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Jurisprudence of Courts in Pakistan upon Validation of Marriages by Sui Juris Woman without the Consent of Walī

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Abstract

Family laws are an indispensable fragment of the legal system of Pakistan. However, there is no statute law in Pakistan regarding the issue of marriage by a *sui juris* woman without the consent of her *walī*. The validity given to such marriages, roots in the precedent laws. The absence of explicit statute laws in this regard has granted absolute authority to the judicial segment to 'create and interpret' rulings for the issue. The case laws dealing with such marriages maintain that such marriages are being validated on the jurisprudence of the Ḥanafī *fiqh*, which is the prevalent school of legal thought among Pakistani Muslims. However, the scrutiny of the classical Ḥanafī *fiqh* depicts that the courts of law have not taken its jurisprudence in holistic manner, rather they are only following it partially. The courts while adjudicating such cases neither pay any heed to the compliance of the pre-requisites of *kafā'ah* and *mahr al-mithl*, nor is the *walī's* right of annulment recognized. These, being the essential conditions attached to the validity of such marriages in the Ḥanafī *fiqh*, if not fulfilled, turn the marriages irregular. This research paper strives to canvass and sketch out the jurisprudence that the courts have developed while dealing with the validity status of the marriages held by adult Muslim women without their *walī's* consent. Thus, in pursuance of this purpose, the case laws, which are the fundamental essence of this jurisprudence are being scrutinized. The current research after critically evaluating and highlighting the inconsistencies and the gaps between the classical Ḥanafī rulings and the contemporary practices of Pakistani courts regarding this matter concludes that the *fiqhī* opinions must be implemented completely and not partially, to bridge the gap between both and to bring the current laws of adult

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woman marriage in better accordance with the true Ḥanafī law.

Keywords: *Sui Juris***,** Validity, Consent, Pakistani courts, adult woman, *Walī*, Irregular, Ḥanafī law, Guardian.

1. Introduction

Family laws are generally comprehended to be the laws that deal with the creation as well as removal of a legal family status, its consequences, and the physical and financial protection of the family members. The family laws of Pakistan also deal with the family matters and domestic relations including the capability and institution of marriage, all forms of its dissolution, dower, dowry, custody of children, inheritance etc. They are not only constituted through statutes; but the court decisions, ordinances and the provisions of the Federal and State enactments that have relevance with the family relationships and the rights, duties and finances attached to them are also the constituents of family laws in Pakistan.

Various acts have been enacted by the Pakistani legislature to regulate the legal issues of families but some of the matters have not been endorsed as statutes, thus are discussed in case laws and are hence applicable as precedents. Likewise, a cursory view of the Muslim family laws reveals that no statute law has been legislated concerning the marriage of an adult woman held without her guardian's consent. Nevertheless, a few case laws have conversed over this issue. One of them, commonly known as the Saima Waheed case, has been established as a precedent for validating such marriages. A profound analysis of the case laws relevant to the matter of validation of the marriage of *sui juris* woman without the consent of her *walī* shall tend to portray the inferences and rules set down by them. Further, their similarities and contradictions with the Islamic laws pertinent to the marriage of adult woman on her own shall also be clarified. However, it is noteworthy that the constitution has ousted the jurisdiction

of Federal Sharīʿat court with reference to scrutiny of the family laws that are contrary to the Islamic laws.[1] Therefore, the revealed inconsistencies can be proposed to be amended by the legislature itself.

The conduction of an in-depth study of the case laws that have developed the Jurisprudence of Pakistani courts on this issue shall assist in exploring the extent of coherence in the Courts' decisions, legal strength of the *ratio decidendi* on which the Courts' have based their decisions, status of validity of such marriages and level of compliance of such decisions with the actual *fiqhī* rulings (which the Courts claim to have followed while issuing their decisions in this regard). As the only existing law on this issue in Pakistan is the precedential law (developed from and consequently observed by the Courts of Pakistan), thus it is very crucial to analyze these case laws in order to examine the validity of such laws in the light of the *fiqhī* rulings, upon which they are professedly based.

The courts apparently claim to follow the Ḥanafī *fiqh* in their decisions, which opposing the majority schools of thought, validates the marriage contract of an adult virgin woman contracted without her guardian's consent. But this validation is restricted with certain conditions and is not absolute. If the pre-requisites of *kafā'ah* and *mahr al-mithl* are not incorporated in such a marriage, it is irregular (*fāsid*) and not irrevocable. In addition, the *walī* is vested with the right to annul such marriage by the Ḥanafī laws, but none of these have been taken into consideration by the Courts while rendering the judgements in this regard.

