

The Role of Pakistani Judiciary in Protecting Woman's Right to Marriage without the Approval of a Guardian

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Abstract

Marriage is considered an institution for the family in Islamic legal system. The importance of marriage signifies with the protection of family system as denoted in objectives of Islamic law. Marriage is a contract that depends on the consent of the parties. If both parties are agreed then there is no issue for conclusion of the marriage but if anyone of the parties is not willing particularly a woman and guardian conclude the marriage without her consent. What could be the legal status of that marriage? Muslim jurists have diverse opinion in this regard. Majority of the jurists opine that consent of a guardian is compulsory for marriage contract of a woman but *Hanafi* jurists permit a woman to get married herself without consent of a guardian. In fact, in our Pakistani society, this issue has become a controversial and still not accepted to our social norms and values but it results horrified consequences. Although it has become a well-established law and our superior judiciary playing its role in provision of this right. The issue of marrying herself by a woman without the consent of a guardian has some positive and negative aspects. Therefore, it has become a debatable topic although safeguard has provided to a woman who gets married herself in legal system of Pakistan. The current paper discusses the consent of a guardian in marriage contract. It also denotes the legal provisions on the issue of consent of a guardian in a marriage. The present paper signifies the marriage of a woman conducted by her without the consent of a guardian. Finally, the paper focuses on the evaluation of case law and highlights the role of Pakistani Superior judiciary in providing woman's right to get married herself without a guardian.

Keywords: Marriage, Consent, Guardian, Woman's Right, Family Law, Pakistani Judiciary

Introduction:

Muslim jurists unanimously agreed that a marriage conducted with the consent of a woman by a guardian is lawful and effective. But they have deviated in their views that an adult woman can get married without a guardian or his consent is to be considered mandatory. Basically, there are two views: firstly, Majority view and secondly; *Hanafi* jurists' view. Majority Jurists (Mālikī¹, Shāfi'ī², and *Hunbali*³) opine that a *sui juris* woman cannot get married herself without a guardian and such marriage considered null and void.⁴ They argue that the word “*انكحوا* *انكحوا*” in a verse of Surah Al-Noor, Allah Almighty expressly indicates that conducting marriage is a duty of guardians.⁵ Another evidence in their support is that word “*فَلَا*”

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¹ See for more detail: *Al-Qur'an*, Al-Nur:32. “Marry those among you who are single, or the virtuous ones among your slaves, male or female: if they are in poverty, Allāh will give them means out of His grace: for Allāh encompasseth all, and He knoweth all things.”

² Muhammad Al-Sharbīnī, *Mughnī al-Muhtāj ila Ma'rifat Ma'ānī Alfāz al-Minhāj*, 3: 147.

³ Ibn Qudāmah, *Al-Mughnī*, 7: 43.

⁴ Ibn Jazī Al-Mālikī, *Qawānīn al-Ahkām al-Shar'iyyah*, edited by 'Abdul Rahman Hasan Mahmood, (Cairo: 'Alim Al-Fikr, 1985), 197.

”تَضَلُّوهُنَّ” in a verse 232 of Surah Al-Baqarah indicates that men or guardians are not permitted to prevent women to marry with her free will.⁶ Hadaith Ma'qal bin Yasar⁷ is also presented by the majority of the jurists in their support in which he forbade his sister to get married with her ex-husband when she was interested. In the same context a above verse revealed.⁸ Another important evidence of majority of the jurists is a *Hadith* of the Holy Prophet (PBUH) as:

“There is no marriage without the permission of a guardian.”⁹

They mention wisdom of the marriage that consent of a guardian is mandatory because it is for the best interest of a woman and a woman cannot observe what a guardian observe. This is not a bond of individuals but the union of the families. So, it needs more care and protection and it could be possible in the presence and approval of guardians in contacting the marriage of a woman.¹⁰

Hanafi jurists opine that a sane and adult woman can contact her marriage without the guardian but they recommend approval and consent of a guardian in a marriage contract.¹¹ They further prescribe conditions for the validity of a marriage of *sui juris* woman that husband must be socially equal and provide dower. If these two conditions are not fulfilled then a guardian has authority to make null and void the marriage contract.¹² If requirements are contented then she has an absolute right to propose someone or marry without the guardian.¹³ They also argue from several verses¹⁴ of *Qur'an*, the phrase *Wahabat* explicitly indicates that a woman may give herself in marriage without the consent of *Walī*.¹⁵ The word حَتَّى تَكُحَّ in verse 230 of Surah Al-Baqarah¹⁶ expressly states that a woman can get married herself without a wali.¹⁷ A *Hadith* of the Holy Prophet (PBUH) does not make a requirement approval of a guardian for validity of a marriage contract as stated:

“An *Aiyyim* (the matron) has more right to herself than her *Walī*, and the virgin is to give permission for herself, and her silence is her permission.”¹⁸

The phrase *aiyyim* refers a woman either a *bikr* or *thayyib* to conduct a marriage independently without permission of a guardian.¹⁹ This is also the opinion of *Imām Ibn Al-Qayyim* as he states:

⁶ *Al-Qur'an, Al-Baqarah:232*. “When ye divorce women, and they fulfill the term of their ('Iddah) do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms.”

⁷ Ahmad ibn Hajar Al-Asqalani, *Fath al-Bari-Sharh Sahih Al-Bukhari*, (Cairo: Dār Al-Rayyan, 1987), 9: 89.

⁸ *Sahih Al-Bukhari*, Kitāb Al-Tafsir

⁹ Abu Dawud, *Al-Sunan*, Kitāb Al-Nikāh, Bāb Fi Al-Walī

¹⁰ Abu Zahrah, *Al-Ahwal al-Shakhsiyyah*, 129.

