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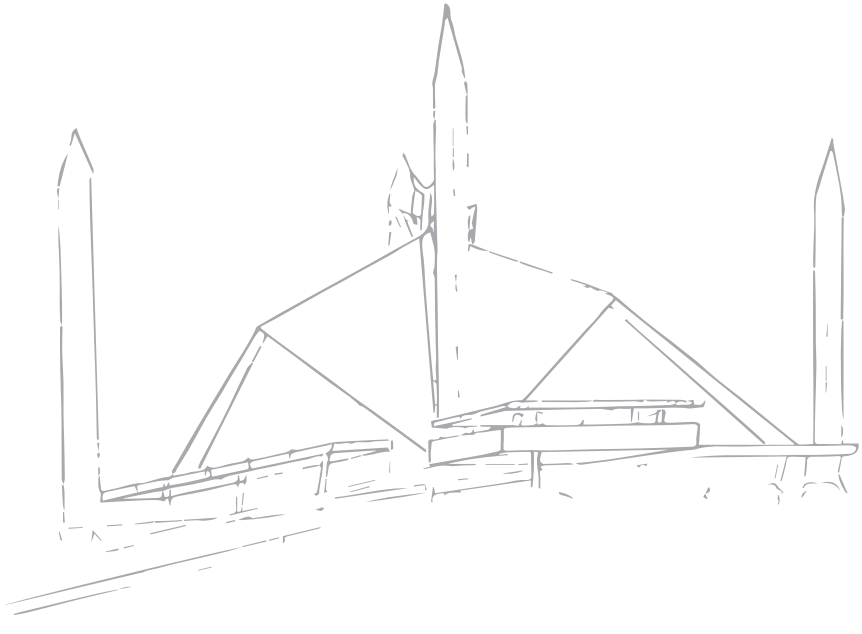

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JUDICIAL LAW-MAKING: AN ANALYSIS OF CASE LAW ON *KHUL'* IN PAKISTAN

Muhammad Munir*

Abstract

This work analyses case law regarding khul' *in Pakistan. It is argued that* Balqis Fatima *and* Khurshid Bibi *cases are the best examples of judicial law-making for protecting the rights of women in the domain of personal law in Pakistan. The Courts have established that when the husband is the cause of marital discord, then he should not be given any compensation; and that the mere filing of a suit for* khul' *by the wife means that hatred and aversion have reached a degree sufficient for courts to grant her the separation she is seeking by resorting to her right of* khul'. *The new interpretation of section 10(4) of the West Pakistan Family Courts Act, 1964 by Courts in Pakistan is highly commendable.*

Key words: *khul', Pakistan, Muslim personal law, judicial khul', case law.*

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Introduction

The superior Courts in Pakistan have pioneered judicial activism[1] regarding *khul'*. In 1959, the Lahore High Court gave a revolutionary decision when it decided the *Balqis Fatima* case, which judicially recognized for the first time, the right of *khul'* for a Muslim woman without the consent of her husband. This was a revolutionary decision and was endorsed by the Supreme Court of Pakistan in 1967 in the *Khurshid Bibi* case. Both were landmark decisions and are followed to date in Pakistan and Bangladesh. Since *Khurshid Bibi*, courts in Pakistan have given numerous decisions refining and polishing the law of *khul'* in Islam, based on the foundations of *Balqis Fatima*[2] *and Khurshid Bibi*[3] cases. These two cases are important for many reasons but one of the important ones is that they are the best examples of judicial law-making[4] in the legal system of Pakistan. This work

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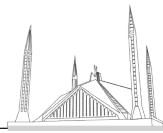
1 The phrase "Judicial activism" was first used to describe some decisions of the US Supreme Court. In the US jurisprudence, it means that in determining whether laws would meet constitutional muster, the Court was accused of acting more as a legislative body than as a judicial body. Justice Oliver Wendell Holmes JR (d. 1935) of the US Supreme Court from 1902-1932, in his famous dissenting opinion in *Lochner v. New York,* 198 U. S. 45 (1905) argued for "judicial restraint," cautioning the Court that it was usurping the function of the legislature. See, *West Encyclopedia of American Law*, Jeffrey Lehman & Shirelle Phelps eds., (MI: Thomson Gale, 2nd edn., 2005), vol. 6, p. 58, (Judicial Review). Two dissenting opinions were written in *Lochner,* one by Justice Oliver Wendell Holmes and the other by Justice John M. Harlan. Both dissents attacked the majority opinion as judicial activism and extolled the virtues of judicial self-restraint. *West Encyclopedia of American Law*, vol. 6, p. 361, (*Lochner v. New York*). See, also, Christopher Wolfe, *Judicial Activism: Bulwark of Freedom or Precarious Security* (San Diego: Harcourt College Pub, 1990). Judicial activism was never a feature of Pakistan's polity. It was born out of the guilt associated with the historic sins of our superior judiciary. As far as our constitutional history is concerned, it is replete with decisions which legitimized executive arbitrariness & extra-constitutional adventures. The law of *khul'* is, perhaps, the only exception in our legal system in which judges did not follow judicial restraint.

2 *Mst. Balqis Fatima v. Najm-ul-Ikram Qureshi*, PLD 1959 Lahore 566; B.Z. Kaikaus, Shabir Ahmad, & Masud Ahmad JJ.

3 *Mst. Khurshid Bibi v.Muhammad Amin*, PLD 1967 SC 97; S.A. Rahman, Fazle-Akbar, Hamoodur Rahman, Muhammad Yaqub Ali, & S.A. Mahmood, JJ.

4 One of the heated jurisprudential debates is whether judges make or create law during adjudication in the same sense as the legislator or they simply discover it. Many famous jurists, among them Bacon, Hale, Blackstone, and Ronald Dworkin, were convinced that the office of the judge was only to declare and interpret the law, but not to make it. At the other end of



focuses on an analysis of the case law concerning *khul'* over the years to point out its pros and cons. It discusses the weaknesses and the strengths of these cases from the perspective of Islamic law that the judges have been referring to and makes recommendations for further development of case law in this regard.

Precedential Value of *Balqis Fatima* and *Khurshid Bibi* Cases

Balqis Fatima will be remembered, despite its shortcomings, as the best example of an original precedent on the law of *khul'*. First, *Balqis Fatima* was a Full Bench decision which was against the decision of the Lahore High Court in the 1952 *Sayeeda Khanam* case.[5] In *Sayeeda Khanam* the Court had rejected the plea that incompatibility of temperament is a ground for dissolution of marriage but seven years later, in *Balqis Fatima,* the Court accepted the same argument as ground for dissolution of marriage. Secondly, in *Sayeeda Khanam*, the Court had ruled that *khul'* cannot be granted without the consent of the husband but in *Balqis Fatima*, the Court held that *khul'* can be granted without acquiring the husband's consent. Thirdly, in *Sayeeda Khanam*, the Court had based its decision on the traditional view of the *fuqaha* (Muslim jurists), especially, of the Hanafi school of thought. In *Balqis Fatima*, the Court did not follow the opinions of jurists of any school of thought and gave its own interpretation to verse 2:229 of the Qur'an, and the *Hadith* with reference to the case of Habibah, wife of Thabit b. Qays b. Shamas. The Court gave a new interpretation to the verse 2:229 useing the incident of Habibah to grant *khul'* for the first time in Pakistan. Whether this amounted to independent *ijtihad* by the Courts or not but the Court certainly resorted to reasoning that was not used by the Muslim jurists. [6] This was something

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the spectrum, equally great jurists as well as judges such as Bentham, Austin, Salmond, Lord Denning and Herbert Hart held the opposite view that judges make the law (the creative theory). For details, see, Muhammad Munir, "Are Judges the Makers or Discoverers of the Law: Theories of Adjudication and *Stare Decisis* with Special Reference to Case Law in Pakistan", *Annual Journal of International Islamic University, Islamabad*, Vol. 21 (2013), pp. 7-40.

5 *Sayeeda Khanam v. Muhammad Sami*, PLD 1952 Lahore 113; Cornelius, Acting C.J.; Muhammad Jan & Muhammad Khurshid Zaman, JJ.

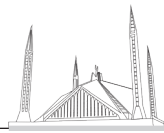
6 It can be said that in the case of *khul'*, Courts in Pakistan did not resort to *ijtihad* per se but rather applied the *Sunnah* of the Prophet (PBUH) and the Maliki school of thought without

impossible when the Privy Council was incharge. Fourthly, in *Balqis Fatima*, the Court praised a living scholar's work without examining him in the Court.[7] This was very unique and unusual. Fifthly, in *Khurshid Bibi*, it was observed by the Supreme Court that "The subordinate Courts, the District Judges and the Judges of the High Courts, in Pakistan, occupy a position akin to that of a *Qazi* [Judge], since they could affect a divorce on any ground on which it could be granted under the Muslim [Islamic] Law."[8] Finally, in *Balqis Fatima*, the Court considered its status and role and acted as if it was bestowed with the Divine authority under Islamic law within the State of Pakistan to interpret Islamic law, and in doing so, be allowed to deviate from the well-known and established opinions of Muslim jurists. This last point is probably more important than the ruling itself because it is exactly this point which other courts followed. *Khurshid Bibi* has endorsed

taking into consideration its interpretation by the majority of Muslim jurists. Since the topic of *ijtihad*, the domain of *mujtahid*, and the modes of *ijtihad* are complex rather than simple, therefore, any statement to the effect that the Pakistani Courts resorted to *ijtihad*, would be a sweeping one. For details, see this author's, "The Law of Khul' in Islamic Law and Legal System of Pakistan: The Sunnah of the Prophet or Judicial Ijtihad?" forthcoming.

7 The Court relied on Abu-l 'Ala Mawdudi's interpretation of *khul'* in his book *Huqooq Al-Zawjain*. Carroll argues that "It is extremely unusual for the opinions of a living person not examined in the Court to be cited in a judicial decision." See, Lucy Carroll, "Qur'an 2:229: "A Charter Granted to the Wife"? Judicial Khul' in Pakistan" *Islamic Law and Society* 3:1 (1996), 103

8 PLD 1967 S C 97 at page 134; per S.A. Mahmood, J. It is this aspect of *Khurshid Bibi* that has caused a stir among the religious clerics ('*ulama*) in Pakistan who have delivered a scathing attack on this ruling. See, for instance, Muhammad Taqi Uthmani, "*Islam me khul' ki haqiqat*" (The Reality of *Khul'* Under Islamic Law), in *Fiqi Maqalat* (Karachi: Maiman Publishers, 1996), 2:137-194. Just when I was busy in the initial draft of this article in June 2011, an interesting story was reported in the local newspapers. According to the report, a woman, Maryam Khatoon, in village Thoha in *tehsil* Talagang (near Rawalpindi), married one Shaukat Ali three years earlier. Two years later they developed differences and the wife demanded *khul'* which the Family Court granted and she married another man but the village's cleric refused to solemnize the *nikah* and the woman and her new husband got married at a local court in Talagang city. On 24th June, 2011, three clerics from the village issued a *fatwa* (religious ruling) from the mosque's loudspeakers declaring the new couple to have committed adultery and thereby liable to death. The local police registered a case against the three clerics." See, *Dawn*, 28 June 2011, 17. Such rulings have very serious repercussions because they challenge the State's authority, amounting to a parallel judicial system, and the '*ulama,* with the support of the people, want to take the law into their own hands.



Balqis Fatima and both have been cited by courts in *khul'* cases in Pakistan.

One of the problems associated with precedent or case law is that it takes time on a point of law to develop as judges could only answer questions raised particular to a case. As discussed below, case law on *khul'* suggests that the Superior Courts have refined and polished the various issues regarding *khul'*. At the same time, however, some judgments have created confusion regarding the Islamic legal history of *khul'*. Moreover, every point in a precedent case does not bind judges of the lower courts as only the *ratio* of a case, and not its *dicta*, is binding.

Some Case Law on *Khul'* Examined[9]

Since the *Balqis Fatima* and *Khurshid Bibi* cases, there have been decisions in which women were denied the newly-established right of *khul'*. In *Mst. Hakimzadi v. Nawaz Ali*,[10] the wife had sued for divorce under the Dissolution of Muslim Marriages Act, 1939 (DMMA). She alleged ill-treatment and false accusation of adultery with her husband's father. She was driven out of her house four times; she returned thrice following some sort of settlement but after the fourth time she sued for divorce under the DMMA, and alternatively, she pleaded for *khul'*. Her suit was dismissed by the trial Court and the District Judge also dismissed her appeal. On appeal to the High Court, it was held that the case of ill-treatment was proven and the grounds for the false accusation of adultery were wrongly presumed to be true. The Sindh High Court should have dissolved the marriage under the DMMA, however, the Court granted the wife a judicial *khul'*.

In *Bashiran Bibi v. Bashir Ahmad*,[11] the wife alleged that her husband attempted to force her to transfer to him the land she had inherited from her father, and on her refusal, she was beaten and driven out of her husband's house. Thereafter, her husband and his accomplices forcibly abducted her along with her sister and mother, and confined them illegally for some days. A criminal complaint was

9 This section is partly based on my earlier publication, see, Muhammad Munir, "The Rights of Women and the Role of Superior Judiciary in Pakistan with Special Reference to Family Law Cases from 2004-2008", *Pakistan Journal of Islamic Research*, 3 (2009), 271-299. For a comprehensive analysis of important *khul'* cases till 1995, see, Carroll, "Qur'an 2:229", 91-126.

10 PLD 1972 Karachi 540.

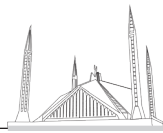
11 PLD 1987 Lahore 376.

filed in regard to these events and the husband was arrested. The wife filed suit for divorce on grounds of cruelty and non-maintenance; in the alternative she prayed for a judicial *khul'*. The Family Court dismissed her suit for divorce on the ground that she had failed to produce any independent evidence of ill-treatment. Her prayer for *khul'* was rejected on a novel ground: that since she had failed to establish the allegations regarding ill-treatment and abduction, she had no reason to develop extreme aversion to her husband which would entitle her to a judicial *khul'*. Her appeal was dismissed by the District Judge but the Lahore High Court granted her *khul'* in a writ petition. The Family Court and the District Judge, both, had denied her *khul'*. Unfortunately, the High Court did not dissolve her marriage under the DMMA but granted her *khul'*.

In *Bibi Anwar v. Gulab Shah*,[12] the wife was given in marriage by her father at the age of about eleven to a seventy-nine years old man. They lived together for about three years. The man became impotent about six months after the marriage and he began beating and ill-treating his wife. He drove her out of the house and she reunited with her family where she remained for three years before suing for divorce on the grounds of non-maintenance, cruelty, and misappropriation of her property – her dowry of half a *tola* (one *tola* is equal to 12 grams) of earrings which were sold by her husband despite her protest. Alternatively, she prayed for *khul'*. Although the wife's claims had remained unchallenged and were never refuted, yet the Family Court dismissed her suit and the District Judge dismissed her appeal. The wife approached the Karachi High Court in a writ petition. Justice Tanzil-ur-Rehman stated that all her claims of cruelty, non-maintenance, impotency, and disposal of her property by her husband, had gone unrebutted, although each one of them was a good ground for dissolution of marriage under the DMMA.[13] He also criticized the lower courts for refusing her the *khul'*. Unfortunately, the Court dissolved the marriage on the basis of *khul',* despite the fact that the judge himself mentioned that the allegations were not rebutted as the husband never attended the proceedings. Carroll has severely criticized this decision and opined

12 PLD 1988 Karachi 602.

13 An additional ground for dissolution of her marriage was the "option of puberty" under s. 2(vii) of DMMA, 1939. Since her marriage was consummated when she was below sixteen, she could have availed this option as well. Surprisingly, the Court denied her this right stating that since the marriage had been consummated, she could not exercise the option of puberty.



that:

The girl in this case, betrayed by her father into a most unsuitable marriage when only a child, lost her childhood, her virginity, and her dowry; she endured nearly three years of ill-treatment at the hands of an impotent old man; she spent five years in litigation (and could not even get costs from the defendant since he did not contest the suit); and, finally, she was permitted to purchase her freedom at the cost of *mahr*. The fact that her husband would probably have been unable to pay her *mahr* of Rs. 1,000 is immaterial; the Court should have at least left her with that shred of dignity and self-worth that recognizing the legitimacy of her complaints would have conferred.[14]

The examination of a few cases on *khul'* shows that Courts have been reluctant to dissolve marriage under the DMMA even when the evidence for dissolution is very strong. Moreover, battered women are forced to request *khul'* from the Courts in cases that are fit for dissolution under the DMMA. In some cases Courts, especially lower courts, have been refusing even *khul'*.

