

## Fatawa in Pakistani Courts: An Appraisal

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### Introduction:

Fatwa<sup>(1)</sup> is an important legal instrument which has been employed of Muslim scholars since formative years of Islamic law. It is a structured reply from the perspective of Islamic law to a query of an inquirer.<sup>(2)</sup> Fatwa is a private religious activity carried out on the request of an inquirer and its implementation is dependent on the quality of submission the inquirer willing to extend. The very foundation of the institution of fatwa is the desire of Muslims to shape their day to day lives according to the dictates of Islamic law. Therefore, whenever they do not find any specific instruction on any issue or find it difficult to understand the true import of any instruction, they take it to Muftis who respond them considering the dictates as well as tenor of Islamic law.

A fatwa is viewed as a mode of bridging a continuous gap between a legal rule and a changing social context. A fatwa is not merely an instrument of Islamic doctrinal reform as is generally understood rather it is also an ‘ethical care of the self’ and a ‘process of ethical cultivation’.<sup>(3)</sup> The institution of fatwa has been analyzed from various dimensions including fatwa as a legal tool, social instrument, political discourse and doctrinal reform device.<sup>(4)</sup> Alexandre Caeiro has analyzed four *Adab al-Fatwa* manuals to bring to the fore the role of temporal context in their compilation. The author is of the view that the manuals “inform us of the shifting normative criteria that have defined the correct performance of a specific religious act and, in so doing, tell a history of changes in the moral economy of Muslim societies.”<sup>(5)</sup>

The institution of fatwa was not clearly distinguishable from the institution of Qada (i.e. judicial system) in the early period of Islam.<sup>(6)</sup> The fatawa were issued by the same scholars who were appointed as judges for the resolution of disputes. But progressively the both institutions were separated from each other and it became possible to draw a line between them. Anyhow these institutions cooperated with each other in another manner. Muftis were used to sit along with judges in the courts and assisted them by expounding the opinions/fatawa of their school of thought on litigious matters.<sup>(7)</sup> The same pattern was in vogue in Indian Sub-continent till the second half of the nineteenth century which was abolished by British government.<sup>(8)</sup> The value of a fatwa varies in Islamic Jurisprudence from a

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recognized proof to a non-binding opinion of a scholar.<sup>(9)</sup> The opinion of a companion of the Prophet (SAW) is considered as a legal proof, whereas the value of opinions of the rest of the scholars is dependent on their consistency with the Quran and the Sunnah.<sup>(10)</sup>

Pakistan is a country committed to Islamic law and principles constitutionally and fatwa is one of the important legal instruments of Islamic law.<sup>(11)</sup> In this context, it needs to be analyzed how this instrument is utilized and valued in the judicial system of Pakistan. There is a growing volume of the courts' decisions dealing with fatawa, but little scholarship on the subject which necessitates an analysis of the role of fatawa in the judicial system. The paper addresses these issues: whether the courts in Pakistan adopt a unified approach regarding fatawa or not? What worth and value do fatawa attract in the judicial system? What sort of mechanism has been evolved by the courts for authenticating fatawa? How parties do resort to this institution for peddling ahead their legal battles in the courts?

I have been prompted to analyze the role of fatawa in Pakistani courts by a decision of the Supreme Court of India. The Indian apex court has refused to acknowledge that fatwa issuing activity constitutes a parallel judicial system, and hence, liable to be banned in the country.<sup>(12)</sup> It has also discouraged the pronouncement of fatawa on hypothetical issues meaning thereby this activity should only be carried out at the request of a genuinely interested person. The court has reiterated the voluntary nature of this legal institution by observing that no fatwa issuing person and body should be allowed to enforce its opinion on the parties if the latter are not willing to abide by it. Moreover, any fatwa violating the rights guaranteed by the Constitution of India or any other law would be regarded as nullity and of no legal effect. The Supreme Court of India has adopted a middle-of-the-road stance on fatwa issuing activity: it has not been outrightly outlawed nor given it any credence when it goes against the laws of the country.

During the analysis of the Pakistani case law, it has transpired that there are two distinct ways in which fatawa have been taken up by the courts. The first is the reliance of the courts and parties on the standard books of fatawa compiled by various schools of thought. The most prominent among this category is the book titled *Fatawa Alamghiri*<sup>(13)</sup> which was compiled under the instruction of famous Mughal emperor Aurangzaib Alamghir.<sup>(14)</sup> Another important fatawa compilation also originated from the Indian Sub-continent and is quite familiar in the judicial circles entitled *Fatawa Qazi Khan*.<sup>(15)</sup> The second manner of the utilization of fatawa in the courts is to cite an individual fatwa issued by a Mufti at the request of a party.

