

Utility of Theory of Willāyah (Guardianship of Walī) In Family Law and Its Impact on Society: Analytical Study in The Light of Islamic Jurisprudence and Laws Regulating Marriage in Pakistan

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Abstract

Islamic Family Law is one of the most sensitive and important studied fields in Pakistani law. This is because it affects the personal life of Muslims, and because many issues have arisen as a result of the implementation of the Islamic Family Law Enactment which governs Muslims in Pakistan. Scholarship in this area has expanded with the development of the Enactment itself. Several approaches have been used to analyze the implementation of the law inter alia, legal, socio-legal, comparative, and anthropological and sociological perspectives. It cannot be denied that research and scholarly publications in the field of Islamic Family Law have contributed to further strengthening the administration of justice and the implementation of the law. As such, this research is intended to describe the overt tendencies inharmonious to the basic social norms in the area of Islamic Family Law that Pakistani system as a case study, this study reject the argument that Islamic law and human rights are competing or contradictory, and support the idea that together they have in fact provided comprehensive protection to Pakistani women's marital rights. Ultimately the research concludes, the exemplary Pakistani regime may potentially serve as an illuminating model for the productive and complementary utilization of Islam and constitutional jurisprudence in the regulation of a marriage law respectful of human rights by utilization of an egalitarian and equitable conception of Islam in the context of marriage law.

1. Introduction

Islamic Family Law is one of the most sensitive and important studied fields in Pakistani law. This is because it affects the personal life of Muslims, and because many issues have arisen as a result of the implementation of the Islamic Family Law Enactment which governs Muslims in Pakistan. Scholarship in this area has expanded with the development of the Enactment itself. Several approaches have been used to analyze the implementation of the law inter alia, legal, socio-legal, comparative, and anthropological and sociological perspectives. It cannot be denied that research and scholarly publications in the field of Islamic Family Law have contributed to further strengthening the administration of justice and the implementation of the law. As such, this paper is intended to describe the trends in the area of Islamic Family Law that Pakistani system as a case study, and human rights are not competing or contradictory, but rather compatible and complimentary, and that together they have in fact provided comprehensive protection to Pakistani women's marital rights. The relationship between Pakistan and Islamic law is quite unique. Pakistan was envisioned and created in the name of Islam and as a home for the Muslims of India. It was the first country in modern history to introduce the concept of an Islamic Republic, a concept later copied by other Muslim nations. Naturally, the Pakistani fascination with Islamic law was given expression in the supreme legal document of the land the Pakistani Constitution.¹ It explores

¹ Article 2(A) of Constitution of Pakistan

the ingenious interpretive techniques Pakistani courts have developed in order to harmonize the constitutional scheme and defend women's rights when addressing controversial issues, which range from prerequisites to marriage, legal and culturally based restrictions on marital freedom and ultimately the research concludes, the exemplary Pakistani regime may potentially serve as an illuminating model for the productive and complementary utilization of Islam and constitutional jurisprudence in the regulation of a marriage law respectful of human rights by utilization of an egalitarian and equitable conception of Islam in the context of marriage law.

2. Islamic Personal Law and Significance of Family as Basic Unit of Society

In a bid to understand this complex phenomenon, it may be important to critically examine the viewpoint of Islam on the issue under consideration. In order to do so, it is necessary to understand two basic principles which provide very basis in this regard. Firstly, it regards the institution of family as the basis of its social order. Secondly, it gives great importance to freedom in decision making by the man and woman who intend to marry. Because in the Muslim society, family is a structure which is formed on the basis of mutual respect, peace, love and affection. It is its intense desire that the institution of family and the freedom of choice in marriage be given utmost consideration and only rare circumstances should allow an exception to these principles. Islam regards the institution of family as the basic unit of a society and stresses that it is the need of every individual,² if his life is viewed as a whole, to be a part of a social set up to overcome socio-economic problems. However, being a human, Man is basically a weak and an insecure being. He has spiritual as well as material needs. Just as he needs to develop a strong relationship with the Almighty to fulfill his spiritual needs, he also needs to develop a strong relationship with his fellow human beings to fulfill his material needs. Islam says that a man and a woman must come together in a permanent bond of wedlock to create a family to fulfill these material needs which may be physical, emotional and psychological. A man and a woman taken separately, are incomplete in their existence. Both need each other to fill the voids of their personalities. There are some responsibilities which only a man can fulfill and others which only a woman can. Furthermore, since these requirements are everlasting, any temporary relationship between a man and a woman can never be truly fruitful. The *Qur'an* says that marriage is a means of solace and comfort for a man and a woman;

