



SAWĀRA MARRIAGES AND RELATED LEGAL ISSUES

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Abstract

Vanī or Sawāra is a custom in which girls are given and taken in lieu of blood in the case of murder. This practice is prevalent in many parts of Pakistan. According to this custom a girl, who in most cases is a minor, from the murderer's family is given in marriage to a man from the victim's family to settle the dispute. This paper argues that sawāra marriages are un-Islamic and against the welfare of the child. The paper aims to discuss the concept and the rules regarding sawāra marriages in Islamic law as well as in Pakistani law. The issues of validity of a child marriage, the role of guardian and the importance of consent of the girl are discussed. Important cases are discussed to consider the approach of Pakistani courts in deciding issues regarding such marriages. The article deals with the Sunnī view due to it being the law that the majority of Pakistani Muslims follow. Four Sunnī schools namely the Hanafīs, Mālikīs, Shāf'īs and Hanbalīs are discussed.

Key words: *Vanī*, Child Marriage, Option of Puberty, Guardian, *Badl-e-Sulh*.

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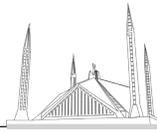
Introduction

Vanī or Sawāra¹ is a custom in which girls are given and taken in lieu of blood in the case of murder. In such cases, the girl belongs to the murderer's family -usually the murderer's sister or daughter- and mostly is a minor. In this custom, the girl is given to the family of deceased as a result of compromise between the murderer's family and the victim's family and the murderer does not get any punishment. This practice is prevalent in rural areas of Pakistan and is affecting a great number of people. This custom is called *sawāra* among *pathāns* whereas in Punjab and Sindh it is termed as *vanī*. In this paper relevant provisions of Islamic law and Pakistani law will be taken into consideration to see whether this practice is in accordance with these laws or not. There are several issues which are related to such marriages. Usually, *vanī* and *sawāra* marriages are child marriages in which the bride is a minor. The article will discuss the concept and the rules regarding child marriages in Islamic as well as Pakistani law. The guardian's role in such marriages and the options available to such a child will also be discussed. The article will discuss the importance of consent of the girl if she is a major and the guardian's role in her marriage. At the end such a compromise/settlement in which a girl is taken or given in lieu of murder will be discussed from the point of view of the Islamic concept of justice.

Child Marriage

In Islamic law the age of marriage is puberty² but child marriages are valid if

- 1 Incidents of *vanī* and *sawāra* are quite often reported in the national press of Pakistan. See www.jang.com.pk/jang/jun2012-daily/01-06-2012/u108745.htm and www.dawn.com/2012/03/16/two-girls-saved-from-vani, last visited 4th November 2012.
- 2 Muslim jurists fixed a particular age of majority in the case there is no proof of puberty. This age is different according to different jurists. According to Abū Hanīfah it is eighteen years for a boy and seventeen years for a girl. In another tradition Abū Hanīfah presumes puberty of a boy on his completion of nineteen years. There are two reports associated to Mālik. According to one report the age of majority in the case of absence of proof of puberty is fifteen years and according to the second report in such case the age of majority will be eighteen years for both sexes. According to Abū Yūsuf and Shaibānī minority ceases at the completion of the fifteenth year. Imam Shāfī and Hanbali jurists also agree with them. Zāhirīs do not fix any particular age in this case. See Dayāb Abdul Jawād 'Attā, *Arkān-al-Hukm*, (Cairo: Dār-al-Adabā, 1980), 158. ; Muhammad Mustafā Shalabī, *Abkām-al- Ushrah fil Islām*, (Beirut: Dār-



contracted by the legal guardian. The guardianship of marriage belongs to the father.³ He can marry off his minor children -both male and female- provided that the marriage is not against the interests of the child. There is a saying of Prophet Muhammad (P.B.U.H) *‘There is no nikāh (marriage) except by (means of) a guardian.’*⁴ The authority of a guardian to marry off his ward is based on this prophetic report.⁵ The majority of jurists including the *Hanafīs*, *Mālikīs*, *Shāfīs* and *Hanbalīs* agree on lawfulness of the marriage of a minor contracted by the guardian. Their agreement is based on the marriage of Prophet Muhammad (P.B.U.H) to *Āishah* during her minority which was contracted by her father as her guardian.⁶ These jurists rely on the following verse of the *Qur’ān* as indicating validity of a child marriage: *‘Such of your women as have passed the age of monthly courses for them the prescribed period, if ye have any doubt, is three months, and for those who have no courses it is the same.’*⁷ In this verse, the waiting period⁸ for a

al-Nahdah Al-‘Arabiyah, 1973), 780-781.; Sālih Jum’a Hasan Al-Jubūrī, *Al-Wilāyah ‘Alā Nafsi fī Shari‘ah Al-Islāmiyah wa Al-Qānūn*, (Baghdad: Mu’assasah Al-Risālah, 1986), 368-370; A. D. Ajjola and S. M. Madnī Abbāsī, *Introduction to Islamic Law*, (New Delhi: International Islamic Publishers, 1989), 105.; K. N. Ahmed, *The Muslim Law of Divorce*, (Islamabad: The Islamic Research Institute, 1972), 913.; Abi Zakariyā Yahyā ibn Sharaf Al-Nawawī, *Rowdhab-al-Tālibin*, (Beirut: Dār-al-Kutb Al-‘Ilmiyah, 2000), Vol. 3, 411-412.; Burhān-al-Dīn Abi Al-Hasan Marghīnānī, *The Hedāya: Commentary on the Islamic laws*, Charles Hamilton (Translator), (New Delhi: KitābBhavan, 1870), 529. ; Fakhr Al-Dīn ‘Uthmān ibn ‘Alī Al-Zailī, *Tabyīn Al-Haqāiq Sharh Kanz Al-Daqāiq ma’a Hashbiyah Al-Shalabi*, (Beirut: Dar-al-Kutb Al-‘Ilmiyah, 2000), Vol. 2, 275-277.

- 3 In the case of disqualification or death of the father guardianship passes to other relatives. It will be discussed later.
- 4 Mansūr ibn Yūnas ibn Idrīs Al-Buhūtī, *Kashāf al-Qanā’ an Matn al-Iqnā’*, (Riyadh: Maktabah Al-Nasr Al-Hadithah), Edited and Revised by H. M. M. Hilāl, Vol. 5, 48.
- 5 Abī Muhammad ‘Abdullah ibn Ahmad ibn Qudāmah, *Al-Mughnī wa al-Sharh al-Kabīr ‘ala Matn al-Muqni’ fī Fiqh Imām Ahmad bin Hanbal*, (Beirut: Dār-al-Fikr, 1984), Vol. 7, 337-339.
- 6 Abī Bakr Muhammad ibn Ahmad ibn Abi Sahl Al-Sarkhasī, *Kitāb-al-Mabsūt*, (Beirut: Dār-al-Kutb Al-‘Ilmiyah, 2001), Vol. 5, 235-237.; Abī Al-Walid Muhammad ibn Ahmad ibn Rushd, *Bidāyat-al-Mujtabid* translated as *The Distinguished Jurist’s Primer*, (Translator: Imrān Ahsan Khān Nyāzee), (Reading: Garnet Publishing: 1994-1996), Vol. 2, 6.
- 7 Q 65:4. The English translation of the Qur’ān used for this work is by Abdullah Yusuf ‘Alī, *The Meaning of the Holy Quran*, (Beltsville: Amana Publications, 1997).
- 8 A Muslim woman is supposed to observe a waiting period of three menstrual cycles if her