Though the both categories of fatawa influence the judicial approach and the outcome of cases, one may notice that there is a marked difference as to the respect extended by the courts to the standard books of fatawa as

compared to an individual fatwa. The standard books of fatawa are generally relied upon by the courts for the purpose of exploring or ascertaining Islamic law when they are confronted with a contentious matter. On the other, the courts are not as welcoming to the individual exercise of issuing fatwa as they are with the standard books of fatawa. Though an individual fatwa is not thrown away or excluded from the consideration instantaneously, but it is not viewed with the same level of sanctity as is generally extended to the standard books of fatawa. The paper in hand will confine its analysis to the second category of fatawa as the approach with respect the first category is fairly settled.

### **Fatawa in Pakistani Courts:**

In this section, the approach of Pakistani courts will be analyzed as to how they deal with individual fatawa issued by Muftis highlighting some of its prominent features. Martin Lau has opined that Islamic law in Pakistan performs three main functions: (a) construe an enacted law/provision; (b) fill a void in the legal system, and (c) question an existing law/provision on touchstone of injunctions of Islam.<sup>(16)</sup> During the analysis of case law, we will notice that fatawa are resorted to for all these purposes.

One of the earlier cases in which the court had dealt with fatawa is *State v Muhammad Sher*.<sup>17</sup> In this case, the respondent no.1 was prosecuted for contempt of court on the basis of launching a malicious and offensive campaign against a decision of dissolution of marriage decided in his ex-wife's favor. Brief facts of the case are: the ex-wife of the respondent no.1 sought dissolution of the marriage from a family court. The court dissolved the marriage, and thereafter, she contracted another marriage. Meanwhile, the respondent no.1 put a hypothetical query to some Muftis about the validity of second marriage of a woman after the dissolution of her first marriage through a court without consent of her first husband. Two Muftis responded to the query and opined that the first marriage would be considered valid and the second marriage would be treated as void. It was also stated that no court is empowered to dissolve a valid marriage in any manner without consent of a husband. Thereafter, the respondent no.1 got these opinions (fatawa) published in a pamphlet and widely circulated them with an intent to incite the people against the second marriage of her ex-wife.

The woman, being aggrieved of her ex-husband's defamatory campaign, applied to a civil court for initiation of contempt of court proceedings against him, two Muftis who issued fatawa and the owner of the press which published the pamphlet. The court found substance in the application and submitted it to the High Court for decision. In the High Court, it was argued by the counsels of two Muftis that they replied to a hypothetical question according to Hanafi school of thought without having a clue about the dissolution of marriage of the respondent no.1 with the

complainant. So they did not intend to bring any disrepute to the court and their object was to elucidate the Hanafi point of view on the issue in a generic manner. The owner of the press tendered unconditional apology to the court. Considering these developments, the court exonerated the Muftis and the owner of the press as they were unaware of the sinister intention of the respondent no.1. The court also observed that the opinions of the Muftis could be treated as a legitimate criticism of a law according to one's own religious beliefs. But the respondent no.1 was held guilty of contempt of court.

In this case, fatawa were obtained by a crooked husband while keeping the Muftis in dark about the real scenario and once he had fatawa of his choice, he utilized them for defaming his ex-wife. Such utilization of fatawa, despite its religious significance and origin, does not seem to be different from maneuvering any other legal instrument for one's own purposes. Another noteworthy aspect of the case is that the court did not discourage the articulation of fatawa paying due regard to this institution which had played a significant role in the development of Islamic law. The court also vindicated those fatawa which went against an applicable law, but pronounced without an intention of inciting the defiance of law under the grab of legitimate criticism.

Fatawa are brought by parties on those issues of Islamic law for which they do not find a specific provision of statutory law. In *Mahammad Shaheed v State*,<sup>(18)</sup> the accused who was serving in a mosque as a moazzan (pronouncer of azaan) married his student to whom he used to teach the Quran. The mother of the bride/complainant protested on the marriage and the people of the locality extended their support to her. The accused could not bear the pressure and divorced his wife even before consummating the marriage. After sometime, the accused remarried his ex-wife without an intervening marriage. On this eventuality, an FIR was lodged against the accused under Hudood laws. For the purposes of seeking bail pending the trial, the accused relied on a fatwa in the High Court in addition to a renowned book authored by Dr Tanzeel ur Rehman on Muslim Personal Law. According to these sources, one could remarry with his ex-wife without an intervening marriage provided the first marriage was not consummated. On the other hand, the complainant brought on record another fatwa disclosing altogether different proposition that no remarriage was permitted without an intervening marriage. Considering the contradictory fatawa and the absence of any specific legal provision on the issue at hand (i.e., necessity of an intervening marriage on remarriage which was earlier dissolved without consummation), the court released the accused on bail on statutorily provided ground of 'further inquiry'<sup>(19)</sup> and let aside the real controversy to be settled during the trial.

