Challenging State Authority or Running a Parallel Judicial System? '*Ulama* versus the Judiciary in Pakistan

Prof. Dr. Muhammad Munir*

This article focuses on the issue of whether the authority of the State of Pakistan can be challenged by *'ulama*, who though uneasy with some legal developments, have pledged their loyalty to the State of Pakistan through their covenant, provided their desired criterion was agreed. It showcases the debate about the tussle between *'ulama* and the state from the case law study of *khul'* in which the judiciary has put its weight towards state law depriving *'ulama* from their desired space. The article attempts to prove that the authority of the State of Pakistan is legitimate under Islamic law; that all appointments including judicial appointments in Pakistan are legitimate; that decisions given by judges are binding and implementable; that decisions of the superior Courts, i.e., High Courts, Federal Shariat Court, and the Supreme Court, which are based on *ijtihad* exercised by these Courts rather than the opinions of *fuqaha*, are binding; that the *mufti*s and *'ulama* in Pakistan cannot issue *fatwa*s against such decisions; and that such rulings might amount to challenging the state's authority.

Introduction

According to a newspaper report, on 28 June 2011, a woman, Maryam Khatoon, in village Thoha in tehsil Talagang near Rawalpindi, Pakistan was married to Shaukat Ali in 2008. Two years later the differences emerged and the wife demanded *khul'* which the Family Court granted. She intended to marry another man. The village's cleric, however, refused to solemnize the *nikah* and the woman had to solemnize her *nikah* at a local court in Talagang city. On 24 June 2011, three clerics from the village issued a *fatwa* (religious ruling) from the loudspeakers of a mosque declaring the new couple to have committed adultery and thereby liable to death (*wajibul qatal*). The local police registered a case against the three clerics.[1] However, even if the

* Vice President Administration, Finance, and Planning; Director General Shari'a Academy, International Islamic University Islamabad. PhD (Karachi University); LL.M (Stockholm University); LL.M & LL.B (Hons) International Islamic University.

[1] 'Fatwa-Stricken Couple Lives in Terror' (*Dawn*, 1 July 2011) <https://www.dawn.com/news/641828> accessed 10 January 2018. According to the paper,

'*ulama* had not attempted to take law into their hands, they would have certainly opposed the granting of *khul'* by the court as the '*ulama* throughout Pakistan are against the dissolution of marriage through *khul'* without the consent of the husband by the courts.

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

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

The Role of *'Ulama* in the Independence Movement

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

people were pressurizing the police not to submit the *chalan* of the case and no one was ready to become a witness. It was this news that convinced me to explore this area.

[2] The '*ulama* were split into two main parties: The Jamiat Ulama-i-Hind supported the Indian National Congress Party whereas The Jamiat–ul-Ulama-i-Islam supported the Pakistan Movement. Muhammad Qasim Zaman, *The Ulama in Contemporary Islam: Custodians of Change* (Oxford University Press 2004) 32-37; KM Chaudhary and N. Irshad,

created, the Thanawi group as well as the followers of the Madani group in the newly born Pakistan declared their loyalty to Pakistan. The new State of Pakistan had to adopt pre-independence laws. The Indian Independence Act 1947 was enacted by the British Parliament, which provided for the partition of India and the establishment of two independent dominions to be known as India and Pakistan, with effect from 15 August 1947. Section 18(3) of the Act provided:

> Save as otherwise provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day shall as for as applicable and with the necessary adaptations, continue law of each of the new Dominions and the several parts thereof until other provision is made by laws of the legislature of the Dominion in question or by any other legislature or other authority having power in that behalf.

Adaptations were made to the existing pre-colonial laws under the Pakistan (Adaptation of Existing Laws) Order 1947 and the Adaptation of Central Acts and Ordinances Order 1949.

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

> Except as provided by this Article, all existing laws shall subject to the Constitution, continue in force so far as

'The Role of Ulema and Mashaikh in the Pakistan Movement' (2005) (3) *Pakistan Journal of Life and Social Sciences* 34-35. For a detailed study of the political activities and role of *'ulama* in the independence movement, see Ishtiaq Husain Qureshi, *Ulema in Politics: A Study Related to the Political Activities of the Ulema in the South-Asian Sub-continent from 1556 to 1947* (Ma'aref 1972).

[3] Martin Lau, 'Introduction to the Pakistani Legal System with Special Reference to the Law of Contract' (1994) 1 *Yearbook of Islamic and Middle Eastern Law* 6; Martin Lau, 'Islam and Constitutional Development in Pakistan' (1999-2000) 6 *Yearbook of Islamic and Middle Eastern Law* 45, fn. 3.

> applicable and with the necessary adaptations until altered, repealed or amended by the appropriate Legislature.[4]

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

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

'*Ulama* and the new State

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

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

---

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

[5] Muhammad Munir, 'The Judicial System of the East India Company: Precursor to the Present Pakistani Legal System' (2005-2006) (13) & (14*) Annual Journal of International Islamic University Islamabad* 65.

[6] Under the 1772 plan, English judges, called Collectors, were advised in the case of Muslims, by a *Qazi* and in the case of Hindus, by a Pundit. For details, *see* ibid.

