

The Role of Fatwa in Family Cases: A Judicial Analysis with Reference to Pakistan

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Abstract

While historically seen as non-binding religious opinions, fatwas (religious legal rulings) play a complex and vital role in Pakistani family law case. Despite lacking official regulation, they hold persuasive power when aligned with the Quran and Sunnah. Courts consider them alongside other evidence, requiring the scholar's presence for cross-examination to ensure accountability and prevent misuse. While this approach aims to address inconsistencies and complexities arising from fatwas in family disputes, challenges remain in its consistent application and the need for legislative safeguards to ensure adherence to Islamic law and principles. This paper advocates that courts should treat fatwas as references to their underlying sources, not as standalone legal basis, ensuring a balanced approach that respects religious significance while upholding legal principles and due process.

Keywords: Fatwa, Shari'ah, Family Courts, Mufti, Admissible

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1. Historical context:

The term fatwa (Islamic legal Verdicts) is an Arabic term which is related to some compound words and phrases revealed in the Qur'an such as ifta (issuing Islamic verdict), istefti (request for an Islamic verdict), mufti (a person who issues an Islamic verdicts) and yufti (a person who issues an Islamic verdict) (Gilani SY, Younas Gilani SM (2011). The Oxford Dictionary defines 'fatwa' as originating from 'ifta,' which means to decide a point of law (Oxford University Press. (n.d.). In essence, a fatwa is a ruling on an aspect of Islamic Law issued by a recognized authority. In summary, a fatwa is a formal Islamic legal opinion provided by a jurist-consult (mufti) in response to queries from private individuals or judges.

Fatwa has been central feature of Islam. In early Islamic Era, the Companions of Holy Prophet assumed this responsibility for managing and transmitting orthopraxy, as they had known the Prophet personally. In Islamic history, around 120 to 130 of these followers, known as Companions, acted as religious scholars or muftis. According to Masud, the practice of giving religious opinions, or fatwas, by these Companions was closely linked to preserving the teachings and actions of the Prophet. These fatwas issued by the Companions are referred to as *fatāwā saḥābī*. In Sunni school of thoughts, religious scholars generally agree that the consensus (*ijma`*) of the Companions of the Prophet holds significant authority and is considered a strong proof of correct practice. However, a question arises about whether the opinion or fatwa of a single Companion should also be accepted as a strong proof and given more importance than other sources like *qiyas* (analogy) or the fatwas of other scholars. Many prominent jurists from different schools of thought have answered this question affirmatively. They believe that the fatwa of a Companion is a valid and strong proof (*hujjah*) that should be followed by Muslims (M. H. Kamali, 2009a).

Being a ruling by the scholar, Fatwa has always assisted in range of issues from brushing teeth while fasting to marrying a non-Muslim. For example, In Malaysia, although the Federal constitution of Malaysia vested the responsibility for enacting laws in the hand of parliament at the Federal level and the state Assemblies at the state level, Fatwa has been used as an instrument for clarification and coordination of issues in Malaysian Judicial, political and financial sectors (Mehmood, 2015a).

Sometimes the question arises that why don't Muslims just look to the Quran for answers to their religious questions? The straightforward answer is that the Quran doesn't provide guidance on every issue. Additionally, some parts of the Quran can be interpreted in different ways, which can make it challenging for a believer to determine the correct interpretation. During the lifetime of the Prophet Muhammad, he could resolve such questions. Even though resources like the Quran, *hadith* (sayings of the Prophet), and law books are accessible, there are still situations in daily life where none of these sources offer clear guidance. In such cases, people may seek a fatwa, which is a religious ruling or opinion from a qualified scholar. Fatwas, in a way, reflect the concerns, desires, and anxieties of individual Muslims and their communities as they navigate their lives.