¹¹ Ibn Al-Humam, *Sharh Fath al-Qadīr*, (Egypt: Matba'ah Mustafā Al-Bābī, 1970), 2: 2.

¹² Al-Kāsānī, *Badā'i' al-Sanā'i'*, 2: 241.

¹³ *Sharh Fath al-Qadīr*, 2:391.

¹⁴ *Al-Qur'an, Al-Ahzab:50*; “Any believing woman who dedicates her soul to the Prophet if the Prophet wishes to wed her.”

¹⁵ Al-Sarkhasī, *Al-Mabsut*, 5:11. See also Al-Kāsānī, *Badā'i' al-Sanā'i'*, 3: 366.

¹⁶ *Al-Qur'an, Al-Baqarah: 230*, “So if a husband divorces his wife (irrevocably), he cannot after that, re-marry her until after she has married another husband and he has divorced her. In that case there is no blame on either of them if they re-unite, provided they feel that they can keep the limits ordained by Allāh. Such are the limits ordained by Allāh.”

¹⁷ Al-Kāsānī, *Badā'i' al-Sanā'i'*, 3: 367.

¹⁸ *Al-Tirmadhī, Al-Sunan*, Kitāb Al-Nikāh, Bāb : Ma ja fi Isti'mar al-Bikr wa al-Thayyib

¹⁹ Al-Kāsānī, *Badā'i' al-Sanā'i'*, 3:367.

“The father of an adult, mature, and virgin woman is not permitted to act on her behalf in any matter of her possessions regardless of how trivial this matter could be.”²⁰

Consent of a Guardian in the Legal System of Pakistan:

The general trend of the Lower Courts is that they grant relief to a woman, whatever the issue is particularly in family matters. A *sui juris* Muslim woman who is interested and willing to get married herself without the approval of a guardian. There is no obstacle provided in our Pakistani legal system rather it facilitates. In fact, it has become a social issue and destroying the norms of society and not following the general principles of Islamic Law. This Islamic and Legal permission in a Pakistani society is abolishing our values and the core purposes of marriage. The fact is that a woman who wants to get married with her free will loves a man and he also responds her. Firstly, they try to get married with the arrangements of their family members but if they deny then they get married. So, this type of marriage is generally considered a marriage without the consent of a guardian. In Pakistan, this type of marriage has two folds; firstly, it is so simple and easy to get married by fulfilling the terms and conditions of the marriage contract but the other side of it very obnoxious. Because when the family knew about their marriages without their willingness, they don't think that they are their kids (sons or daughters), try to hurt them at the level of murder on the basis of honour killing especially a woman.

Legal Provisions regarding Consent of the Guardian:

There is no explicit legal provision regarding the consent of guardian in marriage contract. The approval of a *wali* or consent of a woman for valid marriage contract is not required in the existing Family Law of Pakistan including Muslim Family Law Ordinance, 1961. However, it is a well-established law in *Hanafi* Fiqh that a Muslim, adult, sane woman can contract a valid marriage without the consent of *Wali* and it is observed in a number of cases decided by the Superior Judiciary.²¹ If there is no specific provision in family matters the standard practice of the court of law is that the disputed issues must be resolved in the light of Islamic Law as laid down in the Holy Qur'an and Sunnah of the Holy Prophet (PBUH). It is pertinent to note that there is no uniform code or law in Pakistan regarding consent of *Wali* for an adult Muslim woman marriage. The main sources in the area of family Law are the Holy Qur'an and Sunnah of the Holy Prophet (PBUH) but the decisions are decided on the basis of precedent and judges own interpretation of Muslim Personal law. As mentioned above that there is no specific law regarding consent of *Wali* in marriage but some customary practices like *vani*²² etc. and marriage of a minor girl is prohibited in Pakistani law and option of puberty is granted to a girl attaining age of majority, although Islamic Law permits the marriage of a minor girl. In Pakistan, the laws applicable to the age of marriage are the Majority Act, 1875 and the Child Marriage Restraint Act, 1929. The Majority Act 1875 fixes the age of majority at eighteen years.²³ The age of marriage for a girl is usually lower than a boy. Probably the reason is that girls attain puberty earlier than boys so their right to get

²⁰ Ibn Qayyim, *Zād al-Ma'ād*, (Cairo: Dār Al- Taqwā li-Al-Turāth, 2000), 4: 43.

²¹ See for example, *Muhammad Imtiaz vs. The State*, PLD 1981 FSC 308. *Arif Hussain and Azra Parveen vs. The State*, PLD 1982 FSC 42. *Muhammad Ramzan vs. The State*, PLD 1984 FSC 93. *Muhammad Yaqoob vs. The State*, 1985 PCr. LJ 1064. *Mauj Ali vs. Syed Safdar Hussain Shah*, 1970 SCMR 437, and *Abdul Waheed vs. Asma Jahangir*, PLD 1997 Lah. 301. PLD 2004 SC 219. All these cases will be discussed later.

²² *Vani* is prohibited in this legislation and is made a crime. Section 310-A of the Pakistan Penal Code 1860 prohibits *vani* and *sawara* marriages. This section states that a person cannot be given in *badl-e-sulh*. Punishment for this crime is minimum 3 years and maximum 10 years rigorous imprisonment.