Consequently, the current paper asserts a crucial necessity for imposing certain limitations and conditions to the absolutely valid marriage contract of adult virgin woman, which the contracting parties must comply, if there is no consent of the guardian. It has been proposed that these

[1]As understood by the Article 203 B (c) of The Constitution of The Islamic Republic of Pakistan, 1973.

conditions must be enquired by the courts of law before validating such marriages, so that better accordance with the Ḥanafī law might be achieved. The enactment of an unequivocal statute in this regard or practical amendment in the precedential Pakistani family laws shall assure the mitigation of destructive effects of hasty and un-consented (mostly irregular) marriages and shall also help in bringing the laws in full compliance with the classical Ḥanafī law rather than adopting the condemnable "pick and choose" technique.

Before directly moving on to the scrutiny of the relevant case laws, it is quite essential to study the statutory laws regarding the contracting of marriage and its registration specifically. These laws are mentioned in the Muslim Family Laws Ordinance, 1961 with some relevant provisions in other acts. Therefore, firstly the procedure of execution and registration of marriage mentioned in the said ordinance shall be analyzed in order to get acquaintance of the initial formalities of marriage contract in Pakistan and its ceremonial conditions or requisites.

2. Registration of Marriage in Pakistan Family Law

Section 5 of the Muslim Family Laws Ordinance, 1961 deals with the registration of all the marriages that are solemnized under the Muslim law irrespective of being formalized by the *nikāḥ* registrar or anyone else. It has been declared by the Supreme Court in the Gardezi case that for the applicability of MFLO, 1961, it is not at all necessary that both the spouses must be Muslim citizens. According to the judgment, a marriage held between a Muslim Pakistani male and a non-citizen Muslim woman or even a non-Muslim woman would be dealt under the Muslim Family Laws Ordinance, 1961.[2] It has also been ruled in a case that the MFLO is applicable irrespective of the place of the execution of marriage.[3]

[2]Syed Ali Nawaz Gardezi v. Lt. Col. Muhammad Yusuf, PLD 1963 SC 51.
[3]Fazal Khitab v. Mst. Naheed Akhtar, PLD 1979 SC 864.

This is the only section relevant to the execution of marriage in the MFLO, 1961 and it does not mention any conditions or requisites for entering into the contract. The judges and commentators have however inferred various other rulings from the section. For instance, it has been established in a case law that the registration under section 5 of the MFLO, 1961 is absolutely necessary and non-registration of the marriage creates doubt in solemnization of the marriage.[4] Similarly, in another case, it was asserted that the non-production of *nikāḥ khawān* casts a serious doubt on the genuineness of the contract. Even if the *nikāḥ* registrar is present, but he has not complied with the requirements of the section 5, his eligibility of being a registrar would be in question. It was also affirmed in this case that the duty of the registrar is not to simply fill the columns of *nikāḥ nāmah*, but he has to be very prudent in satisfying all the requisites responsibly; as it is a very sacred and delicate matter, to which are attached very significant issues such that of succession, maintenance, dower legitimacy of children, divorce etc. Therefore, the *nikāḥ* registrar has to be sensible enough to enquire properly about the ages, competency and free will etc. of both the parties before authenticating the *nikāḥ*.[5]

Nevertheless, it is agreed upon by almost all the interpreters that the non-registration of marriage does not invalidate the marriage if it is proved to have taken place in accordance with the requirements of Islamic law. It only attracts penalty under section 5 (4) of MFLO, 1961 without invalidating the marriage.[6]

2.1 *Sharīʿah* Evaluation of Section 5 of the Muslim Family Laws Ordinance, 1961

[4]Dr. A.L.M Abdulla v. Rokeya Khatoon and Another, PLD 1969 Dacca 47.
[5]Syed Farman Ali v. Abid Ali and others, PLD 1995 Lahore 364.
[6]M. Farani, *Manual of Family Laws in Pakistan* (Lahore: Lahore Law Times Publication, 1985), 22.

The teachings of Islam strongly recommend the reduction of contracts and transactions into writing.[7] Marriage itself is also a contract, rather a more sacred and significant one. The Muslim jurists also consider the writing of marriage to be desirable.[8] Rationally, the conversion of marriage contract into written form is very essential as it involves a number of reciprocal obligations like maintenance, legality of children, inheritance and many others. The establishment of such accessory rights in the contemporary era requires documentary evidence, which can be presented only if the contract has been written down formally.

As far as the matter of registration is concerned, it is not obligated by the Holy Qurʾān or *sunnah*, but it is also not prohibited. So, it is noteworthy that the registration or non-registration of the *nikāḥ* does not affect its legality or validity. According to contemporary scholars, the formal deed of marriage contract, which is legally registered facilitates in solving complex issues of proof of marriage and various related problems whereas the absence of any documented evidence makes the proof of marriage cumbersome.[9] Some *'Ulamā'* of Pakistan had criticized considering of non-registration of marriage as an offence at the time when the MFLO, 1961 was freshly promulgated and some still do not deem it proper. But registration of marriage must be assumed to be a commendable act because Islam has permitted the state to enact laws regarding administrative matters which are not prohibited by *sharīʿah* and the enactment of which would curtail hazardous impacts on society. Islam emphasizes on the proliferation of such strategies by the state which shall minimize harm and chaos among the Muslims and regulate their mutual affairs in better way. The elevated number of cases of false allegations of

[7]Qurʾān, 2:281.