woman who has no menstrual courses is given which includes an old woman whose menstruation has stopped and the woman whose menstruation has not started due to minority. It implies that marriage of a minor is valid that is the reason that the waiting period for her is given in the *Qur'ān*.⁹ The jurists also rely on the following verse of the *Qur'ān*: *'Marry those among you who are single (aiyim) or the virtuous ones among your slaves, male or female'*.¹⁰ In this verse, the word 'aiyim' is used which means an unmarried female whether a minor or a major.¹¹ Consensus of companions of the Prophet (P.B.U.H) is also reported on validity of child marriage. Marriage of minors was practiced by companions including 'Alī, 'Umar and 'Abdullah ibn 'Umar. According to the *Shāfi'is* and a tradition of *Hanbalīs*, the guardian can marry off a minor girl only if she is a virgin. In the case of a non-virgin minor no one has authority to marry her off. Such a minor will make decision regarding her marriage herself after puberty.¹²

Ibn Shubramah, *Uthmān Al-Battī* and *Abu Bakr al-Āsim* disagree with the majority of jurists. These jurists consider child marriage void. They based their opinion on the following verse of the *Qur'ān* in which Allah says *'make trial of orphans until they reach the age of marriage then if ye find sound judgment in them, release their property to them'*.¹³ According to them the marriage of a minor is against this verse and if such a marriage would be valid there was no point in revelation of this verse. Opinion of the majority of jurists regarding this verse is that it does not say that

marriage is dissolved by divorce and four months and ten days in the case of the death of her husband. She is not allowed to remarry during this period. The purpose behind this rule is to make sure that the woman is pregnant or not. In the case of pregnancy the child belongs to the ex-husband of the woman.

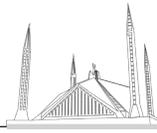
9 Shalabi, 1973, 127; Tanzil-ur-Rahmān, *A Code of Muslim Personal Law*, (Karachi: Islamic Publishers, 1978), 184-185.

10 Q24:32.

11 'Abdullah Yūsuf 'Alī translated the word 'aiyim' as a woman not in the bond of wedlock which includes an unmarried, divorced or widowed woman'. Abdullah Yūsuf 'Alī, *The Meaning of the Holy Quran*, (Beltsville: Amana Publications, 1997), 874.

12 Al-Jubūrī, 1986, 51-53; Muhammad Jawwad Mughniyah, *Al-Fiqh 'ala Al-Madbāhib Al-Khamsah: Al-Ja'fari, Al-Hanafi, Al-Mālikī, Al-Shāfi, Al-Hanbali*, (Beirut: Dār-al-'Ilm lil Malayin, 1977), Ed. 5th, 322.

13 Q4: 6.



marriage of a minor is invalid. This verse only asks for return of property to the minor at puberty. Another argument against child marriage is that the purpose of marriage is procreation of children and fulfillment of sexual desire which cannot be attained in a child marriage. As far as *‘Āishah’s* marriage to Prophet Muhammad (P.B.U.H) is concerned, according to these three jurists it was a special case which was only allowed for the Prophet. They argue that Muslim marriage (*nikāh*) cannot be implemented till the minor exercises the option of puberty and decides about his/her marriage so there is no point in marriage before puberty.¹⁴

Authority of a Marriage Guardian

If the girl is a minor, the guardian has authority to contract her marriage; this is called *wilāyat-al-jabr* but this authority of guardian is subject to some restrictions.¹⁵ This authority of *wilāyat-al-jabr* ceases when the minor attains puberty. The jurists agree that the father has authority to marry off a minor. For other relatives there is difference of opinion. According to *Abū Hanīfah*, all guardians can marry off a minor whereas *Abū Yūsuf* and *Shaibānī* are of the opinion that only agnates have this authority. *Hanafīs* give this authority to guardians other than the father and the grandfather as in some situations the minor may be in need of such arrangement if there are less chances of his/her getting a suitable match later. According to the *Mālikīs*, guardianship of marriage vests in the father and his executor only. The *Shāfīs* give this authority to the father and the grandfather and the *Hanbalīs* agree with them except that they give authority to marry off a minor to the executor if this authority is specifically vested in him by the father. They give this authority to the grandfather as according to the *Shāfīs* and *Hanbalīs* he is like a father in his love and care for the child and has authority over property of the minor as well.¹⁶ As far as the authority of a judge is concerned, he cannot

14 Al-Sarakhsī, 2001, Vol. 4, 235-237; Al-Jubūrī, 1986, 53-55, 57; Rahmān, 1978, 184-186; Ibn Rushd, 1994-1996, Vol. 2, 6; Shalabī, 1973, 127.

15 Muhammad Abū Zahrah, *Al-Abwāl Al-Shakhsīyah*, (Cairo: Dār-al-Fikr Al-‘Arabī, 1957), 107.

16 Al-Zail‘ī, 2000, Vol. 2, 503-504; Muhammad Abū Zahrah, *Al-Wilāyah ‘alā Al-Nafs*, (Ma‘had Al-Dirāsāt Al-‘Arabīyah Al-‘Āliyah, 1966), 174.-177.; Abī Bakr Ahmad ibn ‘Alī Al-Rāzī Al-Jassās, *Abkām-al-Qur‘ān*, (Matba‘ah Al-Auqāf Al-Islāmiyah, 1335AH), Vol. 2, 50-51.; Ibn Qudāmah, 1984, Vol. 7, 382; David Pearl, *A Text Book on Muslim Personal Law*, (London:

marry off a minor except where there is a special need for it.¹⁷ If the marriage is contracted by some other relative and not the guardian according to the *Hanafis* the marriage will be suspended till approval of the guardian.¹⁸

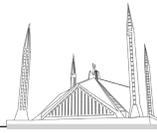
Under Islamic law, the conditions for a guardian of marriage are freedom, maturity and puberty. The guardian should have same religion as of the ward. If the ward is Muslim the guardian has to be Muslim. To have same religion is not a condition if the judge is performing duties of the guardian as he is representing head of the state so has authority on all subjects irrespective of their religion. Another condition is that the guardian should be a male. This is according to the majority of jurists except the *Hanafis*. According to the *Hanafis*, a woman can be appointed as a guardian if male agnates are not there or they are disqualified. Other jurists argue that a woman cannot marry herself without a guardian how can she marry off someone else. According to the *Hanafis*, this argument is not acceptable as a woman can marry without consent of the *wali*. As far as condition of being just and of good character (*‘adālah*) is concerned there are two opinions regarding it: according to the *Shāfīs* and one tradition of *Ahmad ibn Hanbal* it is a condition for the guardian of marriage. They based their opinion on the fact that as it is a condition for witnesses of marriage it should be a condition for the guardian as well. According to the *Hanafīs*, *Mālik* and another tradition of *Ahmad ibn Hanbal*, this is not a requirement as there is no divine text about it. According to them a guardian should be wise and mature and it is possible even without being just and of good character.¹⁹ The purpose of these conditions or qualifications is to

Croom Helm, 1987), 42-44.; Zuhailī, 2004, Vol. 10, 7328; Ibn Rushd, 1994-1996, Vol. 2, 6-7; Mughniyah, 1977, 322-323.

