

**PROTECTION OF LEGAL STATUS OF WOMEN IN
PAKISTAN: AN ANALYSIS OF THE ROLE OF SUPREME
COURT**

Zia Ullah Ranjah*

Dr Shahbaz Ahmad Cheema (Corresponding Author)**

Abstract:

Protection of women's rights in Muslims societies is a subject of scholastic debate in the contemporary legal scholarship. The debate is even more hectic in Pakistan, notably, in the context of the Islamization process that has a constitutional mandate. This process was initiated after emergence of Pakistan on world's map and was accelerated by the military rule of Gen. Zia (1977-1988). One of the important implications of this process is considered to be deterioration in women's rights and status. The paper, by analyzing some judgments of the Supreme Court of Pakistan, posits that Pakistani judiciary has been a forerunner of women's rights though its domain has largely been confined to the constitutional framework. Moreover, the paper suggests that it would have been salutary to the Supreme Court's progressive role and posture had it been stepped into the neglected areas of women's legal status in Islamic Law, e. g. evidence, inheritance, and hudood laws, and assisted the contentious parties to settle them.

Key Words:

Women's rights; Supreme Court; Pakistan; Islamic Law.

* PhD Scholar, International Islamic University, Islamabad.

** Assistant Professor, University Law College, University of the Punjab, Lahore.

1. Introduction:

One of the commonly prevalent perceptions about women in Pakistan is that they do not enjoy equal legal protection. This perception is not altogether devoid of force. If it is overemphasized it is likely to relegate those factors which militate against attempts to downplay women's rights: one of them is the superior judiciary of Pakistan. The paper argues that the Supreme Court of Pakistan has been playing an extremely positive role in uplifting the women's status and protection of their rights. It concedes, however, that its progressive role is circumscribed by the powers bestowed on it by the Constitution. There are certain areas e.g. evidence, inheritance, and hudood laws, etc., where it has not engaged itself into a progressive manner. The paper suggests that it should progressively engage with these areas as well because the institution like this is expected to foster the debate in a right direction.

In order to support the above contentions, the paper examines, firstly, the role of the Supreme Court within the framework of the Constitution of Pakistan. Thereafter, it analyzes some of its judgments to highlight the progressive role played by it in promotion of women's rights. Finally, the paper briefly surveys the areas where the Supreme Court should engage in order to further promote and protect women's rights.

2. The Constitutional framework and the Role of the Supreme Court of Pakistan:

The Constitution of Pakistan, 1973 provides for the equality of women in its various articles. Article 3 notes that the state is committed to eliminate all sorts of exploitations. Article 25(1) guarantees that "all citizens are equal under the law and are entitled to equal protection of law." Article 25 (2) further states that "there shall be no discrimination on the basis of sex alone." Article 27 prohibits discrimination on the basis of sex, race, religion, or caste for government employment. Article 34 contemplates that "steps shall be taken to ensure full participation of women in all spheres of national life." And Article 38 (a) requires the state to "secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living." The above provisions provide adequate constitutional guarantees for the protection of women's rights in Pakistan.

Having found such elaborate provisions for elimination of discrimination in the Constitution, one may assume that the courts have not fully protected the rights of the women otherwise there

would have been little to be accomplished in this respect. The role of the courts -spearheaded by the Supreme Court- has generally been facilitating the women to enjoy their rights sanctioned by the Constitution. This fact is amply demonstrated by the decisions of the Supreme Court. Now, we proceed to survey selected cases from 1956 to 2006 to support the above conclusion. These cases may neither be the most important nor the best written judgments in the area. However, an effort has been made to pick judgments rendered by different judges and during different eras.

The issue of regularization of the profession of prostitutes came up before the Supreme Court in *Mst. Sardaran (1964)*: whether any profession could be prohibited under the guise of zoning regulations. The court held that the prostitutes can carry out their profession at some place other than the area required by the municipality but they cannot in anyway debarred from carrying out their profession. Furthermore, it was observed by the court that they should be provided some assistance in relocation of their profession. Regulation of something should not amount to prohibition of the same. Thus, any attempt to squeeze out the profession would be inconsistent with the provisions of the Constitution. It would be worth-mentioning here that an attempt was made to deprive the prostitutes from their profession under the zoning regulations when the same was entirely lawful within the prevalent Constitution.