²³ *The Majority Act 1875*, Section 3.

married arises likewise. In Pakistan, the age of majority (puberty) is eighteen whereas the marriage age is 18 for a boy and 16 for a girl.²⁴

The Child Marriage Restraint Act, 1929, prescribes the punishment of a major person who marries with a minor as:

“If a person, not being a minor, contracts child marriage, he shall be liable to punishment of simple imprisonment which may extend to six months and fine of fifty thousand rupees.”²⁵

The CMRA, 1929, expounds in section 5 and 6 that if anybody promotes, or permits, or does not to prevent solemnization of a child marriage, he is to be charged of a criminal offence. If a minor contracts her own marriage, the person in-charge or the guardian of the minor will be responsible. The punishment for this offence is six month imprisonment or a fine up to fifty thousand rupees.²⁶ If a woman got married without the consent of Walī, what are the difficulties and problems she has to be faced along with her husband? Generally, the spouses charged with the offence of abduction, kidnapping of guardian's daughter under Pakistan Penal Code 1892 and offence of Zina under Hudūd Ordinance 1979. These charges were quashed under Article 199 of the Constitution of Pakistan 1973 and section 491 of Code of Criminal Procedure 1898. The false accusation may be abduction or unlawful sexual intercourse. In case of a false charge, the Pakistani law is providing some judicial remedies such as constitutional petitions, habeas corpus petitions, to the couple; got married without the will of the family members.

The protection is provided to the all citizens of Pakistan in chapter of Fundamental Rights of the Constitution of Islamic Republic of Pakistan 1973. The rights safeguarded by the Pakistani law, includes security of life, protection from arrest and detention without any reason, equality before the law without any discrimination on the basis of colour, sex or religion etc. The fundamental rights provided by the Law, protected by the superior courts and enforced by the law enforcement agencies. The courts play their vital role for safeguarding the fundamental rights when an accused or alleged person seeks protection through these courts by filing a writ petition.²⁷

The married couple tries to get a relief through the courts when the marriage is concluded by themselves without the interventions of the guardians or parents. Such couples (husband and wife) file a habeas corpus petition for their safeguard against false accusation made on them by their parents or guardians. Usually such habeas corpus petitions are frequently filed after the contract of marriage, either love or court marriage and families are not agreeing upon it. It has become a traditional and social norm in the Pakistani courts. These petitions filed in the high courts of each province under the Article 199 of the Constitution of Pakistan 1973,²⁸ or as a criminal miscellaneous petition under Section 491 of the Code of Criminal Procedure 1898.²⁹

As discussed earlier that petitions usually filed by the couple against parents or guardians to seek safeguard from the court or by the parents and guardians to victimize the

²⁴The Child Marriage Restraint Act 1929, Section 2.

²⁵Ibid., Section 4.

²⁶Ibid., Section 5 -6.

²⁷Applications for enforcement of fundamental rights may be brought under *The Constitution of Islamic Republic of Pakistan 1973*, Art 199.

²⁸*The Constitution of Islamic Republic of Pakistan 1973*, Art 199.

²⁹*The Code of Criminal Procedure 1898*, Section 491.

couple. It also filed by a girl who got married without Wali's consent or even sometimes by the parents against the advocates, on the grounds that they are responsible for detaining their daughter in a shelter home or somewhere else.³⁰

The guardians or parents alleged on the husband who got married with their daughter with her free consent under section 362 of Pakistan Penal Code that he abducted our daughter.³¹ The general practice is that an allegation of abduction, kidnapping and adultery has been made by the parents against husband who got married with a free will and consent of a woman. In such cases, the only recourse for husband is to file a habeas corpus petition to invalidate the false accusations made by woman's parents to ensure his discharge as a fundamental right.³²

In practice, it is a well settled principle in Pakistani Family Law that the consent of a Wali is not compulsory in conclusion of marriage contract for woman, here mere consent is enough for validity of marriage. In the case of *Hafiz Abdul Waheed vs. Asma Jahangir*,³³ the Supreme Court of Pakistan has decided a case regarding consent of a woman in marriage and the position of the Court is very clear on the issue as observed:

"The approval of Wali is not needed for an adult woman and a sui juris Muslim woman can contact a marriage herself. Without the consent of a Wali, marriage is not considered invalid."³⁴

Analysis of Case Law on the Consent of Wali in Marriage:

Muslim Jurists from all schools are not agreeing on the issue of consent of a wali in marriage contract or conclusion of marriage by a woman herself without the approval of a guardian. The Pakistani Family Law is not providing any clear section that signifies the issue of consent in marriage. However, the decisions of the superior courts having no unified position. Infact, Pakistani women are under the authority of men and their marriages are arranged without their consent. Although, none can justify the social norms and values regarding this issue of consent in marriage.

Cousin marriage, Child marriage and marriage to a stranger continue to be the norm in many parts of the Pakistani society. The woman's consent is not obtained due to her inexperience, family pressure, and the norms of modesty and obedience. The religious obligation to obtain consent is not typically little more than a fiction. The operating assumption is that "silence implies consent" a dubious proposition, granting the power to the guardians that they exercise against a young woman.

Generally, the marriages are arranged by their families or guardians and woman has no authority to talk about but there are also some cases in which a voice raised by the young woman for her right of choosing life partners and she selected a life partner by herself and got married without the guardian's consent. Although faced a lot of problems due to family norms, ethics etc. but stood up for her legal rights. Child Marriage and forced marriage arranged by a wali violates the marital rights provided by the Constitution of Islamic republic of Pakistan. Although the right of a woman to get married by herself is not explicitly protected

³⁰ See for example *Abdul Waheed vs. Asma Jahangir*, PLD 1997 Lah. 331

³¹ *The Pakistan Penal Code 1860*, Section 362.

³² See for example *Abdul Waheed vs. Asma Jahangir*, PLD 1997 Lah. 331, *Muhammad Ramzan vs. The State*, FSC 309, *Gul Khatoon vs. Muhammad Aslam*, 2015 PCrLJ 193, *Muhammad Aslam vs. The State*, 2012 PCrLJ 11

³³ *Abdul Waheed vs. Asma Jahangir*, PLD 2004 SC 219

³⁴ *Ibid.*

by the law of Pakistan but the superior courts have granted in various judgments. So here we have to examine the case law regarding consent of Walī in conclusion of marriage contract.