What Should the Complainant Wife Prove to the Court(s) to Obtain *Khul'*?

Previously the standards laid down by the Courts were very high. However, subsequently, the mere filing of a suit by the wife for obtaining *khul'* is considered as a sufficient basis for dissolution of a marriage. In *Shah Begum v. District Judge Sialkot*,[15] the Court has summarized the principles of *khul'*: first, *Balqis Fatima*, 1959 established the rule that the wife is entitled to *khul'* as of right, if she satisfies the conscience of the court that it will otherwise mean forcing her into a hateful union; secondly, *Khurshid Bibi*, 1967 established that if the wife had an incurable aversion to her husband, it was a sufficient basis for granting the *khul'*; thirdly, and finally, *Shahid Javed v. Sabba Jabeen*,[16] established that the right of *khul'* was an independent right and the wife's failure to establish grounds other than the

14 Carroll, "Qur'an 2:229", 119. Justice Tanzil-ur-Rehman seems to have corrected this wrong with his decision in *Syed Dilshad Ahmed v. Mst. Sarwat Bi* (PLD 1990 Karachi 239), discussed later.

15 PLD 1995 Lahore 19.

16 1991 CLC 805.

khul' claimed by her, would not prejudice her right to it.[17] However, according to the latest case law, the wife has to show hatred and aversion only and the mere filing of suit by the wife for obtaining *khul'* implies that hatred and aversion have reached a point of no return, and the trial court should dissolve the marriage by *khul'*. In *Naseem Akhtar* case,[18] the wife was thrown out of the house where the couple resided by her husband, and she filed her case after a passage of three years. During those three years she was not maintained by the husband, either. The couple had five children from their marriage. The wife filed a suit for *khul'* on 6th December 2000, and the husband filed a suit for restoration of conjugal rights on 3rd April 2001. Both the trial court and the court of first appeal refused the wife's suit. She filed a writ petition in the High Court which met the same fate, whence, she appealed to the Supreme Court. The wife's argument was that because of the hatred and aversion between the two she could not stay with her husband anymore. Justice Javaid Iqbal arrived at a very 'pro-women' but true interpretation of the law when he ruled that "no yardstick could be fixed to define or determine the *factum* of hatred which would be inferred on the basis of circumstances of each case *specially the statement of wife* [italics supplied]. It hardly needs any elaboration that emotion of love and hatred cannot be adjudged on rational basis and the only aspect which requires consideration in such-like would be as to whether husband and wife can live together in order to[19] perform their matrimonial obligations and not the solid proof qua hatred or aversion."[20] His Lordship relied on *Amanullah v. District Judge, Juranwala*,[21] *a*nd concluded that "hatred and aversion neither

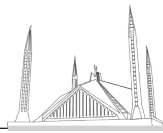
17 See also, *Ahmad Nadeem v. Assia Bibi*, PLD 1993 Lahore 249.

18 *Mst. Naseem Akhtar v. Muhammad Rafiq*, PLD 2005 SC 293.

19 PLD 2005 SC 293 at 295.

20 Ibid., at 295-6 PLD.

21 1996 PSC 59; also reported as 1996 SCMR 411. The observation of the Court in this case is worth quoting in full. It stated that "… when the contesting respondent stated that she had developed hatred towards the petitioner her assertion could not be rejected summarily; [in PLJ there is a comma. In PLD there is a semi-colon after summarily] it may also be mentioned that the relationship between the husband and the wife is of a very intimate nature. It may also be too embarrassing for either of them to disclose to the Court what has transpired between them in the privacy of their home. That being so, *there can hardly be any standard for assessing the substance in the wife's assertion that she has developed hatred for her husband*" [italics supplied].



can be prescribed nor confined within the limited sphere and no mechanism has been evolved so far to express "hatred and aversion" precisely and in a definite manner."[22] His Lordship went on to observe that the mere filing of the suit by the wife for the dissolution of her marriage was demonstrative of the fact that she "does not want to live with her husband which indicates the degree of hatred and aversion."[23] The wife's appeal was allowed. Thus, the mere filing of the suit by the wife for khul' means that hatred and aversion in that marriage have reached a point of no return.

The Quantum of Compensation to be Paid to the Husband in Case of *Khul'*

Under Islamic Law, if discord is caused by the wife, the husband will be paid compensation which is the equivalent of dower, or could be more or less, than it; however, if the husband is the cause of discord, then the *fuqaha* agree that he should not be awarded any compensation. Superior Courts in both Pakistan and Azad Jammu & Kashmir have, over the years, adopted these principles in many cases. In *Razia Begum* case,[24] for example, the Court discussed the factors to be taken into consideration in determining the quantum of compensation:

It is, therefore, not correct that in cases of *Khul* [sic] *ipso facto* the wife should return all benefits. This has to be determined in [light] of the facts and circumstances of each case and balance has to be maintained. If a wife seeks Khula [*khul'*] without pointing out to any default of the husband and the Court considers it proper to grant a decree for Khula [*khul'*], then the wife should be ordered to return all the benefits received by her and also forego such rights under which she can claim any benefit. However, while passing such an order, the court should take into

PLD 2005 SC 293 at 296.

22 At page 1327 in PLJ and at page 296 in PLD.

23 *Ibid*.

24 *Razia Begum v. Sagir Ahmad*, 1982 CLC (Karachi) 1586. See also, M.A.H. Ahangar, "Compensation in *Khul'* – An Appraisal of Judicial Interpretation in Pakistan", *Islamic and Comparative Law Review* 13:2 (1993): 113.

consideration the reciprocal benefits received by the parties.[25]

The non-payment of the compensation for whatever reason does not invalidate the dissolution of the marriage itself; it only creates a civil liability with regards to the benefits. In *Dr. Akhlaq Ahmed v. Kishwar Sultana*,[26] the Supreme Court held that:

> [N]on-payment of stipulated consideration for Khula [*khul'*] did not invalidate the dissolution of marriage by Khula [*khul'*]. Once the Family Court came to the conclusion that the parties cannot remain within the limits of God and the dissolution of marriage by Khula must take place, the inquiry into the terms on which such dissolution shall take place, does not affect the conclusion but only creates civil liabilities with regards to the benefits to be returned by the wife to the husband and does not affect the dissolution itself.[27]

In *Mst. Zubaida v. Muhammad Akram*,[28] it was held that non-fulfillment of conditions will not render the *khul'* decree ineffective; imposition of conditions merely creates a civil liability and a decree of *khul'* cannot be considered as dependent on requiring the wife to fulfill the conditions first.

Under the traditional Islamic law, however, the wife could only redeem herself in return for compensation if she was the cause of discord. Additionally, she could only free herself when she returned the promised compensation of *khul'* (usually the dower) and not before it. The Courts' decisions seem to be against the opinions of jurists in this sense. Perhaps the husbands in these cases were also blameworthy for the marital discord although *khul'* was initiated by the wives.

In a number of cases, the courts have established that when the husband is the

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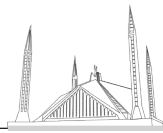
25 1982 CLC (Karachi) 1586 at 1591; *per* Saleem Akhtar, J.

26 PLD 1983 SC 169; Muhammad Afzal Zullah and Shafiur Rahman, J.

27 Ibid., at 172; *per* Justice Shafiur Rahman. In *Aurangzeb v. Gulnaz*, PLD 2006 Karachi 563, the husband argued before the High Court that *khul'* cannot be granted by the Family Court without restoration of the dower. The High Court endorsed and reproduced the above finding of the Supreme Court and rejected the contention. At 567; *per* Ali Sain Dino Metlo, J.

28 1988 MLD 2486.



cause of discord, then he should not be given any compensation. In *Mst. Zahida Bi v. Muhammad Maqsood*,[29] it was held that:

> The consensus is that when dissolution of marriage is due to some fault on the part of husband, there is no need of any restitution of property received by wife from husband at the time of their marriage or thereafter. However, when the husband is not at fault, then the position is otherwise, as in that case wife has to return the entire property so received by her.[30]

In *Khalid Mahmood v. Anees Bibi*,[31]the Lahore High Court, after discussing the amount of compensation, opined that:

> It is established ... that Court has the power to fix any amount of compensation, being the consideration of Khula' [*khul'*] if it is found after recording of evidence that Khula' is not claimed merely on the desire of wife but the fault of husband, is also the reason for recourse to Khula'.[32]

The same point has been asserted in many other cases.[33] The Court stated that the responsibility of the wife to restore to her husband the dower received by her at the time of marriage applies only if she is seeking dissolution of marriage on the basis of *khul'*. It should be noted that 'fault on the part of the husband' could be based on one of the grounds under the DMMA, under which the marriage must be dissolved while the wife gets to keep her dower and other benefits. In *Munshi Abdul Aziz v. Noor Mai*,[34] the Lahore High Court allowed dissolution of marriage on the grounds of *khul'*, and since 'cruelty' had also been alleged in the case, held that [cruelty] was a legal bar for claiming compensation.[35]

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29 1987 CLC 57 [Azad J & K]; *per* Abdul Majeed Mallick, C J.

30 Ibid., 61. C.J., Abdul Majeed is, perhaps, thinking about a 'judicial consensus' in the above quote.

31 PLD 2007 Lahore 626.

32 At p. 632; *per* Syed Hamid Ali Shah, J.

33 Such as *Mst. Parveen v. Muhammad Ali*, PLD 1981 Lahore 116; *Mst. Zahida Bi v. Muhammad Masood* 1987 CLC 57; *Mst. Shagufta Jabeen v. Sarwar Bi*, PLD 1990 Karachi 239 and *Dilshad v. Mst. MusaratNazir*, PLD 1991 SC 779.

34 1985 CLC 2546 Lahore.

35 See also, *Anees Ahmad v. Uzma*, PLD 1998 Lahore 52.

Syed Dilshad Ahmed v. Mst. Sarwat Bi[36] is loaded with too many citations from various books of Islamic Law and has been cited by many courts in their decisions. In this case, the Court had observed that "[I]f the fault lies with the husband, in fulfillment of his obligations to his wife, the acceptance of compensation for Khula'*[khul']* by him is forbidden in Shari'ah."[37] In *Karim Ullah v. Shabana*,[38] the wife sought dissolution of marriage on the grounds, first, that her husband treated her with cruelty, and secondly, she had developed extreme aversion against him making living with him impossible within the bounds set by God. She also claimed fifteen (15) *tolas* of gold ornaments as dower. The Court reviewed the Islamic Law of *khul'* and the relevant case-law and held that where *khul'* is decreed on the basis of cruelty, the Court may not give any compensation to the husband. The Court observed:

On a logical and philosophical discussion of the matter, it can also be argued that a husband if left unchecked shall apprehend no loss if he, for any reason, develops a disposition to break the bondage of marriage and resorts to cruelty with a mind to compel the wife to demand 'khula' [*khul'*]instead of giving her 'Talaq'. In this way he will secure for him[self] the benefit of retaining or getting back the dower property/amount. Such a cruelty will undoubtedly be a purpose-oriented one of which the law and Courts must take notice so as to keep the husband off the oche of cruelty.[39]

The Court further held that:

Where the Court, through a legal, cogent and convincing evidence, comes to an irresistible conclusion that the husband because of machismonian attitude and displaying masculine aggressiveness has compelled the wife to ask for dissolution of marriage on the ground of 'khula' [*khul'*], then the Court shall have the power to refuse the return of the dowered property/amount to husband or to release him from the liability of payment.[40]

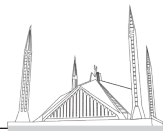
36 PLD 1990 Karachi 239; Tanzil-ur-Rehman , J.

37 Ibid., at 245.

38 PLD 2003 Peshawar 146; Justice Malik Hamid Saeed and Shahzad Akbar Khan, J.

39 Ibid., at 152; *per* Justice Shahzad Akbar Khan for the Divisional Bench.

40 Ibid., at 153.



In this case, the wife was tortured to the extent that she attempted suicide. The Court opined that she was entitled to her dower.

In *Malik Ghulam Nabi Jilani v. Mst. Pirzadi Jamila*,[41] the Supreme Court held ineffective a condition in the marriage contract restraining the wife's right to sue for dissolution of marriage on the ground of *khul'*.

A New Interpretation of the Law of *Khul'*

The Peshawar High Court gave a refreshing interpretation to section 10(4) of the West Pakistan Family Courts Act, 1964 as amended in 2002. The relevant portion of section 10(4) says that:

> If no compromise or reconciliation is possible, the Court shall frame the issues in the case and fix a date for the recording of the evidence. [Provided that notwithstanding any decision or judgment of any Court or Tribunal, the Family Court in a suit for dissolution of marriage, if reconciliation fails, shall pass decree for dissolution of marriage forthwith and also restore the husband the Haq Mehr [dower] received by the wife in consideration of marriage at the time of marriage].

In *Haseeb Ahmad v. Mst. Shaista*,[42] the Peshawar High Court gave an interesting interpretation to section 10(4) and held that this proviso can only refer to khul'. The Court observed that in a situation when the wife does not accept dissolution of marriage on the basis of *khul'* and emphasizes her entitlement to dissolution of marriage on the basis of cruelty or any other legal admissible ground, along with the return or retention of the received dower. "In that eventuality", observed the Court, "should a Family Court, after failure of pre-trial reconciliation proceedings, be left with no other option but to dissolve the marriage in terms of *khul'* only'?"[43] The Court held that dissolution of marriage on the basis of *khul'*, when other grounds exist, would make *khul'* a 'mechanical process' and will deprive the wife from getting her right on any or all other grounds of dissolution of marriage,

41 PLD 2004 SC 132.

42 PLJ 2008 Peshawar 205.

43 Ibid., at p. 207.

other than *khul'*, and "we cannot imagine that the proviso has been legislated to indirectly deprive women, of all their legally recognized grounds of dissolution of marriage, excepting *khul'*."[44] The Court held that the word 'shall' used in the above proviso "is directory in nature and not at all mandatory."[45] This is indeed a very welcome interpretation of the current law on *khul'*. The decision is important because if other grounds for the dissolution of marriage exist, they should also be taken into consideration to get the marriage dissolved because recourse to such an action would preserve the wife's right to retain her dower.

In *Dr. Nosheen Qamar v. Shah Zaman Khattak*,[46] the grounds for appeal are very interesting with regards to our discussion of the granting of *khul'* without asking the wife to return her dower to the husband. One of the grounds given by the Supreme Court to admit the appeal was to see whether or not the principle that 'if the husband has forced the woman to accept the *khul'*, a *talaq* will take place without any liability to pay the indemnity' by the wife to the husband, is attracted in this case.[47] In other words, if the husband is the cause of discord and has forced the woman to apply for *khul'*, should not the marriage be dissolved under the DMMA, 1939 rather than under section 10(4) of the WPFCA, 1964 as amended in 2010?[48]

In *Zohran Bi* case[49], decided by the Supreme Court of Azad Jammu and Kashmir, two real sisters were married to two real brothers. Both sisters had sought dissolution of their marriages on grounds of cruelty and failure of their respective husbands to maintain them. The trial court granted them *khul'* but the appellate court reversed the decision and ordered the restoration of conjugal rights. On

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44 At 207; *per* Syed Yahya Zahid Gillani, J for the Divisional Bench.

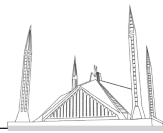
45 Ibid; *per* Syed Yahya Zahid Gillani, J for the Divisional Bench.

46 2007 SCJ 103.

47 Ibid., at 107.

48 As of 04 August, 2014 the case was pending. The Supreme Court converted Civil Petition No.132-P/2006 into appeal on 30 May, 2006, and the new appeal is Civil Appeal NO.1034-/2006. It is pending in branch Registry of the Supreme Court at Peshawar.

49 *Zohra Bi v. Muhammad Saleem and others*, PLJ 2005 SC (AJ & K) 171; also reported as 2005 YLR 896.



appeal, the AJ & K Supreme Court held that if *khul'* was not granted to both the sisters, it would amount to forcing them to live a hateful life. Syed Manzoor Hussain Gilani J, speaking for the Court, stated that matrimonial relations are based on trust, love, affection, good-will, and sacrifice for each other, and if these were lacking, "it is a forced union, not spouseism."[50] Highlighting the true law of *khul'* he further stated:

> The principle of *Khul'a* [*khul'*] is based on the fact that if a woman has decided not to live with her husband for any reason and there is no chance of reconciliation or her retrieving from the position, then it is left to the conscience of the Court to dissolve the marriage through *Khul'a* [*khul'*] and in case of non-dissolution under such circumstances the spouses cannot live within the bounds ordained by Almighty Allah.[51]

In the instant case, his Lordship concluded that dissolution of marriages on the basis of *khul'* must be ordered because attempts for reconciliation had already been exhausted by the elders and litigation had created additional bitterness between the parties.