In another bail matter *Ghulam Abbas v Muhammad Hayat*,<sup>20</sup> the bail was cancelled by the High Court because the Sessions Court inappropriately placed reliance on a fatwa. Brief facts of the case are that the complainant/petitioner lodged an FIR against his wife (Sultana) and the other respondent (Muhammad Hayat) under Hudood laws. Both accused were alleged to have illicit relationship despite the fact that Sultana's marriage was still intact with the complainant. Sultana appeared before a Magistrate on 3-3-1986 and stated that her husband had divorced her in 4-10-1985 and she intended to marry Muhammad Hayat. Considering the statement of Sultana and a fatwa allowing marriage after dissolution of one's marriage, the Sessions Court granted bail to the respondents. The complainant presented an application before the High Court for cancellation of the bail. He brought some documents of the proceedings of Arbitration Council before the court stating that Sultana's marriage with the complainant was subsisted when she eloped with respondent Muhammad Hayat. Hence, both accused could not enter into a valid marriage contract. The court taking due note of this fact cancelled the bail extended to the respondents. It observed that the discretion of the Sessions Court was exercised inappropriately while relying on a fatwa in granting bail. The court further noted that the fatwa was not a legal document and should not have been considered as such.

In the previous case, contradictory fatawa were considered sufficient for exercising the discretion of granting bail, while in the present case, the High Court reprimanded the subordinate court for inappropriate reliance on a fatwa for allowing bail petition emphasizing that it was not a legal document.

In a blasphemy case *Muhammad Ali v Qadir Khan Mandokhail*<sup>(21)</sup> various fatawa were brought before the High Court by the accused persons/applicants for quashing the proceedings against them. The applicants in this case were manufacturer of bed sheets/towels. They received an order from Japan for manufacturing some bed sheets containing some alphabets of various languages. Some of the alphabets printed on the bed sheets resembled the alphabets of the Holy Names (i.e. the Names of God and Holy Prophet). This alleged resemblance prompted the respondent to file a private complaint against the applicants. The applicants applied to the High Court for quashing the proceedings against them. Along with some legal contentions, they presented various fatawa issued by a renowned Madrassah of Karachi. The fatawa stated "some of the words printed on the bed sheets can give rise to a doubt regarding the impression of Holy Names. However, this is not certain." The Muftis also allowed purchase and sale of these bed sheets along with cautioning the applicants to be more careful in future. The fatawa were considered by the court for determining whether the inscription of certain words on the bed sheets amounted to blasphemy or not. The court after examining the bed sheets and considering the fatawa held that the allegedly

resembled words did not amount to blasphemy and quashed the proceedings against the applicants. Hence, in this case the judicial decision was arrived at while being informed by the fatawa.

*Zubaida v Abdul Karim*<sup>(22)</sup> displays the confusion espoused by various judicial organs of the state *vis a vis* fatawa. Brief facts of the case are: a person died leaving behind two widows and two sisters (petitioners), and his estate was mutated in their favor. After sometime, two persons/respondent no.1 & 2 brought a fatwa conferring upon them the status of residuaries before the revenue authorities. The revenue authorities modified the mutation in accordance with the fatwa and the residue of the estate was granted to them. The modified mutation deprived the petitioners from the residue of the estate which was initially transferred to them under the principle of *radd*/return, hence, they filed an appeal against it before the commissioner challenging the entitlement of the respondents as residuaries. The commissioner advised them to file a civil suit for determination of their rights instead of pursuing a redressal of their grievance before the revenue hierarchy.

The petitioners, thereafter, filed a civil suit against the respondents' entitlements as residuaries. The respondents also initiated a civil proceeding against the petitioners. Both the suits were clubbed together by the civil court. But unfortunately without framing the proper issues and recording relevant evidence, the court held the respondents entitled to inheritance as residuaries considering *inter alia* the fatwa in their favor. The decision was upheld in the first appeal and consequently the matter was brought before the High Court. The High Court unearthed the illegalities and remanded back the case to the civil court for proceeding afresh with a direction to frame proper issues of fact on entitlement of the respondents as residuaries.

The case demonstrates that the courts were not on the same page as to the value of the fatwa produced by the respondents. The civil court awarded it some value by treating the respondents as residuaries even without bothering to record additional evidence, but the High Court was not impressed by it, and directed a retrial after the admission of relevant evidence. But on the other hand, mere production of the fatwa was considered appropriate by the revenue authorities for the modification of mutation.

Since the enactment of the Muslim Family Laws Ordinance 1961 (hereafter referred to as MFLO), many a time issues have arisen regarding the complicated interaction of the statutory law on the one hand and Islamic law as traditionally understood on the other. The law has laid down a procedure to be followed for dissolution of a marriage and also stated the penal consequences for violation of this procedure. Many questions have arisen in this regard and the courts have dealt with them, e.g., effect of non-

compliance of the prescribed procedure on validity of dissolution of a marriage. Such like questions will keep on arising as the procedure specified is not exhaustive in itself and it is this space which facilitates presentation of fatawa before the courts.