The very first case law on consent of Walī was *Muhammad Imtiaz vs. The state*,³⁵ the main points of the issue are that Muhammad Imtiaz got married with Mst. Mohammad Jan, this marriage was constituted without the guardian's consent. The Walī filed a charge of Offence of Zina under section 10 (2) of Hudūd Ordinance 1979 against them. The Additional Session judge, Attock convicted Muhammad Imtiaz and his wife. Because they were not having any legal proof in shape of document. In appeal to the Federal Shariat Court, the court observed that learned session judge convicted on the basis of the constitution of marriage contract without consent of Muhammad Jan's Walī³⁶ and considered Nikāh as invalid because it was performed without the permission of guardian. The FSC observed that according to *Ḥanafī* Law the Nikāh of an adult girl is not invalid in the absence of permission from the Walī.³⁷ The Court further elucidates this controversy from the two verses of the Holy Qur'ān. Firstly, the verse

“So, if a husband pronounces or gives his wife an irrevocable divorce then it is not permitted for him to remarry her until after intervening marriage (marry with another man).”³⁸

The Court observed that the Word *Tankehā* denotes marriage by the woman herself and it is evident from this verse that the consent in Nikāh belongs to a woman herself.³⁹ Secondly, the *āyah*:

“When ye divorce women, and they fulfill the term of their (‘Iddah) do not prevent them from marrying their (former) husbands.”⁴⁰

The Court Further observed that the word *Yankihna* (يَنْكِحْنَ) in this *āyah* refers to the will and consent of the women and it is not denoting that women to be forced for marriage or made problems for them to conclude their marriages without the guardians.⁴¹ Beside these two ayat, the Honourable Court further elaborated the issue from the Ahādīth of The Holy Prophet Muhammad (PBUH) and quotations from classic books by arguing the point of Jamhūr it is concluded by Justice Aftab Hussain that if a man and woman marry in a good faith and believe themselves so married, the benefit of doubt should go to them in the context of criminal charges in Hudūd cases and He further added that they are legally married even if they have no documental proof and just admitted that they got married with their free consent.⁴² The same was held in *Arif Hussain vs. The State*⁴³ by Justice Muhammad Taqī Usmanī that the mere statement of the accused person claiming that they are husband and wife is sufficient to establish Nikāh and the relationship of spouses, husband and wife, constituted a valid defense in the absence of proof that they were not married.⁴⁴ The same was held by FSC in *Muhammad Ramzan vs. The State*⁴⁵ that if there is no valid proof against husband and wife that they are not validly married, the mere admission of them is enough that they are married

³⁵ PLD 1981 FSC 308

³⁶ Ibid.

³⁷ Ibid.

³⁸ *Al-Qur'ān, Al-Baqarah*:230 فَارْءِ طَلَّقَهَا فَلَا تَحِلُّ لَهُ مِنْ بَعْدُ حَتَّى تَنْكِحَ زَوْجًا غَيْرَهُ

³⁹ PLD 1981 FSC 308

⁴⁰ *Al-Qur'ān, Al-Baqarah*: 232 وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَبَلَّغْنَهُنَّ أَجَلَهُنَّ فَلَا تَعْضِلُوهُنَّ عَنْ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ

⁴¹ PLD 1981 FSC 308

⁴² Ibid.

⁴³ PLD 1982 FSC 42

⁴⁴ Ibid.

⁴⁵ PLD 1984 FSC 93

validly in accordance with the principles of Islamic law.⁴⁶ In this case the accused woman got married her second marriage after husband's death with Akbar Khan with her free consent and it was recognized by the Honourable court.

There is another noticeable and historical pro-women decision regarding consent of guardian in conclusion of marriage contract is *Hafiz Abdul Waheed vs. Mrs. Asma Jehangir*.⁴⁷ It is also popularly known as the Saima Waheed case.⁴⁸ This decision had already been the hottest topic in legal as well as social circles and has attracted appreciation as well as condemnation from many people. It was also highlighted and got hype in national and International media.⁴⁹ The brief facts of the case are that Saima Waheed, an adult Muslim woman, fourth year college student of Lahore Government College for Women, came from a rich family and married on 26-2-1996 with Muhammad Arshad, who was a tutor of her brother on her own free will without the knowledge and consent of woman's parents. When it (marriage) came into the knowledge of her father, he strongly disapproved the marriage and approached the father and other family members of Muhammad Arshad. In a result, Nikah Nama was returned to the father of Saima Waheed with the note that no Nikāh was performed in any case and same is not subsisting and stands cancelled. This could have been the end of the story but after one month her father alleged on Muhammad Arshad that he abducted the daughter and she was being detained in the "Dastak".⁵⁰ The father was not accepting defeat easily so he fled criminal charge against Muhammad Arshad and Dastak alleging that her daughter has been abducted. He further argued that his daughter's marriage was void ab initio, since he had not given his consent. The daughter also filed a petition, in return, and claimed that her marriage was conducted by her free will, and willing to live with the husband. The chief justice of Lahore High Court constituted a full bench for hearing of the case. The Bench was consisted of three members, Justice Ihsan ul Haq Chaudhry, Justice Malik Muhammad Qayyum and justice Khalil ur Rehman Ramday. Justice Ihsan ul Haq Chaudhry discussed the following three questions one by one raised by the father of Saima Waheed. The questions are

- a) Whether the parents have a right to be obeyed and their right obedience is judicially enforceable?
- b) Whether marriage in Islam is a civil contract? And
- c) Whether or not the permission of Walī is one of the main conditions to a valid Nikāh?