17 Ibn ‘Ābidīn, 2000, Vol. 8, 184; Abū Zahra, 1966, 179; Al-Zailī, 2000, Vol. 2, 513-514.

18 Ibn ‘Ābidīn, 2000, Vol. 8, 274-275.

19 Muhammad Amīn ibn ‘Umar ibn ‘Ābidīn, *Hāshiyah ibn ‘Ābidīn: Radd-al-Mukhtār ‘ala Al-Durr al-Mukhtār*, (Damascus: Dār al-Thaqāfah wa al-Turāth, 2000), Vol. 8, 181; Ibn Qudāmah, 1984, Vol. 7, 355-357; Al-Sayyad Al-Sābiq, *Fiqh-al-Sunnab*, (Place of publication is not mentioned, Maktabah-al-‘Adat, 1982), Vol. 7, 5-6. Wahba Al-Zuhaili, *Fiqh-al-Islami wa Adillatuh*, (Damusca: Dār-al-Fikr, 2004), Vol. 10, 7329.; Abu Zahrah, 1966, 19-122; Shalabi, 1973, 255-257; Al-Buhūti, Vol. 5, 53-54.



minimize instances of abuse of authority on the part of the guardian.²⁰

The Option of Puberty

According to the *Hanafi* school, if a guardian marries off a minor, the minor has a right to repudiate this marriage except where the guardian is the father or the grandfather. This right is called *khiyār-al-balūgh* or the option of puberty.²¹ In the case of the father and the grandfather it is presumed that for the love they have for the child they will not do anything against the child's interest.²² If the girl is virgin at puberty she can give consent to the marriage either verbally or by keeping silent. If she is a deflowered woman her consent must be expressed. For a boy too consent has to be expressed.²³ This right is more important for a girl as a boy after puberty can divorce his wife but the girl has only this option to get out of an unhappy union. The right of *khiyār* is recognized by the jurists in the cases of duress and coercion as well. If a person is induced to perform the marriage because of threat or coercion he/she can repudiate the marriage by the exercise of *khiyār*.²⁴ This right is actually a safeguard against abuse of authority by the guardian and it is available to a girl who is not happy from such marriage. This right should be

20 Mahdi Zahra, "The Legal Capacity of Women in Islamic Law", *Arab Law Quarterly*, 11: 3, (1996), 60

21 Al-Jassās, 1335AH, Vol. 2, 50-51; Ibn Rushd, 1994-1996, Vol. 2, 7; Ibn Qudāmah, 1984, Vol. 7, 382; Abū Zahrah, 1966, 171; Al-Zail'ī, 2000, Vol. 2, 505-506.

22 Ibn 'Ābidīn, 2000, Vol. 8, 231-232.

23 Al-Zail'ī, 2000, Vol. 2, 495-496; Al-Jubūrī, 1986, 186-187; Ibn 'Ābidīn, 2000, Vol. 8, 199-201; Ibn Qudāmah, 1984, Vol. 7, 386-387; Al-Sarakhsī, 2001, Vol. 5, 3; Ibn Rushd, 1994-1996, Vol. 2, 3. There are several ahādīth with respect to a virgin's and a non-virgin woman's consent. See Muslim bin Hajjaj Al-Qashīrī, *Sahīb Muslim*, (Translator: 'Abdul Hamid Siddiqī), (Beirut: Dār-al-'Arabīyah), Vol. 2, 714-716.

24 Al-Zail'ī, 2000, Vol. 2, 495-496; Al-Jubūrī, 1986, 186-187; Ibn 'Ābidīn, 2000, Vol. 8, 199-201; Ibn Qudāmah, 1984, Vol. 7, 386-387; Al-Sarakhsī, 2001, Vol. 5, 3; Ibn Rushd, 1994-1996, Vol. 2, 3. There are several ahādīth with respect to a virgin's and a non-virgin woman's consent. See Al-Qashīrī, Vol. 2, 714-716; Fakhruddīn Hasan ibn Mansur Al-Uzjandī Al-Farghānī, *Fatāwā-i-Kāzee Khān*, (Translator: Moulvī Mahomed Yusoof Khān Bahādur and Moulvī Wilāyat Hussain), (New Delhi: KitābBhavan, 1986), Vol. 1, 86, 99-100.

available in the marriage contracted by the father and the grandfather as well, as the presumption that they will not do anything against the interests of the child is rebuttable.

Termination of Guardianship

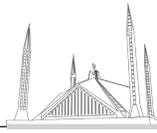
According to all schools, for a boy guardianship of marriage terminates at puberty.²⁵ There is difference of opinion with respect to a girl. According to the *Hanafīs*, guardianship terminates at puberty and a woman can contract her own marriage after that. According to the *Hanafīs* guardianship of marriage is like guardianship of property. The general rule is that if a person is capable to dispose of his/her property he/she should be capable to conclude a contract of marriage. The only exception here is of an interdicted adult woman who can marry but cannot dispose of her property. According to the *Shāfīs* and the *Hanbalīs*, guardianship terminates at marriage whereas according to the *Mālikīs* it terminates at sexual intercourse for a girl.²⁶

As far as a major girl is concerned, there is difference of opinion among jurists with regard to the extent of the guardian's authority and importance of consent of the girl. According to *Abū Hanīfah*, the guardian cannot contract a major girl in marriage without her consent. A girl can contract marriage as soon as she attains the age of puberty. By *ījāb* i.e. offer and *qabūl* i.e. acceptance *nikāh* takes effect. *Ijāb* and *qabūl* are based on consent.²⁷ The guardian can accept a marriage on behalf of a major girl only if she gives him permission in front of witnesses that she is authorizing him to accept on her behalf with her consent. According to the *Shāfīs*, *Mālikīs* and *Hanbalīs*, a major woman -whether virgin or deflowered- cannot contract her own marriage. If she marries without guardian her marriage is void. This is also opinion of *Umar*, *Alī*, *Ibn Mas'ūd*, *Ibn 'Abbās*, *Abū Hurairah*

25 If proof of puberty is not there the jurists fixed a particular age at which the person will be considered major.

26 Zuhailī, 2004, Vol. 10, 7330; Ibn 'Ābidīn, 2000, Vol. 8, 188, 198; Shalabī, 1973, 257-264; Mughniyah, 1977, 321.

27 C. M. Shafqat, *The Muslim Marriage, Dower and Divorce*, (Lahore: Law Publishing Company, 1979), 31.; D. F. Mulla, *Principles of Muhammadan Law*, (Lahore: PLD Publishers, 1995), 389.



and *Āishah*. Their opinion is based on the following verses: *‘When ye divorce women, and they fulfill the term of their (‘iddah) do not prevent them from marrying persons of their choice*²⁸ and *‘Marry those among you who are single or the virtuous ones among your slaves, male or female*²⁹ and *‘Do not marry unbelieving women until they believe ... nor marry (your girls) to unbelievers until they believe.*³⁰ It is said that all these verses are addressed to the guardians. This is an evidence that guardian has authority to marry off a woman.³¹

