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www.advancelrf.org**Role of Wali in Contract Marriage of Islam: A Critical Analysis****Waqas Ahmad**

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E-mail: shaukathussain78682@gmail.com**Abstract**

Every woman has a constitutional right to get married with her own free will. Islam gives a right to a sui juris girl to marry any person without the consent of wali. A woman who did not attain the age of puberty could not sign a marriage contract without permission of her wali. This study focuses on marriage as a one-of-a-kind contract, as well as the opinion of numerous judges expressed through decisions about the role of wali in contract marriages. It also considers the position, role, and importance of consent in a marriage contract, as well as the choice of law regulations that govern such marriages and discusses the impact of wali consent in a marriage contract in Pakistan's legal system. On the other hand, this research also focuses on the criticism of the Hafiz Abdul Waheed vs. Asma Jahangir case about whether the permission of wali is necessary for a contract marriage. The article concludes by discussing how the consent of wali is not essential for the contract of marriage for a sui juris female. Every female has a divine and legal right to marry anyone or to choose his life partner without consent of his/her wali.

Keywords: Muslim Family law, Law of Contract, Marriage, Islam, Concept of Wali**Introduction**

Marriage is a legal agreement. According to Islam marriage is Holy Prophet's (PBUH) Sunnah, in which men perform all matrimonial and social obligations. Holy Quran mentions the purpose of marriage in multiple verses like:

"And of His signs is that He has created wives for you from yourselves that you might find quiet of wind in them, and He put between you love and affection." (Choudhury, 1956; Zubaidah & Zahiri, 2016; 2019, اختر & ظفر)

The Holy Quran states in up noted verse that a woman is not less inferior to a man in the sense that the latter is of more superior than opposite sex. Because both man and woman are Adam's descendants, they share the same soul.

In the primitive Arab before Islamic era. Women had no liberty to choose their partners and they were not allowed to untie the marriage bound or divorce their husbands in case of domestic abuse. Marriages were typically arranged by a man and his potential wife's family and took place either within the tribe or between two tribes. As part of the arrangement, the groom family may offer camels or horses as recompense for the proposed bride. After marriage, the female would abandon her family and spend the rest of her life with her husband's tribe. Pre-Islamic marriage by captivity, or "Ba'al", was also famous. Before Islam women were deprived from their rights in matter of inheritance, social independence and legal status. Arabian culture considered women as their servant and treat them as an animal.

The legal system of Pakistan recognizes not only contract of marriage. But our legal system also establishes many statutory laws like Muslim Family Court Ordinance 1961, West Pakistan Family Court Act, 1964, Dissolution of Marriage Act 1939, and Child Restraint Marriage Act 193 to protect the rights of the woman before and after the contract of marriage.

On March 10, 1997, three justices, Ihsan-ul-Haq Chaudhry and other judges resolved the case of portioner Hafiz Abdul Waheed vs. Ms. Asma Jhangir. This case begins with certain key provisions of Muhammadan Law about understanding of different marriages as nikah (marriage) is following of our beloved Prophet (P.B.U.H) matrimonial obligations. Maulana Ashraf Ali Thanvi wrote a critical statement about the notion of a civil contract, stated:

“It is come to know that the nikah is a similar matter as the matter sale and purchase. Thus, the transaction of other things is done by the people with mutual consent. Similarly, it is also in the case of nikah.” (Metcalf, 1990)

Marriage is not a barter trade of selling and purchasing flesh and blood but to perform a Prophet's (PBUH) Sunnah as an Islamic obligation. Those who go beyond Islamic teachings and sign marriage contracts for sake of lust and physical satisfaction is nothing but inhumane act. The idea that marriage was only a contract of selling and buying a human commodity was promoted without considering this philosophy of sale and purchase which reduced status of women to a mere slaves. (Engineer, 2005) According to the injunction of Islam, there is no valid marriage if it is forced or without her consent.