[8]Tanzil-Ur-Rahman, *A Code of Muslim Personal Law* (Karachi: Islamic Publishers, 1984), 88.

[9]Zeenat Shaukat Ali, *Marriage and Divorce in Islam, an Appraisal* (Bombay: Jaico Publishing House, 1987), 103.

zinā, claims of multiple husbands over one wife, denial of child's paternity etc. proves that non-registration of marriage has caused much difficulties and disputes among the citizens.

The Federal Sharīʿat Court has also vehemently advocated the requirement of registration of the marriage contract, while issuing its judgment after scrutinizing the repugnancy of certain sections of MFLO, 1961 to the Islamic injunctions.[10] The honorable court endorsed the same stance that section 5 can in no way be termed as un-Islamic or in contradiction with the Islamic laws. However, the non-registration would not amount to invalidity of the contract, if other *sharʿī* requirements are complied with.

As far as the registration of the marriage contracts held without the consent of *walī* is concerned, there is no check and balance held over such contracts while their registration. The requirements of *kafā'ah* are not ascertained and the *mahr al-mithl* is not investigated or verified. No conditions of validity, efficacy or irrevocability of the marriage contract are discussed or analyzed. The learned judge in one of the cases named Syed Farman Ali v. Abid Ali has urged the *nikāḥ* registrars to inquire about the parties before registration rather than just filling the columns of *nikāḥ nāmah*.[11] But the learned judge has only pointed to explore the matters of age, competency to understand the act and free will. The matters of equality, compatibility[12] and proportionate dower[13] are not highlighted by the judge, which are essential requisites of Ḥanafī law for the woman marrying in *sui juris* capacity without her guardian.

[10]Allah Rakha and others v. Federation of Pakistan, PLD 2000 FSC 1.

[11]Syed Farman Ali v. Abid Ali and others, PLD 1995 Lahore 364.

[12]Wahbah tuz-Zuhaylī, *Al-Aḥwāl al-Shakhṣīyyah*, (Syria: Dār Al Fikr, 1984), 7/186-192.

[13]Abū Al-Hassan Alī bin Abū Bakar bin ʿAbdul Jalīl Al-Marghainānī, *Al-Hidāyah*, (Riyāḍ: Al-Maktabah Al-Islāmīyyah), 1/202.

3. Analysis of *Nikāḥ Nāmah* Form of the Sui Juris Woman Marrying on her Own in Pakistan

The standard template of the Islamic marriage contract known as the *nikāḥ nāmah* is regularized for the marriage of Muslim citizens of Pakistan as per the rules number 8 and 10 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961. No different or altered *nikāḥ nāmah* is formed for the contract of *sui juris* women; rather the same two-page form is executed for all sorts of marriages. This Form comprises of almost 25 columns which require detailed information regarding the spouses, their paternity, addresses, dower details etc.[14] Although the signatures of the bride, her attorney, bridegroom or his attorney, the witnesses of marriage, the witnesses of appointment of bridegroom's attorney, the witnesses of appointment of bride's attorney, the *nikāḥ* registrar and the *nikāḥ khawān* are required but there is no specific column for the signature of the guardian or *walī* and no mention for the presence or absence of him.

The presence of the bride's attorney is required which can be anyone and not necessarily her guardian. Moreover, there is no restriction of the attorney being a person in blood relation or prohibited degree relation with the bride. This implies that the presence of guardian is not an essential requisite of the marriage contract in Pakistani law. This may not be a seriously objectionable issue as per the Ḥanafī *fiqh*, but the pre-requisites mentioned by Imām Abū Ḥanīfah for a marriage held without the guardian are also neither demanded nor checked by the *nikāḥ khawān* or *nikāḥ* registrar while the conduction of such marriage contracts. As known from the Ḥanafī *fiqh*, the absence of *kafā'ah* between spouses and dower less than *mahr al-mithl* cause irregularity in the *sui juris* woman's contract and the contract incurs grave consequences like that of being liable to get annulled

[14]The prescribed *Nikāḥ-Nāmah* form according to the Rules No. 8 and 10 of the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

at the instance of the guardian.[15] Ignoring such consequences and not paying heed to irregularity of the contract is an alarming flaw in the *nikāḥ nāmah* executed for such marriages. The *nikāḥ nāmah* has to be amended by keeping in view all the conditions and requisites of the Ḥanafī law; thus, adding the columns of the consent of guardian, *kafā'ah* and all its elements, *mahr al-mithl* and other necessary rudiments in order to bring it in compliance with the entire, and not partial, Ḥanafī law pertinent to this issue.