Following a juristic ruling i.e., fatwa is not compulsory. It is purely voluntary and a matter of conscience between a believer and God. The Sunni school of thought believe that ruling by an individual scholar is not binding, whereas Shia believe that fatwa can be binding depending upon

the authority of its issuer. Kamali also conceded that Fatwa does not hold the binding authority. He distinguished between a fatwa (non-binding juristic opinion) and judicial ruling (qada) made by a court. Where latter is binding and enforceable, implementation of fatwa is not indispensable (M. H. Kamali, 2009b). Therefore, fatwa is distinct from state-enunciated law (qanun); it is part of a civil and jurisprudential endeavor that is state-free and carried out by independent ulama (Yilmaz, I., 2019). The general rule is intact that the fatwa will only become binding if the state turns it into a court decree; otherwise, it remains a persuasive instrument used to facilitate religious debate and juristic pluralism (Shaheen Whyte, 2022).

2. Role of Fatwa in Pakistan's Legal Landscape:

According to a research article in the Arts and Social Sciences Journal (ASSJ), written by a scholar associated with the Faculty of Shari'ah and Law at the International Islamic University in Islamabad, Pakistan lacks an official institution for issuing fatwas (Islamic legal opinions). The same source highlights that in Pakistan, various religious sects have issued fatwas, each claiming to adhere to the "true teachings" of their particular sect. Additionally, there is an abundance of Islamic schools (madaris), and graduates from these schools are authorized to issue fatwas. The same source adds the following: "[t]his unlimited and unrestricted authority [to issue] fatwa in Pakistan has created so many problems for Pakistani people ... However, the fatwa issued by a mufti has no legal validity and remains optional to follow until adopted by the court through [a] legal decision" (Mehmood, 2015b).

The judicial treatment of fatwa within the legal framework remains inconclusive, despite a degree of consensus regarding fundamental principles. A fatwa, although significant for elucidating Islamic law, does not hold the status of a primary legal source in Pakistan. In the absence of statutory provisions to the contrary or in situations of legal vacuum, a fatwa may be admissible in judicial proceedings, subject to interpretation of Islamic law. The significance attributed to a fatwa in such proceeding's hinges upon its alignment with more authoritative sources of Islamic law, namely the Quran and the Sunnah. In the context of Pakistan's judicial system, the value of a fatwa is predominantly contingent on two crucial factors. Firstly, it must not contradict any established statutory provisions. Secondly, it must find substantiation in the Quran and the Sunnah (Cheema, Shahbaz Ahmad, 2016a).

In the case of *Mahammad Shaheed v State* (Baloch, Ali Muhammad 1999), the court assigned significant importance to a fatwa in the absence of a specific statutory provision to guide them on

the matter. The essential facts of the case are as follows: the accused, a mosque's moazan (prayer caller), had entered into a marriage with a student whom he used to teach. The girl's parents opposed the union and pressured the accused to divorce their daughter. Under this pressure, the accused divorced his wife before consummating the marriage. However, it later came to light that the accused had remarried the same girl without any intervening marriage ceremony. In response to this situation, a complaint was filed against the accused under Hudood laws. The key issue at hand was whether the remarriage without an intervening marriage was lawful. The accused's counsel presented a fatwa and referred to a renowned book authored by Dr. Tanzeel-ur-Rehman on Muslim Personal Law, arguing that one could remarry their ex-wife without an intervening marriage, as long as the initial marriage had not been consummated. On the other hand, the complainant presented a contradictory fatwa, asserting that remarriage without an intervening marriage was unlawful. Faced with these contradictory fatwas on the same issue and the absence of any statutory provision, the court granted bail to the accused and referred the case back for further investigation and trial.

3. Legal Status of Fatwa in Family Cases in Pakistan:

Since the introduction of the Muslim Family Laws Ordinance 1961 (MFLO, 1961a), there have been several occasions where issues have arisen concerning the intricate relationship between statutory law on one hand and traditional Islamic law on the other. This law establishes a specific process for marriage dissolution and outlines the legal consequences for not following this process. There are several questions that need answers in the context of this interaction. For example, what happens if the prescribed procedure is not followed—does it affect the legitimacy of the marriage dissolution? If Islamic law prescribes a different procedure from that of the MFLO, which procedure takes precedence? In such situations, parties often turn to fatwas, as they are one of the ways to seek guidance on Islamic law and further their perspective.