1. Question: Hinda was given by her uncle in marriage to Zayd while she was a minor. Upon reaching the age of majority, she expressed her displeasure with the marriage and, in the presence of a few men, expressed her refusal to accept it. Has her marriage contract become annulled because of this refusal, or not?

   Answer: According to the *Durr al-mukhtar* [of al-Haskafi] and *al-Shami* [Ibn 'Abidin's *Hashiyat Rad al-mukhtar*],[7] Hinda does have the right to have her marriage annulled immediately after attaining the age of majority. However, without the judgment of a *qadi* (*qadi shar'i*), her marriage contract will not be annulled. The *Durr al-mukhtar* requires 'the *qadi'*s verdict for annulment'; and, as *al-Shami* has it, 'if she chooses annulment, [then] that cannot take place without a judicial decision'. Consequently, since at this time there is no Islamic *qadi*, the marriage contract in question will not be annulled; for Hinda cannot annul her marriage contract on her own, and she cannot marry anyone else unless her husband has divorced her.[8]

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

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

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

[8] Mufti Muhammad Zafir al-din (ed), *Fatawa Dar al-'Ulum Deoband* (Dar al-isha'at, 2002)) 8:122. The *fatwa* itself is undated.

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

The point to note is that the *mufti*s who issued these *fatawa* (plural of *fatwa*) considered the practice of Islamic law dysfunctional in British India and small issues such as the determination of the 'waiting period' or the dissolution of marriage through the option of puberty could not be resolved without a Muslim *qadi*.[10] Another important point is that according to the second *fatwa*, if the judge were a Muslim, then, even if the appointing authority was itself non-Muslim, the former's decision should be valid.[11] Writing in 1933 the main proponent of the Dissolution of Muslim Marriages Act 1939 (DMMA), Mawlana Ashraf 'Ali Thanawi stated that it is mandatory for the judge who has to decide the issue of dissolution of marriage between a Muslim husband and his wife that he himself should be a Muslim. He mentions that the decision of a Muslim judge in such matters would be binding even if the ruler is a non-Muslim.[12] '[However], where there is no Muslim judge or it is not allowed to take the case to the court of a Muslim judge or when the Muslim judge is not allowed to rule according to Islamic law, husband's divorce of the wife seems the only option for the dissolution of marriage as per the Hanafi *fiqh'*.[13] A legal circumvention given by him in situations of dire necessity is that 'when there is no

[9] Ashraf 'Ali Thanawi, '*Imdad al-fatawa'* (Mufti Muhamamd Shafi (ed), Idarat ta'lifat-i awliya', 1394 A H) 2:509f.
[10] Zaman (n 2) 27.
[11] (n 9) 2: 487f, 492.
[12] Khurshid Hasan Qasami (ed), *Ahkam-e-Talaq wa Nizami Shari'i 'Adalat* (*Al-Faisal Nashiran wa Tajirani Kutub* 1996) 60.
[13] Ibid, 62-63.

(Muslim) judge then the Maliki school of thought allows that the people of the street should constitute a village council (*panchayat*) of at least three practicing learned Muslim members who should investigate the matter and decide it as per Islamic law and this decision would be considered as the decision of a (Muslim) judge'.[14] Since these men have to decide the matter according to Islamic law as interpreted by the Maliki school of thought, they have to have great knowledge of Islamic law. In other words, they have to be clergies, *'ulama* or *muftis*, as only they would have good knowledge of Islamic law. Zaman argues that *mufti*s sometimes suggested that the person seeking to dissolve an undesirable marriage might have to go to principalities outside British India such as the Muslim ruled principality of Bhopal, which still had *qadi*s;[15] but in the meanwhile they insisted that 'the stipulations of the legal texts were to be unrelentingly followed in the most literal sense'.[16]

The leaders of the new State of Pakistan had a secular education and no religious knowledge; yet they were backed by an important group of religious scholars – the Thanawi group, which exercised influence over Muhammad Ali Jinnah – the founder of the new Muslim State.[17] The combined efforts of '*ulama* resulted in the passing of the 'Objectives Resolution' by the first Constituent Assembly in 1948, which has been made, with slight changes, the preamble to the 1956, 1962, and 1973 Constitutions.[18] The most important part of the Objectives Resolution, for the purpose of this discussion, is:

> Whereas sovereignty over the entire universe belongs to Allah Almighty alone and the authority which He has delegated to the State of Pakistan, through its people for being exercised within the limits prescribed by Him, is a sacred trust.[19]

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

[14] Ibid, 63.
[15] Zaman (n 2) 27.
[16] Ibid.
[17] A full account of the life and promises of Jinnah is beyond the scope of this work.
[18] The Preamble was made an integral part of the 1973 Constitution by the Revival of Constitution Order 1985 (P. O. No. 14 of 1985).
[19] Para 1 of the 1973 Constitution and para 1 of Objectives Resolution. For the text of Objectives Resolution, see Annex to the *Constitution of the Islamic Republic of Pakistan* (Ministry of Law, Justice, and Human Rights 2008) 173.