In reply to the first question Justice Ihsan ul Haq Chaudhry observed that:

"Virgin girl step out of her house without the consent of the parents can be asked to go back added that at the moment in Islamic countries clash of two civilizations is quite

⁴⁶ Ibid.

⁴⁷ PLD 1997 Lah. 301

⁴⁸ Muhammad Munir, The Rights of Women and the Role of Superior Judiciary in Pakistan with Special Reference to Family Law Cases from 2004-2008, *Pakistan Journal of Islamic Research*, 3, (2009), 281.

⁴⁹ Martin Lau, "Pakistan Abdul Waheed vs. Asma Jehangir (the Saima Waheed Case)", in *Yearbook of Islamic and Middle Eastern Law* 3 (1996) 518-531 and Shaheen Sardar Ali, "Is an Adult Muslim Women Sui Juris? (with Particular Reflections on the Concept of "Consent in Marriage" without a Walī (with Particular Reference to the Saima Waheed Case)", *Yearbook of Islamic and Middle Eastern Law* 3 (1996) 156-174.

⁵⁰ Dastak is a non-governmental organisation (NGO) and Saima Waheed was residing there.

prominent because some negligible number of Muslims are playing the assigned to them by the vested interest from the west”.⁵¹

In reply to the second question, Justice Ihsan ul Haq Chaudhry observed that “marriage in Islam is not a civil contract; it is one of the Ibadat and at the best may be called social contract”.⁵² The Court further submitted that this theory of civil contract is result of superficial approach to the teachings of Islam. It is further explained that before the promulgation of Shariat Act of 1936, the Muslim marriage unlike Hindu and Christian was not enforceable and the Courts enforced it as a civil contract but religious scholars like Maulana Ashraf Ali Thanvi in his book *Islah-e-Inqlabe Ummat*, Volume II condemned it in the strongest possible words. It was argued that after came into being Independence, Shariat was not given effect as complete way of life for the Muslims. This theory of civil contract remained somewhat alive.⁵³

Justice Ihsan ul Haq Chaudhry held with regard to the third question that “an adult Muslim woman cannot enter into a valid marriage contract without the Wali’s intervention and consent”.⁵⁴ He further observed that the judgment of Federal Shariat Court in *Muhammad Imtiaz and another vs. The State* is not binding on this High Court.⁵⁵ He also added that it is a matter of common knowledge that runaway marriages are not solemnised in accordance with the principles of Islam. There is even no proper Nikāh because no Nikāhkhawān is prepared to perform the Nikāh ceremony, no Registrar is prepared to register Nikāh, no person is willing to witness the same and show his participation because they are all afraid of being involved in a case under Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

Justice Ihsan ul Haq Chaudhry comments on the values of a Muslim society as:

“The runaway marriages offend all norms of a Muslim society beginning to end. The proposition would become clear from answer to the question how a girl would arrange her marriage? There cannot be any other mode but of freely mixing with males and then selecting one of them as future husband. This way of like is not permitted rather than even encouraged by any school of thought because it is against basic teachings of Islam that the people from both sexes should not have free access to each other”.⁵⁶

The Court further explained that women are under the protection of men in Islam. The issue of marriage contract has a crucial importance in the family life. All the possible measures have to be taken and observed by the guardian of a woman. Contracting marriage herself by a woman without walī is also against decency, graciousness and against the social values of a Muslim society. Where the conditions of valid Nikāh have been noted. It was argued that the Court can follow jurists, who have given weighty reasons in support of their views or rules relating to social set-up. The learned counsel thereafter reverted back to order, which could be passed by a Court to compel female to join parents.⁵⁷

The court further observed that it is the responsibility of the parents to take care of their children, particularly their marriage when there is a girl. He added that the mode which was approved and followed by Muslims was that man desirous of marrying a girl or woman

⁵¹ PLD 1997 Lah. at 313

⁵² Ibid.

⁵³ Ibid., at 314

⁵⁴ Ibid., at 315

⁵⁵ Ibid., at 317

⁵⁶ Ibid.

⁵⁷ Ibid., at 326

would approach to her father or the head of the family and after settling the dower the Nikāh would be performed. In my humble opinion this not only was in line with command of the Holy Qur'ān but also supported the above Hadī th that a woman cannot marry herself. It is matter of common knowledge that this mode is in vogue in the Muslim Society including this Sub-Continent till today.⁵⁸

He further clearly comments that “we are national Judges and as such custodian of the morals of the citizens”, therefore, it is not possible to subscribe to the opinion expressed by Dr. Tanzil-ur-Rehman. Even otherwise rule of interpretation is that view which is in line with the moral standards of the society is to be accepted.⁵⁹ The Judges are not debarred from giving their own opinion in the matters for which there is no direction in the Holy Qur'ān as well as there is no Hadī th to guide the Umma and there is difference of opinion between various Imāms, Muhaddaseen and jurists. He referred the judgment of the Supreme Court in the case of *Mst. Khurshid Bibi v. Baboo Muhammad Amin*,⁶⁰ and concluded that “it is the duty of the parents to marry the children particularly girls at the earliest point of time. They should not afford opportunity to outsiders in the house or outside to come across the young girls may be visitors, servants, drivers of public conveyance. It is absolutely essential to preserve the purity of the homes and this is why much emphasis has been laid by the Islam that females should not mix up with males”.⁶¹

Justice Ihsan-ul-Haq verdicted that marriage of Mst. Saima Waheed and Arshad was conducted in accordance with the social norms of the Muslim society and he declared such marriage void based on morality and social norms arguments. It has to be said that the decision must be according to the rulings and principles of law not only on the basis of ethics, morals and social norms. Although social norms, customs and ethics are preferred along with legal principles.