In Pakistan, the procedure for instituting a plaint for *khul'* has also been simplified. In *Ahmad Hassan* case,[52] the issue was whether the written statement of the wife in response to a suit for restoration of conjugal rights could be treated as a plaint for dissolution of marriage. The High Court, at page 1027, answered it in the affirmative, stating that no separate suit for the dissolution of marriage was needed because of the new amendment to the West Pakistan Family Courts Act, 1964.

In *Sofia Rasool* case,[53] the High Court had ruled that if the wife had not asked for *khul'* in a suit or her written statement, then the court should not grant her the same, either. This was in response to the Trial Court's grant of *khul'* to the wife in the same, without her demand.

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50 p. 174.

51 At p. 175.

52 *Ahmad Hassan v. Judge Family Court, Sadiq abad*, PLJ 2006 Lahore 1025

53 *Mst. Sofia Rasool v. Miss Abhor Gull*, PLJ 2005 Lahore 855; also reported as 2004 CLC 1932.

In two similar cases, *Ikramullah Khan*[54] and *Muhammad Rizwan*,[55] the Lahore High Court ruled in 2007 that in case of *khul'* the wife must return the benefits, especially the dower which she had received from her husband. In *Ikramullah Khan* case, Justice Syed Zahid Hussain, relied on *Khurshid Bibi*,[56] in which the Supreme Court had observed that in case of separation by *khul'*, if the husband insists, "it is legally permissible for him to demand something more than the dower."[57] Carroll argues that the assumption adopted in judicial *khul'* cases is that since the wife had failed to establish one of the specified fault-based grounds available under the Dissolution of Muslim Marriages Act 1939 the husband stands exonerated of any fault or blame.[58] This assumption is however untenable. Moreover, the Courts have totally ignored the 'reciprocal benefits' which the husband may have received from the marriage. It is in this background that decisions which involve exonerating the wives from paying anything when the husbands are at fault, must be appreciated. Such decisions have added a new and a positive dimension to the law of *khul'* in Pakistan.

In *M. Saqlain Zaheer v. Mst. Zaibun Nisa Zaheer*,[59] the husband had gifted his wife a house and a car during the marriage and wanted to recover both when she asked for *khul'* which was granted by the Family Court in 1986. A single Bench of the Sindh High Court dismissed the husband's request and ruled that in deciding the matter the family court had rightly considered "the reciprocal benefits received by the husband and continuous living together".[60] The Court opined that the petitioner and the respondent lived together for 20 years and apart from performing her marital obligations she must have worked as housekeeper and cook for the petitioner. In addition, she has also born him two children and "assisted the petitioner in bringing up the children which can also be considered

54 *IkramUllah Khan v. Maliha Khan*, PLD 2007 Lahore 423.

55 *Muhammad RazwanYousaf v. Additional District Judge*, 2007 CLC 1712.

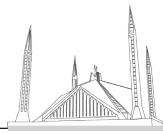
56 *KhurshidBibi v. Muhammad Amin*, PLD 1967 SC 97.

57 Ibid., at p. 121; *per* S.A.Rahman, J.

58 Carroll, "Qur'an 2:229", 124.

59 1988 MLD 427.

60 Ibid., at p. 431, para no. 14. (*per* Ahmed Ali U. Qureshi, J).



as benefits."[61] The Court stated that the house and the car were not given "by the petitioner to the respondent as consideration for marriage, but can be considered as compensation for the benefits that he got from the marriage for 20 years prior to the gifts."[62]

Unfortunately, *khul'* is still claimed as an alternative remedy should the wife fail in her primary claim for divorce on one or more of the grounds available under the DMMA. Moreover, in many instances, even when Courts in Pakistan have agreed that one or more of the grounds, such as cruelty or non-maintenance, have been proved, but they dissolve the marriage on the basis of *khul'* rather than under the DMMA. This means that the wife is usually asked to return her dower. Such examples include, *Abdul Majid*,[63] *Muhammad Sadiq*,[64] *Bashiran Bibi*,[65] and *Bibi Anwar* cases.[66]

In these cases, the battered wives had sought dissolution of their marriages on the bases of cruelty, non-maintenance, misappropriation of their properties, habitual assault, and even impotency in one case, but the Courts dissolved their marriages only on the basis of *khul'*, despite the fact that the grounds required for a divorce under the DMMA had been proved.

Conclusion

Judicial *khul'* is probably the best example of pro-women decisions of judicial law-making or 'judicial *ijtihad*' or judicial activism, to protect battered women from any cruelty on part of their husbands in the domain of personal law in Pakistan. The Courts in Pakistan have advanced the rights of women through *khul'* but their counterparts in India have yet to recognize those rights for Muslim women. Unfortunately, *khul'* is used as an alternative remedy. At first, a battered Muslim

61 Ibid.

62 Ibid.

63 *Abdul Majid v. Rizia Bibi*, PLD 1975 Lahore 766.

64 *Muhammad Sadiq v. Mst. Aisha*, PLD 1975 615.

65 *BashiranBibi v. Bashir Ahmad*, PLD Lahore 376.

66 *Bibi Anwar Khatoon v. Gulab Shah*, PLD 1988 Karachi 602.

wife, typically, attempts to save her marriage through an out-of-court settlement with recourse to the help of her family elders, failing which she sues her husband to get her marriage dissolved under the DMMA, 1939. The idea is that she will keep her dower, if already paid, or will get it from her husband, if unpaid. In her plaint for dissolution of marriage under the DMMA, when citing one or more of the typical reasons for dissolution of her marriage, e.g., the husband either has not maintained her properly, or treats her cruelly, or has misappropriated her property, or any other valid ground under the DMMA, the wife has to specify that alternatively her marriage may be dissolved through *khul'*. Knowing that any ground under the DMMA is very difficult to prove, the only remedy in which the wife does not have to prove anything besides hatred and aversion, is *khul'*. Knowing that now-a-days husbands who maltreat their wives seldom fear God, the Courts in Pakistan have rightly resorted to judicial law-making or judicial activism (rather than *ijtihad*) in *Balqis Fatima* and *Khurshid Bibi* cases, where it was held that *khul'* can be granted without the consent of the husband. It is now an established law that only hatred and aversion are enough for a wife to obtain *khul'* through the courts. In addition, when the husband is the cause of a marital discord, then he should not be given anything in compensation; whereas if the wife is the cause of a marital discord, then she has to return her dower. In 2002, an amendment was made to s. 10(4) of the West Pakistan Family Courts Act, 1964 which has made dissolution of marriage through *khul'* quite simple. The plain meaning of s. 10(4) seems to be that in every case, the Family Court has to attempt a reconciliation, failing which the Court has to dissolve the marriage through *khul'*, and order the wife to return the dower. However, under Islamic law, dower or its equivalent, or more or less, may be given to the husband only if the wife is the cause of discord and not in those cases when she is not. It is good to see that in some cases, Courts have given a good interpretation of s. 10(4) and held that the husband may be given less than the dower or may not be given anything. On the whole, the best decisions by the Superior Courts in Pakistan have been rendered in the field of Muslim personal law which has helped in making our legal system unique.

Islamic Law and the Surrogate Mother

Samia Maqbool Niazi*

Abstract

The idea and process of surrogate motherhood, where a woman acts as an incubator for another couple for payment or otherwise, is vehemently rejected and condemned by most of the modern Muslim scholars. Many consider it a form of unlawful sexual intercourse (zina). Others quote a large number of verses and traditions to show that such an act runs counter to the intention of the Lawgiver, and it also opposes the laws of nature determined by the Almighty.The paper argues that none of the arguments given by the modern scholars against the legal validity of surrogate motherhood are sound. The implication of the texts they quote is not what is intended by these scholars. In fact, there is nothing in the texts or even the writings of the jurists that opposes this process. There may also be arguments in Islamic legal literature that would encourage such a process. The paper also argues that surrogate motherhood may be declared valid with certain conditions.

Key words: Bioethics, *Zihar*, *Zina*, *Rada*, *Qada'f*, Sperm, Surrogacy.

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Introduction

The need for bearing children, feeding them, cuddling them, rearing them, participating in their future and sharing their dreams is immense; it is a basic human need, a necessity. It has been so since the birth of humanity, and will always be so. In a country like Pakistan, or any country for that matter, the lack of children can lead to broken homes, and up until the time the home is finally broken up the wife faces a constant threat of divorce. Even if divorce is not imminent, the prospect of becoming the neglected second wife of a Muslim husband is always present, not to speak of the constant bickering and ultimate miserable relationship to which divorce might be preferable. For these disillusioned parents, especially depressed wives, modern technology offers a ray of hope, just as it has revolutionized human life in almost every other area including health and fitness.

For these couples or women, assisted reproductive technology is an answer to their prayers and dwindling hopes. Their hopes are dashed, however, when a large group of Muslim scholars point out to them that this technology is the very foundation of sin, and employing it for the birth of a child will open the very gates of hell for them.[1] If an unfortunate couple recovers from the onslaught of these scholars, they are confronted by a growing body of Muslim doctors who are eager to develop Islamic bioethics. Some of these doctors are even more enthusiastic in branding this reproductive technology as sinful and they confine the permitted form of technology to cases that may not even need the option granted to them by Islamic bioethics, as nature may take over and give them a child in the natural way. It is not polite to point out who these good intentioned men and women of learning are, and there are many, because a jurist always focuses on the reasoning advanced, the evidence adduced, the *dalil,* and not on who is making the argument or presenting the evidence. It may be indicated here that the Islamic Fiqh Academy at Jeddah is included in this learned group.[2]

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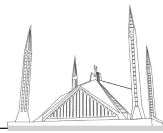
1 See, e.g., a more systematic and logical ruling issued by Muhammad ibn Adam al-Kawthari, Darul Iftaa, Leicester, UK: "What is the Islamic position on surrogate motherhood?" (available at http://qa.sunnipath.com/issue_view.asp?HD=1&ID=3622&CATE=95, accessed March 5, 2014).

2 See Resolution No. 16(4-3) of October 1986 of the International Islamic Fiqh Academy, Jeddah (Majma` al-Fiqh al-Islami).



The Thesis of This Paper

An examination of the arguments given by these learned people shows that not only are the arguments weak, but the problems of reproductive technology, especially the issue of the surrogate mother, which is the subject of this paper, has almost nothing to do with the technology involved -being a mere tool- and may have very little to do with the realm of sin and morality, or even theology. It is purely a legal question and must be settled by Islamic law as understood by the jurists and not by well-intentioned preachers or doctors.

Issues Related to the Legality of Surrogate Motherhood

The problems of medically assisted conception techniques and the surrogate mother are not unique to Islamic law. Jewish law tries to deal with the issues in its own way as can be seen from the writings of men of the law in the Jewish system.[3] In more secular environments, there is a greater concern with errors made by doctors and medical staff rather than with the ethical aspect of it all. What is to be done if fertilized embryos land in the wrong wombs, and the fight is not about babies mixed up in the hospital, but of embryos assigned wrong tickets? Two well-known cases that were litigated in the UK may be mentioned as examples.[4] What if the surrogate mother decides to keep the baby and claims that she has a greater right to the child than the social parents, who paid for it all. These problems can arise in an Islamic environment too, but for the present there is a greater worry about the legality of it all and the encircling rules of Islamic morality.

The Surrogate Mother and the Roadmap of This Paper

The surrogate mother is a woman who bears a child, without indulging in sexual activity for the purpose, on behalf of someone else, usually a couple in need of a child, called the social parents, who pay the surrogate mother for her trouble. There

3 Susan Martha Kahn, *Reproducing Jews: A Cultural Account of Assisted Conception in Israel,* (Durham NC: Duke University Press, 2000) as quoted in Marcia C. Inhorn, "Making Muslim babies: IVF and Gamete Donation in Sunni Versus Shi`a Islam," *Culture*, *Medicine and Psychiatry* (2006), 30: 427–450..

4 For the details see M Kabir and Banu az-Zubair, "Who is a parent? Parenthood in Islamic ethics" *J. Med. Ethics* (2007), 33:605–609.

is considerable terminology that surrounds this issue as well as other reproductive technology, but this will be avoided in this paper. The terms employed here will just be the "sperm" and the "egg". This paper will first examine the evidences from the texts of the Qur'an and the Sunnah that are used by scholars to declare surrogacy unlawful according to Islamic law. After this, the various situations in which the sperm and the egg come together to finally land in the womb of the surrogate mother will be analyzed in the light of Islamic law to see how far they clash with the requirements of Islamic law. Finally, a theological argument advanced by some will also be examined.

Responding to Arguments of Muslim Scholars About the Illegality of Surrogate Motherhood Under Islamic Law

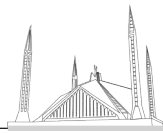
The first argument, the strongest, used by scholars is verse 2 of chapter 58 of the Qur'an:

ٱلَّذِينَ يُظَٰهِرُونَ مِنكُم مِّن نِّسَآئِهِم مَّا هُنَّ أُمَّهَاتِهِمْ إِنْ أُمَّهَاتُهُمْ إِلَّا ٱللَّٰٓـِٔى وَلَدْنَهُمْ وَإِنَّهُمْ لَيَقُولُونَ مُنكَرًا مِّنَ ٱلْقَوْلِ وَزُورًا وَإِنَّ ٱللَّهَ لَعَفُوٌّ غَفُورٌ

"If any men among you divorce their wives by Zihār (calling them mothers), they cannot be their mothers: None can be their mothers except those who gave them birth. And in fact they use words (both) iniquitous and false: but truly Allah is All-Pardoning, All-Forgiving."[5]

The focus of the argument is on the words, "None can be their mothers except those who gave them birth," meaning thereby that only those women can be your mothers who have given you birth and a social mother can never be called the mother of a child borne by the surrogate mother. There is no strength in this argument for a number of reasons. First, these words cannot be taken as a legal rule; they are merely informing the person pronouncing the divorce by way of zihar that this is not the correct form of divorce for you cannot call a grown up woman your mother as she has not given you birth. The intention to divorce not being clear the defective form used is rejected.

5 This verse has been used as the major argument by almost everyone writing on the issue of surrogate motherhood. The list is too long to reproduce here and will serve no useful purpose.



Even if the meaning of the words is taken to be definitive (*qat`i*) and it is conceded that a person's mother is one who gave them birth, the meaning stands restricted by the texts and legal precepts that permit wet-nursing or *rada,* prohibiting marriage between the person breast-fed and the wet nurse, or even the children of the wet-nurse. The wet nurse is also a type of mother now after the restriction of the meaning. The claim of restriction of meaning is affirmed if one raises the question: what if a husband says to his wife, "You are for me like the back of my wet nurse, my foster mother?"

The definitive meaning, after restriction, has now become probable, which means it can now be restricted by arguments of lesser strength. This is the rule according to the Hanafi school. According to the Shafi`is and others the meaning is not definitive to start with; it is probable and can be restricted by arguments that are in themselves probable. The way is now clear for arguments based on necessity and even rational arguments. Consequently, the social mother can be called the mother of the child borne by the surrogate mother, and the social parents the parents, provided they have some kind of biological link with the fertilized embryo growing inside the surrogate mother.

Another argument employed by the scholars is a tradition. Ruwayfi ibn Thabit al-Ansari (Allah be pleased with him) narrates that the Messenger of Allah (P.B.U.H) said on the day of Hunayn: "It is unlawful for a man who believes in Allah and the last day that he water the plant of another."[6] The meaning of "watering the plant of another", the scholars claim, is to introduce one's sperm into the womb of another person's wife. They also argue, backed by rational arguments that inserting a sperm into the womb of a woman other than the wife amounts to *zina* or unlawful sexual intercourse. The argument then is that as watering the plant of another by inserting sperm into a strange woman is *zina*, therefore, inserting sperms or fertilized ovums into a surrogate mother amounts to *zina*, and is to be declared unlawful.