Essential Element of Marriage

According to Muslim Family Law Ordinance 1961, some important essential elements of a valid marriage are as follows:

- Registration of Nikah
- Appointment of Wakil
- Signed by two persons as witnesses
- Signed by both parties both man and woman (M. Ahmad, Nadeem, Khan, & Ahmad, 2015)

Wakil must not be a stranger or vagabond as he will be one to witness Ijab-o-Qabool Wakil. With reference to (section 5) of the Muslim Family Law, Ordinance 1961, a Nikkah perform & nikah registration is mandatory. Moreover, in Column 1 serial 7, appointment of Wakil from bride side is utmost important to carry the ongoing Nikkah. Purpose of Wakil appointment under Shariah is to shelter the women in front of Assembly appointed by groom side.

Women Place in Islam

Role and place of women in Islam are summarized as below:

- Woman is recognized as a separate social and legal entity

- She occupies respectable status in society equal to men
- She has share in property rights as mentioned in Holy Quran.

“It was determined that the lady was not solely to blame the guy's fall from grace, but that both graders succumbed to devil deception”.(Denny, 2015)

Meaning and Legal Status of Wali in Women's Life

Wali means the caretaker or guardian who protects the woman or child either boy or girl in every perspective of life. Wali is the person who has a right to take important decisions relevant to the child or for the betterment of women. A custodian, protector or helper who under takes the child all the way and guides accordingly (Denny, 2015). In Pakistan, the concept of wali is guardian who takes care of the child and has equal right to take important decisions which has a benefit for the child in matter of property, education and marriage but as per Islamic rules, the wali takes all the decisions till the child attain age of puberty or until a child enables to understand the matter of life and take decisions on its own. (Denny, 2015)

The legal status of wali in women's life is very important because wali is a real protector of women in every prospect. According to the Constitutional History of Pakistan, the father will be represented as wali and if the father is not alive grandfather will be the wali of that woman. (Rahman, 1973) Father and grandfather are likely to be strongest to become a wali and if these two are not alive then the closest man who is elder in the age of woman and relation would be 'Mehram' and eligible to be Wali. In rare circumstances if no male member in family is alive to hold the sacred position then elder women in the house will be Wali. (K. B. Ahmad, 1993)

Consent of Wali in Contract of Marriage

Different jurists and fiqh have diversification in their opinion regarding the consent of wali in contract marriages of Islam. In this case study, three kinds are under discussion. Consent of wali in contract marriages or not. Here is the opinion of different law Practitioners.

Hanafi School of Thoughts

According to Hanafi School of thought, the consent of wali in a marriage contract is not necessary. A woman can marry any man with her own free will and without the consent of wali. For this reason, much evidence is available in Holy Quran and Hadith.

Holy Quran encourages believers to marry without placing any restrictions on a believing woman needing a Wali.

“وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالصَّالِحِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ إِنْ يَكُونُوا فُقَرَاءَ يُغْنِهِمُ اللَّهُ مِنْ فَضْلِهِ وَاللَّهُ وَاسِعٌ عَلِيمٌ”

“Arrange the marriage of the spouseless among you, and the capable from among your bondmen and bondwomen. If they are poor, Allah will enrich them out of His grace. Allah is All-Encompassing, All-Knowing.”(AL-HARAHSEH & ALJUNAIDI)

There is no question about a woman who is divorced or widowed and her ability to marry without the permission of her wali.