4. Case Laws Regarding the Marriage of a Sui Juris Woman without the Consent of Her Walī

The matter of entrance of a *sui juris* woman into a marriage contract without her guardian's consent in Pakistani law has been resolved almost by the case laws, as there exists no clear statute on this issue. An overview of the case laws recorded on this matter portrays that most of the decisions are in favor of the view that an adult woman can enter into a marriage contract without her guardian's consent. It is presumably claimed by the judges that such decisions are based on the Ḥanafī law of marriage. The profound analysis of the judgments reveals their compliance with the Ḥanafī law to be partial and not absolute and complete. Some of the case laws holding paramount status or establishing basic principles in this regard shall be discussed with brevity.

4.1 Muhammad Imtiaz and Another v. the State (PLD 1981 FSC 308)

Commonly known as the Muhammad Imtiaz case, it appears to be the first case filed on the issue of validity of the *nikāḥ* held by an adult woman without her guardian's permission. The case had first been filed in the Session court by the father of the girl, where the Additional Session Judge

[15]Muhammad Ṭāhir Manṣūrī, *Family Law in Islam (Theory and Application)* (Islamabad: Sharīʿah Academy, International Islamic University, Islamabad, 2012), 58-62.

convicted both the alleged spouses under section 10 (2) of the Zina (Enforcement of Hudood) Ordinance, 1979 and sentenced them with rigorous imprisonment, stripes and fine. Thus, an appeal was raised in the Federal Sharīʿat Court by the spouses against this judgment and the verdict of the Federal Sharīʿat Court is now considered to be the prevalent ruling of this case.

The facts of the case demonstrate that the father of Mst. Mohammad Jan lodged an FIR at the Police Station that her 18 years old virgin daughter was abducted by Muhammad Imtiaz along with taking off Rs. 50,000, some gold and other ornaments. The police arrested both the appellants of this case and got the woman examined by a lady doctor, who declared that she has been subjected to sexual intercourse.[16]

The father of the girl had shown her unmarried in the F.I.R but later at the Session Court, he along with some other witnesses manipulated the story by adding that he was an Afghan migrant and his daughter had already been married with his nephew in Afghanistan. However, the Session Judge did not give finding in the favor of this claim due to various reasons such as the claim being contrary to the F.I.R report's record and the migration from Afghanistan being doubtful according to the witnesses' statements furnished in defense.[17]

The Federal Sharīʿat Court approved the *nikāḥ nāmah* as it was properly recorded and registered as required by the Muslim Family Laws Ordinance, 1961. But the Session Judge had convicted and sentenced the appellants on the ground that the *nikāḥ nāmah* seemed to be a forged one. Moreover, the Session Judge also opined that even if it was assumed that the *nikāḥ nāmah* is genuine, yet the *nikāḥ* would be invalid because it was performed without the consent of Muhammad Jan's *walī*. The honorable

[16]Muhammad Imtiaz and Another v. the State, PLD 1981 FSC 308-309.
[17]Ibid, 310.

judges of the Federal Sharīʿat Court defied this view by giving arguments from the interpretations of various verses.[18] Several traditions were also quoted which show that the consent of an adult virgin for her *nikāḥ* validates the marriage.

The Ḥanafī view on this subject was also clarified by the learned judge from the book Tabyān al-Ḥaqāʾiq which is the commentary of Kanz al-Daqāʾiq. It declared that the *nikāḥ* of an adult woman is permitted and effective according to Abū Ḥanīfah. The author of the book has also mentioned the viewpoints and arguments of Imām Mālik and Shāfiʿī as well and then argued that the traditions highlighted by them for supporting the invalidity of such a marriage are weak and not authentic.[19]

The learned judge also gave reference of *al-Mabsūṭ* by Sarakhsī and pointed out that Imām Abū Ḥanīfah has deduced from various traditions and occasions that the *nikāḥ* of both a virgin or deflowered woman without the intervention of *walī* but with the free will of the bride, is valid. However, if the male is of unequal status, then the guardians have the right of objection and can get it annulled through the *qāḍī*.[20]

Apart from these, the learned judge has referred to many other books depicting the Ḥanafī law on this issue. Finally, the verdict expressed that the Session Judge was wrong in invalidating the marriage. Furthermore, it was also asserted that if a man and woman marry in good faith and believe themselves to be married, then they should receive the benefit of doubt. Hence, the appellants were acquitted.

4.1.1 Analysis of the Case Law in the Light of *Sharīʿah*

The learned judge of the Federal Sharīʿat Court has undoubtedly given a well-researched judgment and has examined various aspects of the case in

[18]Qurʾān, 2:231; 2:229.

[19]Fakhar ud-Dīn Al-Zaylʿī, *Tabyān al-Ḥaqāʾiq Sharḥ Kanz Al-Daqāʾiq* (Cairo: Al-Maṭbaʿah Al-Kubrā al-Amīrīyyah, 1895), 2/117.