Himself. Subsequently, all legislation and its interpretation by the courts, administrative orders, regulations, adjudications, has to conform to *shar'ia*.

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

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

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

[20] The Constitution of Islamic Republic of Pakistan 1973, art 2.
[21] Ibid sch. 3.
[22] For the full text of the document, see Khurshid Ahmad (trs), *Islamic Law and Constitution* (Islamic Publications Ltd 1997) 332-336. The text is also reproduced in Muhammad Taqi 'Uthmani, *Nifaz-i shari'at awr us-ke masa'il* (Maktaba-i Dar al-'Ulum 1413 A.H.) 19-23.

in contravention of the Qur'an and the Sunnah'.[23] The State shall provide for the basic needs of the people, including food, clothing, housing, medical care, and education, and ensure to its citizens security of life, property and honour, freedom of religion and belief, freedom of worship, freedom of person, freedom of expression, freedom of movement, freedom of association as given to them by Islamic law.[24] The 'recognized' Islamic sects are to enjoy religious freedom within the limits of the law, *and matters pertaining to laws of personal status are to be decided according to their respective schools of law*.[25] What is important to note is that '*ulama* themselves are aware of the fact that as far as the opinions of *fuqaha* (jurists) are concerned, they should be confined to matters of personal status only.

The above provisions are almost all accommodated in the 1973 Constitution. The Constitution makes the Qur'an and the *Sunnah* as the two primary sources of Islamic law in terms of cases that come under the jurisdiction of the Federal Shariat Court by way of Article 203D as well as through the preamble.[26]

One of the oft-quoted provisions of the Constitution is Article 227(1) which states that '[a]ll existing laws shall be brought in conformity with the Injunctions of Islam as laid down in the Holy Qur'an and [the] Sunnah, in this part [i.e., Part IX of the Constitution] referred to as the Injunctions of Islam, and [that] no law shall be enacted which is repugnant to such Injunctions'. This is, however, a lofty proclamation because the operation of this Article is limited to the provisions of Article 227(2) which states that '[e]ffect shall be given to the provisions of clause (1) [Article 227(1)] only in the manner provided in this Part', i.e., only through the limited roles and responsibilities of the Council of Islamic Ideology. Interestingly, an explanation to Article 227, sub-article 1 says that '[I]n the application of this clause to the personal law of any Muslim sect, the expression 'Qur'an and Sunnah' shall mean the Qur'an and [the] Sunnah as interpreted by that sect'.[27] This is in essence the same stipulation as recommended by the '*ulama* themselves in their recommendations in 1951. Perhaps this is the

[23] 22-Point Declaration, art. 2. An explanatory note was attached to this article which states that already enforced laws which are against the Qur'an and the *Sunnah* 'shall be gradually, within a specified period, repealed or amended in conformity with Islamic law'.
[24] Ibid, art. 7.
[25] Ibid, art. 9.
[26] Also see paragraphs one, four, and five of the preamble to the 1973 Constitution, which is an integral part of the Constitution from 1985.
[27] However, it is important to note that recommendations of the Council of Islamic Ideology are not mandatory and the Council only has an advisory role under Article 230 of the Constitution.

reason why *'ulama* agreed on the Constitution of 1973 when it was passed by the Parliament. The text of the convention of the *'ulama* is better known as 'the 22 points of the *'ulama*' as the points on which they agreed were 22, but the document is considered as the pledge of loyalty by the *'ulama* of different backgrounds to the then newly created State of Pakistan.

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

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

Status of Decisions of the Courts in Pakistan

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

[28] The Constitution of Islamic Republic of Pakistan 1973, art. 228.

[29] The Federal Shariat Court was established in 1980 by the Constitutional Amendment Order, 1980 (P. O. No. 1 of 1980) *w.e.f.* 26th May, 1980. An entire chapter 3A which comprises Articles 203A to 203J was added to the Constutution. It replaced the Shariat Benches in the High Courts that existed prior to it since 1979.

frequently quoted and are most popular among the Hanafi '*ulama* of the subcontinent, '[i]f a usurper took over power [of the Muslim State] by force without the consent of *ahl al-hill-i-wa al-'qad* (men of deep knowledge and opinion), and if he fulfills the other conditions, then it is obligatory for the Muslims to obey him'.[30] He further argues that 'piety is not a condition [to be the Head of a Muslim State], therefore, it (such a government by a non-pious Muslim) is allowed; although it is not preferred that a *fasiq* (sinful) [Imam] could be followed [by Muslims]. And if a pious person was chosen but later on he became sinful, he shall not be removed';[31] '[A]nd Muslims shall not rebel against his rule'.[32] According to Marghinani, appointment by a cruel [Muslim] ruler is as lawful as a good ruler'.[33] As a matter of fact, shortly after the period of the rightly guided Caliphs, the Ummyad rulers were not considered '*ahl al-'adl*', except 'Umar ibn 'Abdul 'Aziz (d.101/719), but the Muslims followed their edicts. Moreover, Muslims have rarely been ruled by pious rulers but the people never rejected their authority.