In *Khurshid Bibi (1967)*, wife's right to obtain separation from her husband on the basis of *khula* came before the Supreme Court. The basic issue involved in the case was whether a wife can obtain *khula* without her husband's consent. The court decided the controversy in wife's favor by observing that such a divorce does not rest on the consent of her husband. The court dilated upon the philosophy of *khula* and observed that it is meant to facilitate the women in contradistinction to the right of *Talaq* vested in the man. Thus, if trouble arises from the side of a woman, a man is given the power to divorce her, and when injury is received from man's side, she is given the right to obtain *khula*.

The question as to mother's right of *hizanet* (custody) of her child of tender age was debated in the Supreme Court in *Rahimullah (1974)*. It was held that the respondent mother did not forfeit her right of custody by reason of removing her two boys from their ordinary place of residence. It was, in any case, not within Section 25 of the Guardian and Wards Act to deliver them into the custody of the appellant/father while they were of tender age in order to protect their welfare. This decision favors women to keep custody of their young children.

The right of Muslim women to inherit in accordance with the injunctions of Islam was discussed by the Supreme Court in Ghulam Ali (1990). The court observed that Islam has visualized many modes of circulation of wealth. It pointed out that almost all commentators on the Islamic system agree that strict enforcement of laws of inheritance is an important accepted method for achieving the circulation of wealth. It would be against public policy to give any credence to the claim of 'relinquishment of a woman's inheritance rights' as contended by the petitioner in the present case. Hence, the court affirmed that the women should not be deprived of their inheritance rights and the claims of their so-called relinquishments should not be simply assumed to be correct without ascertaining their free will. In another case decided earlier than the one cited above namely Federation of Pakistan (1983), the Supreme Court declared un-Islamic a customary practice of relinquishing of inheritance rights by women in favor of their male relatives.

The issue of delay in the registration of an FIR for the alleged manipulation of the revenue records depriving a woman of her due share in immovable property by inheritance was brought before the Supreme Court in Rafique Bibi (2006). The Honorable Justice Iftikhar Muhammad Chaudhry observed that the court had always emphasized the protection of women's rights particularly relating to the landed property. Women had every right to approach the courts for their lawful rights, and if such a matter had been brought, it should be dealt with in accordance with law; relief could not be denied merely for technical reasons.

Another important question as to right of women's inheritance was raised by a reference made by the President of Azad Jammu and Kashmir (1997) under Section 46-A of the Azad Jammu and Kashmir Interim Constitution Act, 1974. Though the decision on the reference was made by the Supreme Court of Azad Jammu and Kashmir, but taking into account the significance of the issue we think it merits to be reproduced here. The question was that whether a woman loses her right of inheritance once she obtains a nationality of another country. The court held that a woman could not be debarred from having her share in the immovable property after marrying a person of another nationality or even acquiring nationality of another country.

In Shirm Munir (1990) there was a controversy regarding discrimination on the basis of sex in the admission to educational institutions. The context of the present case was that some educational institutions fixed quota for both males and females with a view to deprive female students to get

admission who were otherwise entitled to it. The Supreme Court held that no discrimination on the basis of sex alone could be permitted except on the ground of reasonable and intelligible classification. It observed that such classification in our society permits the establishment of education and professional institutions exclusively for both females and males. However, co-education is permitted and the fixation of admissions quotas on the grounds of sex is directly opposed to the requirements of Article 25 (2) unless it is justified as a protective measure for women and children under Article 25 (3). The Constitution assumes that women and children need protection not males and as long as the same constitutional assumption continues the court cannot reverse it by affording protection to males at the cost of women and children.

The issue whether the second wife has *locus standi* to file a complaint for an alleged offence of polygamy by her husband was debated in Fahimuddin (1991). To settle the controversy, the Supreme Court raised a question whether the respondent's second wife was not 'aggrieved' when the appellant failed to obtain the requisite sanction under Section 6 of the Muslim Family Law Ordinance, 1961. After having affirmatively responding to the above question, the court held that the second wife, being an 'aggrieved' person, had in fact lawfully instituted the proceeding of the offence of polygamy against her husband.