Justice Malik Muhammad Qayyum, was focused on the question, whether a Muslim adult girl can marry without consent of her Walī or not? Firstly, he agreed with Justice Ihsanul haq that the protection is to be provided to the social values of the Muslim society because it is preferred in the Family system of Islam. He further stated that marriages without the interventions of the family members are against the norms of our Pakistani society, therefore, it must be discouraged. He opposed to the view of Justice Ihsan by saying that “I have despite my best efforts not been able to discover any principle on the basis of which it can be held that Nikāh of sui juris Muslim girl without consent of her Walī would be invalid”.⁶² However, the nature of the marriage and the manner in which it has been performed may be relevant consideration for granting or withholding relief in a matter in which the Courts of law are called upon to exercise their discretion.⁶³

He further observed that the Federal Shariat Court in the case of *Muhammad Imtiaz vs. The State*⁶⁴ after examining all aspects of the matter has ruled that in Islam, a Muslim adult girl can marry without the consent of her Walī. This judgment of the Federal Shariat Court is not only binding on us in view of Article 203-GG of the Constitution of Pakistan, 1973 but

⁵⁸ Ibid., at 340

⁵⁹ Ibid., at 341

⁶⁰ PLD 1967 SC 97 at 341

⁶¹ Ibid., at 343

⁶² Ibid., at 352

⁶³ Ibid.

⁶⁴ PLD 1981 FSC 308

also commands great respect in view of the renown of the scholarly Judges and Ulema forming Bench. He concluded that “I am of the view that Nikāh contracted without the consent of Walī by a sui juris Muslim girl would be valid”.⁶⁵

Justice Khalil ur Rehman Ramdy observed with regard to the decision of FSC, that Dr. Syed Riaz-ul-Hassan Gillani, Advocate made an effort to show that the above-referred Federal Shariat Court judgment was not binding on this Court. In view of the provision of Article 203-GG of the Constitution of Islamic Republic of Pakistan 1973, this view cannot be accepted.⁶⁶

He further explained with regard to the Obedience of Parents that children are ordained to obey their parents; to be kind to them; not to offend them by words or by deeds lit and not even to say “Uff” (expression of displeasure) if the parents were to say something which was not to their liking.⁶⁷ He also quoted so many ahadī th and ayat from the Holy Qur’ān as a reference.

He also considered the *Hanafi* law in this issue as said that:

“According to Imām AbūHanī fā (R.A.) and the Shia Schools of thought, a maiden, if adult and sane, was competent to enter into a marriage and did not require the consent of a Walī for its validity. Some of the later Hanifis (however) added that a marriage contracted without the consent of a Walī would be valid only if the man qualified as a Kufw of the female and also if the dower fixed in respect of this marriage was not inadequate. These Scholars and Jurists further opined that if these two conditions relating to Kufw and dower money did not stand satisfied then the Walī of the bride was entitled to approach the Qazi Court of Law and could demand annulment of the same. It may be mentioned here that Kufw is stated to mean, inter alia, that the man should come from a background similar to that of the woman and should have a status in the matters of education, wealth and family background which is similar to that of the female”.⁶⁸

Justice Khalil ur Rehman Ramdy draws some conclusions regarding consent of Walī as:

“The consent of the man and the woman who are getting married is an indispensable condition for the validity of a marriage and a Walī has no right to grant such consent on behalf of the woman without her approval”.⁶⁹ “The parents and the family have a definite importance and place in the social set-up ordained by Allāh. Although, it is not possible for me to hold that the parents or the family could have a right to force someone to marry a particular individual yet they have a right to be consulted and their wishes were entitled to respect”.⁷⁰ “Authority is also available in Islam that in case of a dispute between the Walī and the child, in the matter of the choice of a spouse, the Court of Law can be approached who shall then resolve the issue. It will, therefore, be open to a person, if his or her parents do not accept the choice made by him or her having acted not in breach of social or religious values, to approach a Court of Law for the settlement of this dispute”.⁷¹

He further observes the points of the case as:

⁶⁵ PLD 1997 Lah. 331, at 353

⁶⁶ Ibid., at 378

⁶⁷ Ibid. at 380

⁶⁸ Ibid. at 377

⁶⁹ Ibid. at 381

⁷⁰ Ibid.

⁷¹ Ibid.

Instances are not unknown where certain person or class of persons, for certain acceptable reasons do not go out shopping. They notify their requirements and preference to their gents who look for the required items; report back about whatever is available in the required category and the concerned person then makes the final choice of whatever appears attractive to him from the available lot. In the light of Islamic injunctions and the established social and moral norms of our society, this appears to be the ideal scheme for choosing marriage partners. The elder family members have to find the best and choose the marriage partner for both male and female whatever looking best for their family systems. This procedure would also be in consonance with respect and dignity of all concerned and would even eliminate crime which erupts where marriages are contracted in a manner which injures honour and pride.⁷²

There may be cases where the parents or the elders or the family have either failed to discharge their obligations in the matter of looking for marriage partners for their children or are intentionally avoiding it for interior motives. In such a case, any such child shall have a right to approach the competent Court complaining of this inaction on the part of his/her parents etc. and if the Court finds that the elders etc. are in default, then the Court shall grant a certificate to that effect where after no blame shall lie on such a person he or she gets married, of his or her own accord.⁷³

Justice Khalil ur Rehman Ramdy concluded that the marriage between Ms. Saima Waheed and Arshad Ahmad⁷⁴ cannot be declared to be invalid and since Ms. Saima Waheed had started residing in Dastak of her own free will, therefore, she could be said to be in illegal custody at the said Dastak. She is, therefore, declared to be at liberty to reside wherever she pleases.⁷⁵

Both the honourable judges, Justice Malik Muhammad Qayyum and Justice Khalil ur Rehman Ramday agreed with the *Hanafi* law that an adult Muslim woman can get married herself by exercising her free will without the consent of Wali . They also agreed that the judgments of FSC are binding upon the subordinate courts including High Courts. Although they recommended that social norms must be protected and safeguarded and the escaped marriages are against the social norms and values, must be denounced.