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

---

[30] Ibn 'Abidin (n 7) 2:241.
[31] Ibid.
[32] Ibid.
[33] Burhanuddin al-Marghinani, *Al-Hidaya* (Idarat al-Qur'an, n.d.) 5:359.
[34] Ibn 'Abidin (n 7) 8:25.
[35] Ibid.
[36] See also the verdict of 42 top *muftis* who met for two days in 1954 in Multan to get consensus on the issue of moon-sighting (*ro'yat al-hilal*). They duly presumed the legitimacy of the authority of the State of Pakistan and issued a collective verdict regarding the same. For collective *fatwa*, see Mufti Rashid Ahmad Ludyanwi, *Ahsanul Fatawa* (Qur'an Mahal 1379 A.H.) 348-363. There was a consensus among the *mufti*s that Pakistan

The doctors of Islamic law (of the Hanafi School) have discussed in details many of the situations that are now unfolding in Pakistan. The situation in the case mentioned in the introduction of this paper is that the court gives its decision before the *mufti*s give their *fatwa*; whereas Hanafi jurists have discussed the situation where if a person gets a *fatwa* or legal verdict from a *mufti* and then gets a court decision regarding the same issue which is different from the *fatwa* of the *mufti*, it has been held that he is bound by the decision of the court and not the ruling of the *mufti*. Imam Kasani states:

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

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

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

---

being an Islamic State should follow the dictates of Islamic law regarding moon-sighting although they differed regarding some details of moon-sighting itself.

[37] 'Ala al-Din Abu Bakr bin Mas'ud al-Kasani, *Bada'i' al-Sana'i' fi Tartib al-Shara'i'* (Dar al-kutub al-'ilmiyah 1406 A.H.) 7:6. The English translation of the above text is taken from Imran A. K. Nyazee (trs), *The Unprecedented Analytical Arrangement of Islamic Laws* (Advanced Legal Studies Institute 2007) 44.

[38] Ibid 42. According to Sarkhasi, 'if the husband (in a dispute between him and his wife) is himself a *mujtahid* but the *qadi* ruled against his [the husband] *ijtihad*, so if he thought that

Imam Sarkhasi is even more specific on this issue. He asserts that 'the *fatwa* of a *mufti* cannot be against the decision of a *qadi* and if a *qadi* decided against the *fatwa* [of a *mufti*] he [the *mufti*] is bound by the decision of the *qadi*'.[39] On this account, if the three *mufti*s in the above case would get judgments of the courts regarding *khul*', these would be binding on them and had to be executed according to Sarkhasi and Kasani.

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

1. Question: 'It is true that in Pakistan the Head of State, the Prime Minister, Ministers, Advisors, and Secretaries do not understand Islamic law and are not practicing Muslims. Should their decisions be obeyed and implemented as those coming from *'Olul Amr'*? Should their appointments, especially judicial appointments and decisions given by such judges be valid, binding, and implemented?'[40]

   Answer: 'The Head of State or other Government Officials are still considered as '*Olul Amr*' even if they are ignorant of Islamic law and are not practicing Muslims and their obedience is obligatory in permissible things and as long as they do not given any order that is against the Shari'a, their orders (that are beneficial for the people) will be implemented'.[41]

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

---

his wife was legal for him but the *qadi* ruled that she was not legal for him, then he must accept the judgment of the *qadi* and leave his own opinion (in the issue)';Abu Bakr bin Ahmad al-Sarkhasi, *Kitab al-Mabsut* (Sameer Mustafa Rubab (ed), Dar Ehya al-turath al-Arabi 2002) 10:171. Al-Sarkhasi, in his book, quotes Muhammad ibn Hasan al-Shaybani who said that '*Ijtihad* should not be against the decision of a judge'.

[39] Ibid, 10:172.

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

[41] See the Annex.

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

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

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

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

3. Question: What is the ruling of Islamic law about a person who instigates other people to disobey a court's decision, which is against his school of thought but is not against the Qur'an and the Sunnah?
   Answer: If a decision is not against the Qur'an and the Sunnah, then instigating people against it because it is not based on a particular school of thought is not lawful.

[42] Shaikh Nizam, *al-Fatawa Al-Hindiyyah* (Syed Amir Ali (tr), Dar Al-Kotb Al-Ilmiyah n.d) 3:307.

> However, if that decision is against the school of thought that is followed by the majority in that country, then attempt should be made to change it [that decision] within the legal boundaries.[43]