The rule of guardianship of marriage is based on the above mentioned verse: *‘Marry those among you who are single or the virtuous ones among your slaves, male or female*³² Here ‘marry’ means give in marriage so the verse is addressed to the guardian. There are several *ahādīth* in which the Prophet said that a woman should be married with her consent. According to a tradition of *Abū Hurairah* the Prophet (P.B.U.H) said: *‘A widow shall not be married, until she be consulted; nor shall a virgin be married, until her consent be asked’*. When the companions asked about consent of a virgin the Prophet (P.B.U.H) said, *‘Her consent is by her silence.*³³ According to another report the Prophet (P.B.U.H) said: *‘A widow has more right over her own person, than her father has; and a virgin’s consent shall be asked, which is her silence.*³⁴ *Ibn Abbās* has reported that a woman came to the Prophet (P.B.U.H) and mentioned to him her displeasure on the marriage contracted by her father. The Prophet (P.B.U.H) allowed her to exercise her choice.³⁵

An Adult Muslim Woman’s Right To Marriage

According to the *Hanafī* school, an adult woman is allowed to enter in a marriage contract without permission of the guardian. There are two conditions attached to

28 Q2:232.

29 Q24:32.

30 Q2:221.

31 Al-Jubūrī, 1976, 73-74.

32 Q24:32.

33 Al-Farghānī, 1986, Vol. 2, 99.

34 Ibid.

35 Ibid., 100.

the validity of such marriage: equality between spouses and dower appropriate to the woman's status. The *Hanafis* also allow a woman to contract another woman in marriage. Their argument is that a woman is allowed to make commercial transactions so she should also be allowed to enter into marriage contract on her own.³⁶ They based their opinion on the following verse: '*So, if a husband divorces his wife (irrevocably), he cannot after that remarry her until after she has married another husband and he has divorced her*'.³⁷ In this verse, a woman is mentioned as contracting marriage and her guardian is not mentioned. It means she has authority to do so. About the verse '*...do not prevent them from marrying persons of their choice*'³⁸ there are two opinions associated to *Hanafis* that this verse is addressed to either husbands or guardians. But this verse tells that a woman's marriage without intervention of the guardian is valid. The following verse '*If any of you die and leave widows behind ... there is no blame on you if they dispose of themselves in a just and reasonable manner*'³⁹ also tells that a woman can marry herself off.⁴⁰ They based their opinion on the following *hadith*: '*the guardian has no authority over the girl*.' According to another tradition narrated by *Aishah* a woman came to her and said '*my father has given me in marriage in order to rid himself of me and this is against my will*.' When the Prophet (P.B.U.H) came he summoned the father after hearing the story and gave authority to the daughter to decide for herself. The woman said: '*I permit what my father has done, but I wanted women to know that their fathers have no authority*'.⁴¹

According to the majority of jurists the rule of financial transactions cannot be extended to the marriage contract. This rule of guardianship is for protection of women as in a Muslim society, women are not allowed to mix with men and there are chances of her to make a wrong decision regarding her marriage if she has to make it alone. Guardianship of marriage is based on virginity. If a woman is no

36 Al-Jubūrī, 1976, 78-81; Alami, 1991, 193, 197.

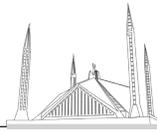
37 Q 2:230.

38 Q 2:232.

39 Q 2:234.

40 Al-Jubūrī, 1976, 79-80.

41 Alami, 1991, 193.



more a virgin she is allowed to contract her own marriage. As far as a minor girl is concerned only the father and the grandfather (according to some schools) have authority to contract her marriage provided the marriage is in the child's interest.⁴²

The guardian while deciding about marriage of a woman cannot act against her interests. If the woman wants to marry, her guardian cannot stop her without a just reason.⁴³ Allah says in verse 232 of surah 2 '*... do not prevent them from marrying ...*'. This verse was revealed on the incident in which *Ma'qal ibn Yasār's* sister was divorced by her husband *Abū al-Dahdah* and then he again proposed to her but *Ma'qal* stopped her from marrying him again. The Prophet (P.B.U.H) said to *Ma'qal*: '*if you are a believer, do not forbid your sister to Abū al-Dahdah*'. *Ma'qal* then agreed to this marriage.⁴⁴ A guardian can refuse or object to the marriage only if such marriage is against the interests of the woman. If he is doing so without a just cause, according to the *Hanafis*, his guardianship ceases and the judge will be the guardian now on. *Hanbalis* are of the view that if the guardian is a close relative, guardianship shall pass to the next male relative in the order given by them but if that guardian is a distant relative, guardianship shall go to the judge. Both *Hanafis* and *Hanbalis* based their views on the following *hadith*: '*if they dispute the authorities will act as guardian for the person who has no guardian*'.⁴⁵

The guardian can marry off a minor but he must protect interests of the minor while deciding such matters. A guardian cannot contract his minor girl in marriage in *sawāra* because it is against the interests of the minor and ruins her life.

Pakistani Law

The Hudood Ordinances 1979 was amended by the Protection of Women (Criminal Laws Amendment) Act 2006. *Vanī* is prohibited in this legislation and is made a crime. Section 310-A of the Pakistan Penal Code 1860 prohibits *vanī* and *sawāra* marriages. This section states that a person cannot be given in *badl-e-sulb*. Punishment for this crime is minimum 3 years and maximum 10 years

42 Alami, 1991, 193.

43 Ibid., 194.

44 Al-Jubūrī, 1976, 75; Alami, 1991, 194; Al-Buhūtī, Vol. 5, 48-49.

45 Alami, 1991, 195.

rigorous imprisonment. Despite this law such marriages are still practiced in rural areas of Pakistan.⁴⁶

In Pakistan, the laws applicable to the age of marriage are the Muslim Family Laws Ordinance 1961, the Majority Act 1875 and the Child Marriage Restraint Act 1929. Section 3 of the Majority Act 1875 fixes the age of majority at eighteen years but section 2 makes the matters related to marriage, dower, adoption and divorce exceptions to which Muslim personal law shall apply. According to the Muslim personal law, a person after attaining puberty can enter into a marriage contract even though he/she is under the age of eighteen years. According to section 12 of the Muslim Family Laws Ordinance 1961, puberty is presumed on completion of the age of sixteen years in the case of a female and eighteen years in the case of a male if there are no signs of puberty. It is worth noting that in most Muslim countries the age of majority and the age of marriage is different. The age of majority is usually fixed at eighteen whereas the age of marriage varies from fifteen to twenty.⁴⁷ The age of marriage for a girl is usually lower than a boy. Probably the reason is that girls attain puberty earlier than boys so their right to get married arises likewise. This is against the strict wording of Article 2 of the Convention on the Rights of the Child 1989⁴⁸ which embodies a principle of non-discrimination on the basis of sex. But the fact is that this law is not discriminatory especially keeping in mind prohibition of sexual relations outside marriage in Islam. Kamran Hashemi considers it in line with Article 3 of the CRC. According to him to fix an earlier age of marriage for girls is in their interest.⁴⁹ In Pakistan, the age of majority is eighteen whereas the age of marriage is eighteen for a boy and sixteen for a girl.⁵⁰ In Azad Jammu and Kashmir, however the age of marriage for a girl is fourteen years and for a boy is twenty one years. Section

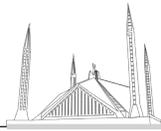
46 See *Akhtar Ali v. the State*, 2013 PCrLJ Lahore 1230; *Muhammad Sultan v. the State*, 2013 PCrLJ Peshawar 950; *Mansoor Ahmed v. the State*, 2010 PCrLJ Karachi 1661.