In this regard, Shaheen Sardar Ali states that

“The “*head of the household*” “*protector*,” and “*provider*” has traditionally been male, and, therefore, inclined to control all the actions of members of his household. It is not difficult for legal norms to be so completely subsumed in custom and socially acceptable roles, so that there comes a point in time when one is simply unable, or is hard put, to disentangle the web of rules made up of law, custom and religious norms. What is more pertinent to our discussion is the fact that interpretations of religious and other kinds of laws are cast in a mould that is “acceptable” to a certain society. Thus, even a simple law stating that an adult Muslim woman *is sui juris* has to be interpreted differently, for if exercised, as it was in the present case, it is perceived as an affront to existing social norms. It is submitted

⁷² Ibid.

⁷³ Ibid. at 382

⁷⁴ In the beginning of the case name was mentioned Muhammad Arshad and here Arshad Ahmad, but we have no concern with the name.

⁷⁵ Ibid. at 384

that by a woman exercising a right given by Islam, the state and laws of the country, it is not Islam that is in danger, but the patriarchal character of social organization".⁷⁶

Martin Lou points out that the real life in Pakistan cities including Lahore is far removed from Islamic ideals portrayed in the decision and any attempt to implement Islamic ideals in the entire country will prove difficult, if not impossible.⁷⁷ He further states that:

"It is unclear why the Lahore High Court would risk resembling King Canute, since it must have been obvious to the judges that it is highly unrealistic that their Islamic utopia will ever become socio-economic reality."⁷⁸

Although the Lahore High Court had already held by a majority of two to one, that the approval of a Wali is not necessary for the validity of her marriage contract, the father of Saima Waheed still appealed to the Supreme Court of Pakistan. The reason given by one of the two judges of the High Court in the Saima Waheed's case was that the judgments of the Federal Shariat Court in the field of family law were binding on the High Courts. Since the former had already established that a Muslim woman can get married herself with her free will and the approval of a guardian for the validity of a marriage is not mandatory, the High Court had to uphold the decision. Justice Karamat Nazir Bhandari, speaking for the Full Bench of Supreme Court of Pakistan, observed that:

"There are number of judgments of the Federal Shariat Court specifically holding that an adult sui juris Muslim girl can contract a valid Nikāh on her own and consent of Wali is not needed. The repeated pronouncements of Federal Shariat Courts are required to be followed by the High Court and by all Courts subordinate to a High Court by virtue of Article 203 GG added in the Constitution of Islamic Republic of Pakistan in 1982".⁷⁹

As mentioned earlier that the Federal Shariat Court had ruled in several cases that a guardian's approval or consent is not compulsory for the marriage contract as discussed in *Muhammad Imtiaz vs. The State*⁸⁰, *Arif Hussain and Azra Parveen vs. The State*⁸¹, *Muhammad Ramzan vs. The State*⁸² and *Muhammad Yaqoob vs. The State*⁸³.

My Learned Professor, Dr. Muhammad Munir has raised a question to the petitioners who were not accepting the judgments of the Federal Shariat Court as precedent to the other subordinate courts including High Courts, he stated that:

"If the decisions of the Federal Shariat Court were unacceptable to the petitioner's counsel then what about the Supreme Court's decision in *Mauj Ali vs. Syed Safdar Hussain Shah*⁸⁴? Shouldn't that decision be binding on the High Court? In this case it was held a

⁷⁶ Shaheen Sardar Ali, Is an Adult Muslim Women Sui Juris? (with Particular Reflections on the Concept of "Consent in Marriage" without a Wali (with Particular Reference to the Saima Waheed Case), *Yearbook of Islamic and Middle Eastern Law* 3 (1996), 174.

⁷⁷ Martin Lou, Pakistan: Abdul Waheed vs. Asma Jahangir (the Saima Waheed Case), in *Yearbook of Islamic and Middle Eastern Law* 3 (1996), 531.

⁷⁸ Ibid.

⁷⁹ *Abdul Waheed vs. Asma Jahangir*, PLD 2004 SC 219, at 230

⁸⁰ PLD 1981 FSC 308

⁸¹ PLD 1982 FSC 42

⁸² PLD 1984 FSC 93

⁸³ 1985 PCr. LJ 1064

⁸⁴ 1970 SCMR 437

Muslim girl attaining puberty is competent to marry of her own free will. The Court declined to give her custody to her father”.⁸⁵

With regard to the jurisdiction of the Federal Shariat Court, the Supreme Court of Pakistan observed that:

“The Court (FSC) shall have such other jurisdiction as may be conferred on it by or any other law and Chapter 3-A not only establishes Federal Shariat Court but also species various jurisdictions of the Court.”⁸⁶

The Supreme Court further observed that the Court will lean in favour of harmonious interpretation of the statutes or various provisions and would certainly avoid an interpretation which has the potential of confliction judgments or pitching one Constitutional Court against another Constitutional Court.⁸⁷

Justice Karamat Nazir Bhandari concluded with regard to the jurisdiction of the Federal Shariat Court that

“It is inappropriate and undesirable that one Constitutional Court should avoid the judgments of another Constitutional Court in collateral proceedings.”⁸⁸

After the case of *Abdul Waheed vs. Asma Jahangir*,⁸⁹ it is well settled principle in Pakistani law that a sui juris adult woman can enter into a valid Nikāh on her own will without the consent of Walī . Usually, the boy and girl who are in love or want to get married, first, they try to involve their families. When the resistance or denial comes from the respective family members then they go to get married by their own or through the court. Normally, the families agreed after the marriage of their children but sometimes they think that this is disrespect for us and they do not accept defeat easily. As a result, they filed a false charge against them and husband and wife, if convicted by the lower courts, file a petition for quash of allegations.