It is submitted, with respect, that the argument that insertion of semen into the womb of a strange woman, without sexual activity, amounts to *zina* is totally flawed. First, the tradition has to be interpreted in its context. Having sex with

6 *Sunan Abu Dawud,* no. 2151 and also in *Sunan Tirmidhi.*

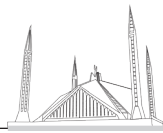
enemy women whose status is that of slaves after conquest is permitted. The Prophet (P.B.U.H) is telling the combatants that if you indulge in sex it is not proper with a pregnant woman in whose womb the foetus planted by her husband is growing as this would amount to watering something planted by him. In these and other cases during battle, ejaculating outside is suggested. The watering of another's plant during battle would in any case be interpreted as recommended and not obligatory.[7]

Zina, on the other hand, is an offence with its very specific conditions. First, it requires the meeting of the private parts. Second, it requires penetration of the male private part into the private part of the female. The penetration of the private part must be witnessed by four male witnesses. All these conditions must be met for the act to constitute the offence of *zina*. In the case of the surrogate mother, at least the first two conditions are completely missing. Thus, it is not *zina*, and calling the insertion of sperm into the womb through medical procedures *zina* will amount to *qadhf* invoking the severe penalty of eighty stripes. It is not a moral issue here, but a legal issue, and the law says this is not *zina*, and no one should have the audacity to call it *zina*. The literal implication (*dalalt un-nass*) of the word *zina* does not include the meaning of insertion of sperm, the Hanafi interpretation; nor does *qiyas* ul-ma`na convey this meaning, which is the Shafi`i method -all that is required for *zina* is penetration and the issue of sperm does not enter this meaning. On the other hand, *qiyas ul-`illah,* which is the regular form of *qiyas* cannot be used in the criminal law.[8] In other words, extending the meaning of *zina* to the insertion of sperm in the womb through medical procedures is incorrect according to the Islamic system of interpretation.

A subsidiary argument is that extraction of semen through the process of masturbation is illegal as masturbation itself is illegal. There is no need to answer this argument as those who advance it are themselves not convinced about its illegality. This masturbation is not for pleasure, and its purpose is to contribute

7 But we leave the task of estimating the weight of the *hukm* in terms of fard, wajib, mandub and so on to the ulama'.

8 Imran Ahsan Khan Nyazee, *General Principles of Criminal Law* (Islamabad: Federal Law House, 2002), 77.



to a medical process. If such arguments are used for prohibiting things and processes, it will become very difficult for the extraction of blood for testing, blood transfusion, transplants and many other medical processes to be legally justified.

Yet another argument advanced is based on a tradition. There is a well-known tradition[9] in which the Messenger of Allah (P.B.U.H) said: "The child will be attributed to the husband and the adulterer will receive the stone." The meaning is that the right of paternity will always be for the person who is married to the child's mother. The argument is that if a donor's sperm or the husband's sperm mixed with that of a donor is embedded in the wife's womb, the child will still be attributed to the husband. The husband may deny such paternity, in which case the child is attributed to the mother alone. In this argument, the main target is the social mother, who cannot be deemed the mother when it is the surrogate mother who is bearing the child.

This argument has two interrelated parts. The first is about attributing paternity to the husband where his fatherhood is doubtful. The second is about attributing paternity to the social mother when the ovum is hers, but is borne by the surrogate mother after fertilization.

Where the husband accuses his wife of unlawful intercourse, the couple has to undergo the procedure of *li`an*, which is the taking of oaths first by the husband and then by the wife. If both do so, it is the statement of the wife that is preferred. When a child is born, the husband has to deny paternity within seven days of birth according to some and within the postnatal period according to others.[10] If he fails to do so within the prescribed time, paternity of the child is attributed to him.[11] The attributing of paternity has the welfare of the child in view. The tradition above and this procedure are reflected in the principle, "*al-walad lil-firash*." This is usually translated as "the child is attributed to the marriage bed." In fact, the principle means that the child is attributed to the "man who had legal access for sexual relations." The latter meaning includes the paternity of the child born to

9 Recorded by Muslim and other acclaimed compilations.

10 Imran Ahsan Khan Nyazee, *Outlines of Muslim Personal Law* (Islamabad: Federal Law House, 2012), 100.

11 Ibid.

a slave girl too; where paternity is attributed to the master. It may be mentioned here that paternity of an illegitimate child can be claimed at any time by the father on the basis of earlier marriage or *shubhah* of marriage, but till such time that he does the child remains attributed to the mother.[12]

The assigning of paternity is not confined to this case alone. It is well known that the minimum period for gestation is six month on the basis of the Qur'an. It is, however, less well known that the maximum gestation period, where a woman has not claimed the termination of her waiting period on the basis of monthly cycles, is two years according to the Hanafi school. The maximum period is four years according to the Shafi`i and Hanbali schools, on the basis of which there have been a few judicial opinions in Saudi Arabia that have upheld this maximum period.[13] The legal basis for this is the principle of *`adah* (the scientific and physical state observed) among women during the period of the Prophet (P.B.U.H).[14] Those who rely on scientific facts alone today will say that this is not possible. The jurists were aware of this too, but the important point to note here is that it is the welfare of the child that takes over here and not the integrity or reputation of the parent. For the welfare of the child, who is likely to be declared illegitimate otherwise, the law assigns paternity to the husband. It may be noted that the illegitimate child cannot easily inherit from the genetic mother, because he is pushed to the last slot in the line, that is, even after the next of kin of the mother.[15] The discrimination and hatred exhibited for such a child by society is very cruel as compared to the denial of inheritance. Paternity is, therefore, assigned to the husband.

The issue then is whether the social mother, who has knowingly contributed her ovum fertilized by the sperm of her lawfully wedded husband for development in the womb of the surrogate mother, can be assigned the maternity of the child, that

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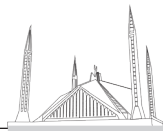
12 Ibid., 111—112.

13 For the details see N. J. Coulson, *History of Islamic law,* as quoted by Imran Ahsan Nyazee, "The Scope of Taqlid in Islamic Law," *Islamic Studies* (1983): XXII, 32.

14 Imran Ahsan Khan Nyazee, *Islamic Legal Maxims* (Islamabad: Federal Law House, 2013), 194.

15 See Nyazee, *Outline of Muslim Personal Law,* 224. D.F.Mulla has misinterpreted the rule about the inheritance of the child in his well-known Code. Ibid.



is, can the law create a fiction in her favour that calls her the mother of the child borne by the surrogate mother along with all the legal effects. It is suggested that the law should create such a fiction on the basis of necessity and on the basis of analogy from the above cases for the social mother and the interests of the child to be born. Assume, for example, that the naturally born child of the social parents and their child born through the surrogate mother grow up and now want to get married to each other, will such a marriage be permitted by the scholars. If not, then on what grounds will such a marriage be prohibited?

A theological argument is also advanced with the complaint that Muslim scholars are relying solely on the law to answer the important issue of the surrogate mother, and very little attention is being paid to the theological foundations.[16] We may quote the learned author:

> More often than not, contemporary Muslim scholars, both the conservative minded and the liberal minded, do not consider the theological implications of using a legal discourse to determine an answer for contemporary issues. Issuing a fatwa assumes that both the theology – which is conclusive – and the ethical paradigms – which blossom from the theological discourse – are unshaken by the fatwa offered. If a fatwa dismantles the Islamic theological and ethical paradigms, then perhaps the question leading to the fatwa should be investigated first.[17]

The main argument is advanced on the basis of the verses 49 and 50 of chapter 42 of the Qur'an: "To Allah belongs the dominion of the heavens and the earth. He creates what He wills.

He bestows (children) male or female according to His Will; or He bestows both males and females, and **He leaves barren whom He wills:** for He is full of Knowledge and Power."[18] The argument then is that the Muslims throughout

16 Shaykh Mohammed Amin Kholwadia, "The Islamic Ruling on Surrogate Motherhood." (Available at http://www.ilmgate.org/the-islamic-ruling-on-surrogate-motherhood/ , accessed March 5, 2014).

17 Ibid.

18 Emphasis on the original.

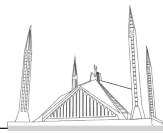
have resorted to prayer and lawful (*halal*) cures rather than resorting to unlawful means. Resorting to unlawful means will amount to opposing the Will of Allah and this may upset the basic requirement of submission to His Will. The author goes into further details, but this appears to be the crux of what he has stated.

The response to these worthy arguments is that, first, it has been assumed that the procedure involved in reproduction through the surrogate mother is unlawful. We have tried to show above that there is little to indicate that the procedures are unlawful in their entirety. Second, in those early times, blood transfusion, transplants and other similar processes might have been deemed inconceivable if not unlawful. Today, technology has informed us that lives can be saved through these processes, and many scholars are inclined to declare most of these processes as lawful. In the same way, the making of babies through assisted reproductive technology has been made possible, and the jurists as well as experts on theology must reexamine many of these issues, although as we have claimed earlier that this is a legal issue.

Analyzing the Legal Problem and Related Issues

There is, however, a need to separate and then examine the different types of processes that go under the name of surrogate motherhood. In other words, we first need to separate traditional surrogacy and gestational surrogacy, and then see what is permitted in the light of what we have asserted above, and what has to be excluded. We may restate here that in doing so we will avoid all technical terminology and focus on the journey of the sperm and the ovum to assess the types.

We will follow the general meaning of surrogacy here, which is that it is an agreement by virtue of which a woman carries and delivers a child for another couple or person. When the woman who is going to bear the child is the child's genetic mother, that is, when the ovum used is her own, the surrogacy is called "traditional surrogacy." When the fertilized ovum to be planted in her womb is not her own, that is, she is not genetically related to the child, the surrogacy is called gestational surrogacy. In this case, she is merely the host. The couple with whom the surrogate mother has entered into an agreement are called the social parents,



that is, the social mother and social father. For purposes of our legal analysis, the process through which the ovum is fertilized in the clinic and is transferred to the womb of the surrogate is not really essential for the legal conclusions to be drawn.

Some of the obvious situations that may arise in the case of traditional surrogacy, where the ovum belongs to the surrogate mother, are the following: first, where the sperm belongs to the social father; second, where the sperm is provided by the surrogate's husband; and third where the sperm is provided by a stranger. In the case of gestational surrogacy, where the surrogate is going to host an alien fertilized ovum, there are five obvious situations: first, where the fertilized ovum and sperm belong to the social parents; second, where the ovum of the social mother has been fertilized by the sperm of a stranger and is placed in the womb of the surrogate; third, the sperm has been provided by the surrogate mother's husband for the ovum of a strange woman, and this is placed in the womb of the surrogate; fourth, where the fertilized ovum and sperm belong to a strange married couple; and fifth, where the fertilized ovum belongs to a strange unmarried couple. These are eight situations in all and, perhaps, other combinations can be imagined.

Out of these, all those situations in which the sperm and the ovum provided have nothing to do genetically with either the social mother or the social father or both may be excluded right away from our analysis as these situations resemble adoption of a child not genetically related to the social parents. This leaves us with three situations that may be subjected to legal analysis. Finally, a few remarks may be made about the cases of adoption. Let us take up the three situations one by one.

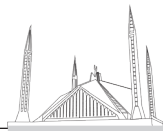
The first situation under gestational surrogacy may be taken up first. In this case, the ovum of the social mother fertilized with the sperm of her husband, the social father, is placed in the womb of the surrogate mother, who will bear the child and deliver it. Scientifically, the child belongs genetically to the social parents, therefore, it is their child. The body of the surrogate mother is providing sustenance to the fetus. The issue is whether the social parents are the true parents of the child or the surrogate mother is the true mother. Here verse 58:2, that is, of Surat Mujaadalah appears to stand in the way, because it says your mothers are those who have given you birth. We have already discussed this verse above

to show that the meaning is not absolute, and the wet nurse or the foster mother is also treated as a mother by the texts. The meaning of this verse having been restricted it is probable and can be restricted by rational arguments, like *qiyas* and scientific evidence. We need not repeat the arguments here. As the social parents are the genetic parents, they are to be treated as the true parents.

The surrogate mother here may be compared to a foster mother. In fact, her claim is stronger for being called a foster mother as compared to the wet nurse. If breastfeeding can lead to the wet nurse being called a mother, the surrogate mother who has provided the fetus with sustenance is like the wet nurse. Yet, she also appears to fall under meaning of the words "those who have given you birth." Do these words mean "those who have provided the ovum and then given you birth." If the purely literal meaning is followed and the reasoning rational mind is shut down totally then this surrogate mother will be called a mother, but if the underlying cause of "providing the ovum" is followed then she will be classified as the foster mother. The child should not inherit from the surrogate mother, but for purposes of marriage the child will be her foster child.

Are the social parents the real parents of the child? They have provided the cause and they are the parents on the basis of all scientific evidence. The social mother has avoided the gestation period and has not permitted the embryo to develop within her womb, just as she may avoid breastfeeding her own child. All that is needed in this case is that the social parents should acknowledge the child as their child, that is, they should claim paternity. The rules of claiming paternity will be applied. The second rule that applies is *al-walad lil-firash*. *Firash* here is translated as the matrimonial bed. It means, if the husband does not deny paternity within a prescribed period, the child will be attributed to him. *Firash* actually implies legal access for cohabitation, when the meaning of slave girls is added. The husband of surrogate mother, if she has any, should declare in the surrogacy contract that he will deny paternity of the child to be born as a consequence of the contract, and then he should deny such paternity as soon as the child is born.

The second issue that is second in importance is where the social father has provided the sperm with which the ovum of the surrogate mother is fertilized. This case falls under traditional surrogacy. The act of fertilization is not *zina*,



because it does not meet the conditions of *zina*, like facilitating the male actor, penetration and four witnesses witnessing penetration. Anyone who accuses these persons of *zina* is liable to *qadhf* and deserves eighty stripes. As soon as the child is born, the social father is to acknowledge paternity. The surrogate mother, who is the true mother in view of 58:2, may be asked in the contract to relinquish all claims to the child in favour of the social (and actual) father and the social mother in lieu of what she is charging. In violation of the agreement, she should provide an undertaking that she will pay back what she has charged, the expenses of the entire procedure, she will not claim maintenance from the social father and she will also pay damages to the tune of the agreement.

The third case is where the ovum of the social mother has been fertilized by the sperm of a stranger, and is accommodated in the womb of the surrogate mother. This is gestational surrogacy, and the surrogate mother is a mere host. The egg is fertilized outside the uterus of the mother (*in vitro*); it is not *zina* at all as it does not meet the conditions of the offence. Anyone who accuses her of *zina*, or even the surrogate mother, is liable to *qadhf*. Here the social father will not deny paternity of the child and the social mother will claim paternity. The surrogate mother will be treated as a foster mother on the analogy discussed above. This case can arise where the husband does not produce sperm at all.

All other cases, besides the three mentioned above, are cases of adoption because the social parents cannot be genetically linked to the ovum or the sperm that are used in the process. A child is born through some process, and the birth is financially supported by the social parents. The rules of adoption will apply, however, the social parents may become the foster parents through this procedure. In cases of adoption, the problem is not that the social parents remain childless. They do get a child to care for and to look after. The problem is that they wish to give their name to the child. Giving the name to the child usually means giving the last name. In official papers too some name has to be entered for the parents. These are problems of an administrative nature and can be overcome; we need not dwell on them. The other problem is that of passing on property to the child by way of inheritance. The solution for that may be the making of a gift during the lifetime of the parents or entering into a contract of *wala'* with the child

when there is no next of kin.[19] Finally, it is the child itself and his welfare that is important. Will the child be told the truth about his birth and origin, and that he is not the real child of the social parents. It is suggested that the truth should be told; it will be good for the psychological make-up of the child, as compared to the shock he or she will get when the truth is accidentally and suddenly revealed to the child later. It may be mentioned here that even in the United Kingdom a law has been passed by virtue of which a child born through the use of this technology has a right to know who his or her genetic parents were. If all this cannot be done it is better not to go for adoption as a foster child.

Conclusion

In the end, we may conclude that issue of medically assisted births, especially the issue of the surrogate mother, is purely a legal issue and should be settled through the law. Scholars, who are not specialists in the legal field, and even medical specialists, should acquaint themselves thoroughly with the rules of Islamic law and how they operate. A better option, however, is to refer the issue to jurists.

19 For the method of passing property to someone by way of contract, that is, the procedure of *wala'*, see Nyazee, *Muslim Personal Law,* 227.