The rights of illiterate *pardanashen* women regarding property matters came under discussion in another case Fazal Jan (1992). The Supreme Court observed that the petitioner was not expected to conduct a complicated case herself, so it was in the interest of justice that she should be provided with the assistance of a competent and experienced civil lawyer. Such assistance would be deemed in accordance with her fundamental rights as contained in Article 25 (3).

In Inquilabi Labour Party (1993) the competency of a female to be Prime Minister of Pakistan was disputed and a declaration was sought that a woman cannot be head of an Islamic state, minister or member of the Provincial or National Assembly as the same is against the spirit of the Constitution and the Quran and Sunnah. The court held that it is clear that the Constitution itself envisages that "Muslim" means a "Person" which by no means could be restricted to men. Thus, the court concluded that there is no constitutional bar for a female to assume responsibilities of public nature debated in the case.

One of the most celebrated cases regarding women's rights in Pakistan is Hafiz Abdul Waheed (2004). It has settled the controversy about the right of an adult girl to marry by her own free will and without consent of *wali* once for all. The Supreme Court held that the marriage was not illegal on account of the alleged absence of a *wali's* consent. The court relied on a number of judgments of the Federal Shariat Court specifically holding that an adult *sui juris* Muslim girl can contract a valid *nikah* on her own.

The above case law reveals that the superior judiciary has been reasonably consistent in promoting and protecting the rights of women within the constitutional framework. It has seemed to follow a progressive interpretation of Islamic law by applying *istihsan* to serve *maslahah* as pointed out by Iqbal (2010, 197).

The above survey of cases highlights that the superior judiciary's commitment has by and large been structured by the constitutional parameters as we do not find the same level of commitment in a number of other contentious areas of women's right, e. g. evidence, inheritance, and hudood laws. By pointing out this we do not suggest that the courts in general and the Supreme Court in particular should get themselves relieved of the constitutional framework to appease a specific segment of the society. Our contention is that the superior judiciary should debate in an objective manner at least such matters to help us arrived at a sensible juncture. This is not something altogether unachievable while being within the present constitutional framework and the courts had already achieved results similar to this in some famous cases, e. g. Khurshid Bibi (1967) and Hafiz Abdul Waheed (2004). Moreover, it is a settled proposition within Pakistan's legal system that when the courts do not find any specific ruling or consensus of opinion on any issue they are free to debate and formulate their own opinion (Mst. Zohra Begum 1965).

In the following section, we will present some glimpses of the debates on the issues of evidence, inheritance, and hudood laws with a view to pursue the courts to dilate upon them, applying its *judicial ijihad* in the changing socio-political environment of Pakistan.

3. Some Contentious Issues Calling for Judicial Engagement:

As mentioned above, some areas of Islamic law regarding women's right are still a source of hectic debate. They are status of women as witnesses, their rights to inheritance, and hudood laws. We have selected these issues as they are more contested in Pakistan's socio-political

context than others and their selection is not meant to give any impression as if they are the only debatable issues. Discussing these issues in the following pages, we seek an enhanced engagement by the superior judiciary as it is one of the institutions which is trusted by the public and viewed with a hope to find amicable solutions for debatable issues.

3.1. Evidence of women:

Article 17 of the Qanun-e-Shahadat Order, 1984 provides that in financial matters two women should substitute one man as witnesses. This provision is supposed to be based on the Quranic verse 2:282 which reads that:

“call in two male witnesses from among you, but if two men cannot be found, then one man and two women whom you judge fit to act as witnesses; so that if either of them commit an error, the other will remember”.

In addition to the above referred article, there are some other statutory provisions in, e.g. Hudood laws of 1979, meant to exclude women’s evidence in offences of hudood. The critics (Weiss 2003) argue that such laws are discriminatory against women as they disallow women from testifying at all in certain kinds of cases and would cause their testimony in other cases to be irrelevant unless corroborated by another woman. And, even in financial matters the law gives men and women different legal rights, at least, underscores that the state does not regard women and men as equal economic actors.