“And among His signs is that He created for you mates from among yourselves that ye may dwell in tranquility with them and He has planted love and kindness between you.”³

With that, besides providing peace and tranquility to the spouses, the role a family set up in fulfilling the needs of the individual born to a family is apparent to every keen eye. He passes the first half of his life in transforming from a child to a mature young man and the second half in transforming from a mature young man to an old man. In the greater part of the first period, he needs the love and affection of his parents. As an infant ‘mewling and puking in the nurse's arms’ his meek and helpless existence need the love and affection of a mother and a father. It is only proper parental care which makes him feel secure and confident. Since parents are the first seat of learning, the base they build in molding his character and in instructing he plays a vital role in the later part of his life. Every member of the family has play his part, as grandparents also have an

² Ahmad, Khurshid. Family life in Islam. Leicester, UK: Islamic Foundation, 1974.

³ Al Quran,30:21

all-important role to play: They imbue their grandchildren with the priceless wealth of wisdom and experience which helps them in traversing the rugged terrain of life. Brothers and sisters also make important contributions in developing his personality. The older ones are actually an extension of the parental role while the younger ones create in him an initial awareness of parenthood.

It could, therefore, be conceivable that, once a person reaches a mature age, certain other needs arise in him which must be fulfilled. In time, however, it will become necessary for man and a woman to have each other to complement and complete one another. This relationship is the only means of providing emotional fulfillment and satisfaction to the spouses, which is the primary need that brings them together and they now also assume the role of the progenitors of a new family to start the cycle once again. In the second phase of life, an individual advance from the exuberant years of youth to enter the folds of old age. It is now that he needs the love and protection of his grown-up children. In this state of 'second childishness and mere oblivion', which is 'sans teeth, sans eyes, sans taste, sans everything', it is only the set-up of a family which can properly support him.⁴ Without such a support, old age is the worst form of affliction. No one else except the children have a strong some form the support and affection they had once received from their parents. Besides these primary relationships, the secondary relationships like maternal aunts and uncles and paternal aunts, cousin brothers and cousin sisters, nieces and nephews perform in a wider perspective the same function as the primary ones. The components of a family constitute a small community which if administered properly by the head of the family makes the basic unit of a society healthy.

Needless to say, that the western world, over the last fifty years, however seems lost and confused on the importance of the institution of family. The feminist movement which began two centuries ago is now culminating in the disruption of this age-old institution. The western world is bemoaning the loss of family values but perhaps it is just too late.⁵ Islam on the other hand, as mentioned earlier, has always insisted that the institution of family is the basic building block of the society and it is in the interest of humanity to adhere to a family-oriented society.⁶ Consequently, it has given a number of directives for the protection and preservation of the family. These also declares that a man and woman must come together in a permanent bond of marriage and must not indulge in extra-marital relationships since they dismember the institution of family. It prescribes severe punishments for people who are guilty of adultery and ostracizes them from the society. It lays down a whole code of social etiquette and communal conduct to safeguard and protect chastity and modesty which themselves are necessary for the well-being of a family set up. It is of the view that all differences of opinion between the husband and wife should generally be resolved in an atmosphere of mutual trust and confidence. However, if a situation of anarchy and disorder arises which threatens to disrupt the whole family set-up, the wife must adopt an attitude of submission and adjustment.

⁴ Neighbour, Roger H. "The family life-cycle." *Journal of the Royal Society of Medicine* 78, no. Suppl 8 (1985): 11.

⁵ Glendon, Mary Ann. *The transformation of family law: State, law, and family in the United States and Western Europe*. University of Chicago Press, 1989.