Sawāra Marriages and Related Legal Issues

Mudasra Sabreen*

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

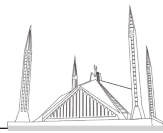
Vanī or Sawāra[1] is a custom in which girls are given and taken in lieu of blood in the case of murder. In such cases, the girl belongs to the murderer's family -usually the murderer's sister or daughter- and mostly is a minor. In this custom, the girl is given to the family of deceased as a result 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 puberty[2] 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 Shāf'ī and Hanbalī 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, *Ahkām*-al- *Usrah 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, Shāf'īs* 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 period[8] for a

al-Nahdah Al-'Arabīyah, 1973), 780-781.; Sālih Jum'aHasan Al-Jubūrī, *Al-Wilāyah 'Alā Nafs fī Shari'ah Al-Islāmīyah wa Al-Qānūn,* (Baghdad: Mu,assisah Al-Risālah, 1986), 368-370; A. D. Ajijola and S. M. Madnī Abbasī, *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.; Abī Zakariyā Yahyā ibn Sharaf Al-Nawawī, *Rowdhah-al-Tālibīn,* (Beirut: Dār-al-Kutb Al-'Ilmīyah, 2000), Vol. 3, 411-412.; Burhān-al-Dīn Abī 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-Zail'ī, *Tabyīn Al-Haqāiq Sharh Kanz Al-Daqāiq ma'a Hashiyah Al-Shalabi,* (Beirut: Dar-al-Kutb Al-'Ilmīyah, 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' fi Fiqh Imām Ahmad bin Hanbal,* (Beirut: Dār-al-Fikr, 1984), Vol. 7, 337-339.

6 Abī Bakr Muhammad ibn Ahmad ibn Abī Sahl Al-Sarkhasī, *Kitāb-al-Mabsūt,* (Beirut: Dār-al-Kutb Al-'Ilmīyah, 2001), Vol. 5, 235-237.; Abī Al-Walīd Muhammad ibn Ahmad ibn Rushd, *Bidāyat-al-Mujtahid* 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 *Shāf'īs* 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

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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.

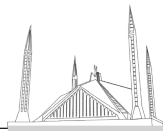
9 Shalabī, 1973, 127; Tanzīl-ur-Rahmān, *A Code of Muslim Personal Law,* (Karachi: Islamic Publishers, 1978), 184-185.

10 Q.24:32.

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 Mughnīyah, *Al-Fiqh 'ala Al-Madhāhib Al-Khamsah: Al-Ja'farī, Al-Hanafī, Al-Mālikī, Al-Shāf'ī, Al-Hanbalī,* (Beirut: Dār-al-'Ilm lil Malayīn, 1977), Ed. 5th, 322.

13 Q.4: 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 *Shāf'īs* 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 *Shāf'īs* 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-Ahwal 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-'Ālīyah, 1966), 174.-177.; Abī Bakr Ahmad ibn 'Alī Al-Rāzī Al-Jassās, *Ahkām-al-Qur'ān,* (Matba'ah Al-Auqāf Al-Islāmīyah, 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]

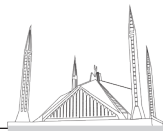
Under Islamic law, the conditions for a guardian of marriage are freedom, maturity and puberty. The guardian should have same religion as of the ward. If the ward is Muslim the guardian has to be Muslim. To have same religion is not a condition if the judge is performing duties of the guardian as he 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 *walī*. As far as condition of being just and of good character *('adālah)* is concerned there are two opinions regarding it: according to the *Shāf'īs* 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 *Hanafis*, *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; Mughnīyah, 1977, 322-323.

17 Ibn'Ābidīn, 2000, Vol. 8, 184; Abū Zahra, 1966, 179; Al-Zail'ī, 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-Sunnah,* (Place of publication is not mentioned, Maktabah-al-'Adat, 1982), Vol. 7, 5-6. Wahba Al-Zuhaili, *Fiqh-al-Islami wa Adillatuh,* (Damuscua: Dār-al-Fikr, 2004), Vol. 10, 7329.; Abu Zahrah, 1966, 19-122; Shalabī, 1973, 255-257; Al-Buhūtī, Vol. 5, 53-54.



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

The Option of Puberty

According to the *Hanafī* 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

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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, *Sahīh 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 Moulvi 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

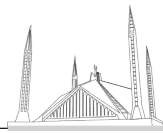
According to all schools ,for a boy guardianship of marriage terminates at puberty.[25] There is difference of opinion with respect to a girl. According to the *Hanafīs,* guardianship terminates at puberty and a woman can contract her own marriage after that. According to the *Hanafis* guardianship of 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 *Shāfʿīs* 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 *Shāfʿīs, 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 *ʿUmar*, *ʿAlī*, *Ibn Masʿūd*, *Ibn ʿAbbās*, *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 ʿĀbidīn, 2000, Vol. 8, 188, 198; Shalabī, 1973, 257-264; Mughnīyah, 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 *Hanafi* school, an adult woman is allowed to enter in a marriage contract without permission of the guardian. There are two conditions attached to

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28 Q 2:232.

29 Q 24:32.

30 Q 2:221.

31 Al-Jubūrī, 1976, 73-74.

32 Q 24:32.

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 *hadīth*: *'the guardian has no authority over the girl.'* According to another tradition narrated by *'Āishah* 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.

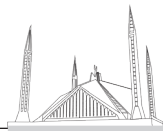
37 Q 2:230.

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-Daḥdaḥ* 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-Daḥdaḥ'*. *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 *Hanafīs,* his guardianship ceases and the judge will be the guardian now on. *Hanbalīs* 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 *Hanafīs* and *Hanbalīs* based their views on the following *hadīth*: *'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-sulh*. 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 1989[48] 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

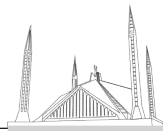
46 See Akhtar Ali v. the State, 2013 PCrLJ Lahore 1230: Muhammad Sultan v. the State, 2013 PCrLJ Peshawar 950: Mansoor Ahmed v. the State, 2010 PCrLJ Karachi 1661.

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 rupees[51] 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 Hanīfah* 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 it[64] 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

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59 PLD 1970 SC 323. Also see GhulamHussain 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; GhulamQadir 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.

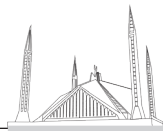
In the case of exercise of the option of puberty, Pakistani courts do not consider intervention of the court necessary for repudiation of marriage. The Lahore High Court in Noor Muhammad v. the State[65] and the Federal Shariat Court in Sajid Mehmood v. the State[66] decided that if a woman has contracted 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 *nikāḥ* 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 *khul'* as an alternative prayer so that if they cannot prove existence of child marriage they could get dissolution on the basis of *khul'*. 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 *khul'* 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 *khul'*. 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 *khul'* rather benefits received by the girl were considered consideration for *khul'*.[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 *khul'* is not applicable here.[70] In the case of *khul',* 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 *khul'* 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 *khul'* 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 *khul'* but could not prove that the marriage was repudiated before attaining the age of eighteen years so the court granted *khul'*.[71]

69 2004 YLR Lahore 1415. Also see LiaquatHussain 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.

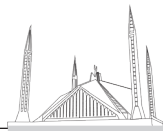
Section 2 of the Dissolution of Muslim Marriages Act 1939 says that exercise of the option of puberty will be valid if the marriage is not consummated. The issues related to consummation are discussed by the courts in several cases. In Allah Diwaya v. Mst. Kammon Mai, the Lahore High Court said that 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. GhulamSakina v. FalakSher 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 *Sharī'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 *Sharī'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 *diyah*. 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 *diyah* 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'ān*,*'O you who believe; Be you staunch in justice'*.[82] The custom of

77 Al-Sābiq, 1982, Vol. 2, 14.

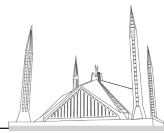
78 Ibid., 253.

79 Ibid.

80 Muhammad Abū Hassan, *Ahkām al Jarīmah wa Al-'Uqūbah fī Sharī'ah Al-Islāmīah,* (Jordan; Maktaba Al-Manār Al-Zarqā, 1987), 182-183.

81 Al-Sābiq, 1982, Vol. 2, 305-307.

82 Q 4:135.



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 Q.35:18.

84 Al-Sābiq, 1983, Vol. 2, 432.

85 Q.4:93.

86 Al-Sābiq, 1983, Vol. 2, 429.

87 Al-Sabiq, 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 Child[89] has always pushed Pakistan to formulate such a law. In 2009, the Protection of Children Bill[90] 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 children[92] 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).

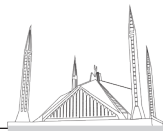
92 The Child Protection Bill 2009, Section 2(c).

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 rupees[104] 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.

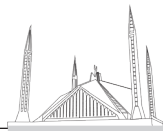
Conclusion

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. *Hanafī* 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 will[107] 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 MuttahidaQaumi Movement's manifesto see www.mqm.org/englishnews/1793/manifesto2013.Last visited 9th May 2013.

Rape Laws in Pakistan: Will We Learn from our Mistakes?

Ruba Saboor*

Abstract

The objective of this research is to explore and establish the position of zina-bil-jabr in the Islamic legal system while comparing it with the previous and current laws regarding rape in Pakistan, and to see whether its punishment amounts to hadd or siyasah under the Islamic criminal law and how this classification can be incorporated in the Pakistani legal system.

The article begins by explaining what zina-bil-jabr is under Islamic law and how it was integrated in the Pakistani legal system under the name of Hudood Laws in 1979, continuing to explain how this law was abused in the past. The Protection of Women Act 2006 was meant to bring the Hudood Laws in agreement with the injunctions of Islam, but ended up creating more anomalies in the legal system. Finally, the concept of siyasah is discussed where, if such a crime was to be brought under this banner, it solves the problem of the nature of the crime, its evidentiary requirements and its punishments. If the offence of zina-bil-jabr was to be renamed and redefined, it will not only exclude this crime from the operation of the stringent rules of zina but also the law will be able to cover a large number of sexual offences with their own requirements of evidence and the penalties may differ according to the gravity of the assault on the victim. Also, such a law would be gender-neutral for it would cover sexual assaults on both women and men. These changes can only be made if the offence is governed under the doctrine of siyasah.

Key words: *Zina-bil-jabr, Siyasah Shariah,* Hudood Ordinance, 1979, Protection of Women Act, Sexual assault

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Introduction

The offence of *zina-bil-jabr* or rape and the laws in Pakistan proclaiming it have been a subject of heated debates and a source of a number of controversies. With the rising popularity of the concept of Human Rights in the country, the *Hudood* Ordinances, 1979 met with much criticism. The *hadd* punishments are an essential part of Islamic Criminal law and the *Hudood* Ordinances, 1979 had been promulgated in an attempt to bring the criminal laws in Pakistan in compliance with the rulings specified in Islam. Unfortunately, the laws relating to sexual offences against women were discriminatory and instead of protecting the victims and the accused focused more on penalizing them. The laws that were meant to protect its subjects became a tool of oppression.

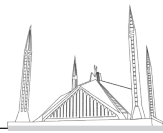
This article aims to highlight the rape laws in Pakistan throughout history comparing them with the Islamic laws and it aims to point out the differences as well as the positive and negative aspects of the old and new Pakistani rape laws; whether or not either of the two laws have protected the rights of its subjects and whether we have available to us a satisfactory solution.

Rape under Islamic Law

Rape, under Islamic law, is dealt with under the same rules that apply to any situation regarding coercion and duress. Let us briefly look at how coercion is treated under the umbrella of Islam.

Coercion under Islamic law

The Arabic term "*ikrah*" is commonly used to define coercion. In general, it refers to the commission of an illegal act by one upon another which is injurious or harmful to him, without his consent or that such deed was forced upon. This also includes the act of threatening another to coerce him into committing an illegal act against his will. *Ikrah* has been divided into two sub-categories; *Ikrah ta'am* refers to a situation where one has neither given consent nor is he in any position to refuse the aggressor, for example, fear of one's life if one is to refuse. This is unconditional *ikrah* or absolute coercion. The other category is that of *ikrah naqis* or imperfect coercion where the one coerced upon does not consent to the act but



the consequences of refusal are not so dire. For example, one is threatened with minor injury in case of refusal or that the one being coerced knows that the other is unable to carry out the threat.[1]

According to the Prophetic traditions, the Messenger of Allah (P.B.U.H) has said, "Allah has pardoned, for me, my *Ummah*: (Their) mistakes, (their) forgetfulness, and what they have done under duress."[2]

According to the four major schools of thought, i.e. Hanafi, Maliki, Sha'fi and Hanbali, the situation of *ikrah* initiates the moment the one coerced to do the illegal act is inflicted with fear. After that moment, he is to be dealt with under the rules of *ikrah* and not as a regular offender, as long as the threat is physically possible.[3]

There are certain conditions that apply in any situation of *ikrah*; without these conditions the matter of whether the situation is to be dealt with under *ikrah* becomes questionable. Firstly, the one being coerced must experience fear of death or severe injury in case of refusal; second, the threat must be immediate. In other words, the coerced person has no or very little opportunity to protect themselves. And lastly, the person being intimidated believes that the threat will be carried out. Whether the threat is actually able to be carried out or not is irrelevant. As long as the victim believes it will be, the situation of *ikrah* exists, unless he is being threatened with something that is impossible.[4]

Once the situation of *ikrah* has been determined, the victim of coercion is not liable to any kind of punishment for his actions were not his own. However, if it is an easily avoidable situation, yet the victim still believes himself to be a *mukrih* (one who is coerced) he may still be held liable for he had the opportunity to avoid it. Such a situation will be judged according to his mental capacity.[5]

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1 Au'dah, Abdul Qadir, "*At-Tashree' Al-Jinai Al-Islami*" (Beirut: Musawwamat ur Risalah, 1997), 1:563-564.

2 Ibn Maajah and al-Bayhaqee. < http://hadithaday.org/40-hadith-an-nawawi/pardoning-of-mistakes/> (accessed: July 26, 2014).

3 Au'dah, "*At-Tashree' Al-Jinai Al-Islami*", 1:564.

4 Ibid, 565-566.

5 Ibid, 568.

There is a consensus among all major schools of thought that all crimes are acceptable under the condition of *ikrah* except for murder. One is not allowed to take another's life even under coercion.[6]

Rape under Islamic Law

Islamic law treats rape under the same category of the general law of *zina*. It is interpreted as a sub-category and the general term used to describe it is *zina bil jabr* or *al-watt bil ikrah* (forced penetration). This understanding of rape is due to the fact that the Quran does not directly deal with the offense of coercive sexual relationship and only mentions the rules and penalties for consensual sexual intercourse. Therefore, decrees relating to rape are based on analogy or other forms of legal analysis.

Muslim scholars have based their arguments regarding rape on the previously mentioned Prophetic tradition that says "Allah has pardoned, for me, my *Ummah*: (Their) mistakes, (their) forgetfulness, and what they have done under duress."[7] There is a general consensus among the majority of Islamic scholars that any person, man or woman, forced into an illegal sexual relation, is not to be subjected to punishment.[8] This consensus is also based upon the Quranic verse "… But he who is driven by necessity, being neither disobedient nor exceeding the limit, it shall be no sin for him. Surely, Allah is Most Forgiving, Merciful."[9], that he who did not have a choice bears no sin.

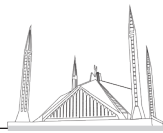
Other instances in our history have also proved that any woman who asserted to have been raped was not punished. For instance, during the Prophet's (P.B.U.H) time a woman claimed to have been subjected to rape, the Prophet (P.B.U.H)

6 Ibid, 569.

7 Ibn Maajah and al-Bayhaqee. < http://hadithaday.org/40-hadith-an-nawawi/pardoning-of-mistakes/> (accessed: July 26, 2014).

8 Au'dah, "*At-Tashree' Al-Jinai Al-Islami*", 1:573, and Charles Hamilton, "*The Hedaya*" (Lahore: Premier Book House, 1987), 187, and *Karamah: Muslim Women Lawyers For Human Rights,* "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan". <http://karamah.org/wp-content/uploads/2011/10/Zina-Rape-and-Islamic-Law-An-Islamic-Legal-Analysis-of-the-Rape-Laws-in-Pakistan1.pdf> (accessed: July 27, 2014)

9 Al-Quran, Chapter II, verse 174.



did not charge her of any crime, but appointed *hadd* of *rajm* on the man who had attacked her.[10] Another incident occurred during the time of Caliph Omar when some female slaves were sexually assaulted by some male slaves. The female slaves were cleared of any misconduct and Caliph Omar ordered for the male slaves to be flogged.[11]

Another occurrence took place when a lady, who had allegedly committed adultery, was brought before the Caliph Omar where she argued that she was a heavy sleeper and a man came unto her during her sleep. Caliph Omar had her released, even though she was unable to identify her assailant. When asked about his decision he replied that a *hadd* punishment is waived in case of even the slightest doubt. According to the statement of Caliph Ali and Ibn Abbas quoted here, if there is an "if" or a "maybe" in a *hadd* case, it cannot be applied.[12] There is a general consensus among all major schools of thought that in a situation of doubt, the *hadd* punishment is not to be carried out. This consensus is based on the Prophetic tradition that doubt negates *hadd* punishment.[13]

Moreover, the definition of coercion adopted by the jurists is in no way a narrow one for it extends to include meanings other than that of physical force as well. In other words, simple threat to hurt or kill the woman, or denying her food or water, in order to subjugate her into giving consent, is also covered under the umbrella of coercion. This was seen in the case where a woman, who was brought before Caliph Omar charged with *zina*, claimed that she was thirsty and asked a shepherd for some water. The shepherd, however, refused unless she agreed to have sexual intercourse with him. This did not leave the woman with any other option but to agree to his demand. Caliph Omar consulted Ali in the matter and they concluded that such a woman bears no sin for she did not have any choice

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10 "*Jami Tirmidhi*", Book of Hudood, Chapter 22, Hadith 1458. (Place of Publication and publisher ?)

