamic Republic of Pakistan respectively enjoins the state for the protection of marriage and family.³¹

In *Mst. Sarwar Jan v. Abdur Rehman*, the wife Sarwar Jan, applied for the dissolution of marriage based on her husband's cruel treatment. While giving a reference to above given Humaira case the Court ruled that from the perspective of Cairo Declaration on Human Rights in Islam and CEDAW, the government of Pakistan is under an obligation to ensure and protect the rights of women within the lifetime of marriage as well as upon its dissolution.³²

In a *Suo Moto* case, the Federal Shariat Court dealt with article 10 of Citizenship Act 1951, which provides that a Pakistani man can acquire citizenship for his foreign wives but not vice versa. The Court considered this a discrimination against women.³³ Here in this case the court adopted an interesting approach by stating that Pakistan has made international human rights law commitments which are legally and morally binding upon Pakistan, namely, the obligation under UDHR and CEDAW. By referring to the relevant part of the Quran, "O you who believe! fulfill the obligations" the Court stated Shariah law clearly obligates us to satisfy the promise that we make.³⁴ The Court also held that gender inequality is in contravention with the Quran as well Sunnah. Building on Justice Jilani's approach the Court endeavoured to draw its decision upon plural legal systems, Islamic Law, Constitution of Pakistan and international human rights law.³⁵ The Court very articulately used the Islamic norm to support the CEDAW in reaching a pro-women decision.

In these four cases CEDAW was explicitly mentioned to arrive at a women friendly decision. Though there are some other cases where a general reference has been made to human rights. Due to the dualist nature judges in Pakistan tend to apply the most relevant law and legal norms in reaching a judgement. The hierarchy of laws plays an important role where Islamic law, constitutional provision, statutory laws are the first to be relied upon instead of human rights law. The judgement in accordance with international human rights standards of Justice Jilani, though receiving a great amount of support abroad, receives no passionate following at home.

III. The approach of the courts while dealing with women rights

Despite the fact that there exist numerous conflicts within the domestic laws, the judiciary had tried its best to interpret any inconsistency with the spirit of the women protection principle so as to advance the rights of women. Interestingly, in some cases where the judiciary has reached a pro-women decision, it has relied on the Shariah Law and negated the application of contemporary Pakistan family law.³⁶ It is our understanding that the common trends within the examples we have analysed is that the attitude of Pakistani courts, especially the superior judiciary, is to abide by the Women Protection Principle. Women Protection Principle means that whenever the Courts come across conflicting provisions of law, an attempt has been made to interpret it in a way that better protects the interests of women. This principle is however not codified, rather, we have drawn this principle after carefully analysing the case laws.

The judiciary in Pakistan has acknowledged and protected women rights related to maintenance, their consent to the contract of marriage, and their right to divorce. It has negated the conditionality of guardian's consent to the marriage, as according to the courts it is the consent of the parties to the marriage which is mandatory and decisive and not the consent of the

parents or guardian. The judiciary had also provided protection to the women in cases where the validity of subsequent marriage by women is challenged based on its irregularity on the ground that the second marriage by women contracted while the first marriage was not legally dissolved due to the failure of the husband to comply with legal requirements, or where the iddat period was not observed. The judiciary had tried its best to protect maintenance of the wife neither as a privilege nor as a benefit to the wife, but as a legal right of the wife. However, the quantity and the duration of the maintenance awarded in majority of the cases is nominal which leaves the wife economically in destitute.³⁷

The Courts also ensured the wife's right to divorce on the ground of the husband's cruelty. Moreover, the delegated right of the women to divorce in some cases was accepted while rejected in others. This signifies that delegated right to divorce is not a right available to every woman in all the cases. It is only available when it has been expressly provided for within the marriage contract (nikahnama). Still, this right of the wife is conditional to the discretion of the Court.³⁸

The above analysed examples also give us the understanding that it is a trend within the judicial processes relating to family matters that in almost every case of maintenance, divorce, khula and custody of children, the husband responds by filing a lawsuit for restitution of conjugal rights. Marriage in the Shariah legal system is wrongly considered as sacrosanct, where the husband has the right to the restitution of conjugal rights. As a matter of fact, principle of marriage as a sacrosanct and resultant emphasis on the restitution of conjugal rights is not local to the Shariah legal system, rather, it was introduced to the Muslim world and shariah legal system by the influence of the western colonialism. The principle of restitution of conjugal rights is indeed based on canonical law which renders marriage a sacrosanct that cannot be easily terminated.