47 Jamal J. Nasir, *Islamic Law of Personal Status*, (London: Graham and Trotman, 1990), 47-49.

48 Hereinafter the Convention or the CRC. Pakistan ratified this convention in 1990.

49 Kamran Hashemi, "Religious Legal Traditions, Muslim States and the Convention on the Rights of the Child: An Essay on the Relevant UN Documentation", *Human Rights Quarterly*, Vol. 29(1), (2007), 212

50 The Child Marriage Restraint Act, 1929, Sec 2.



2 of the Child Marriage Restraint Act 1929 had fourteen years as the age of marriage for a girl and twenty one years for a boy which was amended by section 12 of the Muslim Family Laws Ordinance 1961 in the rest of Pakistan but as this Ordinance is not implemented in Azad Jammu and Kashmir the age of marriage there remains fourteen years for a girl and twenty one years for a boy.

According to the Child Marriage Restraint Act 1929, to promote, or permit, or not to prevent solemnization of a child marriage is a criminal offence. If a minor contracts her own marriage, the person in-charge or the guardian of the minor will be responsible. The punishment for this offence is one month imprisonment or a fine up to one thousand rupees⁵¹ which seems symbolic. An important point here is that the Child Marriage Restraint Act does not declare such marriage void so a child marriage itself is valid.

Case Law

There are several cases in which the courts declared child marriages valid despite penalizing the adults involved in such marriages. The Karachi High Court said in 1962 in *Mushtaq Ahmad v. Mirza Muhammad Amin* and another that the Child Marriage Restraint Act 1929 only restrains and punishes child marriages and it does not declare a child marriage void.⁵² It means that a marriage solemnized before sixteen years of age for a female and eighteen years of age for a male is a child marriage which may attract punishment but is still valid. In 1977, in *Mst. Aziz Mai v. S. H. O. Police Station Jalalpur Pirwala, District Multan* and another the Lahore High Court ignoring the age of sixteen years as the age of marriage fixed by the Act considered completion of 15 years or attainment of puberty as the age of marriage.⁵³ Probably the court followed the opinion of the disciples of *Abū Hanīfab* with reference to the age of majority.⁵⁴ To prove puberty is a question of

51 Ibid., Sec 5-6.

52 PLD 1962 Karachi 442. Also see *Zafar Khan v. Muhammad Ashraf Bhatti*, PLD 1975 Lahore 234; *Ghulam Qadir v. Judge, Family Court, Murree*, 1988 CLC Lahore 113.

53 PLD 1977 Lahore 432; Also see *Ghulam Qadir v Judge Family Court Murree*, 1988 CLC 113.

54 See *supra* note 3.

fact. If signs of puberty appeared before completion of said ages puberty can be proved in a court of law.⁵⁵ In *Abdul Ghaffar v. Ishtiaq Ahmad Khan* the Lahore High Court discussed signs of puberty and said that ejaculation of semen is a sign for a boy and menstruation or becoming pregnant for a girl. If these signs are proved they will be considered major.⁵⁶ According to the courts, a child who is major according to the personal law but minor according to the Majority Act and wants to file a suit regarding the matters of marriage, dower, divorce or adoption, does not need a guardian or next friend. In *S. M. Aslam v. Rubi Akhtar*, the Karachi High Court decided that a girl who is major under the Muslim law but a minor under the Majority Act can sue or be sued without a next friend in matters regarding marriage, dower, maintenance, custody and divorce.⁵⁷

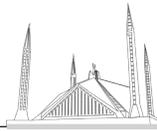
According to section 6 of the Child Marriage Restraint Act 1929, if a minor has contracted their own marriage, the person in-charge or the guardian will be responsible. In such cases, Pakistani courts follow Islamic law and consider the marriage valid if the girl has attained puberty and custody of the girl is given to the husband as her guardian. In 1970, in *Mauj Ali v. Safdar Hussain*, the minor girl who had attained puberty under Islamic law contracted marriage by her free will. The Supreme Court of Pakistan decided that according to Islamic law the marriage is valid and her husband is now her guardian. The court said that according to the Child Marriage Restraint Act, the marriage could be declared void.⁵⁸ In *Mst. Bakhshi v. Bashir Ahmad*, the Supreme Court decided that the girl who was fifteen years old and had contracted marriage was free to go with her husband. Her husband, as an adult, was guilty of contracting child marriage but the marriage itself was declared valid. The custody of the girl was contested by the mother. The court gave custody to the husband as a guardian. The court noticed that after the mother's remarriage with a stranger she was disqualified for

55 *Daulan v Dossa*, PLD 1953 Lahore 332.

56 1997 PCr.LJ 1150 Lahore, Also see *Abdul Jabbar v. the State*, PLD 1991 SC 172; *Muhammad Yusuf v. the State*, PLD 1991 SC 179; *Khan Zaman v. the State*, 1991 PCrLJ 928.

57 1996 CLC Karachi 1.

58 1970 PCr.LJ SC 1035.



her daughter's custody.⁵⁹

In Pakistani law, the only protection which a child has in a child marriage is the right to exercise the option of puberty. The Dissolution of Muslim Marriages Act 1939 gives the right to exercise the option of puberty to a girl if her marriage is contracted by her guardian before the age of sixteen years. In this case, she can repudiate the marriage before reaching the age of eighteen years.⁶⁰ In *Muhammad Mumtaz v. J. F. C. Shahpur Sadar*, District Sargodha, the Lahore High Court construed this section widely and said that if a girl attains puberty before the age of sixteen she can exercise the option of puberty.⁶¹ In *Muhammad Riaz v. Robina Bibi*, the Lahore High Court decided that to exercise the option of puberty the wife has to prove three points: marriage was contracted before she attained the age of sixteen years; the marriage had not been consummated; she had repudiated marriage before she has obtained the age of eighteen years.⁶² In *Ghulam Qadir v. Judge Family Court Murree* the Lahore High Court said that the age of puberty in the case of absence of proof is fifteen years. The court said that section 2 of the Dissolution of Muslim Marriages Act does not fix sixteen years as the age of puberty but it says that at this age the girl can exercise her option of puberty.⁶³

In *Mst. Daulan v. Dosa* the Lahore High Court said that the purpose of the Dissolution of Muslim Marriage Act is to clarify Muslim personal law and not to change it⁶⁴ but the Act allows a woman to exercise the right to exercise the option of puberty even if the marriage is solemnized by the father or the grandfather

59 PLD 1970 SC 323. Also see *Ghulam Hussain v. Nawaz Ali*, 1975 PCr.LJ Karachi 1049; *Mushtaq v. Muhammad Amin* PLD 1962 Karachi 442; *Allah Bakhsh v. Safdar*, 2006 YLR Lahore 2936.