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

Analysis of Two Important Cases on *Khul'*

Let us examine the two prominent decisions about *khul'*, which brought a revolution in providing a remedy to helpless women in Pakistan. In two successive decisions: *Balqis Fatima*[44] and *Khurshid Bibi*,[45] by the Lahore High Court and the Supreme Court of Pakistan respectively, it was held that *khul'* is available as of right and the consent of the husband is not necessary for the dissolution of marriage through *khul'*. This was against the established opinions of the jurists of three Sunni schools, i.e. Hanafi, Shafi'i, and Hanbali schools of thought.[46] Surprisingly, jurists of these schools mention the famous *hadith* in which Habibah binth Sahl, the wife of Thabit b. Qays b. Shamas, told the Prophet Muhammad (peace be upon him) about her hatred of her husband and the Prophet (peace be upon him) ordered Thabit to let her free,[47] but do not base their rulings regarding *khul'* on it. In all the versions of the *hadith*, the husband remains passive and had no role and the Prophet (peace be upon him) told him to let her free (*farriqha*) or divorce her (*talliqha*). The husband is not asked whether he agrees to it or not, yet *fuqaha* unanimously gave the husband a decisive role. *Balqis Fatima*'s case was decided by a Full Bench of the Lahore High Court whereas *Khurshid Bibi*'s case was decided by a larger Bench of five judges of the Supreme Court. The judges in both cases discussed the opinions of *fuqaha*, but ruled that they are not bound by them. Instead, they based their rulings on the above mentioned *hadith* and the explicit words of the verse 2:229. Thus, they resorted to the wording of the Qur'an and the *hadith* and

[43] See the Annex.
[44] *Mst. Balqis Fatima v Najm-ul-Iram Qureshi* PLD 1959 Lahore 566.
[45] *Mst. Khurshid Bibi v Muhammad Amin* PLD 1967 SC 97.
[46] For details of the opinions of *fuqaha* regarding the consent of husband in *khul'*, see Muhammad Munir, 'The Law of Khul' in Islamic Law and the Legal System of Pakistan' (2015) 2 *LUMS Law Journal* 33-63.
[47] Muhammad Ismail al-Bukhari, *al-Jami' al-Sahih* (People's Edition n.d.) *hadith* no. 4971.

not to the opinions of the *fuqaha*. In other words, they based their decisions on the Qur'an and the Sunnah of the Prophet (PBUH). But this was exactly what the previous constitutions as well as the present constitution allowed the judges to do. In addition, this is exactly what a judge should be doing under Islamic law. Sarkhasi has categorically stated that:

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

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

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

> If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for [recording] of evidence. Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and 'shall also restore to the husband the Haq Mehr [sic] received by the wife in consideration of marriage at the time of marriage.[50]

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

[48] (n 38) 16: 88.

[49] PLD 2014 FSC 43. The FSC disposed off six Shariat Petitions bearing No.S.P.3/L-2005, S.P.2/L-2006, S.P. 1/K-2007, S.P. 2/K-2007, S.P.3/K-2007 and 7/I-2007 respectively. The judgment was delivered on 25 August 25 2009 but was reported in 2014.

[50] Family Courts Act 1964 as amended in 2002, s. 10 (4). The new provision was added in 2002.

to its juris-consults. The questions are reproduced here. First, who is the addressee in the Qur'anic verse: which reads 'if you fear that they both will not observe the limit of Allah' (2:229): the *Qadi, Ul-ul-amr* (authorities), or the spouses? Second, in the case of Thabit and Habibah/Jamila in what capacity the Holy Prophet asked Thabit to release Jamila from marriage bond?[51] Whether the Holy Prophet acted in his capacity as a *qadi*, or as a head of the State or as a Messenger of God?[52]

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

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

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

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

[53] The main verses on which reliance was placed are: 2:228, 2:229, 2: 231, 4: 434, and the famous *hadith* of Habibah bint Sahl – the wife of Thabit b. Qays b. Shamas Al-Ansari. The petitioners had not paid due attention to the *hadith*, however, because the husband, i.e., Thabit had only a passive role in the episode as he is ordered by the Prophet to divorce Habibah or let her go. The Prophet never asked his consent whether he accepts the ruling or whether he wants to divorce her or not.

with any specific injunction contained in the Holy Qur'an and [the] Sunnah of the Holy Prophet (صلی اللہ علیہ وسلم). According to the Qur'anic teachings, the husband is supposed to divorce his wife when the two cannot live within the bounds set by God but if the husband does not divorce his wife and is bent on harming her and does not accept any compensation, then 'what should be the course of action for the wife?', the court asked. The court further argued, 'What would she do if reconciliation fails and the husband proves adamant not to dissolve the marriage?'[54] The FSC argued that the Qur'an has repeatedly stressed the husband to keep the wife with kindness; to keep them in good fellowship or let them go with grace;[55] to retain them in kindness or set them free with kindness;[56] not to retain them (women) for injury and not to exceed the limits;[57] and treat them with grace and kindness.[58]

The court put women on equal footing when it observed: 'obviously Islam does not intend to force a wife to live a miserable life, in a hateful unhappy union, for ever. If she is unhappy and reconciliation fails, she should be entitled to get relief whatsoever'.[59] Another noticeable observation of the court is that how could the jurisdiction of the courts be ousted in case of *khul'*? If the courts can decide all matters including dissolution of marriage on other grounds, 'one wonders why they are not authorized to decide the case of Khula [*khul'*], if a husband does not at all agree to the divorce of his wife and all the reconciliatory efforts fail'.[60] The court summed up the discussion in this way: 'there is no specific verse or authentic Ahadith that provides a bar to the exercise of jurisdiction by a competent Qazi [*qadi*] to decree the case of Khula [*khul'*] agitated before him by a wife after reconciliation fails'.[61]