11 Au'dah, "*At-Tashree' Al-Jinai Al-Islami*", 1:573, and *Karamah* "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan".

12 *Karamah: Muslim Women Lawyers For Human Rights,* "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 10-11.

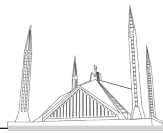
13 Au'dah, "*At-Tashree' Al-Jinai Al-Islami*", 2:365 and ibid.

in the matter. Therefore, the case was dropped against her and she was even provided with some monetary compensation.[14]

While there is a general consensus among all schools of thought regarding the waiver of punishment for a woman forced into sexual relationship, such is not the case where the victim is a man. Jurists have considered the possibility of a man being coerced into having an illicit sexual relationship and their opinions differ slightly from one another.

Imam Abu Hanifa originally believed that a man cannot be forced to have sex as he is an active partner in the process, unlike a woman who plays a passive role; and that distension of the male organ is an indication of desire and consent. Therefore, according to his prior opinion, compulsion cannot be proved with respect to him. Later on, he changed his opinion and said that compulsion upon a man can be proved if his life is threatened at the time of the intercourse and so he cannot be blamed for his actions. He also argued that the physical reaction from a man, i.e. distension of the organ, is no positive proof of desire and consent but rather of his masculinity since it may sometimes occur independent of his mind's activity, in his sleep, for instance. Imam Abu Hanifa further divided the situation into the two types of coercion, namely absolute and imperfect. He said that in case of absolute coercion or *ikrah ta'am*, which he believed occurs only by the order of the sovereign, is not liable to the *hadd* punishment. But if any other person other than the sovereign should compel a man to commit *zina*, then that man has to take on the responsibility for his actions. His two disciples, Abu Yusuf and Muhammad, differed in this matter. They said that a man subjected to absolute coercion to commit *zina* by any person is not liable to *hadd*. In the Hanafi school of thought, regarding the matter of coerced sexual intercourse upon a man, the opinion of the two disciples is preferred over the opinion of Imam Abu Hanifa. However, in case of imperfect coercion or *ikrah naqis*, both Imam Abu Hanifa and his disciples share a consensus that a man subjected to imperfect coercion is liable to *hadd* punishment, for he has the opportunity to avoid his oppressor's intimidation. It may be concluded that according to the Hanafi school of thought, a man does not incur punishment if subjected to absolute coercion and is liable to

14 Ibid 1:573



hadd punishment in a situation of imperfect coercion.[15]

Contrary to the Hanafi school of thought, the Hanbali School believes that since a man holds the active role, he is liable to *hadd* regardless of whether the coercion he is faced with is absolute or imperfect. They believe that *zina* is not possible without the distension of the male organ and, according to them, distension is not possible if he is terror-stricken. Therefore, if distension occurs then that is proof of desire and that, in turn, makes him liable to punishment.[16]

The Maliki school of thought is in slight agreement with the Hanbali School. They believe that anyone coerced into having an illicit sexual relationship, whether it be a man or a woman, is liable to *hadd* punishment as this is a matter of Right of God. However, there is a second opinion among the Maliki School where they believe that if a person is threatened to be killed only in that case a coerced illicit relationship is permitted. If one were to commit the act of *zina* under any other intimidation other than that of one's fear of life, he incurs upon himself the *hadd* punishment.[17]

The Sha'fi school of thought is the most lenient in the matter of a man being coerced into an illegal sexual relationship. According to them, any person faced with a situation of coercion, whether absolute or imperfect, is not liable to the *hadd* punishment. Their reason being that coercion, whichever kind, gives the one coerced the benefit of doubt in the situation; since doubt negates the *hadd* punishment such a penalty cannot be carried out on this person.[18]

Case of Unmarried Pregnant Woman Claiming Rape

There is a wide disagreement among the Muslim scholars regarding how to deal with a situation of an unmarried pregnant woman who claims rape. The women lawyers at Karamah have compiled these opinions by jurists, quoted many of them and have provided with the most appropriate one.

15 Au'dah "*At-Tashree' Al-Jinai Al-Islami*", 1:573, Charles, "*The Hedaya*", 187 and Wahbat-uz-Zuhaili, "*Al-Fiqh Al-Islami Wa Adallatuhu*" (Damascus: *Dar al Fakr*, 1985), 2nd edition, 5:401.

16 Wahbat-uz- Zuhaili, "*Al-Fiqh Al-Islami Wa Adallatuhu*", 5:401.

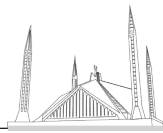
17 Ibid, 402.

18 Ibid, 401.

They quote and agree with Imam Abu Hanifa that if a woman claims rape, she is not required to prove it nor is it necessary for her to identify or name her attacker. They quote that according to him if there is a situation where it cannot be proved that the woman has committed *zina* nor is it possible to verify her claim of rape, it is best to drop the case against her owing to the Prophetic tradition telling us to dismiss the *hadd* punishment if there is an element of doubt. Clearly, Imam Abu Hanifa sympathized with the rape victim and believed that any woman subjected to such brutality could not be expected to remember the identity or name of her assailant. This opinion of Imam Abu Hanifa is mostly based on such occurrences during the time of the Prophet's (P.B.U.H) Companions where they dismissed apparent cases of *zina* where the victim claimed rape.[19]

However, Imam Malik and some other jurists shared different views regarding the matter. They argued that *zina* is proven in a situation where the woman is pregnant, unless the woman proves rape or marriage. This statement is based on Caliph Ali's statement where he categorizes *zina* into two forms, first is private *zina* that can only be proved through the testimony of four male eyewitnesses and second is public *zina* in a case where there is pregnancy or a confession. In spite of this, Caliph Ali provided with certain requisites for dealing with a situation of extramarital pregnancy. For one, he always gave the pregnant woman the opportunity to defend herself by claiming either that she had been raped or that she was already married. He also seemed to be quite willing to dismiss the charges based on doubt. The women lawyers at Karamah have interpreted the statement of Caliph Ali a bit differently, where they say that an illegal sexual relation leaves its private sphere when pregnancy of an unmarried woman occurs, which in turn affects the upholding of the public morality in the society. The society has the right to protect its moral values under Islamic jurisprudence; thus it becomes important that the alleged woman justify her pregnancy either by claiming rape or marriage. If she is unable to do as such, and if there is no other doubt in the matter, only then will her pregnancy be considered as proof of *zina*.

19 *Karamah: Muslim Women Lawyers For Human Rights,* "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 10-11.



In the case where a pregnant woman was brought before him, he even went as far as asking questions like: "maybe you were raped in your sleep?" or "perhaps you were forced to have sex?" suggesting to the pregnant woman, ways to justify herself. Therefore, according to Karamah lawyers, jurists who take up Caliph Ali's statement regarding pregnancy as proof of *zina* take it out of context which goes against the spirit of the rulings that protect such women.[20]

The seriousness of the matter of imposition of *hadd* punishment is clearly visible where even the most rigid of jurists, e.g. Imam Malik, have accepted physical evidence as proof of rape. The statement of a single witness who happened to hear the victim's cries for help was considered sufficient proof by Caliph Omar and he ordered the woman to be released. Concluding the matter of an unmarried pregnant woman who claims rape, we can ascertain that a woman who is raped is not under the obligation to identify her assailant under the less rigid schools of thought, like the Hanafi school. Even under the rigid schools of thought, like that of the Maliki school, while she has to prove rape, she is not bound to point out the aggressor. [21]

Now, the matter of an unmarried pregnant woman claiming rape and identifying an individual, accusing him of raping her is a different matter. Muslim jurists have expressed different opinions regarding this matter especially where the woman is unable to fully establish her claim.

According to the Maliki school of thought, if the person accused of rape is one known for his piety then the woman is liable to *hadd* of *qadhf*[22] if she is unable to produce any witnesses or physical evidence. However, in a situation where the accused is known for his misconduct, it is left up to the judge to decide whether to believe the woman's claim or not. In the event that the judge finds the accused individual guilty, he may inflict corporal punishment upon him, imprison him and

20 Ibid, 11.

21 Ibid, 11-12.

22 *Hadd* of *qazf* refers to the punishment of 80 lashes for accusing the chastity of a pious person. While the Quranic verse specifically talks about falsely accusing chaste women, Muslim scholars have applied this rule to anyone accusing the chastity of any other individual, man or woman.

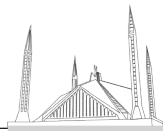
pay the woman an amount equivalent to mahr.[23] According to Omar bin Abdul Aziz, if the alleged lady is able to produce even one witness who heard her calling for help, then she can escape the punishment for *qadhf*. However, according to the Maliki school of thought, this evidence is not sufficient enough to establish the guilt of the accused. To do so would be unfair to the alleged rapist. The lawyers at Karamah believe that the opinion of the Maliki school of thought is greatly flawed and inconsistent with the Quranic injunctions. Instead they quote Ibn Hazm, a famous jurist who fiercely disagrees with Imam Malik and has provided with an alternate solution to the problem of unmarried pregnant woman identifying her assailant.

Ibn Hazm developed a new mechanism on how to deal with this situation and keep the damage to a minimum. He is of the opinion that when a woman approaches the court accusing an individual of forcing himself on her, rather than perceiving it as a false accusation, she should be looked upon as a plaintiff seeking justice. This would remove her from the liability of *qadhf* therefore relieving her of any fear from approaching the law. As a plaintiff, there are two courses of action: (1) She should be asked to produce clear evidence to prove her claim, and if produced the accused be punished accordingly; (2) if she fails to produce sufficient evidence, then the man would be asked to take an oath asserting that he did not assault her nor did he compel her to do anything against her will. However, he cannot be made to swear that he did not commit *zina* for such an oath would be too inflexible. Once the oath is conducted, both parties would be allowed to leave and neither would be liable for any form of punishment whatsoever. [24]

This article describes Ibn Hazm's opinion of the matter as "balanced, just and

23 The paying of *mahr* to the victim by the assailant does not mean that he is to marry her, as most believe. The payment is actually a form of compensation for the damage he has caused to the woman. I believe that the "amount equivalent to *mahr*" is the scale set out by the Maliki school of thought as to the amount of compensation that the victim is to receive. The Sha'fi school of thought agrees with the Maliki school in saying that the rapist is liable to *hadd* punishment for *zina* and the victim should be provided with monetary compensation. Other scholars disagree with this approach saying that it imposes double jeopardy on the accused and it would therefore be unfair for the accused and inconsistent with the spirit of Islam.

24 *Karamah: Muslim Women Lawyers For Human Rights,* "Zina, Rape, and Islamic Law- An Islamic Legal Analysis of the Rape Laws in Pakistan", 13-14.



compassionate" and unbiased. It tells the Muslim judge to lean towards side of caution to avoid victimizing anyone. Ibn Hazm notably distinguishes between the act of reporting an injustice and falsely accusing someone, for without such distinction the divine law that is meant to protect women becomes an instrument of victimization and exploitation. This opinion embodies the idea of justice and equity in such a way that rights of both parties are protected.[25]

Summarizing the discussion, it is agreed by almost all schools of Islamic Law that rape is a crime where the victim is not liable to any form of punishment, the only matter where they disagreed is on how to prove rape.

Rape under Hudood Ordinance 1979

During President Zia ul Haq's regime, Pakistan enacted a set of ordinances under the title of "Hudood Ordinances" in an attempt to bring the laws in "conformity with the injunctions of Islam". The crimes of theft, adultery, slander and alcohol consumption were the main subjects of the Ordinances as they became effective in February 1979.[26] The offence of zina was to be dealt with under "The Offence of Zina (Enforcement of Hudood) Ordinance 1979". Another offence that was to be dealt with under this Ordinance was the offence of rape or *zina bil jabr*. Section 6 of the Ordinance defined *zina bil jabr* and its punishment as:

1) "A person is said to commit *zina-bil-jabr* if he or she has sexual inter-course with a woman or man, as the case may be, to whom he or she is not validly married, in any of the following circumstances, namely:-

a) against the will of the victim;

b) without the consent of the victim;

c) with the consent of the victim, when the consent has been obtained by putting the victim in fear of death or of hurt; or

d) with the consent of the victim , when the offender knows that the offender is not validly married to the victim and that the consent is given because the victim believes that the offender is another person to who the victim is or

25 Ibid, 14.

26 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, preamble. See also Izzud-Din Pal, "Women and Islam in Pakistan", *Middle Eastern Studies*, 26:4 (1990), 459-460.

believes herself or himself to be validly married."

"**Explanation:** Penetration is sufficient to constitute the sexual inter-course necessary to the offence of *zina-bil-jabr*…"[27]

The lawmakers classified the same punishment for both crimes of *zina* and rape. Next the Ordinance went on to state the nature of evidence required to prove *zina* and *zina bil jabr* in section 8 where it stated:

"Proof of *zina* or *zina bil jabr* liable to *hadd* shall be in one of the following forms, namely:-

a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence; or

b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of *tazkiyah al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eye-witnesses of the act of penetration necessary to the offence:

Provided that, if the accused is a non-Muslim, the eye-witnesses may be non-Muslims."[28]

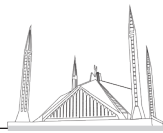
When this provision of section 8 was enacted, it raised a serious question; why is there no distinction between the evidentiary process of the offence of *zina* and that of *zina bil jabr*? The law makers blurred the legal line between rape and *zina*. In other words, whenever a *zina bil jabr* case failed to provide with the prescribed evidentiary requirements, i.e. of four male witnesses, the courts had the authority to decide that the intercourse was consensual, and thus the rape victims would be charged as *zina* offenders.[29] This has happened more than once during the twenty-seven years *zina bil jabr* has been a part of "The Offence of Zina (Enforcement of Hudood) Ordinance 1979".

According to the research conducted by the Human Rights Commission in

27 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, section 6.

28 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance 1979, section 8.

29 Shahnaz Khan, "Locating the Feminist Voice: The Debate on the Zina Ordinance", ed. Sadaf Ahmed, *Pakistani Women: Multiple Locations and Competing Narratives* (Karachi: Oxford University Press, 2010), 147.



Pakistan, a woman is raped every 2 hours and every eight hours a woman is subjected to gang rape. With one woman in every 12,500 being a rape victim, this law used to give them the treatment of "guilty until proven innocent" which is much too cruel.[30] The fact that no distinction had been made between *zina* and *zina bil jabr*, resulted in it becoming an instrument of exploitation and oppression.[31]

Evidence for *hadd* punishment has been fixed. Only two forms of proof are recognized; either the accused confesses to committing the offence or four pious adult sane male witnesses give testimony. These requirements have been laid out in the Quran and the Sunnah.[32] However, to apply these to a case of *zina bil jabr* as well is too harsh. Shifting the onus of proof on the victim and not accepting any form of expert opinion, medical evidence or documentary proof has been a great injustice practiced by the Pakistani legal system for almost three decades.[33]

Such injustices are quite clear in cases like that of Jehan Mena in 1982 and Safia Bibi in the year 1985. Zafran Bibi, a pregnant lady, was another victim of this law. The source of the poor lady's pregnancy was never even asked and it was assumed that since her husband was in jail, the unborn child was illegitimate. Rape may

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30 Ibid, 5 and Amnesty International in Asia & the Pacific, "Hudood Ordinances- The Crime And Punishment For Zina" <http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/svaw_hudoo> (accessed: April 12, 2012) and "Women Rights Situation in Pakistan", *Online Women In Politics.org*. <http://www.onlinewomeninpolitics.org/womensit/paks.pdf> (accessed: April 26, 2012).

31 Omar Farooq, "Rape and Hudood Ordinance: Perversions of Justice in the Name of Islam", *Islamicity*, 3. <http://www.globalwebpost.com/farooqm/writings/gender/rape_fiqh.html> (accessed: July 27, 2014)), Lutz Oette ed., *Criminal Law Reform and Transitional Justice: Human Rights Perspectives for Sudan* (UK: MPG Books Group, 2011), 251 and Anita M. Weiss, "Women's Position in Pakistan: Sociocultural Effects of Islamization", *Asian Survey*, 25:8 (1985), 870.