⁶ Abdul-Rauf, Muhammad. *The Islamic view of women and the family*. R. Speller, 1977.

It holds the parents responsible for the proper upbringing of their children. It urges the children to be very kind and compassionate to their parents, especially in old age. It wants the mothers to regard the house as the center of their activities (which of course does not mean that they cannot go out) so that they can give due attention to the future generations and are able to provide their husbands with solace and comfort.

It says that if ever a divorce is to end a family set up, a certain prescribed procedure should be followed in letter and spirit since this procedure ensures that the dissolution of marriage passes through an interim phase in which the decision has ample time to be reconsidered.

It maintains that if a divorced woman intends to start a new family, her former husband or his relatives must in no way obstruct her. These all social directives of Islam pertaining to the institution of family and is based on great wisdom. Since the preservation and protection of the family set up is of paramount importance to Islam, it is but natural that each marriage take place through the consent of the parents who are the foremost guardians. It is obvious that a marriage solemnized through the consent of the parents shields and shelters the newly formed family. For reasons stated earlier, it is essential that the newly formed family be part of another larger family.

One other thing, the society which, we believe, Islam wants to build is one in which the relationship between parents and children is based on such norms and values as protect the family set up. In such a society, if an individual has to select a life partner for himself or herself, he or she must make the utmost effort to convince the parents. In differences of opinion it seems proper that the individual accommodate the opinion of the parents as far as possible, and only in extraordinary circumstances should he/she persist in his/her decision. An individual no doubt has total freedom in decision making in this regard but he/she should give top priority to the protection of the institution of family. This freedom is so absolute that Islam disapproves of parents who forcibly marry their sons and daughters and makes it clear that it is the concerned man and woman who have the final say in this regard:

A girl once came to 'Aishah (raa) and said 'My father has married me to his nephew to alleviate his poverty through me. I dislike him.' 'Aishah (raa) replied 'Wait here until the Prophet (sws) comes.' The Prophet (sws) arrived shortly and she informed him of the matter. At this, the Prophet (sws) sent for her father. When he arrived the Prophet (sws) gave the girl the choice to do whatever she liked. She said: 'I accept my father's decision. I only wanted to know whether a girl has authority in this regard or not'. (Nisa'i, Kitab-al-Nikah)⁷

On the whole, in a society envisaged by Islam it is important that an individual give due regard to the opinion of the parents in marriage, it is even more important that the parents be extra cautious in this matter since they hold moral authority over their children. Indeed, misuse and abuse of such authority can produce grave consequences. Parents must give deep consideration to the inclinations and tendencies of their children in deciding their future in an affair as delicate as marriage. They should understand that once their children become mentally mature, they must not impose their ideas on them. When an individual develops into a grown-up person, he deserves freedom of expression and freedom of action within certain limits. This actually develops and strengthens his personality. The vivacity of youth and the vigor of adolescence demand a certain amount of independence, which if curtailed, only turns a dull child into a dunce and an intelligent one into a ruffian. Adult children must be handled very tactfully. They must be molded and convinced,

⁷ Sunan an-Nasa'i 3269 Book 26, Hadith 74

encouraged and exhorted. Parents must realize that an adult child learns a lot through experience and exposure. The blunders he/she will commit today make him/her wise tomorrow. Parents who forgive and forgo win respect and regard and those who make it a point to punish the children on every mistake committed make no positive impression in their minds. Important decisions must always be discussed with children to breed confidence and conviction in them. A decision as crucial as marriage is no exception. If parents have a different view from their son's or daughter's, they must handle the situation very carefully. They must calmly assess the situation, and must also make a true evaluation of the grounds of such a proposition. They must also estimate how far they can insist before the matter enters the zone of no return.