In *Muhammad Asif Arain v SHO*,<sup>(23)</sup> the applicant contracted a love marriage with Shaista/detainee which was also attended by the parents of the spouses. The marriage was consummated and the couple lived for a few months together. After sometime, the applicant's parents started to exert pressure on him for divorcing his wife and they even threatened him of depriving of his share in the property had he refused to divorce his wife. Eventually the applicant succumbed to the pressure and signed on the divorce papers which he sent through courier service to his wife's brother.

Shaista shifted to her brothers' house where she was confined and maltreated by her family to the extent that she developed a fear of being murdered. She then contacted the applicant and requested him to protect her from the captivity. The applicant who was almost invisible from the scene for about six months started collecting fatawa/shari advisories from various Muftis for the continuity of his marriage with Shaista. He said to the Muftis for having fatawa of his choice that he was coerced to sign on the divorce papers and he never intended to divorce his wife. On this account, he procured few fatawa that his marriage with Shaista was still intact and he had every right to live with her. Once the applicant had such fatawa in his hand, he filed a writ of habeas corpus in the High Court claiming that his wife had been detained illegally by her brothers and she be set at liberty.

The counsel of the applicant argued before the court that in addition to the applicant's forced signature on the divorce papers, the procedure prescribed in the MFLO had never been complied with for reconciliation and confirmation of the dissolution; hence, the alleged divorce was ineffective and void. On the other hand, the brothers of Shaista also brought before the court some fatawa stating that the divorce pronounced by the applicant had become effective and operative in law. Hence, the applicant and Shaista were not husband and wife. An interesting aspect of the case was that one of the fatawa produced by the brothers was issued by the same Mufti who had earlier granted a fatwa to the applicant.

Having found such a material before itself, the court pursued a more legalistic approach of leaving aside all issues on validity of the dissolution of marriage for a family court and confined itself to liberty of the detainee/Shaista. The court held that Shaista, being a *sui juris*, may live wherever she desires and the police would be under an obligation to provide her protection.

In the above case and another *Mahammad Shaheed v State*<sup>(24)</sup> analyzed earlier, the courts had to maneuver with contradictory fatawa

brought by various parties for substantiating their arguments. And the courts in both of them conveniently abstained themselves from commenting on the real issues between the parties and hid behind the law for disposing of the cases. Thanks to the contradictory fatawa which to some extent facilitated such judicial approach. Another point to be gleaned from the cases is that window shopping of fatawa is carried out by parties. Parties exploit differences of opinion among various schools of thought on contentious issues of Islamic law and procure fatawa of their own choice. Sometimes parties do not disclose real facts to Muftis for securing fatawa favorable to their point of view. On the other hand, Muftis write down fatawa according to their schools of thought religiously motivated to do this and least bothering to contemplate how it would jeopardize the institution of fatawa during a court proceeding.

In *Seadar Iqbal v Tahira Parveen*,<sup>(25)</sup> a fatwa on ineffectiveness of a divorce pronounced thrice by mistake was brought before the court. The petitioner was married to the respondent no.1 and out of the marriage the respondent no.2/daughter was born. The petitioner divorced the respondent no.1 thrice on 27-02-2007 and expelled her out of the marital abode sometime later. The respondent no.1 filed a suit for recovery of dower, dowry articles and maintenance for *iddat* period for herself and future maintenance for the respondent no.2. The petitioner reacted to the suit by filing a suit for restitution of conjugal rights arguing that the marriage between the spouses still subsisted because the divorce was mistakenly pronounced thrice, and hence, it was ineffective. Both suits were processed by the family court together and the suit of the respondents was decreed, while that of the petitioner dismissed. In the appellate forum, the decision rendered by the family court was upheld.

On this eventuality, the petitioner filed a writ petition before the High Court challenging the decision on various grounds. One of the arguments of the petitioner was that he was done injustice by not properly framing the issues in the case because the issues of subsistence of the marriage and in/effectiveness of dissolution were not framed. To bring forward his argument of continuity of the marriage, the petitioner presented a fatwa stating about ineffectiveness of a divorce which was pronounced thrice by mistake. The fatwa further stated that the petitioner had to cohabit during the period of *iddat* for rendering such a divorce ineffective. Since the spouses admitted that there had not been cohabitation between them during the *iddat* period, the High Court refused to interfere with the decisions of the courts below in the writ petition. The court further observed that the divorce pronounced by the petitioner was irrevocable according to the divorce deed and the notice of the same was properly sent to Arbitration Council. Though the petitioner sent the revocation to Arbitration Council during the *iddat*



period, but that revocation did not follow the requisite cohabitation between the spouses as per contents of the fatwa; hence the divorce was effectuated after the expiry of *iddat* period.