There are some other cases decided by the Superior Courts from the respective provinces as instance, safeguarding and protecting the rights of a woman to get married without the will of Walī . In *Naseer Ahmad vs. The State*,⁹⁰ the facts of the case are that Mst. Mafia got married with Ghulam Shabbir with her free consent as a sui juris adult Muslim woman. The brothers of Mafia alleged on Ghulam Shabbir that he kidnapped and abducted our sister. Mst. Mafia appeared before the court and recorded her statement that she willingly entered into a valid Nikāh neither kidnapped nor abducted by Ghulam Shabbir. The Lahore High Court held that a puberty woman can contract marriage of her own accord without the indulgence of a Walī , hence, the same principle shall be applicable to the instant case of Mst. Mafia and Ghulam Shabbir. In *Gul Khatoon vs. Muhammad Aslam*,⁹¹ The brief facts of the case are that Mst. Khadija entered into a marriage contract with Mr. Abdul Rahman with her own free consent. The Mother of Mst. Khadija alleged that her daughter was engaged with Abdul Rahman against her free will and he abducted my daughter after the death of my husband. She also claimed that the age of my daughter is less than the age of majority. She appeared before the judicial Magistrate –VI Quetta and recorded her statement that she was

⁸⁵ Muhammad Munir, *The Rights of Women and the Role of Superior Judiciary in Pakistan with Special Reference to Family Law Cases from 2004-2008*, 282.

⁸⁶ *Abdul Waheed vs. Asma Jahangir*, PLD 2004 SC 219, at 231

⁸⁷ Ibid.

⁸⁸ Ibid., at 234-235

⁸⁹ PLD 2004 SC 219

⁹⁰ 2011 MLD 1228

⁹¹ 2015 PCrLJ 193

married to Abdul Rahman with her free consent and no one has abducted her. NADRA authorities also checked the age of Khadija and confirmed that she is already adult, her age was 25 years when got married and there is a well-established principle that a sui juris woman can exercise her right of conclusion of marriage without the consent of guardian. The Balochistan High Court concluded that an adult Muslim woman can enter into a valid marriage contract without the intervention of a guardian.⁹²

In *Ajab Khan vs. The State*,⁹³ the precise facts of the case are that the complainant Bakht Sherwan reported to the local police that his daughter Mst. Naseema, who was already engaged to Abdur Raziq through a valid Nikāh. She was enticed by Ajab Khan for the purpose of contracting illegal marriage with her. The additional Session Judge, Swat convicted Ajab Khan and Naseema with imprisonment of five years each as well as fine. The aggrieved parties (Ajab Khan and Naseema) appealed before the Peshawar High Court. The Court observed that according to the prosecution the appellant Ajab Khan enticed away the co-appellant Naseema for the purpose of illegal marriage despite the fact that Nikāh of Naseema had already been effected with Abdur Raziq. The evidence (Nikāhnāma) produced by the prosecution in this regard has neither been signed or thumb impression by the husband Abdur Raziq nor it bears the signature or thumb impression by the appellant Mst. Naseema. Although, it is a stance of the prosecution that consent of Mst. Naseema had been obtained by her Walī, the court further observed that the signature or thumb impression of the Walī is also not mentioned in the Nikāh Nāma. Therefore, the status of the Nikāh Nāma has become doubtful.⁹⁴ Another issue in this case was the age of Mst. Naseema, the prosecution argued that at the time of Nikāh with Abdur Raziq, she was 13 or 14 years of age. But they did not produce authentic evidence on the record to show her exact age. It was proved before the Court that Mst. Naseema got divorced from Abdur Raziq under dissolution of Muslim Marriage Act. The court concluded that both the appellants have exercised their option of to tie the knot being adult and sane citizens which is not prohibited by the law of the land.⁹⁵

Conclusion

Marriage is a contract that requires consent of a man and woman independently without any intervention of the guardians. Islamic law is explicitly endorses that a man and a woman can choose their partners with their free consent. In our Pakistani society, woman is not generally permitted to initiate her marriage or given a right to choose her life partner. She faces more difficulties as compare to a man. Most of the times, she is not even consulted and a groom is not known to her till the marriage ceremony. Liking and disliking of a man for marriage is so far and beyond from her dreams and she has to accept whomsoever is selected for her as a groom. This is a real fact of our Pakistani communities and usually happens the same particularly in the rural areas. Although, there is no explicit provision for the consent of a guardian and woman's right to get married with her free will but there are several cases in which it is evidently elaborated by the judges that a Muslim sui juris woman is permitted to conduct her marriage without the approval of a guardian. Before *Hafiz Abdul Waheed vs. Asman Jehangir*, this right was not granted to a woman but after *Saima Waheed* case, it has become a precedent and a well-established law in our Pakistani legal system. The general trend of the lower and superior Judiciary of Pakistan is safeguarding a woman who gets married without the consent of their parents or guardians but it is still unaccepted and regretted in our social norms.

⁹² Ibid.

⁹³ 2016 PCr. LJ 657

⁹⁴ Ibid.

⁹⁵ Ibid.