60 The Dissolution of Muslim Marriages Act 1939, Section 2(vii). Also see *M Amin v. Surayya Begum*, PLD 1970 Lahore 475; *Ghulam Qadir v. Judge Family Court, Murree*, 1988 CLC 113. For a discussion on laws related to child marriage in South Asia see Lucy Carrol, 'Marriage – Guardianship and Minor's Marriage at Islamic Law', *Studies in Islamic Law, Religion and Society*, Ed. H. S. Bhatia, (New Delhi: Deep and Deep Publications, 1996), 379-384.

61 1985 CLC Lahore 1808.

62 2000 MLD Lahore 1886.

63 1988 CLC Lahore 113.

64 PLD 1956 Lahore 712.

which is against *Hanafi* law. As the right to exercise the option of puberty is a safeguard against abuse of authority by the guardian, the girl should have this right even if the marriage is contracted by the father or the grandfather. Not to allow her to use the right to exercise the option of puberty in such case is to restrict effectiveness of this right and to leave the girl without any option as most of the child marriages in Pakistan are organized by the father of the child. *Hanafi* law does not give the right to exercise the option of puberty to a girl in case her marriage is contracted by her father or the grandfather on the presumption that due to their love for the minor they will not do any act against her welfare but this presumption is rebuttable.

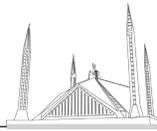
In the case of exercise of the option of puberty, Pakistani courts do not consider intervention of the court necessary for repudiation of marriage. The Lahore High Court in *Noor Muhammad v. the State*⁶⁵ and the Federal Shariat Court in *Sajid Mehmood v. the State*⁶⁶ decided that if a woman has contracted a second marriage after attaining puberty, her first marriage will get automatically dissolved. The courts were of the view that if the option is exercised and the marriage is repudiated there is no requirement to communicate this decision to the court. Judicial approval is not a requirement for exercise of the option of puberty. If the decision is communicated and the court issues a decree such decree will be just a confirmation of the decision. In *Mst. Irfana Tasneem v. Station House Officer and others*⁶⁷ and *Mst. Sardar Bano v. Saifullah Khan*,⁶⁸ the Lahore High Court decided that second *nikāh* itself is a valid repudiation of the first marriage. The court observed that the law only requires the repudiation to be made before the girl attains eighteen years of age and no specific age, time or mode of exercise of the option of puberty is required by the law. According to the courts, institution of the suit itself annuls the marriage if the conditions for the option of puberty are fulfilled. Although a boy can also exercise the option of puberty but as he can divorce his wife this right is more important for the girl.

65 PLD 1976 Lahore 516.

66 PLD 1995 FSC 1.

67 PLD 1999 Lahore 479.

68 PLD 1969 Lahore 108.



It is noticed that when girls, after puberty, file suits for dissolution of marriage by exercise of the option of puberty they also ask for dissolution of marriage on the basis of *kbul'* as an alternative prayer so that if they cannot prove existence of child marriage they could get dissolution on the basis of *kbul'*. There have been cases where a girl has exercised the option of puberty before attaining the age of eighteen years but the court dissolved the marriage by *kbul'* and not by the option of puberty. In 2004, in *Tasawar Abbas v. Judge, Family Court and others*, the girl was married off by her father during minority. The father gave an undertaking to the bridegroom that if he would not be able to marry his daughter to him after majority he would pay Rs. 100,000. The girl repudiated her marriage after puberty and filed a case for dissolution of marriage on the basis of the option of puberty. The Family Court considered the undertaking to pay Rs. 100,000 as a consideration and awarded her *kbul'*. The Lahore High Court did not declare the marriage void as a result of exercise of the option of puberty but said that the undertaking cannot be a consideration for *kbul'* rather benefits received by the girl were considered consideration for *kbul'*.⁶⁹ In 1988, in *Manzoor Ahmed v. Additional District Judge III, Rahimyar Khan*, the Lahore High Court said that where marriage was performed during minority and the marriage was not consummated, the marriage should be dissolved by the exercise of the option of puberty as the rule of *kbul'* is not applicable here.⁷⁰ In the case of *kbul'*, the wife has to return her dower or pay compensation whereas in the case of exercise of the option of puberty she does not need to pay any compensation. To dissolve marriage on the basis of *kbul'* where it can be dissolved on the basis of the option of puberty is against interests of the wife. If the wife could not prove that her marriage was contracted during minority, the court may grant *kbul'* as in such case the wife does not have a right to exercise the option of puberty. There have been cases where the wife demanded dissolution of marriage on the basis of the option of puberty and not on the basis of *kbul'* but could not prove that the marriage was repudiated before attaining the age of eighteen years so the court granted *kbul'*.⁷¹

69 2004 YLR Lahore 1415. Also see *Liaquat Hussain v. Zil-e-Huma*, 2012 CLC SCAJK 1386.

70 1988 CLC Lahore 436.

71 *Muhammad Akram v. Shakeela Bibi*, 2003 CLC Lahore 1787; *Muhammad Rashid v. Judge, Family Court, Chishtian*, 2001 CLC Lahore 477.

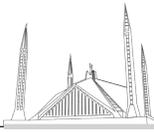
Section 2 of the Dissolution of Muslim Marriages Act 1939 says that exercise of the option of puberty will be valid if the marriage is not consummated. The issues related to consummation are discussed by the courts in several cases. In *Allah Diwaya v. Mst. Kammon Mai*, the Lahore High Court said that in this section 'consummation' means consummation by free will. A girl below the age of fifteen years is not capable to give consent. Her consent is not acceptable as she is a child. Consummation before puberty does not affect a girl's right to exercise the option of puberty.⁷² If the marriage is consummated by force, the right to exercise the option of puberty will not be lost as this consummation will not be by free will.⁷³ In *Muhammad Sharif v. Judge Family Court and Others*, the woman who was married by her guardian when she was thirteen years old said that she had repudiated her marriage at puberty. The parties came to the court after eighteen years from the date of their *nikāh* in a dispute over property. The husband said that the marriage was consummated and was not repudiated by the wife whereas the wife said that the marriage was never consummated and duly repudiated by her. The Lahore High Court considered the fact that if the marriage was consummated and the couple was living together for so many years why they did not have a child. The husband claimed that his wife was pregnant twice but had miscarried. The husband could not bring any proof of consummation or pregnancy or miscarriage so the court did not accept his contention. Although the woman refused medical examination to prove her virginity the court accepted her contention and dissolved the marriage on the basis of the option of puberty.⁷⁴

A landmark case on the authority of guardian and the importance of consent of an adult woman is *Abdul Waheed v. Asma Jahangir*. *Saima Waheed*, who was a college student, married in 1996 without consent of her parents. The issue in question in this case was whether an adult Muslim woman can contract her own

72 PLD 1957 Lahore 651. Also see *Mst. Ghulam Sakina v. Falak Sher* PLD 1949 Lahore 75; *Allah Diwaya v. Mst. Kammon Mai* PLD 1957 Lahore 651; *Mst. Muhammad Bibi v. Raja and others* PLD 1962 Azad Jammu Kashmir 7; *Mst. Sarwar Jan v. Abdul Majid*, PLD 1965 Peshawar 5.