In this case, a fatwa was brought before the courts by a husband even without complying with the formalities mentioned in it for the purpose of avoiding the financial responsibilities to his ex-wife and his daughter. The High Court considered the fatwa in totality, but did not place reliance on it exclusively for arriving at conclusion: it also referred other material for elucidating the law on the point.

In *Taimoor Aslam Satti v Aalia Bibi*,<sup>(26)</sup> a matter of dispute was about effectiveness of the oral divorce pronounced by the petitioner/husband and the exact date of divorce for determination of the divorcee's (the respondent) right to maintenance. The petitioner though admitted that he had divorced his wife orally in a *jirgha* (elders') meeting, but was unable to specify when that meeting was held. The petitioner admitted that he did not send a written divorce to the respondent and also acknowledged not sending notice to Arbitration Council till initiation of the present litigation for ushering effectiveness to the oral divorce. His counsel asserted before the High Court that even if the petitioner had not complied with the procedure laid down in MFLO, his divorced had become effective disentitling the respondent for her claim of maintenance. On the other hand, the respondent admitted that the matter of oral divorce was sent to a Mufti and he issued fatwa as to its effectiveness. Considering such pieces of evidence, the court concluded that the petitioner's oral divorce had become effective even if he had not followed the provisions of MFLO, and the disputed date of divorce for determining the respondent's right to maintenance would be reckoned from his filing written statement in the trial court.

In *Naveeda Kausar v Mauzzam Khan*,<sup>(27)</sup> again the dispute revolved around effectiveness of oral divorce pronounced by the respondent/husband without following the procedure laid down in MFLO. The petitioner/divorcee asserted for having her property and maintenance rights enforced on the basis of oral divorce by the respondent. On the other, the respondent pleaded that the oral divorce was pronounced in anger and irritated mood, so it could not have been implemented. He also produced a fatwa on this aspect of the matter. The court observed that even producing such a fatwa by the respondent was sufficient to acknowledge that he had pronounced an oral divorce which was as good as a written divorce. It was also observed by the court that mere no following the procedure of MFLO did not make an oral divorce ineffective.

In both the above cases, the effectiveness of oral divorce in violation of the procedure prescribed in MFLO was in issue. The courts in addition to their own settled perspective on this matter<sup>(28)</sup> sought support from fatawa

produced by the parties. In none of the cases, the Mufti pronouncing them was brought before the courts and in one of the cases the fatwa was merely acknowledged while adducing evidence without formally making it part of the evidence.

In *Saleem Ahmed v Govt of Pakistan*,<sup>(29)</sup> a question about relevancy of fatawa/opinions of scholars came up for decision before the Federal Shariat Court in its original jurisdiction. The court noted that its original jurisdiction was confined to evaluating the laws or their provisions on touchstone of the Quran and Sunnah of the Prophet (PBUH). And it could not declare any law or its provision repugnant to Islamic injunction because it was so opined by a Mufti. The court held that unless there was no specific '*nass*' in the Quran and the Sunnah, it could not exercise its original jurisdiction for declaring any law or provision of law as repugnant to the injunctions of Islam.

In this case, Sec. 10(4) of the Family Courts Act 1964<sup>(30)</sup> was challenged and it was argued that the provision violated the injunctions of the Quran and the Sunnah on different grounds including opinions of various scholars (fatawa). The provision states that after submission of the written statement, the court would fix a date for pre-trial hearing in which the court would ascertain whether there is any possibility of reconciliation between the spouses or not. If the court arrives at a conclusion without framing the issues and recording the evidence that there is no prospect of continuity of a marriage, the court would dissolve it on the basis of *khula*. This way of dissolving the marriages was argued to be inconsistent with Islamic law. On the basis of various fatawa issued primarily by Hanafi scholars, it was contended that dissolution on the basis of *khula* could not be ordained without procuring consent of a husband. The FSC dismissed the argument by holding that its domain was confined to ascertain the validity of any provision in light of the injunctions of Islam as laid down in the Quran and the Sunnah. Therefore, it could not take the opinion of any Mufti as valid on touchstone of Islam unless the same was substantiated by the primary sources. Since in this case, the opinions of scholars (fatawa) were not supported by the Quran and the Sunnah, hence the court held the impugned provision as valid under Islamic law. The court observed: "there is no specific verse or authentic Ahadith that provides a bar to the exercise of jurisdiction by a competent Qazi to decree the case of *Khula*' agitated before him by a wife, after reconciliation fails."