The Federal Shariat Court had the opportunities on many occasions to get rid of this misconceived principle. However, the Court upheld the principle of restitution of conjugal rights against the wife's right to maintenance, khula and divorce. According to Federal Shariat Court, the prevailing mechanism for the restitution of conjugal rights, which involves the attachment of wife's property, and paradoxical payments by wife to husband, was not repugnant to the injunctions of Islam.³⁹ The Court here missed that though the principle of restitution of conjugal rights is not repugnant to the injunctions of Islam, however it is not even local to the Shariah principles which must be adhered to.

This judicial activism is encouraging for women rights; however, has its downsides and shortcomings. Judicial activism is not the sole satisfactory solution to the challenge faced by women with respect to their rights. The subjects of polygamy, women right to divorce, maintenance, equal inheritance rights, equality before the law, maintenance, educational and

economic rights of Pakistani women shall be unconditionally and visibly protected by law, otherwise the attitude of the judicial system will be encouraging, but still fluctuating and discretionary.

The patriarchal mindset also does exist within the judiciary of Pakistan. though the Supreme Court delivered a pro women decision in Saima Waheed Caws, however, in the same case at an earlier instance, the Lahore High Court was naive of women's right to freely choose with their free consent a spouse of their liking. The attitude of the Court towards women's freedoms relating to marriage were evident in the judgement of the Court:

"The concept of young girls for that matter venturing out in search of spouse is alien to the teachings of Islam and even otherwise this scheme of husband-shopping which obviously involves testing and trail of the desired..."⁴⁰

It indicates that though judicial system is progressive in nature, it is also true that some segment of this institution maintains a patriarchal mindset. The case law suggests that the courts in a number of occasions have not adopted approach protective of human rights of women despite the fact that the courts were having the room and the discretion to do so. The comparatively liberal appellate courts did not hesitated to use the overarching Islamic principles of morality for the expansion of its judicial review powers in 1990s. This activism was evident in the public interest cases, human rights petitions, and writ petitions. Pakistani courts applied the shariah legal principles as the bedrock while dealing with human rights and rule of law, where the substance of these subjects was required to be examined for its accordancy and consistency with Shariah principles. This attitude of the superior judiciary, to decide the cases under the banner of Shariah law principles, validated the cultural practices that were gender discriminatory. Illustrative of this is the *Zaheeruddin v. State* case, where the Supreme Court held that religious freedom enshrined in 1973's constitution were to be interpreted in accordance with the principles of Shariah standards, leading to the severe negation of the religious freedom aspect of human rights standards.⁴¹

IV. Courts, Constitutional Boundaries, and Women's Rights

The judiciary do not have the jurisdiction under the constitution to declare any law repugnant to the injunctions of Islam, thus invalid. It is the mandate and responsibility of the legislature to take the initiative and repeal the legal provisions that are discriminatory and punitive against women and consider women contemporary rights as contradictory to the injunctions of Islam as well as that of fundamental rights provision of the constitution. The role of the judiciary here can be that of formally signposting existing legal lacunas to the legislature for further legislative measures to be adopted.

To bring the domestic laws of Pakistan in conformity with fundamental rights provision of the constitution as well as to that of international human rights standards, legislature/ parliamentarians must be

equally partnering with the Judiciary/judges. Judiciary in some instances is supplemented by the legislature in efforts to modernise the family laws of Pakistan. Muslim Family Law Ordinance 1961 is the prime example of this coordination between the two. However, politicians willing to attain and maintain social legitimacy within the eyes of public at large, at the face of the fact that Pakistani legal system is primarily based on misconceived religious principles, fail to bring substantial reforms and build consensus with the judiciary of the state for the protection of the rights of vulnerable groups of society, women and children for instance.