3. The Relationship Between Pakistan and Islamic Law

The relationship between Pakistan and Islamic law is quite unique. Pakistan was envisioned and created in the name of Islam and as a home for the Muslims of India. It was the first country in modern history to introduce the concept of an Islamic Republic, a concept later copied by other Muslim nations. Naturally, the Pakistani fascination with Islamic law was given expression in the supreme legal document of the land the Pakistani Constitution.⁸ The most conspicuous feature of the 1973 Constitution is its painstaking devotion to Islamic law. Many of its articles serve to articulate the centrality of Islam, and indeed, it contains more Islamic provisions than any other constitution in the entire Muslim world.⁹ It contains more Islamic provisions than any other constitution in the entire Muslim world.¹⁰ Islamic law treats marriage as an everlasting institution with specific rights and responsibilities assigned to each partner. A Muslim marriage is a social contract between two independent persons who have attained puberty. Islam introduces checks and balances to protect and secure the rights of all stakeholders in this matter—the husband, the wife, the children, and society at large. It prohibits all forms of extramarital relations, both before and after marriage, treating them as a transgression which ultimately causes imbalance in society.¹¹ It also assigns different roles to each spouse to ensure smooth functioning of the family that emerges as a result of the marriage contract between husband and wife in a prescribed way for the poise and balance of a society. The poise and balance of a society heavily depends on the poise and balance of the attitudes and tendencies of its people. Whenever human attitudes cross their natural limits disorder and discord result. In particular, the stability of a society is threatened with dire consequences if people vested with political or moral authority misuse this sacred trust of Allah. A despotic ruler often faces popular revolt; a tyrannical husband soon encounters a defiant wife; oppressive parents inevitably groom rebellious children. It is necessary to curb this tendency of power to corrupt in order to build a healthy and prosperous society.

⁸ Article 2(A) of Constitution of Pakistan

⁹ See Riffat Hassan, Are Human Rights Compatible with Islam?, <http://www.religiousconsultation.org/hassan2.htm> (last visited Feb. 22, 2009)

¹⁰ Burks, Adath W. "Constitution-making in Pakistan." *Political Science Quarterly* 69, no. 4 (1954): 541-564.

¹¹ See Riazul Hasan Gilani, *A Note on Islamic Family Law and Islamization in Pakistan*, in *ISLAMIC FAMILY LAW* 339, 342-44 (Chibli Mallat & Jane Connors eds., 1990)

4. Perception *Willāyah* in *Shari'ah*, and law regulating marriage in Pakistan

With that understanding, the ongoing debate on the extent of authority of parents over their children's choice to marry is one such case in point. As always, two distinct opinions have emerged. One of them is that a man or a woman is totally free in making his or her decision about the choice of partner and has the right to overrule the opinion of the parents or the guardian. The second is that the opinion of the parents is in all cases binding and must necessarily be kept in consideration. Though, the role of the guardian in contracting a marriage is largely settled in traditional Muslim thought,¹² nonetheless, it became the subject of a major controversy in Pakistan. Some schools of Islamic thought consider an adult woman the same as an infant who cannot understand the nature of marriage, and who is "weak in reason, and open to flattery and deceit," and as such lacks the legal competence to enter into marriage of her own accord. They, therefore, subject her right to marry to a superior right vested in her male guardian. The Hanafi School stands alone in allowing women to marry independently, even without parental consent. Along the same lines, the **Shāfi'i** and **Hanbali** schools of thought- the majority of scholars are of the view that if a woman is married off without her consent, then the marriage contract is invalid, because it is a forbidden contract which cannot be validated. According to the **Hanafi** school of thought, the contract is dependent upon the woman's acceptance. If she gives her consent then it is valid, otherwise she may annul it. To this point, **Ibn Muflīh al-Hanbali** (may Allāh have mercy on him) said present the Hanbālī view, as he said; The parents have no right to force their son to marry someone he does not want. In a similar vein, **Shaykh Ibn Taymiyyah** said: Neither of the parents has the right to force their son or daughter to marry someone whom he does not want, and if he refuses, he is not sinning by disobeying them, because no one has the right to force him\her to eat food he finds off-putting when there is food that he\she **wants** to eat, and marriage is like that and more so. Food that one is forced to eat is unpleasant for a short while, but a forced marriage lasts for a long time, and it harms a person and he cannot leave it.¹³