[20]Muhammad Imtiaz and Another v. the State, PLD 1981 FSC 308, 314.

a scholarly manner. The requisites of equality and appropriate dower have also been highlighted while mentioning various paragraphs from certain Ḥanafī books. But while deciding the case, no heed was paid to these requisites of marriage which are deemed very significant in the Ḥanafī School, in the context of the marriage conducted without the *walī's* permission. Even in some opinions of the Ḥanafī scholars, if the marriage held without guardian's permission is such that the man is not equal in status to the woman or the dower settled is inappropriate, it would be an invalid marriage. Those who do not invalidate such marriage altogether, they also declare it to be irregular and exposed to annulment by the guardian[21].

The learned judge has not emphasized upon these pre-requisites. While issuing the verdict of the case, neither the equality of spouses was evaluated, nor was notice of the appropriate dower taken. Despite the fact that the guardian was objecting upon the marriage, he was not acquainted about his right of getting the contract annulled if there were grounds of inequality between spouses or lesser dower. Hence, the marriage was validated completely only on the ground that the wife and husband had consented upon that. The honorable judge would have set a stronger and a more Sharīʿah-attuned precedent if the decision would have incorporated all the aspects of validity, irrevocability and enforceability of the contract.

4.2 Arif Hussain and Azra Parveen v. The State (PLD 1982 FSC 42)

This was another suit which was instituted in relevance to the issue of validity of a *nikāḥ* conducted without *walī's* permission. It was also originally filed in 1981 but the judgment of the Additional Session Judge was appealed by the aggrieved spouses in the Federal Sharīʿat Court. The Additional Session Judge had convicted and punished the appellants with

[21]Muḥammad bin Aḥmad bin Abū Sahl al-Sarakhsī, *Al-Mabsūṭ* (Beirut: Dār al-Maʿrifah, 1993), 5/13.

rigorous imprisonment, stripes and fine under section 10 of the Zina Ordinance, 1979.

The brief facts of the case are recorded to be that Barkat Ali complained in the court that his daughter was kidnapped by Arif Hussain and she is residing with him since one and half years. He alleged that they both have been committing *zinā* during this period and a girl has also been born to them.[22] Furthermore, the complainant also claimed that he has no knowledge of the *nikāḥ* held between the spouses and even if they have contracted any *nikāḥ*, it is invalid and unacceptable as it is conducted without his permission.

On the other hand, Arif Hussain denied all the allegations put on by the prosecution and its witnesses and asserted that he was legally married to Azra Parveen. He also stated that Azra's father had taken Rs. 10,000 from him and had promised to marry his daughter with him. Similarly, Azra also refuted the allegations and stated that her parents themselves had married her to Arif.[23]

After listening to both the parties and their witnesses and examining the records carefully, the honorable judges of the Federal Sharīʿat Court declared that there were no eye or trustworthy witnesses to the kidnapping and *zinā* of the accused spouses. The allegation of *zinā* can only be proved if some undeniable evidence is presented about the absence of *nikāḥ* between both, but no such thing could be brought on record which would suffice the denial of *nikāḥ* between them. The learned judges asserted that the appellants have admitted their *nikāḥ* to be legal and valid; and it is established in *fiqh* that if husband and wife affirm the conduction of *nikāḥ* between them and verify it, then it is a sufficient proof of existence of *nikāḥ* between them. They referred to Fatāwā-e-Qāḍī Khān, Fatāwā-e-ʿĀlamgīrī

[22]Arif Hussain and Azra Parveen v. The State, PLD 1982 FSC 42, 44.
[23]Ibid, 45.

and other books where it was mentioned that the *nikāḥ* is proved by the mutual verification of the spouses. It was said that as the *fuqahāʾ* have declared that *nikāḥ* can be proved by mutual verification, it means that the *qāḍī* or judge can consider the existence of valid *nikāḥ* and decide an issue according to it on the basis of mutual verification of the spouses. [24]

The honorable judges declared that in the matter at hand, they can rightly implement this rule of *fuqahāʾ* and hence for declaring the valid establishment of marriage contract between Arif and Azra, the proof of mutual verification of both is enough; especially when the *nikāḥ khawān* has also testified it. It was further explained that the Session Judge punished the appellants on the ground that they did not produce the *nikāḥ-nāmah*, but according to the judges of Federal Sharīʿat Court, this reason was not enough to prove the allegation against them. They asserted that neither the registration of *nikāḥ* is an essential condition of validity of *nikāḥ* in *sharīʿah*, nor does the MFLO, 1961 declare an unregistered *nikāḥ* to be invalid. Moreover, irrelevancy of the requirements of articles 91 and 92 of the Qanun-e-Shahadat Order, 1984 to writing of *nikāḥ* has been argued. The judges also declared that even if no written record of *nikāḥ* was provided and no witnesses of it were presented, yet the *nikāḥ* is validated merely on basis of the affirmation of spouses. They said that the witnesses were not required to prove the *nikāḥ*. Hence, the verdict was delivered in favor of the appellants by considering their *nikāḥ* conducted and valid; only on the basis of the statements given by both of them.[25]