V. Conclusion

This study demonstrates that, despite operating within significant constitutional, religious, and institutional constraints, Pakistan's judiciary has played a consequential role in advancing women's rights, particularly in the domain of family law. Through purposive interpretation of statutory provisions and selective reliance on Islamic legal principles, courts have often sought to protect women's rights relating to consent to marriage, maintenance, dissolution of marriage, and contractual autonomy. In several landmark decisions, the superior judiciary has resisted patriarchal customs masquerading as religious norms and has affirmed women's legal agency. This research article also identifies the inherent fragility of judicially driven progress. Judicial protection of women's rights in Pakistan remains inconsistent, highly fact-dependent, and vulnerable to individual judges' interpretive philosophies. The persistence of traditionalist reasoning, procedural delays, and the continued privileging of restitution of conjugal rights over women's autonomy illustrate the judiciary's ambivalence toward fully embracing substantive gender equality. Moreover, while references to CEDAW and other international human rights instruments signal an openness to international human rights standards, such engagement remains sporadic and secondary to constitutional and Shariah based reasoning due to Pakistan's dualist legislative and judicial structure.

Crucially, this article underscores that judicial activism, while valuable, cannot substitute for legislative responsibility. Courts lack the constitutional mandate to invalidate discriminatory laws on religious grounds or to enact comprehensive reforms addressing structural inequalities faced by women. The enduring gaps in areas such as inheritance, polygamy regulation, economic security, and enforcement of maintenance obligations point to the legislature's failure to translate constitutional guarantees and international commitments into effective domestic law. Meaningful advancement of women's rights therefore requires sustained legislative initiative, informed by judicial guidance and aligned with Pakistan's international human rights obligations. Only through coordinated institutional reform can the promise of gender equality move from judicial discretion to legal certainty.

References

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- ² United Nations, Convention on the Elimination of All Forms of Discrimination against Women, adopted December 18, 1979, 1249 U.N.T.S. 13, art. 2(c).
- ³ European Union's Punjab Access to Justice Project (March 2015), Public Knowledge, attitudes and perceptions of Justice: Report of a Household Survey in southern Punjab district.
- ⁴ Lucy Carroll, "Orphaned Grandchildren in Islamic Law of Succession: Reform and Islamization in Pakistan" *Islamic Law and Society*, 5 (1998) 410.
- ⁵ Farishta V. Federation of Pakistan, 1980, PLD- 47 PLD 1980 Peshawar High Court (Shariat Bench); as cited within Muhammad Zabair Abbasi and Shahbaz Ahmad Cheema, *Family laws in Pakistan* (Karachi: Oxford University Press, 2018).
- ⁶ Shahida Parveen v. Sami Ullah Malik, 2006, PLD Lah. 401.
- ⁷ Shahida Parveen V. Samiullah PLJ 2006 Lah 1215.
- ⁸ Muhammad Masood Abbasi, V. Mamona Abbasi 2004 YRL 482 (Lah).
- ⁹ Muhammad Zaman v Mst Irshad Begum PLD 1967 Lah 1104.
- ¹⁰ Issa Khan v. Mst Ramza 1991 SCMR 2454.
- ¹¹ Muhammad Aslam v. the State 2012 PCrLJ 11 (FSC).
- ¹² Hafiz Abdul Waheed V. Asma Jahangir, PLD 2004.
- ¹³ In case of divorce between husband and wife, or in case of the death of the husband, the wife must observe the Islamic obligation not to marry another person for a specified time. In case of husband's death, the wife must observe iddat for four lunar months and ten days. In cases where the wife is pregnant, she must observe iddat until she give birth.
- ¹⁴ Allah Dad V. Mukhtar 1992 SCMR 1273, Shariat appellate bench.
- ¹⁵ Ameer Bakhsh vs. Additional Sessions Judge, etc. Writ Petition No.16880/2021
- ¹⁶ Muhammad Aslam v. Ghulam Muhammad Tasleem PLD 1971 Lah 139.
- ¹⁷ Relying on the case of Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf.
- ¹⁸ Azra Bibi v. S.H.O, police station district vehari 2005 YLR 1859 (Lah).
- ¹⁹ Hira Mahmood v. The State PLD 1999 Lah 494.
- ²⁰ Farzana Siddique v. The State through Advocate General Azad Jammu and Kashmir 2014, CrLJ 897.
- ²¹ In many Muslim countries, mata'a is paid to the wife alongside maintenance and dower. These countries are Egypt, Jordan, Algeria, Libya, Morocco, Syria, and Tunisia. The Law and Justice Commission of Pakistan in its 2009 report proposed the same kind of reforms by adding additional section 2(bb) to MFLO. This proposed section provided for the obligation of the husband to pay mata'a to the wife at the time of divorce according to his means. The mata'a can be either cash, movable or immovable property. The proposal however is yet to make its way to the statute books.
- ²² Shazia v. Muhammad Nasir 2014 YLR 1563 (Pesh).
- ²³ Ghazala Sadia v. Muhammad Sajjad 2012 YLR 2841 (Lah).
- ²⁴ Syed Abu Talib Shah v. Bibi Rukhsar Zahra 2012 CLC 1272 (Pesh).
- ²⁵ Malik Tanveer Khan v. Amber Liaqat 2009 CLC 1210 (Pesh).
- ²⁶ Khawar Iqbal v. the Federation of Pakistan 2013 MLD 1711 FSC.
- ²⁷ Ali Abbas Khan v. Palwasha Khan 2010 YLR 1632 Islamabad.