However, as it evident from the *Hadith* also, there can always be an exception to this general principle. If a man and a woman feel that the rejection on the part of the parents has no sound reasoning behind it or that the parents, owing to some reason, are not appreciating the grounds of this union, they have all the right to take this matter to the courts of justice, by adopting proper code of law, under certain legislation .It is now up to the court to analyze and evaluate the whole affair. If it is satisfied with the stance of the man and woman, it can give a green signal to them. In this case, as is apparent from the *Hadith*, the state shall be considered the guardian of the couple. On the other hand, if the court is of the view that the stand of the parents is valid, it can stop the concerned parties from engaging in wedlock. Similarly, if a case is brought before the judicial forums in which the marriage has taken place without the consent of the parents, it is up to the court to decide the fate of such a liaison. If it is not satisfied with the grounds of this union, it can order for their separation and if it is satisfied, it can endorse the decision taken by the couple. This is an egalitarian reformatory and quality solution could be or ought to be a ultimate solution and remedy for this problem. But regrettably, the Pakistani legislature has largely failed to translate constitutional guarantees from rhetoric into reality.

¹² al-Mughni, 7/364; Fath al-Bāri, 9/194

¹³ Ibn Muflīh al-Maqdisi al-Hanbali Al-Adāb al-Shar'iyyah ,(1/447)(Risalah Publishing, Beirut, 2015).

Apparently, this basic requirement is not so self-evident in Pakistan. Quite to the contrary, absent any clear legislative guidance, the phenomena of forced and “exchange” marriages “run” marriages regarded as an “inhuman” and “gender insensitive” practice became prevalent in Pakistan, severely jeopardizing women’s independent decision-making in marriage. The Muslim Family Law Ordinance (MFLO) is the main body of law regulating marriage in Pakistan.¹⁴ The MFLO mainly deals with the procedural aspects of marriage, meaning that courts enjoy wide discretionary power to decide what the substantive codified Muslim personal law is. Unlike legislation in many other Muslim countries, Pakistani law is silent as to the right of an adult woman to marry a person of her choice and as to whether her consent to marriage is sufficient or even required as a prerequisite for its validity. This raises the question of how a legal system is expected to adequately function when its defining document seems inherently flawed, and how its judges are meant to carry out its conflicting mandates faithfully, especially when dealing with the delicate regulation of marriage. Recent years, however, have witnessed many cases of so-called runaway “love- marriages,” with more and more women marrying on their own initiative and without parental approval. Women, independently practicing decision making in marriage, have created social and legal turmoil in Pakistan, leading to court battles, police raids and harassment, and even so-called “honor” killings. Every year an immense number of women, of all ages and in all parts of Pakistan, are reported killed in the name of honor, making Pakistan the home of an “honor killing industry.” In fact, honor killings in general, and in response to love marriages in particular, are so prevalent that government statistics report that not a day goes by without at least one woman being killed in the name of distorted notions of honor. While a woman who marries without parental consent is frequently murdered to restore her family’s honor, her husband can escape this fate by paying her father what her “worth” was. More often than not, the man “pays” his wife’s family not financial compensation, but another woman such as his sister or cousin. This grim reality did not escape the eye of Pakistani courts. On the occasions they were called upon to deal with forced marriages, the courts proved highly critical of what they regarded as an “inhuman” and “gender insensitive” practice.¹⁵

The Court embraced an egalitarian interpretation of Islam in above said case over the claims of Humaira’s family, and cautioned that male chauvinism, feudal bias and compulsions of a conceited ego should not be confused with Islamic values. In this context I would like to quote very interesting case which has intensive relation with this fundamental dilemma.

In the closing years of the twentieth century, a case of love marriage reached the High Court and received massive media attention, both locally and internationally. The sad story of Saima Waheed often referred to in the literature as the “Saima Love Marriage” case was highly publicized and touched off a flurry of debate over a woman’s right to self-determination and choice in marriage. Saima Waheed, a twenty-two year old business student, married her sweetheart with neither the approval nor the knowledge of her parents. The Court’s decision in favor of women’s

¹⁴ <http://lgkp.gov.pk/wp-content/uploads/2014/03/Muslim-Family-Laws-Ordinance-1961.pdf>.