“وَإِذَا طَلَّقْتُمُ النِّسَاءَ فَلَا تَعْضُلُوهُنَّ أَنْ يَنْكِحْنَ أَزْوَاجَهُنَّ إِذَا تَرَاضَوْا بَيْنَهُمْ بِالْمَعْرُوفِ ذَلِكَ يُوعَظُ بِهِ مَنْ كَانَ مِنْكُمْ يُؤْمِنُ بِاللَّهِ وَالْيَوْمِ الْآخِرِ ذَلِكَمْ أَزْكَىٰ لَكُمْ وَأَطْهَرُ وَاللَّهُ يَعْلَمُ وَأَنْتُمْ لَا تَعْلَمُونَ”

“When you have divorced women, and they have reached (the end of) their waiting period, do not prevent them from marrying their husbands when they mutually agree with fairness. Thus, the advice is given to every one of you who believes in Allah and the Hereafter. This is purer and cleaner for you. Allah knows and you do not know.” (Qur’an, 2020)

In this Hadith Holy prophet (P.B.U.H) permitted a woman to marry without the consent of wali.

“من طريق عمر بن أبي سلمة عن أم سلمة قالت: دخل علي رسول الله صلى الله عليه وسلم بعد وفاة أبي سلمة، فخطبني إلى نفسي فقلت: يا رسول الله؛ إنه ليس أحد من أوليائي شاهداً. فقال: (إنه ليس منهم شاهد ولا غائب يكره ذلك). قالت: قم يا عمر. فزوج النبي صلى الله عليه وسلم، فتزوجها”

“Sayyidah Umme Salama related when her Iddah was completed following the death of her husband, the Prophet sent her a proposal for marriage. She responded to the Prophet: ‘my guardian is not present here.’ The Prophet responded: ‘whether your guardians are present or not, they will not disapprove of this Nikah.’ Then Umme Salama said to her young (immature) son: ‘O Umar come to accompany me at my Nikah.” (Muhammad & Bībī, 2012)

The above-mentioned evidences show the opinion in favor of the Hanafi School of Thoughts that a woman can marry any person without the consent of wali and it will not be prohibited in Islam in the lights of the above-mentioned Verses from the Holy Quran and Hadith.

Shafi School of Thoughts

Shafi School of Thoughts opposes the opinion of the Hanafi School of Thought regarding the consent of wali in contract marriage of Islam. Shafi School of thoughts said that women cannot get into the marriage without the permission of wali. According to the Shafi School of Thoughts, a woman can marry with the permission of wali and that marriage will be valid. In this case study Hafiz Abdul Waheed vs. Asma Jhangir the learner council for the petitioner Riaz-ul-Haq-Gilani Advocate supports their arguments with the base of Shafi School of Thoughts that a woman can marry with the permission of wali and support the arguments with the verses from “Holy Quran” and Hadith of Prophet which is as follows. (Fatah & Utami, 2018)

The last Prophet (P.B.U.H), said about the consent of wali as follows:

“It is stated by Ibn-e-Abbas, that Holy Prophet (P.B.U.H) said, those women who get into marriage without the presence of witnesses done the sin if Zina.” (Al-Bukhari, 1978)

With reference to other hadith, the Last Prophet (P.B.U.H) says about the consent of wali is as follows:

“It is indited by Abu Mousa that Last Prophet (P.B.U.H) said, there will be no marriage without the consent of wali, further narrated in Tirmizi, Abu Dawood, Ibne Maja, Hazrat Ayesha (R.A) stated by our beloved Prophet (P.B.U.H) those women which get into marriage without the consent of wali their marriage will be void marriage.” (Al-Bukhari, 1978)

So above mentioned Hadith shows that the woman cannot marry without the consent of wali if she does so the marriage of that woman will not be valid. Shafi School of Thoughts in the judgment of Hafiz Abdul Waheed vs. Asma Jhangir answers the three issues that everyone should mandatory to oblige the parents and it can be enforceable, the marriage also a civil contract and this is essential to every woman to get permission before marriage otherwise the marriage will be void.