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

[54] The court put these and other questions to all the advocates and scholars but their answers did not satisfy the court.
[55] The Qur'an, 2:229.
[56] The Qur'an, 2:231.
[57] Ibid.
[58] The Qur'an, 4:19.
[59] The court relied on verse 2:228 which state: 'Women shall have rights similar to the right against them, according to what is equitable'.
[60] (n 49), 61. Regarding the interpretation of Thabit's wife episode the court relied on Syed Abul A'ala' Mawdudi, *The Rights and Duties of Spouses* (Markazi Maktaba Islami Publishers 2009) 58-80.; 'Umar Ahmad 'Uthmani, *Fiqh al-Qur'an* (Idara Fikr Islami) 3: 398-417.
[61] (n 49), 62-63.

Muslim jurists regarding the issue of the consent of the husband on *khul'*, that is, the majority of *fuqaha* consider the consent of the husband necessary for *khul'* to be granted by the courts but the Maliki jurists do not consider the consent of the husband as necessary; second, in matters of difference of opinion among the jurists, the state is the final authority and no one can challenge the authority of the state once it has taken a position and legislated on such matters; finally, no jurist is allowed to challenge or disagree with the decision of a court even if that is against his school of thought or against his *ijtihad*. Consequently, any *mufti* or jurist or *mawlavi* or cleric or religious leader in Pakistan cannot and should not challenge state's laws on issues such as *khul*' and neither should they issue a *fatwa* about it. Any such challenge or *fatwa* should be declared as strictly prohibited and punishable by state's authority. Therefore, the government of Pakistan is requested to pass legislation to this effect.

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

Conclusion

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

[62] Mufti Taqi 'Uthmani has put a scornful attack on the landmark judgements on *khul'* in Pakistan such as *Balqis Fatima v Najmul Ikram Qureshi*, PLD 1959 Lahore 566, and *Khurshid Bibi v Muhammad Amin* PLD 1967 SC 97. Muhammad Taqi Uthmani, '*Islam me Khul' ki Haqiqat: Fiqi Maqalat* (Maiman Publishers 1996) 2:137-194.

[63] Appeal against this judgment were filed by Muhay ud Bukhari, Civil Shariat Appeal No. 1 of 2009 and Syed Matanat Muazzam Bukhari, Civil Shariat Appeal No. 2 of 2009.

constitution which was more or less accommodated by the framers of the Constitution. The creation of the FSC was a turning point in the process of the Islamization of laws and since 1980 '*ulama* have become more vocal.

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

It is not allowed under Islamic law to instigate others when a decision is against a particular school of thought, but is not against the Qur'an and the Sunnah of the Prophet (peace be upon him). Therefore, any instigation by '*ulama* against cases decided by courts in Pakistan regarding *khul'* is not allowed under Islamic law and would amount to challenging the authority of the state or running a parallel judicial system. Loyalty to the state is a citizen's obligation, regardless of the nature of rulers and judges, and whether their decisions are based on a particular school of thought or are based on their *ijtihad.*

Annex

Section 10 of the Family Courts Act 1964 as amended in 2002

Section 10: Pre-trial Proceedings. (1) When the written statement is filed, the Court shall fix an early date for pre-trial hearing of the case.
(2) On the date so fixed, the Court shall examine the plaint, the written statement (if any) and the précis of evidence and documents filed by the parties and shall also, if it so deems fit hear the parties, and their counsel.
(3) At the pre-trial, the court shall ascertain the points at issue between the parties and attempt to effect a compromise or reconciliation between the parties, if this be possible.

(4) If no compromise or reconciliation is possible the Court shall frame the issues in the case and fix a date for [recording] of evidence.

Provided that notwithstanding any decision or judgment of any Court or tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and 'shall also restore to the husband the Haq Mehr received by the wife in consideration of marriage at the time of marriage'.

Translation of the Fatwa

Dear Mufti Sahib,

Assalamalaikum,

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

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

The second question concerns the schools of law. The judges of the Supreme Court or the High Courts in Pakistan sometimes, instead of following any particular school of law, either choose one from among the different opinions of a school on a problem on the basis of the principle of *takhyir*; or,

following the principle of *talfiq*, combine opinions from different schools of Islamic law. Yet sometimes they practice *ijtihad* through rendering decisions by considering the texts of the Qur'an and the Sunnah directly. Would such kind of a decision, rendered by the unanimous or majority opinion of a bench of judges be binding on the general public?

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

Response

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

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

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

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

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

> (His saying: because obedience to the People of Authority is obligatory) 'Allama al-Biri says at the end of his commentary

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

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

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

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

It is in the *Tanqih al-Fatawah al-Hamidiyyah* (volume 2, page 184):

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

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

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

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

It is in the *Usul al-Fatawa wa Adabuhu* by Taqi Usmani (page 234):

> (Adjudication outside of the four schools) All these problems are proof of the position that the implementation of decisions is not limited to the four schools; rather, they'll stand implemented if they accord with an accepted *mujtahid*; with the condition that such an opinion is established through a sound method.