On the other hand, some (Shah 2006, 58-60) argue that the evidence of two women, rather than one, is not a requirement in all cases: it is so in commercial transactions only. Even in these latter cases, only one woman has to testify as a witness, whereas the other has simply to help her ‘remember’ relevant facts. In other words, the testimony of the second woman is not obligatory. In offences of hudood, e. g. Zina liable to hadd, women’s evidence is excluded as the offences are required to be proved on the evidence of male witnesses. Controversy, on the above issues, requires the judicial organ of the state to conduct Ijtihad. It is worth-observing that the Ijtihad of the courts in such matters would not be overstepping as they have been following, from the beginning of Pakistan, a progressive or woman friendly interpretations of Islamic law (Farouki 1987, 53-78).

3.2. Inheritance:

There are a few verses of the Quran which deal with some rules of law of inheritance. One of them is verse 4:11 which states “A male shall inherit twice as much as a female”. This verse lays a general principle regarding inheritance of women that their share will be half than that of men. Though there are circumstances in which women inherit the same share as that of men, but in most of the situations men receive double or more than them. This is viewed as discriminatory against women by many though there are some scholars who defend such a scheme of inheritance on the basis of social and familial responsibilities of both genders.

This issue of inheritance raised a controversy amongst the scholars at the 1993 Vienna Human Rights Conference. Americans and most Western European delegates tried to get a resolution passed for the equal inheritance of sons and daughters. On the other hand, the representatives from Muslim countries and some others, who were against such a resolution, argued that their societies had developed some home-grown mechanisms in forms of extended families whose advantages ‘could not be measured in terms of land or capital’ (Weiss 2003).

On the same line of argument as offered by the Muslim countries at the Vienna Conference, a renowned Muslim philosopher Iqbal (1934, 161-162) seems to justify the inequality of share of women in inheritance. He is of the opinion that one must not assume from such inequality that men have a superior status over women as there seems to be no justification for such an assumption in the Quran. It is provided in the Quran: “And for women are rights over men similar to those for men over women.” The daughter’s share has nothing to do with her status as equal and honorable human being; the division of shares in this manner has more to do with her responsibilities and economic opportunities.

Iqbal (1934) points out that the principles of law of inheritance as enunciated in the Quran have yet to be explored by Muslim scholars. Furthermore, he is hopeful that such an academic exercise would usher us a renewed faith on the wisdom of these principles. In view of the above arguments, Iqbal (1934) appears to consider the re-interpretation of foundational principles of Islam as a necessity for ‘renewed faith’ in the modern era of scientific enquiry, individualism, liberty, and economic revolution.

On the other hand, departing from Iqbal's (1934) emphasis on creative re-interpretation tied to the persistence of fixed shares, Shah (2006) argues that if men do not discharge their economic responsibility, or women contribute equally to family income, women should also be considered as entitled to an equal share in inheritance.

In our opinion, Shah's (2006) argument is an innovative interpretation, but at the same time apparently contradicts to the relevant text of the Quran which provides relatively fixed shares in inheritance for both men and women. Iqbal (1934), however, giving full attention to the text of the Quran persuades Muslim lawyers/scholars to explore the principles underlying it. Thus, Iqbal (1934) encourages ijthihad with sound reasons. The above controversy also suggests involvement of the superior courts in this academic debate to promote women's rights in Pakistan in the manner suitable to the society.

3.3. Hudood laws:

Pakistan's Hudood Ordinances are an offshoot of General Zia ul-Haq's Islamization of laws program which was initiated in 1979. One of the most debatable of those Ordinances is the Offence of Zina Ordinance, 1979 which stands amended by the Protection of Women (Criminal Laws Amendment) Act, 2006. Even after this amendment, status of women does not appear to be changed a lot. It is argued that the Ordinance, 1979, discriminates against women on the basis of gender alone. In particular, women are prosecuted for committing adultery if they fail to bring witnesses to prove the offence of rape. Sometimes pregnancy is taken as a piece of evidence against women for commission of Zina. In a number of rape trials, the women complaining of rape have been convicted on the grounds of their unexplained pregnancy (Mullally 2005). Another strong voice against the above law has been of renowned Pakistani lawyers Jahangir & Hina Jilani (2003) who are of the view that the law has played havoc against the already deprived segment of the society, i.e. women. Moreover, they (2003) contend that it is a convenient tool in the hands of those who intend to harass women by fictitious criminal proceedings: hence, liable to be repealed entirely.