Case Laws

Case laws of any state of the country are the statutory decision of the state. Case laws show the decision of former judges in different matters of legal problems. Case laws also help many judges to reach the proper decision of the case. As we discuss above the status of the wali and his consent with an Islamic perspective and different schools of opinions of Muslim jurists in the light of Quran and Hadith. Now we discuss the consent of wali in the constitutional courts of Pakistan, for this, many case laws were decided in constitutional courts of Pakistan. These case laws show the importance of consent of wali in contract marriages. According to Muslim Family Law Ordinance 1961, essential elements of a valid marriage in Pakistani statutory law are the registration of nikah, the presence of two witnesses, the offer and acceptance of the parties, and the payment of dower, either prompt or deferred. Now we shall go over the key case laws one by one.

PLD 1970 Supreme Court 323

Mst. Bakhshi vs. Bashir Ahmad was the criminal appeal no 13 of 1970 and decided on 14th May 1970. A Muslim girl aged more than 16 years left the house of her mother and father, eloping with B and contracting marriage with him. Mother and father file a complaint of kidnapping, so girl recovered by police and handed over to parents, so habeas corpus petition filed against parents. The court on the statement of girl that she had contracted marriage and was living with her husband B of her own free will and also she attains the age of puberty so her marriage will be valid which based on Muhammadan Law. (PLD, 1970) However, in my point of view, this case law shows that consent of wali is not necessary for the contract of marriage.

1973 SCMR 189

Sardaran vs. Kushi Muhammad was the criminal appeal no 21 of 1973 and decided on 21st June 1973. A widow whose husband had died in an accident and she has aged more than 25 years with no child living in the house of her parents, did a marriage contract with B Mother and Father of a girl file a complaint of kidnapping, so the girl was recovered by police and handed over to parents, so habeas corpus petition filed against parents. The court on the statement of girl that she had contracted marriage and was living with her husband B of her own free will and also she was a widow and with the provision of Muhammadan Law she has complete right to get second marriage after the period of iddat, so her marriage will be legal or valid and according to the injunction of Islam and she was not bound to get permission from her father. (SCMR, 1973a) However in my opinion every sui juris woman must have her own free will to go his way.

PLD 1980 Lahore 350

Naila Afzal vs. Muhammad Ahmad was the criminal appeal no 78 of 1980 and decided on 12th April 1980, the court decided the petition in favor of the petitioner. She gets into a contract marriage with B and afterward the petition is filed. The High Court decided that the woman attains the age of 17 years or above and attain the age of puberty and she consented to live with her husband, her marriage will be legal or valid either she did not get the permission of marriage so that the court decides in favor of petitioner. (PLD, 1980) However, in my opinion regarding this case law is that the court cannot put restrictions on the woman who attains the age of puberty and sound mind or who can easily distinguish between the right and wrong path. Every court respects the consent of women, especially regarding marriage.

1995 MLD 1507

With reference to Muhammad Jahangir vs. Mst Samina case, the upper courts granted permission to the girl sui juris to follow her own will and declared marriage valid which get into the contract without

the consent of the woman. The court decided that the woman who attains the age of puberty and above the age of 16 years may get into the marriage with her own free will. High Court may decide in favor of the respondent and dismiss the petition respectively. (MLD, 1995) However, the court and statutory law of Pakistan strongly oppose the forced marriages of the woman so that no one can force any woman to get into the contract of marriage.

1973 SCMR 577

Mauj Hussain vs. Mst. Sharifa etc a girl living with her parents in their house and she escaped with her cousin B and got into a contract marriage with him. Her parents filed a FIR against the B for kidnapping her. Police recovered the girl and took her to court with her cousin and she gave her the statement to the court that B did not kidnap me. I myself escaped with my consent and signed marriage contract with B. Court after hearing both parties reached into the result that the girl is major in age and has attained the age of puberty, she has full rights to get into marriage with its own free will. Hence the petition was dismissed. (SCMR, 1973b) However, in my opinion of this case, the right to get free will or consent is the basic fundamental right of every citizen of Pakistan so that every woman must have free will and to do anything they want in the state. Hence a woman can get into the marriage with her consent and forced marriages are prohibited in Islam and statutory law of Pakistan.