However, rather than mitigating the problems, fatwa has created more problems for the courts, particularly in cases where both parties have presented their respective rulings from scholars that are in contradiction. One such instance occurred in the case of Muhammad Asif Arain v SHO (Mazhar, Muhammad Ali 2012). In this case, the applicant had initially entered into a love marriage with Shaista, which was attended by both sets of parents. After consummating the marriage and living together for some time, the applicant's parents pressured him to divorce his wife, even resorting to threats of property deprivation. Succumbing to this pressure, the applicant

signed divorce papers, which he sent to Shaista's brother. Shaista was confined and mistreated by her family, leading her to fear for her life. She contacted the applicant, who, after being absent for six months, collected multiple fatwas from different Muftis in an attempt to validate his marriage with Shaista, claiming he had been coerced into signing the divorce papers. With these fatwas in hand, he filed a writ of habeas corpus in the High Court to secure Shaista's release from her alleged unlawful detention.

The court considered the validity of the divorce and the conflicting fatwas but focused primarily on Shaista's liberty. They ruled that, as a *sui juris* (capable of making her own decisions) individual, Shaista could live where she wished, and the police were obligated to provide her protection.

Rather than delving into the substantive issues between the parties, the courts relied on legalistic approaches and avoided taking a stance on the validity of the divorce. The contradictory fatwas played a significant role in facilitating this judicial approach. These cases also highlighted the practice of "window shopping" for fatwas by parties who exploit differences of opinion among various schools of thought in Islamic law to procure favorable fatwas. Additionally, parties sometimes withhold relevant information from Muftis to obtain fatwas aligned with their perspectives. Muftis, on the other hand, often issue fatwas based on their religious affiliations, without considering the potential impact on the institution of fatwas during court proceedings (Urus, N. S. T., & Azhar, A. (2018).

In another case of Seadar Iqbal v Tahira Parveen, the petitioner relied on a fatwa to support his argument that the divorce he had pronounced was ineffective due to a mistake. This illustrates the common practice in some legal disputes in Pakistan of using fatwas as a means of interpreting or validating Islamic law and its application to specific situations. The court decided that while fatwas can be considered in legal matters, they are not the sole or exclusive basis for making legal determinations (Aslam and Jamila Jahanoor, 2010). The court examined the fatwa but also considered other evidence and legal requirements, such as the divorce deed and notice to the Arbitration Council, in making its judgment.

In the cases of Taimoor Aslam Satti v Aalia Bibi (Mehmood Atir, 2016) and Naveeda Kausar v Mauzzam Khan (Mubeen Shahid, 2016), the issue at hand was the effectiveness of oral divorces that were pronounced by the husbands without following the procedure laid down in the Muslim Family Laws Ordinance (MFLO). The courts in both cases considered the validity of these oral

divorces and took into account the role of fatwas (religious opinions) issued by Muftis in determining their effectiveness. In both cases, the courts considered the fatwas issued by Muftis as evidence supporting the effectiveness of the oral divorces. The courts ruled that an oral divorce could be valid and effective, even if the procedure specified in the MFLO was not strictly followed, especially when there was a fatwa supporting the divorce's validity. Importantly, in neither case were the Muftis who issued the fatwas brought before the courts, and in one of the cases, the fatwa was acknowledged as evidence without being formally made part of the evidence.

The Federal Shariat Court (FSC) of Pakistan has ruled that fatwas, or opinions of scholars, do not carry any weight if they are not supported by the Quran and the Sunnah, which are the primary sources of Islamic law. This ruling was made in the case of *Saleem Ahmed v Govt (Haziqul Khair, Fida Muhammad and Mirza Salahuddin, 2014)* of Pakistan, in which the court was asked to decide whether Sec. 10(4) of the Family Courts Act 1964 (FCA, 1964a), which allows for the dissolution of marriages on the basis of khula (a wife's unilateral request for divorce), was repugnant to Islamic law. The court held that the provision was valid, as it was not supported by any specific verse or authentic hadith (saying of the Prophet Muhammad) that prohibited a competent Qazi (judge) from decreeing a case of khula after reconciliation fails. The court also observed that fatwas are not inherently valuable, and that their value depends entirely on whether they are substantiated by the Quran and the Sunnah. This ruling is significant because it clarifies the role of fatwas in Pakistani courts. While fatwas may be considered as valuable opinions, they do not have any binding authority and cannot be used to challenge laws or their provisions unless they are supported by the Quran and the Sunnah.