32 The Quran mentions in Chapter xxiv, verse 13 that, "Why did the slanderers not bring four witnesses (to prove their charge)? Now that they have not brought witnesses, they themselves are liars in the sight of Allah." This verse clearly states that anything less than four witnesses is not acceptable for proving *zina*. The *hadith* proving confession as another form proof are mentioned in notes 72 and 73.

33 See also "*Encyclopedia of Women and Islamic Cultures*" (The Netherlands: Brill Academic Publishers, 2005), 2:395.

have been the only crime in Pakistan where the alleged rapist had to be proved guilty by the prosecution.[34]

There seem to be two major problems with the implementation of this law. First is the rationale that adultery becomes public with pregnancy. Such reasoning makes the pregnant woman guilty before she even approaches the law. This is clearly discriminatory treatment towards the woman. She is a presumed adulteress before she gets any chance to defend herself. And where she takes up the defense of rape, the other party (if any) either refuses to acknowledge the woman or argues consent. This is quite normal in any case where the woman claims rape, however, in a situation where she is already looked upon as the guilty party, it is difficult to attain justice.

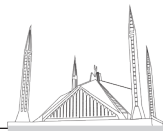
Second is the question raised in every rape case i.e. the character of the woman claiming rape. It is not for anyone to judge the character of a woman. However, the Pakistani courts have laid down the rule that if it is proved that the victim is one of easy virtue, her credibility is lost and no reliance can be placed on her testimony.[35] A victim remains a victim regardless of their character. To completely disregard a woman's claim based on something like character is unfair to one who was raped for real. And to make matters worse, this clichéd idea assumes that if there is no struggle from the woman's side against a sexual assault, then she must be a sexually loose woman–thus, validating the conversion of the charge of rape to *zina*. This generalization of human reaction to force and threat of violence is extremely unfair and unreasonable. And, it works to the detriment of those women who have been sexually assaulted and were able to survive only by submitting to the rapist.[36]

It is unfair for the courts to disregard rape over what "might have happened". A woman's claim of rape was converted to *zina* because according to the opinion of the court it was more "plausible" that she "must have consented to the commission

34 PLD 1983 FSC 183, *Mst. Jehan Mina vs. State*

35 SCMR 1995 SC 1403, *Muhammad Sadiq vs. State* and SCMR 1996 SC 1897, *Muhammad Yaqub vs. State*

36 Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective", *Islamic Studies*, 38:3 (1999), 11.



of *zina*…" Also, the biased opinion of the judges becomes visible when they make a statement saying, "We ourselves have noticed her as very clever girl, unlikely to be threatened for *zina-bil-jabr*." [37] It is not the place of a judge to give a personal comment about anyone's character. Not only that, they refuse to believe that a girl of loose character can be threatened for rape. So, use of weaponry to force the victim to consent, as was asserted in this case, has zero credibility in our courts. On the other hand, an alleged rapist was granted bail by the court because he had a "white beard and looked innocent".[38] Such biased conduct needs to be avoided in order to induce justice.

There are many cases where the conviction was converted from rape to *zina* over the defense of "possible consent" of the victim. Nighat Sultana's claim that she had been abducted and raped was disbelieved and instead it was converted into as case of elopement and consensual *zina*.[39] It is unfair of the Pakistani courts to disregard the possibility of forced consent, for in any case of alleged rape, if the medical reports did not show that "absolute resistance" was made, the conviction was converted to *zina.* The definition of "absolute resistance" has yet to be produced.

Supreme Court's discriminatory policy towards women became evident when it took an exception to the observation made by a High Court Bench where they stated that in this country, no woman, especially if she is an unmarried girl, would risk her reputation, character and future by making such an allegation unless it were true and she had been a victim of such "animal lust". Such comments were declared to be "uncalled for" and "improper" by the Supreme Court.[40] Comments defending the victimized girl are rendered improper and personal opinions criticizing the girl's character[41] are never even questioned.

Ever since the introduction of the Hudood Ordinance in the Pakistan Penal

37 PCr.LJ 1997FSC 1639, *Muhammad Khalil alias Kach vs. State*

38 1982 PCr.LJ 1202, *Zahoor Ahmed vs. State*

39 PCr.LJ 1980 LHC 1037, *Ihsan Ahmed alias Nanna vs. State*

40 PLD 1979 SC 377, *Sabir Ali vs. State*

41 PCr.LJ 1997 FSC 1639, *Muhammad Khalil alias Kach vs. State*

system, the idea of what rape is and how it should be handled, took a turn for the worse. The accusation of rape is difficult to prove no matter where the case may occur, but in case of failure to prove rape, both parties are set free. This, however, has not been the case in Pakistan. For almost three decades, women claiming rape watched their alleged assailants walk away, as free men, while they themselves got convicted for *zina*.[42] Seventy percent of the appeals filed from the Hudood Ordinance were against *zina* and rape convictions. The records of rape and *zina* are not maintained separately by the Federal Shariat Court as both offences and their punishments were prescribed under the same law.[43] While it is unjust to place rape and *zina* under the same umbrella, the provision that was more damaging was the one of *tazi'r*. It is the *tazi'r* punishment for *zina* and *zina bil jabr* that has created more victims.

Rape as *Tazi'r* under Pakistani Legal System

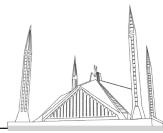
The criminal legal system that existed before the introduction of the Hudood Ordinance may not have been an ideal system; however, it did provide a certain amount of protection to women. This changed during General Zia's regime and women, as well as children, became victims of an unjust law. Women could be charged for rape. Consent of a minor was submitted as a defense by the accused assailant and, in any case where consent was established, the offence would be converted from rape to *zina*; like in the case of Naimat Ali where possibility of consent of the minor girl converted the case of rape to *zina*.[44] Therefore, victims of rape faced the possibility of being convicted of *zina* as a co-accused if they did not bring forth a watertight case against the assailant. And in case a victim became pregnant, she would be plagued with the fear of being looked upon as the guilty party.

Even though the *hadd* punishments for *zina* and *zina bil jabr* were made a part

42 U.S Department of State, Bureau of Democracy, Human Rights, and Labor, "Pakistan: Country Reports on Human Rights Practices" (2006). <http://www.state.gov/j/drl/rls/hrrpt/2002/18314.htm> (accessed: July 27, 2014).

43 Asma Jahangir and Hina Jilani, "*The Hudood Ordinances: A Divine Sanction?*" (Lahore: Sang-e-Meel Publications, 2003), 70.

44 PLD 1982 FSC 220, *Naimat Ali vs. State*



of Pakistani statute law, they have never been executed. Instead, the courts have relied on *tazi'r* punishments for the said offences. The Pakistani Higher Courts have gone out of their way to convert *hadd* punishments, awarded by the trial courts, into those of *tazi'r*.[45] While under Islamic Law, where there is *hadd* punishment prescribed by God, *tazi'r* cannot be applied. *Hadd* is the right of God and it has been laid out in black and white. There is no grey in *hadd*. The grey area is covered under *tazi'r*. So the problem brought about in the Pakistani legal system was that a *hadd* crime was brought under the category of *tazi'r*.

Consequently, the situation became something like this; a victim of rape would appear before the court. She would be unable to prove rape due to the strict evidentiary rules of *zina* being applied to rape as well. Her case would be converted to that of *zina*. Evidentiary rules would not permit the court to convict her of *zina* liable to *hadd*, so instead she would be convicted under a *tazi'r* punishment, which could include imprisonment, whipping and/or fine.

Jehan Mena was sentenced to three years rigorous imprisonment plus ten stripes.[46] Safia Bibi, the blind girl who was raped by her employer and his son, was found guilty of *zina* and sentenced to three years rigorous imprisonment, fifteen lashes and a fine of rupees one thousand. The accused were acquitted for lack of evidence.[47] Farakh Naza was awarded *hadd* punishment of whipping numbering hundred stripes, on appeal she retracted her confession on the basis that she was forced into it. Due to this retraction, the court changed her *hadd* sentence to that of *tazi'r*.[48] In any case of retraction of confession, under Islamic law, the accused are free to leave. However, that was not the case under Pakistani law. The victim still had to face *tazi'r* punishment which was, sometimes, more damaging.

While converting the conviction of rape into that of *zina* is damaging enough, the Supreme Court has even gone as far as accepting compromise between the parties where the alleged accused was convicted. The accused had been awarded *tazi'r*

45 Jahangir and Jilani, "*The Hudood Ordinances: A Divine Sanction?*", 67.

46 PLD 1983 FSC 183, *Mst. Jehan Mina vs. State*

47 PLD 1985 FSC 120, *Mst. Safia Bibi vs. State*

48 MLD 1998 FSC 344, *Shahbaz vs. State*

punishment by the Federal Shariat Court which was reduced by the Supreme Court, Shariat Bench owing to the statement made by the victim saying that she had forgiven the accused and that a compromise had been reached between him and her family and asked the court to reduce the sentence "if it cannot be remitted altogether".[49] While compromise does make for an easy solution, it could be used as a precedent by a guilty party to reach a compromise by force, resulting in more agony for the victim. Treating a victim of rape as a co-accused in a *zina* crime is extremely cruel and unjust. The police did not register cases of rape and *zina* separately. Similarly, records of rape and *zina* cases are kept side by side. In their opinion, they both fall under the same category.[50] This approach towards rape cases has brought about much suffering to the victims and one wonders whether the law was created to torment the victims rather than protect them.

Rape as *Harabah*

From the seven major *hadd* crimes under Islamic law, *harabah* is believed to be the fourth on the list. It has been translated as "highway crimes" or "forcible taking" and is believed to be a crime greater than theft, for in a case of *harabah,* the victim not only faces loss of property, but is also subjected to fear and mental agony.[51] The crime of *harabah* is based on the Quranic verse:

> "Indeed, the penalty for those who wage war against Allah and His Messenger and strive upon earth [to cause] corruption is none but that they be killed or crucified or that their hands and feet be cut off from opposite sides or that they be exiled from the land. That is for them a disgrace in this world; and for them in the Hereafter is a great punishment."[52]

Most Islamic legal scholars have interpreted it as any form of forcible assault upon an individual or group of individuals that may or may not cause loss of property.[53]

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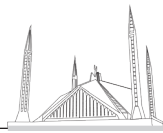
49 SCMR 1988 SC 1489, *Allah Ditta vs. State*

50 Jahangir and Jilani, "*The Hudood Ordinances: A Divine Sanction?*", 101 and 115.

51 Wahbat-uz- Zuhaili, "*Al-Fiqh Al-Islami Wa Adallatuhu*", 2nd edition, 6:128.

52 Al-Quran, Chapter v, verse 33.

53 Wahbat-uz- Zuhaili, "*Al-Fiqh Al-Islami Wa Adallatuhu*", 2nd edition, 6:128.



The basic factors that distinguish *harabah* from theft are that the latter is taking by stealth and the former is taking by force. Also, infliction of fear upon the victim is a major element in the crime of *harabah*. When discussing the offence of *harabah,* there are those jurists who have included the offence of rape under it as well, classifying it as a "*harabah* with the private parts". Therefore, a person's honour may be taken as their property and rape becomes the forceful taking of one's honour. This is applicable to both genders and thus includes any man subjected to rape as well.[54]

In her article, Asifa Quraishi believes that this categorization of rape under *harabah* advocates the principle that a woman's sexual dignity established by the Quran in the verses related to *zina* must be honored. Furthermore, circumstantial evidence, medical data and expert opinions would be accepted and encouraged if rape was treated as *harabah* by the Pakistani legal system.[55]

In Pakistan, *harabah* is not treated as a separate *hadd* crime; rather it is placed under theft as a sub-category. "The Offences Against Property (Enforcement of Hudood) Ordinance 1979" defines *harabah* in section 15 as: "When any one or more persons, whether equipped with arms or not, make show of force for the purpose of taking away the property of another and attack him or cause wrongful restraint or put him in fear of death or hurt such person or persons, are said to commit 'haraabah'."[56] Punishment of *harabah* has been provided under section 17 where the offender can be awarded with a penalty of "whipping not exceeding thirty stripes and rigorous imprisonment not less than three years". In case the property seized by the offender exceeds the *nisab*[57] then his punishment is "amputation of right hand from wrist and left foot from ankle". And in case of

54 Asifa Quraishi, "Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective", *Islamic Studies*, 38:3 (1999), 11, Au'dah, "*At-Tashree' Al-Jinai Al-Islami*", 2:638-639 and Huhammad Tufail Hashmi, "*Tahaffuz-e-Niswan* Act *Kita'b aur Sunnat ke Tanazr Mein*", *Monthly Al-Shariah*, 18:1 (2007). < http://www.alsharia.org/mujalla/2007/jan/tahaffuz-niswan-dr-tufail-hashmi > (accessed: July 26, 2014).

55 Ibid.

56 The Offences Against Property (Enforcement of Hudood) Ordinance 1979, section 15.

57 4.457 grams of gold.

murder, the penalty is death imposed as hadd.[58]

Proving *harabah*, under Pakistani legal system, is not as easy as one might think. Since *harabah* is treated as a sub-category of theft, therefore, the evidentiary requirements for proving *harabah* are the same as that of theft. The only two methods of proving *harabah* are: first, the accused confesses to the commission of the offence, and second, two adult male Muslim witnesses, other than the victim himself, give evidence as eyewitnesses of the occurrence. These witnesses must fulfill the requirements of "*tazkiyah-al-shuhood*"; that they are honest people and that they do not indulge in major sins.[59]

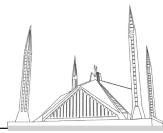
Regarding theft and armed robbery, the evidentiary requirements, aside from the fact that women witnesses have been excluded, seem fair enough. Since the *hadd* punishment is extremely severe, the conditions for proving *hadd* are just as strict. On the other hand, if we were to apply this rule to a situation of rape, I believe we will be back to square one.

Rape was never categorized under *harabah* in the Pakistani legal system, however, there has been a serious discussion regarding this in the Federal Shariat Court. In 1989, a number of women's rights activists challenged certain provisions of the Hudood Ordinances as being "repugnant" to Islam. One of them was the treatment of *zina* and rape as one and the same. The Court accepted and examined these provisions and it was hoped that a clear distinction would be made between the two. Consequently, the judges were of the opinion that rape should be removed from the category of *hadd* and placed under *harabah*. According to them, this would lessen the strict evidentiary requirements of four male witnesses to two male witnesses. They felt this would differentiate between *zina* and rape and that it would also ease the burden of the victim in proving rape. As a safeguard for false accusation of *zina*, the Federal Shariat Court recommended *hadd* punishment for *qadhf* may be awarded if the complainant is unable to bring forth four eye-witnesses.[60] In other words, if the court concludes that the complainant made a

58 The Offences Against Property (Enforcement of Hudood) Ordinance 1979, section 17.

59 Ibid, section 16.

60 PLD 1989 FSC 59, *Begum Rashida Patel vs. State*



false accusation of rape, that complainant would then be awarded the punishment of *qadhf*. However, the Court failed to consider the consequences of regarding "honor" as property. For one, if honor is that property that does not have any cost then how can it be brought under the banner of *harabah*? And if honor does have a price, how will it be determined? The question will arise on how different people have a different price of their honor and how much honor was "looted" at the time of the offence? All of these questions were conveniently ignored by the Court.[61]

This judgment failed to come up with any favorable solution for protecting the rights of a rape victim. Though this judgment was never codified as a statute by the Parliament in the Pakistani legal system, even if it had, it would not have made much difference for a rape victim. Rape is a crime that is extremely difficult to prove all over the world. It is nearly impossible for the victim to come up with even one testimony who was a witness to the act of penetration, let alone four, or even two. Also, if a pious Muslim was to encounter such brutality anywhere, his first instinct should be to save the victim, rather than wait and watch for the penetration to occur to be able to become an eye-witness.

The Hudood Ordinance has created more victims rather than protect the ones already existing. The foundation of law is to shelter those under it and in case of failure, to bring the ones responsible to justice. Providing justice to victims is the first and foremost purpose of law. Any law that fails to protect its citizens is a failed law and unfortunately, the rape laws under the Hudood Ordinance not only failed, but also victimized the victims themselves. For twenty-seven years, these laws prevailed, inflicting fear and pain in the hearts of those seeking justice. Though the law regarding rape was finally revised in 2006, the harm that has been inflicted upon the victims for almost three decades cannot be undone.