The above case has determined the criterion for evaluating the worth of a fatwa when it is brought to challenge any provision of law on touchstone of Islam during a proceeding before the Federal Shariat Court. According to the FSC, a fatwa does not carry any weight if it is not supported by the Quran and the Sunnah: but if a fatwa is substantiated by anyone of them, it would be

considered as a valuable opinion. Hence, there is no intrinsic worth or value of a fatwa and whatever value it would have that is entirely dependent on the primary sources of Islamic law, i.e. the Quran and the Sunnah.

In *Muhammad Daud v Muhammad Rafique*,<sup>(31)</sup> the High Court pondered upon the value of a fatwa from various perspectives. The parties in the case were legal heirs of a deceased person. They inherited the land left by the deceased and after sometime they started litigation against each other for its partition and declaration of their proprietary rights. One of the respondents requested the court for settlement of the matter out of court through a religious person/scholar. The parties agreed on the name of the scholar and the court allowed them to pursue that course of action. Thereafter, the parties appeared before the scholar and presented their points of view. The scholar, after hearing the parties, wrote down a fatwa/Shariah advice settling their issues according to Islamic law. The parties submitted it to the court. Thereafter, the suit filed by the respondents was dismissed on technical grounds and the only suit left to be processed was that of the petitioners.

The case when brought before the High Court the respondent whose case was dismissed earlier argued that the fatwa of the scholar should have been considered as an award and executed as such. This argument made the court to deliberate on the value of the fatwa. The court observed that it could not be treated as an award because no terms of reference were settled and no time frame was specified. Moreover, neither the scholar while conducting the proceedings before him followed the procedure prescribed in the Arbitration Act nor the parties thereafter attempted to get the fatwa implemented as such. The court further noted that the fatwa could have been considered of some value had its author been produced before the court and subjected to cross-examination after bringing into his knowledge all important facts of the case. With this analysis, the court refused to give any credence to the fatwa.

The last point emphasized in the previous case regarding the production of the author of fatwa was earlier articulated in *Niaz Ahmad v State*.<sup>32</sup> This case was registered against the accused on charges of blasphemous remarks against the Holy Prophet Muhammad. Brief facts of the case are: some people had been talking at a tea stall including the accused when a person came there and exchanged greetings in a religiously instructed manner, i.e. *Assalamualaikum*. All persons shook hands with the visitor, but the accused did not do that and allegedly started abusing the Prophet Muhammad when he was told that this manner of greetings was ordained by him.

The accused was convicted by the Sessions Court, and thereafter he filed an appeal against the conviction in the High Court. The court found many flaws in the prosecution story and held it to be unconvincing for

upholding the conviction. During the appeal, a fatwa appended with the case file as a piece of evidence was commented upon by the court in this manner:

“[Although] said document was brought on the file and also got exhibited by the prosecution but there is abundant case on the point that unless its author or signatory was produced in the witness box and subjected to cross examination enabling the accused to explain the entire circumstances prevailing, at the relevant time, such “FATWA” even by some Mufti or religious scholar cannot be considered and read in evidence.”

This judicial approach manifests the realization on the part of the courts that people do not bring relevant facts into the knowledge of Muftis and thereby extract fatawa of their own choice. Moreover, the party against whom a fatwa is utilized should be given an ample opportunity for cross-examination of the Mufti so that no injustice is caused to him. These developments in the judicial approach are praiseworthy in themselves, but they are not followed in judicial proceedings consistently. Barring the last two cases, the cases analyzed above do not emphasize on these important formalities. There is a need to be more consistent and appreciative of such judicious requirements.

The requirement of producing a Mufti who has pronounced a fatwa before a court for subjecting him to cross-examination has virtually equated him to that of an expert witness. The last two cases have not specifically declared the Muftis as such. This void has been filled by Abdul Ahad v State<sup>(33)</sup> treating Muftis as expert witnesses and applying the same criterion on them so far as the admissibility and evidential worth of their evidence/fatawa are concerned. In the last mentioned case, the accused/appellant was charged of allegedly disparaging and defiling the Quran by making additions into one *surah* (a part of the Quran) which were not authentic. He was arrested and the published material was confiscated. Thereafter, he was tried before the Sessions Court and convicted of capital punishment. At the appellate stage before the High Court, many illegalities and shortcomings in the prosecution version/evidence were pointed out and the appeal against conviction was accepted by exonerating the accused of the charge. Many pieces of evidence were on the case file, but for our purposes, the court's evaluation of the opinions rendered by Muftis requires consideration.