Judgment of Ihsan-ul-Haq Chaudhry in Case Study of Hafiz Abdul Waheed vs. Asma Jahangir

The major thing regarding this judgment is that woman who attains the age of puberty or adult girl can marry anyone with her consent. However, in this case study, justice Ihsan-ul-Haq Chaudhry considered the three major issues regarding this case which are as follows:

- Parent's right of obedience is judicially enforceable or not?
- Is marriage a civil contract or not in Islam?
- Does Nikah validity depend upon consent of wali?

Brief Facts of the Case

Malik Muhammad Nawaz Advocate and Riaz-ul-Hassan Gillani advocate learned counsel for the petitioner suggested below mentioned valid reasons for Nikah.

- Consent of Wali and Bride is mandatory
- Two witnesses are compulsory for valid Nikah
- Welcoming with the consent of both spouses in the presence of girl's side witness.
- It is obligatory to every human being to respect his parents
- The contract of marriage is a civil contract because it is judicially enforceable
- Consent of wali is necessary for every contract of marriage

“The learned counsel for the respondents suggested in accordance to article 199 of the Pakistan's Constitution and in (section 491) of the Pakistan Penal Code, as well as some important Pakistani case laws. According to article 2 of Pakistan's Constitution, everyone has a fundamental right, according to the respondent's learned counsel. Normally, the courts have let the girl sui juris have her way. In the cases of various PLD judgments the courts allow the girl her own way.” (PLD, 1997)

Findings of Justice Ihsan-ul-Haq Chaudhry

Justice Ihsan-ul-Haq put forward his findings based on the aforementioned arguments that there are multiple Ahadiths which stated it so clearly children are born to serve and obey their parents in all

conditions It is burning question in the present age that such obedience can be enforced via courts or not. In this regard, the prolific precedent recounted by Hazrat Umar (R.Z.A), that marrying to a women whom he loved a lot but he married to a woman whom he loved, but, his father, had not approved that women and forced him to divorced but Hazrat Abdullah did not act upon the order. It is obvious from the preceding example that the obedience of the parents could be enforced through courts". (TAHIR, 2012). Marriage is a civil contract and enforce by the court to come with consent of wali which is legally mandatory for the girl to ensure the validity of this social contract.

It is therefore declared in the light of that Mst. Saima Waheed and Arshad case that marriage was not valid because of absence of Wali. It is witnessed that petitioner Mr. Waheed as well as Mst. Saima approached the honorable District court, Lahore to recount the evidences in the first half of judgement.

Judgment of Justice Malik Muhammad Qayyum

Despite hearing lengthy arguments from the learned counsel, he agreed with the respectable advocate, that we are not in need to start a disputed conversation on the subject because Federal Shariat Court, had already ruled a Muslim adult women can marry without the consent and approval of her wali.(PLD, 1981)

After hearing from both parties, Justice Malik Muhammad Qayyum issued judgement in which he only addressed the question about the consent of wali. This judgement is entitled to great respect because it issued from a high court, the Shariat Court, which was established specifically to deal with questions concerned the interpretation of Islamic principles. As a result, his claim that Nikkah was contracted without the consent of wali by an adult Muslim girl would be valid in the eye of law.

Judgment of Justice Khalil-ur-Rehman

Given the importance of the issues raised in this petition, he thought it appropriate to share his thoughts as well as my own decision and the reasons for it. The judge must decide whether a Nikkah marriage, secretly contracted by both parties on her own initiative and without the assistance of a wali, which is not valid under Islamic law. In his opinion, he made the following references from the Holy Quran:

"It is not fitting for a believer, man or woman when a matter has been decided by Allah and his Apostle to have any option about their decision. If any disobeys Allah and His Apostle, he is indeed clearly on a wrong path." (Sugiarto, Janhari, & Hotimah, 2021)

Similarly, the justice Khalil-ur-Rehman gives references from the Hadith which is as:

"Do not manhandle the females."(Siddiqui, 1976)

Similarly, quoted from Hadith of Holy Prophet (P.B.U.H) about the Women right:

"A woman is the leader of her husband's house and is also answerable for her acts concerning this rule."