God knows the best.

Rashid Sa'eed

Dar al-Ifta, Jamiah, Dar al-Ulum Karachi

Original Text of the Fatwa

۳۸۱۷
۳۲/۵/۴

from	Muhammad Munir muhammadmunir@iiu.edu.pk	
to	Darul ifta Darul uloom <daruliftadarululoom@gmail.com>	hide details
date	3 July 2011 18:16	3 Jul (3 days ago)
subject	Re: Away from the net Re: fatwa about the authority of the State of Pakistan	

محترم المقام جناب مفتی صاحب مد ظلہ العالی

السلام علیکم ورحمۃ اللہ وبرکاتہ

درج ذیل استفتاءات، جو دراصل ایک ہی مسئلے سے تعلق رکھتے ہیں، آپ کی خدمت میں ارسال کر رہا ہوں تاکہ آپ اسلامی قانون کی رو سے ان کے جوابات مرحمت فرمائیں۔

یہ ایک معلوم حقیقت ہے کہ پاکستان میں سربراہِ ریاست، وزیراعظم، وزراء، مشیران اور سیکریٹری بالعموم شریعتِ اسلامیہ سے ناواقف ہوتے ہیں اور ان میں بہت سے لوگ باعمل مسلمان بھی نہیں ہوتے۔ کیا اس کے باوجود ان کے فیصلوں کو اولوالامر کی حیثیت سے واجب الاطاعت اور نافذ العمل مانا جائے گا؟ بالخصوص مختلف مناصب پر لوگوں کی تعیناتی، جیسے عدالتوں میں ججوں کی تعیناتی، اور ایسے ججوں کے فیصلوں کو درست اور نافذ سمجھا جائے گا؟

دوسرا سوال یہ ہے کہ عدالتِ عظمیٰ یا عدالتِ عالیہ یا وفاقی شرعی عدالت کے جج صاحبان بعض اوقات اپنے فیصلوں میں کسی خاص فقہی مسلک کی پابندی کے بجائے اسی مسلک کے اندر ایک سے زائد آرا میں تخییر کے اصول پر، یا متعدد مسالک کی آرا کے درمیان تلفیق کے ذریعے، یا براہِ راست قرآن وسنت کے نصوص پر غور وفکر کر کے ایک نوعیت کے اجتہاد کے ذریعے، کسی نتیجے پر پہنچ کر فیصلہ سناتے ہیں۔ کیا اس نوعیت کا فیصلہ، جو عدالتی بنچ کے ججوں کا متفقہ یا اکثریتی فیصلہ ہو، عامۃ الناس پر لازم ہوگا؟

تیسرا سوال یہ ہے کہ اس شخص کا کیا حکم ہے جو اس نوعیت کے کسی عدالتی کو برسرِ عام خلافِ اسلام قرار دے کر لوگوں کو اس کی مخالفت پر ابھارتا ہے جبکہ فی الحقیقت وہ فیصلہ قرآن وسنت کی صریح نصوص سے متصادم نہ ہو، جبکہ بعض اوقات وہ فیصلہ خواہ اس شخص کے فقہی مسلک کے خلاف ہو لیکن کسی اور فقہی مسلک کے مطابق ہوتا ہے اور بعض اوقات وہ فیصلہ خواہ کسی خاص فقہی مسلک کے مطابق نہ ہو لیکن اس سے قرآن وسنت کی صریح نصوص کی خلاف ورزی نہیں ہوتی؟

١

بسم الله الرحمن الرحيم

الجواب حامداً ومصلياً

(۱)۔۔۔۔۔ سربراہِ ریاست یا حکومت کے دیگر اعلیٰ عہدیداران شریعتِ اسلامیہ سے ناواقف ہونے اور باعمل مسلمان نہ ہونے کے باوجود اولوالامر میں داخل ہیں لہٰذا جائز اور مباح امور میں ان کی اطاعت واجب ہے اور جب تک وہ شریعت کے خلاف کوئی حکم صادر نہ کریں، ان کے احکام (جو رعایا کی مصلحت کے لئے ہوں) بھی نافذ العمل ہوں گے۔

الفتاوى الهندية – (ج ٣ / ص ٣٠٧)

يجوز تقليد الفاسق وتنفذ قضاياه إذا لم يجاوز فيها حد الشرع لكن لا ينبغي أن يقلد الفاسق كذا في البدائع ولو قلد وهو عدل ثم فسق يستحق العزل ولكن لا ينعزل به وبه أخذ عامة المشايخ ويجب على السلطان أن يعزله كذا في الفصول العمادية

البحر الرائق – (ج ١٨ / ص ١٤١)

(قوله ؛ لأن طاعة أولي الأمر واجبة) قال العلامة البيري في أواخر شرحه على الأشباه والنظائر عند الكلام على شروط الإمامة ثم إذا وقعت البيعة من أهل الحل والعقد صار إماما يفترض إطاعته كما في خزانة الأكمل وفي شرح الجواهر تجب إطاعته فيما أباحه الدين وهو ما يعود نفعه إلى العامة كعمارة دار الإسلام والمسلمين مما تناوله الكتاب والسنة والإجماع اهـ .