73 *Mst. Maqsooda Begum v. Muhammad Aslam Khan and others*, PLD 1970 SC Azad Jammu and Kashmir 9.

74 1998 MLD Lahore 1873.



marriage without consent of the guardian and what is status of such a marriage. Mr. *Abdul Waheed's* (the bride's father) stand was that the marriage was void as the marriage was held without his permission as a guardian. Ms. *Waheed* claimed that her marriage was valid. The court declared this marriage valid by majority. Justice *Khalil-ur-Rehman Ramday* and Justice *Abdul Qayyum* declared a marriage without consent of the guardian valid whereas Justice *Ihsan-ul-Haq* declared such marriage void based on morality arguments. Justice *Ramday* and Justice *Qayyum* declared that a major Muslim woman has legal capacity to enter into a marriage contract and a marriage without permission of the guardian is valid. This case settled a rule in Pakistan that guardian's consent, though recommended, is not necessary for a marriage of a girl to be valid.⁷⁵

Islam does not discriminate between the age of majority and the age of marriage. Puberty is the standard for both but as said earlier puberty should be qualified with sound judgment. In a country like Pakistan where puberty is attained so early it is reasonable to set an age of marriage to discourage child marriages. Although in Islam there is no prohibition of child marriages but keeping in view the hazards in such marriages it should be at least discouraged, if not prohibited. Although the law gives the right to a girl to repudiate her marriage but in reality it is very hard for a girl to exercise this option without her family's support. An important factor here is that child marriages are arranged by respective families so it is not easy for such girls to exercise this option.⁷⁶

***SAWĀRA* Marriage**

Islam does recognize those customs which are in conformity with Islamic values and injunctions. As it is obvious from the above discussion that this custom is against Islam so this is totally prohibited. It can be said that custom of *sawāra* is prohibited because it results in injustice and *zulm* and is against *Shari'ah*.

Marriage under the umbrella of *sawāra* is prohibited from another aspect too. It

75 PLD 1997 Lahore 301.

76 Ihsan Yilmāz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan*, (Aldershot, Hants, England: Ashgate Publishing Ltd., 2005), 135.

is provided by *Shari'ah* that if a person believes that he will not do justice with his wife and her rights will not be fulfilled this marriage is *harām* upon him because it results in *zulm*. In *sawāra* usually intention of the concerned party is not good and they take revenge from that poor girl so here this rule will apply. *Qurtubī*, a renowned scholar of Islamic law, also has the same opinion. According to him if a man cannot give his wife her rights, this marriage is *haram* upon him.⁷⁷ If a husband is not fulfilling his duties, the wife has every right to get judicial divorce. If the woman hates her husband due to any reason she can get *khul'* by giving back her dower (*mahr*). According to a tradition, a woman came to Prophet Muhammad (P.B.U.H) and said that she didn't want divorce because her husband was of bad morals or he was not a good Muslim but she didn't like him because of his ugliness. The Prophet (P.B.U.H) asked her to give back a garden given to her by her husband. She agreed and the Prophet (P.B.U.H) ordered *khul'*.⁷⁸ It is obvious from the *hadīth* that Islam gives right to get divorce on such minute reason that the wife doesn't like her husband because of his ugliness. In case of *sawāra* there is infringement of basic rights of the girl by the husband so she can demand divorce on these grounds according to Islamic law.⁷⁹

In *Shari'ah*, punishment of murder is *qisās* or *diyyah*. No one has authority to change these punishments. But heirs of victim, if they want, can let the offender free by forgiving him either for *diyyah* or for nothing.⁸⁰ There is no third way; settlement made upon marriage is not *sulh*. *Shari'ah* does not recognize a *sulh* which is made in return of a person. *Badl sulh* can only be *mal* or property.⁸¹ A person cannot be *badl sulh*.

The commitment to justice is a basic requirement of Allah from a Muslim. Allah said in the *Qur'an*, 'O you who believe; Be you staunch in justice'.⁸² The custom of

77 Al-Sābiq, 1982, Vol. 2, 14.

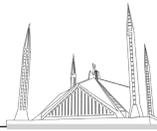
78 Ibid., 253.

79 Ibid.

80 Muhammad Abū Hassan, *Abkām al Jarimah wa Al-Uqūbah fi Shari'ah Al-Islāmiyah*, (Jordan; Maktaba Al-Manār Al-Zarqā, 1987), 182-183.

81 Al-Sābiq, 1982, Vol. 2, 305-307.

82 Q4:135.



vanī and *sawāra* is against Islamic concept of justice as Allah said in the *Qur'ān*: *'And no bearer of burdens shall bear another's burden'*.⁸³ It means the person who did the wrong act is responsible for his deeds and will face punishment whatever it is. There is no concept in Islam that another person can bear punishment for wrong deeds of someone else whosoever he is. For everyone there is a right to live whether the person murdered was a man, a woman or a child. The person responsible for the death has to face punishment himself.⁸⁴ In case of *sawāra*, punishment is faced by that poor girl and the murderer enjoys his life. Whereas in Islam, murder is a most serious offence and there are many verses in which Allah ordered punishment for the murderer both in this world and in the hereafter. For the murderer Allah said: *'And whoever kills a believer intentionally, his recompense is hell to abide therein ... and a great punishment is prepared for him'*.⁸⁵ According to *IbnAbbās*, the offence of murder is so grave that a murderer who has committed murder intentionally cannot even repent.⁸⁶ We cannot and should not let such a criminal free towards which the *Qur'ān* adopted such a strict attitude. To leave him free by such settlement is against the Islamic system of justice and is a sin.

In pre-Islamic period, if one man of a tribe was killed the whole tribe would be held responsible. Islam came and annulled this practice and said that the murderer only is responsible for his deeds; no one else can take his burden.⁸⁷ The practice of *sawāra* is somewhat similar to that practice of pre-Islamic period so it is also prohibited. There is no question that a girl whether minor or major be held responsible for someone else's crime as it happens in custom of *sawāra*. Even if a minor themselves have killed someone, *qisās* cannot be taken from them because of their immaturity and incapability to form intention.⁸⁸

The Child Protection Bill

83 Q35:18.

84 Al-Sābiq, 1983, Vol. 2, 432.

85 Q4:93.

86 Al-Sābiq, 1983, Vol. 2, 429.

87 Al-Sābiq, 1983, Vol. 2, 442.

88 Ibid.

Pakistan needs a consolidated Child Act to cover issues related to children. The Committee on the Rights of the Child⁸⁹ has always pushed Pakistan to formulate such a law. In 2009, the Protection of Children Bill⁹⁰ was proposed but is still pending in the Parliament for approval. This Bill is an effort to incorporate provisions of the Convention on the Rights of the Child 1989 in Pakistani law. This Bill covers areas of family law, criminal law and labor law related to children. In this Bill, a child is defined as a person under the age of eighteen years.⁹¹ The best interest of the child is made a primary consideration in all actions related to children⁹² but the term 'best interests' is not defined by the Bill. The Bill makes it a duty of the Federal Government to establish a Commission for Protection of Children which will review the national laws and propose amendments in the existing laws to bring Pakistani law in conformity with the CRC. The Commission will also monitor implementation of the laws related to children.⁹³ According to the Bill, each Provincial Government will establish a Child Protection Bureau which will review relevant provincial laws and will propose amendments. This Bureau will monitor implementation of child laws on the provincial level.⁹⁴ The Provincial Government will also appoint child protection officers who will be responsible to monitor the situation of the child during custody period.⁹⁵ According to the Bill, it is a duty of the Provincial Government to establish Child Protection Centers in the province. Such centers will be responsible to provide all necessary facilities including residence, education and medical assistance for those children who are in need of care.⁹⁶ According to this Bill, each Provincial Government will have a duty to establish the Child Protection Courts after consultation with the

89 Hereinafter the Committee.

90 The text of the Bill is available on www.na.gov.pk/uploads/documents/1302215481_467.pdf. Last visited 30th May 2013. Also see www.crin.org/resources/infodetail.asp?ID=25667. Last visited 31st May 2013.