During the investigation, the confiscated material was sent to various Muftis. One of them gave opinion against the accused as a fatwa duly signed, but he did not appear in the court for cross-examination. Another Mufti who also supported the prosecution version by issuing a fatwa appeared in the court, but the court did not convince itself as to the value of his evidence/fatwa. The Mufti stated about his qualifications and expertise before the trial court, but the appellate court noted with dismay that no independent

verification was carried out for ascertaining his academic credentials. The court further observed that the status of the Mufti was erroneously assumed to be that of an expert in Islamic law without evaluating his credentials independently. It was stated by the court:

The most essential requirement of law is that an expert on a particular subject whether Science, Art or Law including Muhammadan Law must be a master in the relevant field because of special study, training, experience and extensive research work carried out. The opinion of such an expert alone would be relevant and admissible. Additionally such religious scholar/expert has to be duly notified by the Government to provide legal sanction to his opinion. Unfortunately, the Government has not appointed "Muftis" authorizing to issue "Fatwa" (verdict) on any religious matter/question to be referred to them.

Considering this important lapse in the proceeding of the trial court in addition to other deficiencies surfaced during the Mufti's cross-examination, the appellate court observed that his level of knowledge in Islamic law was nothing other than a guess work, and in this situation his opinion did not merit to be considered for conviction.

### **Conclusion:**

The judicial approach pertaining to fatawa is not comprehensively settled despite the fact that there seems to be an agreement on some broad principles in this respect. A fatwa is not treated as a primary source of law though it is one of the important instruments for discovering Islamic law. A fatwa may be considered in a judicial proceeding where there is no statutory provision stating the opposite or where there is a legal void that can be filled by resorting to or interpreting Islamic law. The weight/value a fatwa is likely to attract during a judicial proceeding depends on its confirmation from other more important sources of Islamic law, i.e. the Quran and the Sunnah. Precisely, two factors are main determinants for fatawa's worth in the judicial system of Pakistan: first, it does not contravene any statutory provision and second, it is substantiated by the Quran and the Sunnah.

It is gleaned from the analysis that the relative weightlessness of fatawa has a lot to do with those who consider themselves entitled to pronounce them. Since they belong to various schools of thought and whenever they issue fatawa they take into consideration the perspective of their own school predominantly. That is why we find divergent fatawa on the same matter brought by various parties before the courts lending considerable space to the courts to maneuver with them or trivializing their significance. Had fatawa not pronounced in this manner and this privilege be exercised sparingly, this instrument would have more credibility and worth than what it has at the moment.

The attitude of the parties relying on fatawa is not above board. Sometimes they seek fatawa by presenting a hypothetical proposition to scholars without disclosing that they are themselves experiencing or going through it. Moreover, they even swab their own school of thought for the purpose of having a fatwa of their own choice. Considering this aspect of procuring fatawa of one's own choice, the parties seem to be little appreciative of the religious significance and origin of fatawa and use them selectively and subjectively in the manner suited to their objective. This selective approach of the parties is not different from an individual's maneuvering of law for protecting one's own interest. So, in addition to Muftis, the parties are partly responsible for downsizing the impact of fatawa in the judicial proceedings.

With a passage of time, an important trend has emerged in the courts' decisions pertaining to individual fatawa that without producing the Muftis before the courts and allowing proper opportunity to the opposite parties for cross-examination, fatawa would have negligible significance. This approach has virtually equated a Mufti with that of an expert witness whose opinion would not bear any result unless it is established that he possesses the requisite qualification and expertise. This judicial development has provided a screening mechanism to the courts to first convince themselves as to competency of a Mufti before allowing him to articulate a fatwa. At present, this approach of treating a Mufti as an expert witness is not consistently followed in all types of suits and proceedings. During our analysis, we have observed that the courts have not adopted this approach in all regular suits, and so far as other judicial proceedings like writ petitions and bail applications are concerned, this judicial approach is conspicuous by its absence. If the requirement of producing Muftis in the courts and subjecting them to cross examination is followed in its letter and spirit, it would discourage pronouncing fatawa as a routine matter because Muftis would progressively start seeing themselves as accountable before the courts not only with respect to their qualifications and competency, but also regarding the correctness of their pronounced opinions/fatawa.