(۲)۔۔۔۔۔ اگر حکومت کی طرف سے جج کو کسی خاص فقہی مسلک کے مطابق فیصلہ کرنے کا پابند نہ بنایا گیا ہو تو اس صورت میں اگر کوئی جج اپنے فیصلے میں کسی خاص فقہی مسلک کو سامنے نہ رکھے یا ائمہ اربعہؒ کے علاوہ کسی اور فقیہ کے قول کے مطابق فیصلہ کر دے تو اس کا فیصلہ نافذ العمل ہو گا۔ البتہ کسی غیر مجتہد جج کا اپنے اجتہاد سے فیصلہ کرنا درست نہیں اور چونکہ سوال میں مذکور "تلفیق" اور "تخییر" کی صورت واضح نہیں لہٰذا اس کی وضاحت پر ہی جواب دیا جا سکتا ہے۔

البحر الرائق – (ج ١٧ / ص ٤٧٢)

وفي عمدة الفتاوى القاضي إذا قضى بقول مرجوع عنه جاز وكذا لو قضى في فصل مجتهد فيه اهـ .وكذا في السراجية وفي مآل الفتاوى قضى بخلاف مذهبه وهو مختلف فيه قال أبو حنيفة ينفذ وقال أبو يوسف لا ينفذ اهـ .فقد تحرر أن القاضي المقلد إذا قضى بمذهب غيره فإنه ينفذ وكذا إذا قضى برواية ضعيفة أو بقول ضعيف لإطلاق قولهم أن القول الضعيف يتقوى بقضاء القاضي وما قيده به في فتح القدير من أن هذا إنما هو في المجتهد ثابت في بعض العبارات ولذا قال في القنية القاضي المقلد إذا قضى بخلاف مذهبه لا ينفذ اهـ .

٢

تنقيح الفتاوى الحامدية – (ج ٢ / ص ١٨٤)

وقد صرحوا بأن القاضي وكيل عن السلطان في الحكم ونائب عنه فإذا خصص قضاءه بزمان أو مكان أو شخص أو حادثة أو مذهب تخصص وإلا فلا والقضاة في زماننا يؤمرون بالحكم بما صح من مذهب سيدنا أبي حنيفة رحمه الله تعالى وقد ذكروا في رسم المفتي أن المقلد لا ينفذ قضاؤه بخلاف مذهبه أصلا فلا بد حينئذ من تولية قاض حنبلي أو مالكي ليحكم بذلك فينفذه الحنفي

حاشية ابن عابدين – (ج ٥ / ص ٤٠٨)

وقال في النهر وادعى في البحر أن المقلد إذا قضى بمذهب غيره أو برواية ضعيفة أو بقول ضعيف نفذ وأقوى ما تمسك به ما في البزازية إذا لم يكن القاضي مجتهدا وقضى بالفتوى على خلاف مذهبه نفذ وليس لغيره نقضه وله نقضه كذا عن محمد وقال الثاني ليس له نقضه ا هـ وما في الفتح يجب أن يعول عليه في المذهب وما في البزازية محمول على رواية عنهما إذ قضارى الأمر أن هذا منزل منزلة الناسي لمذهبه وقد مر عنهما في المجتهد أنه لا ينفذ فالمقلد أولى ا هـ ما في النهر ويأتي قريبا ما يؤيده

(۳)۔۔۔۔۔اگر فیصلہ قرآن وسنت کے خلاف نہ ہو تو صرف کسی خاص فقہی مسلک کے مطابق نہ ہونے کی وجہ سے اس فیصلہ کو خلاف اسلام قرار دے کر لوگوں کو اس کی مخالفت پر ابھارنا درست نہیں۔ البتہ اگر وہ فیصلہ ملک کی غالب مسلمان اکثریت کی فقہ کے خلاف ہو تو اسے جائز قانونی حدود میں تبدیل کرنے کی کوشش کرنی چاہئے۔

اصول الافتاء وآدابه للشيخ محمد تقي العثماني – (ص ٢٣٤)

(القضاء بغير مذاهب الاربعة) وهذه المسائل كلها تدل على أن نفاذ القضاء ليس خاصا بالمذاهب الاربعة ، بل ينفذ اذا وافق إحد المجتهدين المعتبرين ، بشرط أن كان قولهم ثبت بطريق موثوق ..... والله اعلم بالصواب

الجواب صحیح
احقر محمود اشرف غفرلہ
۱۳/۳/۱۴۳۳ھ

الجواب صحیح
۱۳ ربیع الاول ۱۴۳۳

الجواب صحیح
محمد یعقوب عفا اللہ عنہ
۱۳/۳/۱۴۳۳ھ

الجواب صحیح
۱۴/۳/۱۴۳۳ھ

الجواب صحیح
۱۳/۳/۱۴۳۳ھ

الراشد
بندہ راشد سعید عفی عنہ
دارالافتاء جامعہ دارالعلوم کراچی
۱۳/۳/۱۴۳۳ھ