Justice (R) Usmani (2006) argues that the Ordinance of 1979 is valid and non-discriminatory piece of legislation. However, he (2006) does not negate the possibility of its being manipulated by unscrupulous people; but the same does not justify its obliteration from the statute books. He

has heavily relied on the research carried out by of an American Scholar Kennedy (1996, 63) who states in one of his conclusions that “women fearing conviction under Section 10 (2) frequently bring charges of rape under Section 10 (3) of the Ordinance, 1979, against their alleged partners. The FSC finding no circumstantial evidence to support the latter charge, convict the male accused under section 10 (2)...the women is exonerated of any wrongdoing due to reasonable doubt rule.” One must recognize that, similar to men, women could also misuse certain provisions for their own benefit or disadvantage of other party.

The above referred contentious issues are routed through the modern notions of human rights. It is argued that Islamic law does not have such notions: hence, it cannot be expected to address to women’s rights. The only solution offered in such a situation is an absolute acceptance of current standards of human rights. On the other hand, many scholars doubt the ideological outcome of this argument taking into account the diversities of various Muslim societies and their corresponding interpretations of Islamic law (Ali 2000). Baderin (2010), while quoting another famous scholar Abdullahi An-Naim, notes that there are obvious conflicts between historical *Shariah* and certain human rights, especially women’s rights and the rights of non-Muslims, and indicates the need to focus on how these areas of conflict could be resolved. A modern version of Islamic law is required to be indigenously reconstructed and developed which could be consistent with standards of human rights on the one hand and the principles of Islamic law on the other (Baderin 2010). Baderin (2001) further argues that the differences would be easier to address if the concept of human rights is first positively reconstructed from within the themes of Islamic law rather than imposing it as a concept alien to Islamic law. Here, Baderin, Abdullahi An-Naim, and Iqbal seem to agree on re-interpretation of Islamic law from within to accommodate the modern notions of human rights.

The above discussion suggests that there are various views regarding the status and protection of women rights in Islam. Some consider dictates of Islamic law apparently discriminatory against women, and the others think that the objective of non-discrimination cannot be achieved unless the principles of Islamic law are not re-interpreted in an egalitarian way from within. There are still others emphasizing on traditional understanding of the relationship between Islam and gender without any need of re-interpretation of the former. All such views ultimately point out to one pertinent fact that the role of human agency is far reaching in construction and re-

construction of the dictates of the divine precepts, i.e. the Quran and Sunnah of the Prophet Muhammad.

A brief survey of the arguments on the issues of evidence, inheritance, and hudood laws etc. has indicated strong support of the scholars for developing a home-grown framework from within Islamic law. It calls for a reinforced judicial engagement in the realm of women's rights by the superior judiciary of Pakistan.

Re-interpreting Islamic law while taking its social political context in account has been a hallmark of Islamic legal history. The passage of time and the expansion of Islam after the Prophet presented new situations to the Muslims for interpretation of the primary sources of Islamic law. More so, sometimes, the divine itself provides a space for different interpretations. It is this context in which one may really appreciate the true significance of the doctrine of Ijtihad. The superior courts, therefore, can re-interpret Islamic provisions by employing human reasoning in the interpretive space generated by the divine to promote women's rights in the contentious areas.

4. Conclusion:

The Constitution of Pakistan, 1973, lays down a comprehensive framework for the protection of the legal status and rights of the women. The superior courts have succeeded to a large extent in materializing these rights through their judicial pronouncements as analyzed in the earlier part of the paper. The survey of the cases demonstrates that the courts have often protected and promoted the women's rights in the areas of education, family, politics, and landed property. The government has also shown achievements in the area of law making aiming to facilitate the women's rights. Pakistan, being signatory to United Nation's Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), is obliged to reconsider revising its existing laws on women, so that they might not militate against their rights.