4.2.1 Sharīʿah Evaluation of the Case

The judgment given by the Federal Sharīʿat Court in this case seemed to be deficient in *fiqhī* and legal arguments. It has neither covered all the aspects of the issue, nor has it entailed all the elements and conditions necessary for

[24]Arif Hussain and Azra Parveen v. The State, PLD 1982 FSC 42, 46.
[25]Ibid., 47.

a valid marriage. The learned judges have ignored all the essentials and constituents of formation, validity, efficacy, and irrevocability of a marriage contract. They also overlooked the requisites of formation of a marriage contract upon which all the *fuqahāʾ* have consensus. They only chose to pick one statement mentioned in a few books to decide the whole critical matter; and disregarded the context in which it was issued.

The case was being set as a precedent for the coming cases, but it was negligently handled. The mutual verification of the spouses is a proof of *nikāḥ* but it is not a source of forming a *nikāḥ*. It is mentioned in *Radd al-Muḥtār* that this statement actually meant that the *qāḍī* can decide the related matters by accepting the mutual verification of the spouses.[26] Hence, it meant that the ancillary matters can be decided after the mutual verification of both. But where the marriage itself is in question, how could mere oral verification of spouses be taken as the only evidence to prove it? If this could be set as a principle that mere confirmation of the man and woman claiming to be husband and wife is sufficient to prove existence of *nikāḥ* between them; what would be the need of witnesses in marriage, the guardian's presence, the condition of announcement among people, writing of the contract and other provisos? This established rule would lead to devastating consequences and highly ambiguous situations. Any couple who would even maintain illicit relation would take advantage of the cover of mutual confirmation of their marriage and would be declared husband and wife without any other proof. This decision is also highly vulnerable to become a source of promoting false marriages, protecting extra marital affairs, claiming rights on divorced women and much more.

Furthermore, the judge has neither taken the notion of guardian's consent into account, nor the elements of equality and appropriate dower

[26]Ibn ʿĀbidīn, *Radd al-Muḥtār ʿalā Al-Durr al-Mukhtār* (Maktabah wa Maṭbaʿ Muṣṭafā al-Bābī al-Ḥalabī, 1966), 2/13.

are paid any regard. The whole judgment is based only on one statement; the context and interpretation of which is manipulated to bring it within the ambit of the situation at hand. Mere mutual confirmation of the spouses can be a source of waiving the *ḥadd* punishment for them, but not for validating the formation of their marriage.

4.3 Hafiz Abdul Waheed v. Asma Jehangir and Another (PLD 1997 Lahore 301)

Commonly known as the Saima Waheed Case, this case has been granted highest significance in the context of permissibility of a *sui juris* woman to marry without her *walī's* consent. Although it succeeds the above-mentioned cases but its prominence is due to being discussed at length and being decided by the High Court. The jurisdiction of the Federal Sharīʿat Courts has been controversial in personal laws, so their binding nature is weaker; whereas the binding nature of the precedents set by the High Courts is stronger. Hence, this judgment is considered to be a landmark judgment in the revolutionary right of women to marry independently.

The brief facts of the case are ascertained to be that Mst. Saima Waheed, a student of 4th year, had allegedly contracted marriage with Muhammad Arshad who was the tutor of his brother. After a few days, Saima's father came to know about the marriage and he approached Arshad's father and other family members. The *nikāḥ-nāmah* was returned to him with a note that no *nikāḥ* subsists or was performed. Saima continued to live with her father until after about a month, she was allegedly abducted. After two days, her family came to know that she was detained by Arshad. After negotiations, the release could not be obtained. Hence, the father of Saima lodged a suit for her recovery and declaration of unlawful marriage.[27]

[27]Hafiz Abdul Waheed v. Asma Jehangir and Another, PLD 1997 Lahore 301, 313.

The learned Counsel for Mr. Waheed asserted that a virgin girl if steps out of her house without her parent's consent, can be asked to return. He also argued that the *nikāḥ* conducted without guardian's consent is not valid. He presented various commands of the Prophet (Peace be Upon Him) in this regard.[28] He also claimed that the judgment of Federal Sharīʿat Court in Muhammad Imtiaz case is not binding on this court because it was given in an appeal, which was directed against the verdict of Additional Session Judge. He criticized the judgment of Federal Sharīʿat court in that case stating that it was based on certain written papers and had no authentic foundation. Other arguments on un-Islamic nature of runaway marriages and necessity of guardian's consent in virgin woman's marriage were put forth.