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## Refercnes

- <sup>1</sup> The plural of fatwa is either fatawa or fatwas. Both plurals are used in academia. For instance, Shaheen Sardar Ali, Muhammad Khalid Masud and Alexandre Caeiro have preferred fatwas in some of their academic writings, whereas and Muhmaud A. El-Gamal has preferred fatawa. I have employed fatawa in this paper due to its proximity to the Arabic word as compared to fatwas.
- <sup>2</sup> See Kh. Masud, Brink Messick, and David Powers, eds., (1996) *Islamic Legal Interpretation: Muftis and their Fatwas* Cambridge: Harvard University Press; Weal Hallaq (1994) From Fatwas to Furu‘: Growth and Change in Islamic Substantive Law. *Islamic Law and Society*, 1 (February 1994), 17-56.
- <sup>3</sup> Hussein Ali Agrama (2010) Ethics, tradition, authority: Towards an anthropology of the fatwa, *American Ethnologist*, Vol. 37, No.1, pp.2-18.
- <sup>4</sup> Alexandre Caeiro (2006) “The Shifting Moral Universes of the Islamic Tradition of *Ifṭā*: A Diachronic Study of Four *Adab al-Fatwa* Manuals” *The Muslim World* Oct 2006 Volume 96 pp.661-685.
- <sup>5</sup> *Ibid* at p. 677.
- <sup>6</sup> Mahmoud A. El-Gamal (2006) *Islamic Finance: Law, Economics and Practice*, Cambridge University Press: Cambridge, UK. p. 32.
- <sup>7</sup> Judith E. Tucker (1998) *In the House of Law: Gender and Islamic Law in Ottoman Syria and Palestine*, University of California Press.
- <sup>8</sup> Michel R. Anderson “Islamic Law and the Colonial Encounter in British India” in David Arnold and Peter Robb (Eds.) *Institutions and Ideologies: A SOAS South Asia Reader* (London: Curzon Press Ltd.) 1993, pp. 165-185. It is also available on <http://www.wluml.org/node/5627> (Last accessed on 29/04/2016).
- <sup>9</sup> Shaheen Sardar Ali “Resurrecting Siyar Through Fatwas? (Re)constructing ‘Islamic International Law’ in a Post (Iraq) Invasion in World” pp. 117-152 at p. 124 in *Islam & Europe: Crises are Challenges* (2010) Edited by Marie-Claire Foblets and Jean-Yves Carlier, Leuven University Press: Leuven, Belgium.
- <sup>10</sup> Muhammad Hashim Kamali (1998) *Principles of Islamic Jurisprudence* (2<sup>nd</sup> Revised Edition), Ilmiah Publishers Sdn. Bhd. Kuala Lumpur. p. 235.
- <sup>11</sup> See Articles 01, 02, 02A, 20, 31, 203D, and 227-230 of the Constitution of Pakistan 1973.
- <sup>12</sup> Full text of the decision can be accessed on the following link: <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41747> (Last accessed on 29/04/2016)
- <sup>13</sup> Nisar Ahmad Khan v Ismat Jehan Begum PLD 1969 SC 194; Karim Bakhsh v Muhammad Nawaz 1989 CLC 807 (Lahore); Muhammad Asad v Humera Naz 2000 CLC 1725 (Lahore); Imtiaz Begum v Tariq Mahmood 1995 CLC 800 (Lahore); Allah Dad v Mukhtar 1992 SCMR 1273; Razia Bibi v District Judge, Bahawalnagar 1992 CLC 1981 (Lahore)

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- <sup>14</sup> Aurangzaib Alamghir was sixth emperor of the famous Mughal dynasty of the Indian Subcontinent. He was well known for his piety and dedication to flourishing of Islamic values in the country among a notable circle of researchers. On the other hand, some historians believe that he was instrumental in sowing the seeds of religious extremism in the Indian Subcontinent.
- <sup>15</sup> Muhammad Asad v Humera Naz 2000 CLC 17259 (Lahore); Mumtaz Ali v Dr Gulnaz 2000 YLR 1258 (Karachi); Said Mahmood v State PLD 1995 FSC 1
- <sup>16</sup> Martin Lau (2006) *The Role of Islam in the Legal System of Pakistan*, Leiden: Martinus Nijhoff Publishers.
- <sup>17</sup> PLD 1964 (W.P.) Lah 96
- <sup>18</sup> 1999 PCRLJ 1279 (Karachi)
- <sup>19</sup> The phrase ‘further inquiry’ is not defined anywhere conclusively and it allows the courts an ample space for using discretionary powers in bail petitions.
- <sup>20</sup> 1987 PCRLJ 1261 (Lahore)
- <sup>21</sup> PLD 2006 Kar 613
- <sup>22</sup> 2002 YLR 3849 (Peshawar)
- <sup>23</sup> 2012 PCrLJ 1553 (Karachi)
- <sup>24</sup> 1999 PCRLJ 1279 (Karachi)
- <sup>25</sup> 2010 YLR 582 (Lahore)
- <sup>26</sup> 2016 YLR 765 (Lahore)
- <sup>27</sup> 2016 CLC 180 (Lahore)
- <sup>28</sup> Allah Dad v Mukhtar 1992 SCMR 1273; Mirza Qamar Raza v Tahira Begum PLD 1988 Kar 169
- <sup>29</sup> PLD 2014 FSC 43
- <sup>30</sup> This law establishes the family courts and lays down their procedure for settling family disputes in a speedy manner as compared to other civil litigation.
- <sup>31</sup> 2015 CLC 653 (Sindh)
- <sup>32</sup> 2009 MLD 616 (Lahore)
- <sup>33</sup> PLD 2007 Pesh 83