Pakistan has taken considerable steps in the legislative domain to improve the status of women. For example, the Criminal Law (Amendment Act), 2004, has facilitated the prosecution of "honor killing" cases; the Protection of Women from Domestic Violence Act, 2005, protects women from domestic violence i.e. stove burning and torture etc; the Protection of Women (Criminal Law Amendment) Act, 2006, has attempted to remove lacunae in the law pertaining to

the arrest and punishment of women in Zina cases; and the Protection Against Harassment of Women at the Workplace Act, 2010, provides protection to working women from sexual harassment. But the story does not end here, it is yet to be seen, how do the courts bridge the gap between the laws and their implementation and their role in this regard cannot be overstated. Moreover, the superior courts should engage in an academic manner to help settle the contentious issues about women's rights as debated in the latter half of the paper. The courts conscientious activism in these areas would not be against the overall progressive attitude of the judiciary on the one hand, and on the other, the same will also be facilitated by the interpretative space generated by the sources of Islamic law.

Bibliography:

Ali, S. S. (2000) *Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Man?* The Hague: Kluwer Law International.

Baderin, M. A. (2001), "Establishing Areas of Common Ground between Islamic Law and International Human Rights", *The International Journal of Human Rights*, Vol.5, No.2 (Summer 2001) pp 72-113.

Baderin, M. A. (2010), *Abdullahi An-Naim's Philosophy on Islam and Human Rights*, Research Paper No.10/2010, London, School of Oriental and African Studies, University of London.

Fahimuddin Vs. Sabeeha Begum and another, PLD 1991 SC 1074

Farouki, K. F. (1987), 'Pakistan Islamic Government and Society' in John L. Esposito (ed.) *Islam in Asia: Religion, Politics, and Society*, Oxford: Oxford University Press.

Federation of Pakistan Vs. Muhammad Ishaque, PLD 1983 SC 273

Ghulam Ali and two others Vs. Ghulam Sarwar Naqvi, PLD 1990 SC 1

Hafiz Abdul Waheed Vs. Mrs. Asma Jahngir, PLD 2004 SC 219

Inquilabi Labour Party Vs. Govt. of Pakistan and others NLR 1993 SCJ 397

Iqbal, K. (2010), *The Right to Development in International Law, the Case of Pakistan*, London: Routledge.

Iqbal, M. (1934), *Reconstruction of Religious Thought in Islam*, London: Oxford University Press Humphrey Milford.

Jahangir, A. & Hina Jilani (2003) *The Hudood Ordinance: A Divine Sanction?*, Lahore: Sang-e-Meel Publications.

Kennedy, C. (1996) *Islamization of Laws and Economy*, Islamabad: Institute of Policy Studies.

Mst. Fazal Jan Vs. Roshan Din and two others, PLD 1992 SC 811

Mst. Sardaran and 75 others Vs. the Municipality, Lyallpur, PLD 1964 SC 397

Mst. Khurshid Bibi Vs. Baboo Muhammad Amin, PLD 1967 SC 97

Mst. Zohra Begum Vs. Sh. Latif Ahmad Munawwar, PLD 1965 (West Pakistan) Lahore 695.

Mullally, S. (2005), "As Nearly As May Be": Debating Women's Human Rights in Pakistan, *Journal of Social and Legal Studies*, Vol.14 (3).

Rafique Bibi Vs. Muhammad Sharif, 2006 SCMR 512

Rahimullah Choudhury Vs. Mrs. Sayeda Helali Begum and Others, 1974 SCMR 305

Reference by the President of Azad Jammu and Kashmir PLD 1997 SC (AJ&K) 1

Shah, N. A. (2006), *Women, the Koran and International Human Rights Law: the Experience of Pakistan*, Leiden/Boston: Martinus Nijhoff Publishers.

Shirn Munir and others Vs. Government of Punjab and another, PLD 1990 SC 295

Usmani, T. (2006) "The Islamization of Laws in Pakistan: The Case of Hudud Ordinances" *The Muslim World* April 2006 Volume 96 pp. 287-304. Also available at http://www.globalwebpost.com/farooqm/study_res/islam/fiqh/usmani_hudud.pdf (Last Accessed on 13 February 2014).

Weiss, A. M. (2003) *Interpreting Islam and Women's Rights: Implementing CEDAW in Pakistan*, *International Sociology*, September (2003), Vol 18 (3) 587.