In the case of *Muhammad Daud v Muhammad Rafique (Khan Irfan and Sarki Shahab 2015)*, the High Court of Pakistan considered the value of a fatwa, or opinion of a scholar, in the context of a dispute between legal heirs of a deceased person. The parties had agreed to settle their dispute out of court through a religious scholar, who issued a fatwa settling their issues according to Islamic law. However, when the matter came before the High Court, one of the parties argued that the fatwa should have been treated as an award and executed as such.

The High Court held that the fatwa 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. However, since this was not done, the court refused to give any credence to the fatwa. Although the case was not related to family matters, however, the decision reflects the new approach of the court.

The same rationale was also emphasized in the earlier case of *Niaz Ahmad v State* (Ahmad Saghir and Ashraf Muhammad, 2009) The High Court stipulated that the mere presence of such a document, even if issued by a Mufti or religious scholar, could not be considered admissible evidence unless the author or signatory of the fatwa appeared as a witness in the court, underwent cross-examination, and thereby afforded the accused an opportunity to elucidate the circumstances surrounding the fatwa. In essence, the court held that a fatwa could not be admitted as evidence unless its originator participated in the legal proceedings and was subject to rigorous examination. The court observed as follows:

“[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”

In the article titled “Fatwa in Pakistani Courts: An Appraisal” (Cheema, Shahbaz Ahmad 2016b), the author wrote that the judicial approach to fatwas in Pakistan has evolved in recent years. Courts are now realizing that people may not always bring all relevant facts to the attention of Muftis, and that fatwas can be used to manipulate or harm others. As a result, courts are increasingly requiring that the author of a fatwa be produced in court for cross-examination. This gives the party against whom the fatwa is being used an opportunity to challenge the Mufti's knowledge and motives. This judicial approach is commendable, but it is not being followed consistently. There is a need for courts to be more consistent in their application of the new judicial approach. Cross-examination should be required in all cases where a fatwa is being used as evidence unless there are exceptional circumstances. Courts should also be more vigilant in ensuring that the credentials of Muftis are properly verified.

Conclusion:

The court's approach regarding the admissibility of fatwas has been marked by complexity and inconsistency. In the past, we observed instances where the court admitted and considered fatwas without summoning the Mufti (the one who issued the fatwa) to court for examination. However, in recent years, a significant shift has taken place in the court's approach. Presently, they view fatwas as akin to expert opinions, deeming them admissible only when the signatory Mufti or the issuing authority is made available for cross-examination. This is a positive development, as it ensures that Muftis are held accountable for their opinions and that their testimony is subject to the scrutiny of the court. It also helps to protect the parties at trial from being prejudiced based on the opinions of Muftis who are not qualified or credible.

However, the cases further highlight the government's failure to appoint and authorize Muftis. This is a valid concern, as it means that there is no guarantee that Muftis who are called to testify in court are qualified or knowledgeable in Islamic law, and this is left to cross-examination, if any is conducted, of a Mufti giving evidence in a case. This is potentially problematic where a Mufti may give evidence, or a fatwa may be produced in evidence in *ex parte* proceedings without scrutiny of cross-examination.

RECOMMENDATIONS:

This paper contends that better legislative safeguards should be enacted to allow for a closer scrutiny of fatwas if produced in evidence, not only by the opposing party(ies) but also by the court to ensure that:

- i. The fatwas being produced in evidence are in line with the cannons of the Muslim Personal Law.
- ii. The fatwas being produced in evidence do not transgress beyond primary sources of Islamic law i.e. the Quran and Sunnah.
- iii. The qualifications and credentials of the author must be independently verified.
- iv. Where penal consequences are involved, extra caution must be exercised by the court that principles of natural justice are strictly upheld and where a novel proposition of law or a new interpretation is involved, the application of the law must prospective and not retrospective.

The court relying on the fatwa must treat the sources contained in the fatwa as the underlying source, giving them due consideration which they deserve, and not treat the fatwa itself as the underlying source for a judicial decision.

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