91 The Protection of Children Bill 2009, Section 2(a) and (g).

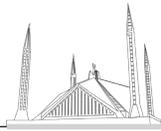
92 The Child Protection Bill 2009, Section 2(c).

93 *Ibid.*, Section 12.

94 *Ibid.*, Section 24.

95 *Ibid.*, Section 36.

96 *Ibid.*, Section 49.



concerned High Court.⁹⁷ The High Court in the province has authority to confer status of the Child Protection Court to a Family Court or a Court of a Senior Civil Judge.⁹⁸ If this Bill is passed by the Parliament, the biggest challenge for the Government will be allocation of resources to establish all the above mentioned institutions and courts. In the past, the same happened with the Juvenile Justice System Ordinance 2000 (JJSO); due to lack of resources the proposed institutions were not set up and implementation of the JJSO could not be made possible.

The Bill proposes repeal of the Child Marriage Restraint Act 1929.⁹⁹ This Bill raises the age of marriage for a girl from sixteen to eighteen years. According to this Bill, marriage with a girl who is under eighteen years of age is a child marriage which is an offence for which the groom, the parents or the guardian of the child and the person solemnizing this marriage will get up to two years imprisonment or Rs. 100,000 fine or both.¹⁰⁰ A woman involved in such marriage in any capacity will not be punished with imprisonment but with fine. The person in charge of the minor will be presumed to have allowed such marriage unless proved otherwise.¹⁰¹ Cognizance of such marriage cannot be taken after lapse of six months from the date of marriage.¹⁰² If the court gets information about a child marriage taking place it may issue an injunction to stop it.¹⁰³ Apparently, the Bill considers a marriage a 'child marriage' only if the bride is under eighteen years of age. A marriage in which the groom is a child is not a child marriage according to the definition provided by this Bill. This Bill, like the Child Marriage Restraint Act 1929, does not make a child marriage void but only gives penal sanctions for the persons involved. The punishment for the persons involved is increased which is a positive thing. Previously, according to the Child Marriage Restraint Act

97 Ibid., Section 38.

98 Ibid., Section 38(3).

99 Ibid., Section 85.

100 Ibid., Sections 53-55.

101 Ibid., Section 55.

102 Ibid., Section 56.

103 Ibid., Section 57.

1929, the punishment was one month imprisonment or a fine up to one thousand rupees¹⁰⁴ which was symbolic. It is proposed that the definition of a child marriage should be changed to include a marriage in which either the bride or the groom is a child.

The Protection of Children Bill is pending approval since 2009. In 2009, the Federal Government had authority to legislate on issues related to children but in 2010 the law was changed. In 2010, article 142 of the Constitution of Pakistan 1973 was amended and the issue of child rights was made more complicated by making it a subject on which Provincial Government and not the Federal Government has authority to legislate.¹⁰⁵ There is a need to bring child rights in the domain of Federal Government as a law made by the Federal Government extends to the whole of Pakistan. Secondly, if there is a contradiction between a provincial law and a federal law the latter prevails.¹⁰⁶ For the sake of consistency, throughout the country the child law should be promulgated at the Federal level.

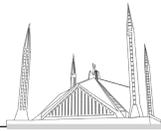
Conclusion

In Islamic law as well as Pakistani law, a guardian cannot marry off a child if such marriage is against that child's interests. In Pakistan, the Child Marriage Restraint Act 1929 makes child marriage an offence but keeps child marriage itself valid. The punishments given for the persons involved in child marriage are symbolic. Pakistan needs to reform its child law to cater for the needs of its society. Pakistan ratified the Convention on the Rights of the Child in 1990. The Committee on the Rights of the Child has always pushed Pakistan to reform its child law. Although Islamic law allows child marriage but this marriage is valid only if it is in the interests of the child. *Sawāra* is a custom in which girls are given and taken in lieu of blood in the case of murder which is against Islamic as well as Pakistani law. Islamic law and Pakistani law both give the right of the option of puberty to a girl who was married off by her guardian during minority. Pakistani

104 The Child Marriage Restraint Act, 1929, Sections 5-6.

105 The Constitution of Pakistan 1973, Article 142. The Constitution (Eighteenth Amendment) Act 2010 made amendment in article 142.

106 The Constitution of Pakistan, 1973, Section 143.



law gives this protection even if the marriage is arranged by the father and the grandfather which is against Islamic law. As the right to exercise the option of puberty is a safeguard against abuse of authority by the guardian, the girl should have this right even if the marriage is solemnised by the father or the grandfather. Not to allow her to use the right to exercise the option of puberty in such case is to restrict effectiveness of this right and to leave the girl without any option as most of the child marriages in Pakistan are organized by the father of the child. *Hanafi* law does not give the right to exercise the option of puberty to a girl in case her marriage is contracted by her father or grandfather on the presumption that due to their love for the minor they will not do any act against their welfare but this presumption is rebuttable. In reality it is not easy to exercise this option by the girl without support of her family. The Protection of Children Bill is pending approval since 2009. The Bill has certain lacunas for instance definition of the child marriage in this Bill does not include a marriage in which the bridegroom is a child. This Bill, if improved, can reform child marriage law in Pakistan. To reform its child law Pakistan needs political will¹⁰⁷ and allocation of resources to build institutions.

107 Pakistan had elections in May 2013 in which Muslim League (Nawaz Group) won a clear majority. It is interesting to note that in these elections no political party had included family law reforms in its election manifesto. Main political parties in 2013 elections were Pakistan Muslim League (Nawaz Group), Pakistan Tehrik-e-Insaaf, Pakistan People's Party and Muttahida Qaumi Movement. For Pakistan Muslim League (Nawaz Group) manifesto see www.pmln.org/pmln-manifesto-englishurdu/; for Pakistan Tehrik-e-Insaaf manifesto see www.scribd.com/doc/135200186/PTI-Manifesto-2013-Urdu; for Pakistan Peoples Party's manifesto see www.ppp.org.pk/pppchange/manifestos/manifesto2013.pdf; for Muttahida Qaumi Movement's manifesto see www.mqm.org/englishnews/1793/manifesto2013. Last visited 9th May 2013.