On the other hand, the learned Counsel for respondents gave arguments on the liberty of adult girl to marry, according to the Ḥanafīs. He also argued that the judgment of the Federal Sharīʿat court is binding on the High Court, by referring to articles 203-A, 203-DD and 203-GG of the Constitution of the Islamic Republic of Pakistan, 1973. The counsel also cited a number of verses and *aḥadīth* that supported the validity of the marriage of a male and female without the intervention of the *walī*.[29]

The judges also conversed in detail about the significance of family, standards of dignity, duties of children and parents, western norms and consequences of lack of family institution, significance and nature of *nikāḥ*, ingredients of institution of *nikāḥ* etc. While mentioning the ingredients of the marriage contract, it was also discussed that Imām Abū Ḥanīfah held the view that for a valid *nikāḥ*, consent of *walī* is not necessary. After giving details from both sides of the contention, one of the honorable judges asserted that the judges are not debarred from giving opinions in matters

[28] Ibid., 316.
[29] Ibid., 301, 322.

that have ambiguity and upon which no clear ruling of Qurʾān and *sunnah* is found.[30]

It was also concluded that the decision of Federal Sharīʿat Court given in appellate jurisdiction is not binding on the High Court.[31] After giving opinions on rights and duties of parents and children at length, it was also demonstrated by one of the honorable judges that Muhammad Imtiaz's case proceeded on inaccurate authorities and was declared not to be a good law.[32] Pre-marital and extra-marital liaisons were condemned severely.[33] The concepts of *kafā'ah* and *mahr al-mithl* were also discussed.[34]

Finally, the majority of the judges of the court decided that the marriage in question, that was contracted without the consent of the *walī* is not invalid and Saima could not be deemed to be in an illegal custody as she is residing there with her own will. By giving the liberty of marriage and liberty of residence to Saima, the Court disposed the cases filed by her father and declared all the sought reliefs to be infructuous.[35]

4.3.1 Critical Analysis of the Judgment in the Light of *Sharīʿah*

The judgment of Saima Waheed case holds a prominent position in the Family Laws of Pakistan regarding the marriage of a *sui juris* woman. Although it is a detailed and lengthy judgment, but its keen study reveals that it contains a lot of immaterial and superfluous discourse. An overall view could be summarized to state that it is an unnecessarily prolonged judgment consisting of irrelevant details, emotional arguments and morality-based urgings.

Judge Ihsan-ul-Haq's judgment in this case was considered to be the minority judgment. He declared the marriage of an adult woman without

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[30]Ibid, 343.
[31]Hafiz Abdul Waheed v. Asma Jehangir and Another, PLD 1997 Lahore, 346.
[32]Ibid, 376.
[33]Ibid, 383.
[34]Ibid, 377.
[35]Hafiz Abdul Waheed v. Asma Jehangir and Another, PLD 1997 Lahore, 384.

legal guardian's consent to be invalid. His arguments were based on extracts from books of morality and religion. He discussed the importance of preservation of family, elevated status of mother and unity of families, which was not at all relevant in convincing the invalidity of an adult woman's marriage without *wali's* consent. He also conversed about the moral decline of the West. Quoting the article from the Reader's Digest and the saying of General Colin Powell did not make any sense in the judgment of a purely Pakistani case. It only described the deterioration of American society and its evils. Evaluation of number of unwed mothers and illegitimate children in America had no connection with the impugned Pakistani case of validity of marriage.

Ignorance of the relevant arguments from *sharīʿah* laws and taking judicial notice of the statistics of divorce rates and number of single parents in Britain, compels in being skeptical about the firmness of the judgment. It portrays the lack of focus on the main issue and protracting the judgment with un-required efforts. Judge Ihsan-ul-Haq tried to prove that marriage was not a civil contract and the concept was wrongly adopted from the British rule of sub-continent and the developed English law of marriage.

Muslim Family Laws Ordinance, 1961 does not require *walī's* consent for a valid marriage. But Justice Haq inferred that the provision for mentioning the bride's *wakīl's* name in *nikāḥ-nāmah* connotes the fact that the female should not appear in the assembly herself, rather her guardian should conduct her *nikāḥ*. This inference that the *wakīl* should necessarily be a *maḥram* of her, cannot be held accurate because there is no any clear evidence in Islamic injunctions that the *wakīl* must be the *walī*. Hence, there are many flaws in his judgment.

On the other hand, the judgment of the majority judges is also arguable as much as its compliance with the *sharʿī* rulings is concerned. Justice Muhammad Qayyum just gave arguments to uphold the judgment of

the Federal Sharīʿat Court in the Imtiaz case and declared in a single statement that the *nikāḥ* contracted by a *sui juris* girl without her guardian's consent is valid. He neither gave any evidences for that, nor mentioned the Ḥanafī *fiqh* over it.