²⁸ Shaheen Sardar Ali, From ratification to implementation: 'domesticating' the CEDAW in state, government, and society. a case study of Pakistan in Women's Human Rights: CEDAW in international, Regional, and national law, Anne Hellum and Henriette Sinding Aasen (Eds.) (Cambridge, Cambridge University Press, 2013) 448.

²⁹ Mst. Humaira Mehmood v. The State, PLD 1999 Lah 494.

³⁰ Mst. Saima and 4 others v. The State, PLD 2003 Lah 747.

³¹ Ibid, 751–2.

³² Mst. Sarwar Jan v. abdur Rehman, 2004 CLC 17

³³ Suo Moto No. 1/K of 2006

³⁴ Al-Quran, Surat al-Ma'ida, 5: 1.

³⁵ These articles of constitution relate to the objective resolution and equality of citizens respectively. The Court went on further stating that article 10 of Pakistan Citizenship is in violation of international human rights law obligations of Pakistan.

³⁶ For example, in the Allah Dad Case the Court preferred Hudood Ordinance over MFLO, as a lacuna existing in MFLO was constituting danger to the protection of women. In MFLO it is required for the husband to give the notice of Talaq to the Chairman of the Union Council, whereas In Hudood Ordinance it is not the requirement for divorce to be effective. Based on the husband's failure to give notice of divorce to the Chairman of the Union Council the husband used to take the position that since the marriage was intact the wife in the lifetime of first marriage is accused of committing Zina. The Judiciary in such cases used to rely on hudood ordinances rather than MFLO.

³⁷ The plethora of the case law suggests that the wife has the right to maintenance during her iddat period which is four months and ten days. From the perspective of international human rights law, this is meagre consideration for the maintenance of a wife. While fixing the amount of maintenance, the courts held that it should be in accordance with the needs of the wife and the financial status of the husband, however, the amount of the maintenance is nominal, which can not sufficiently support women.

³⁸ The right to divorce can be delegated to the wife by the husband within Nikahnama (marriage contract deed). The delegated right to divorce is recognized under the shariah law but it is not a mandatory ingredient by law to be included within every contract of marriage. Ali Abbas Khan v. Palwasha Khan case made it clear that the talaq e tafwid is not an absolute right to every woman, it is only available to those women where it is explicitly mentioned with the marriage contract. Generally, in the shariah legal system, the wife is not entitled to the right to divorce.

³⁹ Naseem Siddique v. Islamic Republic of Pakistan PLD 2016 FSC 4.

⁴⁰ Zainab Sohail, Rising Again, Courting the Law, 30/09/2016, online accessible at: <https://courtingthelaw.com/2016/09/23/commentary/rising-again/>.

⁴¹ Zaheeruddin v. State, 1993 S.C.M.R. 1718; Hafiz Abdul Waheed v. Asma Jehangir, P.L.D. 1997 Lah 301: In Hafiz Abdul Waheed v. Asma Jehangir case, the Lahore High Court held that the consent of the wali was not a necessary precondition for a marriage to be legally considered as valid. In this case, the court reached a correct decision, but through the reflection of judicial attitudes that was detrimental to women's rights in a number of other contexts.