Since the above-mentioned verses and Hadith, justice Khalil-ur-Rehman uncovered findings that Mst. Saima Waheed has the legal and religious liberty to stay wherever she wants.

Criticism on Above Mentioned Judgements

The above-mentioned judgements regarding the consent of wali in a contract of marriage are different in opinions. Mr. Justice Ihsan-ul-Haq gives importance to the obligations of parents and permission of wali in a contract of marriage. Every person is duty bound to perform their acts especially in case of marriage with permission of their respective parents and wali. But Islam gives social status to the women and gives a right to live freely with anyone whatever she wants. All above mentioned Holy Quran verses and Hadiths shows that women have right to get marry any person with his own free will. An adult and sound mind person has a right to sign social contract legally without permission of wali.

Legal Remedies Regarding Consent of Wali in Contract Marriage

Legal remedy is one of the best legal solutions to legal problems. When any person violates the rights of any person then the laws provide the legal remedy to that person. The following are the remedies available regarding the consent of wali in a contract marriage.

- Legal Remedies
- Civil Remedies
- Criminal Remedies

Now we shall discuss these remedies one by one and their role in the consent of wali regarding contract marriages by the woman.

Legal Remedies

In Article 2 of the fundamental rights of a citizen of Pakistan, shows the different constitutional remedies regarding the different rights of the individual. “The Constitution of Pakistan safeguards fundamental rights relevant in cases of intervention with the right to choose in matrimonial. Specifically, it assures the rights to safety of the law and life and liberty for citizens and non-citizens alike” (Choudhury, 1956). Furthermore, he suggested, “it acquires citizens the rights to freedom of movement equivalence before the law and equal protection of the law, nondiscrimination on the ground of gender and special measures for the defense of females and children” (Choudhury, 1956).

Civil Remedies regarding Consent of Wali

Under Muslim personal law, amendment in cases of intervention with prime of marriage is mainly available from the Family Court. A many civil court though rarely applied it, it was fruitful to avoid forced or child marriages, as well as injuries for any loss or grievance agonized in such cases through family court actions.

- File the civil suit in the Family Courts
- Claim the damages against injuries and claim maintenance
- Recovery of dower through the Family Courts
- Right to get Kula from the Court

Criminal Remedies Regarding the Consent of Wali

By applying the criminal procedure, we can file criminal cases against those persons who get into a marriage with the child or without the consent of a woman. By applying criminal proceedings, we can claim all kinds of rights regarding marriage and claim damages. The woman can punish those persons who get married with a child and put them behind bars if anyone does so. “Criminal remedies,

such as prosecution and punishment, are provided in Pakistan's statutory laws for various offences committed in the course of performances of intervention with marriage choice or threatened or actual forced marriages. They may also include other forms of protective relief, such as the release of anyone apprehended for this purpose, as well as compensation or disciplinary action” (Hossain & Turner, 2001).

Conclusion

Matrimony in Islam is always associated to the Sunnah of the Last Prophet (P.B.U.H). The parents or guardian or wali must marry their child with their free consent. If any woman or girl is adult, then according to the Hanafi School of thought she can marry anyone without the permission of wali even no Islamic provision and Constitution of Pakistan can stop any woman to get married to any other man. A case judgment shows that the petition against a woman that she cannot get married without the consent of wali or if she gets married then it will be void. The Court finds the three major issues that obedience of wali is judicially compulsory as marriage is a civil contract and the consent of wali is mandatory for a woman to get married. A many primitive case shows the consent is not necessary because the right of obedient of wali is not a fundamental right and marriages always shows the social contract in nature, so it will not bind any woman to get the consent of wali before getting married.

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