Justice Khalil-ur-Rehman Ramaday discussed the theme of the moral decline of the West and rights of women etc. And while discussing the status of women in Islam, he unnecessarily mentioned the details of Greek mythology, the true meaning of Aphrodite, Roman culture, Israeli women and the practices of England and America regarding women rights. Moreover, many verses of various chapters of the Holy Qurʾān were quoted out of the context. However, he spared few words for mentioning the notion of *kafā'ah* and *mahr al-mithl*, but in his decree he paid no regard to these requirements. The order decreed simply validated Saima's marriage and no certain *ratio decidendi* could be extracted. The marriage was validated absolutely, without evaluating the *kafā'ah* standards, without calculating the *mahr al-mithl* and without declaring any right of annulment to the guardian. The claim of following the Ḥanafī *fiqh* was just specious. This judgment granted absolute and unconditional validity to the marriages conducted by women without their guardians. It not only is an un-compliant judgment but also a doorway to much social turmoil.

4.4 Other Miscellaneous Cases on this Issue

There are a number of other cases on the issue of the marriage conducted without guardian, which followed the above-mentioned cases. But the fact remains that no strict rule has been followed in the cases, rather a new dimension has been given to the rulings in almost each case. Like Muhammad Ramzan v. State was argued 2-3 years later than the Imtiaz case and the Arif Hussain case.[36] It opposed the judgment of the Arif Hussain

[36]Muhammad Ramzan v. State, PLD 1984 FSC 93.

case and stated that the mutual confirmation of the man and woman about their *nikāḥ* can only waive *ḥadd* punishment from them and it cannot be a proof of the conduction of *nikāḥ.* It was ruled that only their mutual confirmation will not be enough evidence to prove the conduction of their *nikāḥ*, if there exist other circumstantial evidences which oppose its conduction.

On the contrary, in a much later case with almost the same facts, the *nikāḥ* itself was considered to be doubtful in spite of the presence of *nikāḥ-nāmah*. The reasons given were that it was not made public and apparently seemed not to be in interest of the girl.[37]

In another case, it was established that the marriage contracted by a girl on her on accord, who has not attained the age of majority, but has attained puberty is valid and not void.[38]

These are a few instances out of the many cases on this issue. Almost each case has come up with different rulings but generally the marriage of *sui juris* woman without her guardian's consent is declared to be valid. It is noteworthy that no judgment has incorporated the elements of *kafā'ah* and *mahr al-mithl* in the grounds of their judgement. No verdict has evaluated these elements which have a very significant place in the Ḥanafī School; the only school of thought which allows such marriages.

5. Conclusion

After thorough research and analysis on the *fiqhī* rulings, statutes and precedents on the marriage contracted by an adult woman without her *walī's* consent, it is therefore concluded that there exists considerable disparity between the actual *sharʿī* principles in this regard and their claimed implementation in the Pakistani Muslim Family laws.

[37]Syed Farman Ali v. Abid Ali, PLD 1995 Lahore 364.

[38]Mst. Hajra Khatoon and Another v. Station House Officer, Police Station Fateh Jang, District Attock and two others, PLD 2005 Lahore 316.

The statutory family laws of Pakistan do not integrate any concrete laws on the marriage contracted by an adult woman without her guardian's permission. The only provision, which can be said to have relevance with this issue is the section 5 of the MFLO, 1961, which necessitates a formal *nikāḥ-nāmah* and its registration for all sorts of marriages. The analysis of the common *nikāḥ-nāmah* for all sorts of marriages depicts that there is no requirement of the presence of the guardian of a woman in the *nikāḥ* conduction. The *nikāḥ-nāmah* also does not incorporate any columns regarding the assessment of *kafā'ah* and *mahr al-mithl*.

The only laws in Pakistan regarding the marriage of an adult Muslim woman held on her own accord are the case laws or the precedential laws. The study of the case laws reveals that in general, the marriage contracted by an adult woman without her guardian's consent, may she be a virgin or deflowered is valid and not void. The case laws have yielded various rulings while decreeing the cases on this issue. But it is quite astonishing that despite of being well furnished with the *fiqhī* rulings and regardless of the claim of applying the Ḥanafī law in these cases, the learned judges have ignored the notions of *kafā'ah* and *mahr al-mithl* in entirety. No judgement has been based on these two essential requisites, hence leaving such marriages prone to annulment or *faskh* due to their irregularity.

As it has been established that the Ḥanafī School is the only school, which allows such marriages but with certain conditions, whereas the majority declares them absolutely void; the judges must had been very cautious in its implementation in entire terms. The practice of pick and choose in *sharʿī* rulings is not only deplorable but also very likely to increase perilous impacts on the Muslim society and its legal structure. The current jurisprudence which has been developed by the Pakistani courts on this issue is not only incoherent and ambiguous, but also lacks rational stability and referential compliance and authenticity. It is therefore

extremely indispensable to add the procedure of scrutiny of *kafā'ah* and *mahr al-mithl* in the contracts of marriages conducted without the permission of the girl's guardian to ascertain their validity and irrevocability. The judges can act as *mujtahids* in this regard if the legislature furnishes a comprehensive, explicit and coherent enactment on this issue. Unless such a reform is assured in the present laws, the precedential laws in this regard cannot be said to be in complete accordance with the Ḥanafī laws.

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