¹⁵ One such particularly brutal case of forced marriage reached the Pakistani court—the story of the 28 year-old Humaira Mehmood, the only daughter of a then-member of the Legislative Assembly. Humaira Mehmood, PLD 1999 Lah. 494, 514–15. In a long monograph, the Court lamented that even though women are given equal rights in matters of marriage:

liberty to marry became a rallying point for women's rights organizations; it was hailed as "historic" and a "landmark judgment," and as a victory for constitutional rights. Indeed, after the Saima Waheed case, similar cases were routinely resolved in favor of women's capacity to order their own personal lives. But at the other hand this is creating another big problem in Pakistan, which is increasing number of so-called runaway marriages, it is analyzed that dilemma of court marriage is growing day by day in Pakistan, in the same year a report published in the Express Tribune, June 2nd, 2013 states that the district courts here received an average of 150 cases of couples hoping to solemnize marriage at courts each month.¹⁶

"According to court data, as many as 903 couples had applied for permission to marry at the courts here during last the six months. It was observed that most of the couples who filed these petitions were between 19 and 24 years of age. Of the 903 couples, 668 had moved for protection through petitions at the district courts. They reported torture and illegal confinement by their parents and in-laws, for marrying against their will. Most of the petitions for protection were filed by women. In some cases, the parents had registered criminal cases alleging that their daughters were kidnapped. However, when most of these allegedly kidnapped women were 'rescued' by the police, they stated that they had left their homes of their free will and had married for love.

In most cases, when these 'abductees' recorded their statements before the court, they maintained that they did not want to live with their parents.".

Interestingly one factor in 99% cases found common, that the facts and circumstances leading up to all these petitions have been found same, in all those cases, each young, unmarried girl had managed to establish contact with a man, this contact then developed into a secret liaison and this secret affair then allegedly culminated into a secret marriage; each girl disappeared from her parental home; apprehending worst of consequences and family commenced frantic search, they launched F I R, etc. this way of like is not permitted rather than even encouraged by any school of thought because it is against the basic teachings of Islam furthermore premarital and extra marital liaisons, courtships, secret friendships and secret marriages are one major source of serious crime in our society. In conclusion, the Pakistani courts have generally recognized and respected women's basic Islamic and constitutional freedom to exercise choice in marriage, it is evident that these practices in their nature is preventive not reformatory. In other words, they prevent the spreading of anarchy and disorder in a society but have no role in positively building a society on a certain ideology. It is the utmost goal of Islam to build a society in which traditions are so deeply rooted. It is advisable that only in extreme circumstances they should deprive the couple of their guardianship "*willayah*". They must also keep in consideration that if they intend to back out from this position, the concerned man and woman have all the right to present their case before the court to finally decide the matter. This of course would either unite the two under the guardianship of the state or endorse the view of the parents, in which case the two must submit to the verdict of the court.

5. Conclusion

This we believe is the stance of Islam on this issue. We hope that the pundits of the society "women's rights organizations" will find some time to consider this matter in the light of what has been said above. However, there are certain practices in Pakistan, which are often in blatant violation of Islamic teachings, largely due to public ignorance of Islamic teachings and weak

¹⁶ The Express Tribune, June 2nd, 2013

implementation of laws, and partly to weaknesses in the laws. To alleviate the additional suffering that this situation imposes on disintegrating families, the remaining inconsistencies and gaps between Islamic teachings and family laws need to be closed. They should develop and implement various techniques, invalidating forced unions, quashing criminal charges, issuing restraining orders, penalizing police officers, and rejecting compromises and the honor killing defense all in order to preserve the sanctity of the right to marry, , public awareness needs to be built on a war footing, and the concerned stakeholders, especially legislators, lawyers, the judiciary and *ulema*, need to be facilitated in understanding one another's perspective and working together. In addition to it, once a good policy document should be made, it should be taken as guide line for judicial action to be taken in this regard while currently the Pakistani legislature has largely failed to translate constitutional guarantees from rhetoric into reality. So it is not easy to address all aspects of this subject but the research is mainly aimed to address the following research problems.