Background of the Protection of Women Act, 2006

The bill officially became a statute in December 2006 under the name "Protection of Women Act (Criminal Laws Amendment), 2006". Its promulgation sparked an intense debate in the media, mostly emotional rather than legal, between

61 VSC-J-1, *A vs. Z*. Virtual Sharia'h Court < http://vcourt.org/index.php/en/cases/decided-cases/doc_download/6-rape-pakistani-law-and-shariah> (accessed: 4th January, 2015)

two major groups; the *ulema* and the women rights activists. "The Protection of Women Act, 2006" was met with protests by the *ulema* faction and disappointment by the women rights activists. Nevertheless, the amended law was considered a step forward towards enhancing legal protection for the Pakistani women.[62]

"The Protection of Women Act, 2006" brought about three major changes. First, some of the offences from "The Offence of Zina (Enforcement of Hudood) Ordinance 1979" and "The Offence of *Qadhf* (Enforcement of *Hudood*) Ordinance 1979" were brought under the "Pakistan Penal Code"; secondly, the offences of fornication and false accusation of fornication were specified and re-defined; and lastly, new procedures for the prosecution of these offences as well as adultery and rape were formulated.

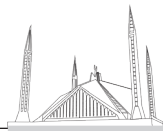
Rape under Protection of Women Act, 2006

One of the major changes brought about by the "Protection of Women Act, 2006", that won full support from the human rights groups, was that rape or *zina-bil-jabr* was removed from the *Hudood* Ordinance 1979 and inserted in the "Pakistan Penal Code" as a *tazi'r* offence.[63] The definition of rape in section 375 of "Pakistan Penal Code" is the same as the old common law definition with the exception of clause (v) where the age of the victim was changed from fourteen years to sixteen years. Marital rape has also been included in the said definition.[64] This change was welcomed by the Women rights activists for this meant the removal of the requirement of four male pious witnesses. If the testimony of the victim corroborates with the medical evidence, it is enough to convict the accused. As rape was now a *tazi'r* offence, the *hadd* punishment for it was repealed and it is now punishable with 10 to 25 years of imprisonment and death or life

62 Ibid, and Muhammad Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", *Yearbook of Islamic and Middle Eastern Law*, 14 (2008-2009), 95-96, and NCSW, "Study to Assess Implementation Status of Women Protection Act 2006", *National Commission on the Status of Women Islamabad*, 5 and 7. <http://www.ncsw.gov.pk/prod_images/pub/StudyonWomenProtectionAct2006.pdf> (accessed: July 27, 2014).

63 Ibid, 105, and Ibid, 7.

64 Protection of Women (Criminal Laws Amendment) Act, 2006, section 5.



imprisonment in case of gang-rape.[65] Furthermore, in the event that rape could not be proved, the complaint will not be converted into *zina*. This was a relief provided to the victims of the offence so that they may seek justice without fear of being prosecuted instead.[66]

While it is true that the new law protects the rights of women, the lawmakers seem to have neglected the rights of men. There seems to be no remedy for the men in the event that the accusation is false. The problem with rape being a *tazi'r* offence is that where the allegation is false, *qadhf* cannot be invoked. The *qadhf* punishment serves as a shield against false accusations of *zina* or *zina-bil-jabr*. It is quite possible that a woman has consensual intercourse with a man and then, later, accuses him of forcing himself upon her. In such a case the man cannot mention that she was a willing party for fear of *hadd* punishment while the woman is not afraid of being punished at all. Therefore, the new law does a very good job of protecting the women, it has left the men with absolutely no defense.[67]

"The Protection of Women Act, 2006" not only shifted the offence of *zina-bil-jabr* back to the "Pakistan Penal Code", but also other offences related to rape were removed from the Offence of *Zina* Ordinance and inserted in the Penal Code as *tazi'r* offences. These include those dealing with "kidnapping or abducting a woman to compel her for marriage; kidnapping or abducting someone in order to subject him or her to unnatural lust; selling or buying persons for the purposes of prostitution; cohabitation caused by a man deceitfully inducing a belief of lawful marriage and; enticing or taking away or detaining a woman with criminal intent".[68] This was also considered a positive change by the human rights groups.

While the women rights activists rejoiced over the said amendments, there is one particular law that needs attention. Section 365-B, a new provision inserted by the

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65 Pakistan Penal Code, section 376.

66 "Study to Assess Implementation Status of Women Protection Act 2006", *National Commission on the Status of Women Islamabad*, 7. <http://www.ncsw.gov.pk/prod_images/pub/StudyonWomenProtectionAct2006.pdf> (accessed: July 27, 2014).

67 Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", 105-106.

68 Protection of Women (Criminal Laws Amendment) Act, 2006, sections 2-4, 6-7.

"Protection of Women Act, 2006"[69], makes abducting a woman and compelling her into marriage an offence punishable with imprisonment for life and fine. Although the intentions of the law-makers seem noble, this new clause will have other repercussions in cases of, what are known as, "court marriages". It has been a common phenomenon in Pakistan that if a girl were to marry someone against the wishes of her parents, they would lodge a first information report (FIR) against her and her husband, alleging that she had been abducted and forced into marriage. According to the new law, the girl cannot be arrested in this case but her husband could be arrested for abduction. Not only that, but if the girl were to give in to her parents pressure, conviction of the man would become certain. Even the least amount of penalty he could receive would be ten years imprisonment.[70] The man is completely defenseless in this situation.

A positive change that was welcomed in the "Offence of *Zina* Ordinance, 1979" was the insertion of a clear definition of "confession". Many cases of *zina-bil-jabr* have been converted into *zina* when the complainant was unable to prove rape, on the ground that the victim had confessed to committing the offense when the complaint was made. The insertion made by section 10 of the "Protection of Women Act, 2006" defines confession as "… an oral statement, explicitly admitting the commission of the offence of zina, voluntarily made by the accused before a court of sessions having jurisdiction in the matter or on receipt of a summons under section 203A of the Code of Criminal Procedure, 1898."[71] This definition aims to remove any confusion between rape and *zina*, safeguarding the victims from fear of *hadd* punishment.

It is true that the "Protection of Women Act, 2006" brought about quite a few positive changes in our legal system, but it seems they were not good enough. It is the duty of the law to protect all its citizens. If the previous law failed to protect the rights of women, then this new law is neglecting the rights of men.

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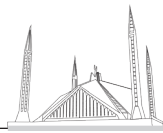
69 Ibid, section 2.

70 Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", 107-108.

71 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979, section 2 (aa).



Rape: A *Siyasah* Offense?

The debate between the *ulema* and human rights groups continues on the question of whether making *zina-bil-jabr* a *tazi'r* offence was the right thing to do or not. While the latter are satisfied with the change, the former have made cynical attacks on the Protection of Women Act, 2006 insisting that the change contradicts with Islamic law. They firmly believe that *zina-bil-jabr* is specifically a *hadd* crime and that it cannot, under any circumstances, be a *tazi'r* offence.[72] Taqi Usmani, a former judge of the Supreme Court of Pakistan, narrated the following Prophetic tradition to prove his stance that rape carries a *hadd* punishment:

> "It is reported by Wile ibn Hujr (May Allah be pleased with him) that at the time of the Prophet (P.B.U.H) a woman came out of her house to pray [in the mosque], when someone raped her on her way. The man ran away when she raised hue and cry. Later on, that man confessed to raping her. Upon this the Prophet (P.B.U.H) awarded *hadd* punishment to that man and did not award *hadd* punishment to [that] woman."[73]

However, another version of the same *hadith* has been reported as such:

At the time of the Prophet (P.B.U.H) a woman got out of her house for [the purpose of] prayer. A man forced her and had sex with her. He ran away as she raised her voice and another man came over. She said that that man had this [sex] with her. Some Muhajir (those who migrated from Makka to Madina) came over to whom the woman told that this man had [sex] with her. They apprehended that man who was accused by the woman to have raped her. She said [about that man] that he is the one. They brought him to the Prophet (P.B.U.H). But when he (the Prophet) ordered him to be stoned to death; there stood the [real] man who did rape her, and said, "O! Prophet of God (P.B.U.H) I had raped her." He [the Prophet] told the woman to go away 'Allah has pardoned your mistake' and he spoke nicely with the first [accused] man, then he ordered that the rapist be stoned to death and said about him [the second accused] that he has regretted

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72 Muhammad Taqi Usmani, "*Amendment in Hudood Laws The Protection of Women's Rights Bill An Appraisal*" (Islamabad: Institute of Policy Studies, 2006), 9-10 and 16.

73 *Jami'e Imam Tirmizi, Kitab al-Hudood*, Chapter 22, *hadith* 1458 and 1459.

in such a way that his repentance would suffice all the people of Madina if they would render it.[74]

To put it simply, the man who was awarded the *hadd* punishment was the one who had confessed to his crime.

Now the more important question that arises is that whether there is a way out of this debate. Problems exist when rape is classified under *hadd* offences and problems exist when it is brought under *tazi'r*; does a solution to this dilemma exist? Obviously, as it has been observed, the answer does not lie in *hudood* laws nor can it be found under *tazi'r* offences; what is best suited to administer justice and protect the rights of all is the notion of *siyasah*.[75]

Siyasah Shariah

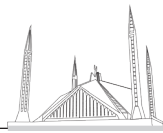
'*Siyasah*' literally translates as "policy" and it encircles the entire administrative justice system which is dispensed by the head of state and by his political representatives. This is in contrast with the system of *Sharia'h* which is administered by the *qadhi*. In simple terms, the public law lacked a comprehensive form and loopholes in the law would deter the complete administration of justice. Thus additional jurisdiction was needed in the sphere of Islamic public law; the legal doctrine of "*Siyasah Sharia'h*" evolved to fill in the cavities.[76]

The term "*siyasah shariah*" can be roughly interpreted as "the administration of justice according to *shariah*". Throughout history, Muslim jurists have made much effort to illustrate that part of Islamic legal system that has been fixed and did not focus much on that area which is flexible. This part of the legal system adapts with the changes in time, in accordance with the necessities of the Muslim community,

74 *Sunan Abu Dawood*, *Kitab al-Hudood*, Book 33, *hadith* 4366.

75 Muhammad Mushtaq Ahmed, "*Tahaffuz-e-Niswan* Bill 2006 – *Aik Tanqeedi Jaiza*", *Monthly Al-Shariah*, 17:10 (2006). < http://www.alsharia.org/mujalla/2006/oct/huqooq-e-niswan-mushtaq-ahmed > (accessed: July 27, 2014).

76 Imran Ahsan Khan Nyazee, "*Theories of Islamic Law*" (Islamabad: Islamic Research Institute, 1995), 111-112; Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", 102 and Suhrab Aslam Khan, "*Islamic Legal System for An Ascendant Social Order: Methodology of Reorganization*" (Lahore: Ferozesons (Pvt) Ltd., 1996), 65-66.



headed by the *Imam* (head of Islamic state). The power to carry out such functions is granted to the ruler by the doctrine of *siyasah shariah*, though the head of an Islamic state must bear in mind not to make any laws repugnant to the Quran and the *Sunnah*.[77] It is therefore safe to say that any offense that cannot be classified as a *hadd* crime and placing it under *tazi'r* hinders absolute administration of justice, needs to be dealt with under *siyasah*, where the head of state has the authority to award a strict penalty for a heinous act.

Rape as *Siyasah*

From what we have learnt from our history, it seems to be quite clear that there are bound to be complications whether rape is classified under *zina* or under *tazi'r*. The *hadd* punishment brings with itself the strict evidentiary criterion which is nearly impossible to satisfy and the *tazi'r* punishment, which cannot exceed the *hadd* punishment, seems too low for such a heinous crime. Not only that but in Pakistani law, rape under "The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979", was unjust towards women and now that the crime is covered under the Pakistan Penal Code, it leaves the men completely defenseless. So, where the path towards justice cannot be achieved through *shariah*, I believe the answer can be found under the doctrine of *siyasah*.

The author, Mushtaq Ahmed, quotes Imran Niyazee where he proves that *zina-bil-jabr* cannot be classified as a *hadd* offence. Niyazee explains that according to doctrine of *maqasid al-shariah* (purposes of Islamic law), matters related to bodily harm are given priority over matters of sex. Rape is an attack on the physical and mental person of the victim and is an offence that is categorized under *hifz ala nafs* (protection of life or protection of self) and, therefore, cannot be included under the offence of *zina*, which is classified under *hifz an nasl* (protection of future generations).[78]

As regards *siyasah*, it seems that it is ignored by most authors writing on different

77 Ibid, 103 and Ahmed, "*Tahaffuz-e-Niswan* Bill 2006 – *Aik Tanqeedi Jaiza*", *Monthly Al-Shariah*, 17:10 (2006). < http://www.alsharia.org/mujalla/2006/oct/huqooq-e-niswan-mushtaq-ahmed > (accessed: July 27, 2014).

78 Ibid, 102.

types of punishments under Islamic law. Even so, the existence of *siyasah* can be traced back to the time of the Prophet (P.B.U.H), where he awarded harsh punishments to various offenders. One has already been mentioned before, where a woman was raped and the alleged rapist was awarded *hadd* punishment. Even though the actual rapist later confessed and was awarded the punishment of being stoned to death, the first accused was given the *hadd* punishment without a confession or the presence of four male pious witnesses. In other words, the punishment awarded to the first accused was not according to the evidentiary criteria for *zina*, but rather it was according to the notion of *siyasah*.[79]

Another event that occurred during the Prophet's (P.B.U.H) lifetime was when some people from the tribe of *Ukl* or *Uraina* became sick and were sent by the Prophet (P.B.U.H) outside Madina to drink milk from the camels of charity in order to recover. Once they had regained their health, they killed the shepherds, drove off the camels and turned apostates. The Prophet (P.B.U.H) had them brought back, had their hands and feet cut off from alternate sides, tore off their eyes and left them in the desert until they died.[80] In another narration, it is mentioned that they were not even provided with any water even though water was even provided to the person who was sentenced to be executed.[81] These people were not punished under *harabah*, for mutilation of bodies is not a prescribed *hadd* punishment under Islam. Therefore, the safe conclusion is that they were punished under the principle of *siyasah*.[82]

When debating about the Hudood Ordinances, 1979 and the "Protection of Women Act, 2006" on the media, bringing rape under *siyasah* was never mentioned by any scholar, whether modernist or orthodox. If rape were to be brought under *siyasah*, its definition, evidentiary requirement and punishment would be left to the government to determine. It is distressing to think that such an easy solution of the problem exists, yet it never even occurred to the minds of

79 Ibid.

80 *Sahi'h Muslim*, Book 16, Chapter 2, *hadith* 4130 and 4131.

81 Ibid, *hadith* 4132.

82 Munir, "Is Zina bil-Jabr a Hadd, Ta'zir or Syasa Offence? A Re-Appraisal of the Protection of Women Act, 2006 in Pakistan", 104.

Pakistani scholars.[83]

Is there a solution?

After analyzing rape laws of the United States of America and Britain as well as the amended laws in India, I have compiled a brief overview on how Pakistani rape laws may be amended in an attempt to offer a better system of justice. It is my personal opinion that in order to bring the existing Pakistani law in conformity with the rules of *Sharia'h*, what needs to be done is to expand the scope of the offence, which is to say that all forms of sexual violence should be covered under the same banner i.e. non-consensual offences. [84]

As the offence of rape is removed from the offence of *hadd*, a much broader view of the offence can be taken. The offence of rape will always carry within itself the element of penetration; however it should include penetration of not only the vagina, but the rectum and mouth as well. Under rape, penetration will always be from the male genitalia. In a situation where the act of penetration is carried out from a body part other than the penis (e.g. fingers), the title of the crime should change to "assault by penetration". This would constitute a separate felony and the intensity of the offense would be slightly lesser than rape, also this title would not include penetration of the mouth. This title could further be spread out to include penetration by anything other than one's body parts as well (e.g. bottle or stick), or this could be made into a separate offence.[85] Another option could be to couple the offence of "assault by penetration" with that of "hurt". For example, if the act of penetration has left the penetrated portion of the victim slightly injured, such an offence would be a on a higher scale compared to when the penetration leaves no injuries. The scale of the injury would determine the intensity of the offence. This would also mean that in an event there is a case of "rape and murder", it

83 Ibid, 104.

84 VSC-J-1, *A vs. Z* and "Report of the Committee on Amendments to Criminal Law", Justice J.S. Verma, Justice Leila Seth and Gopal Subramanium, (January 23rd, 2013), 63-65.

85 Rape and Sexual Offences: Chapter 2: Sexual Offences Act 2003 - Principal Offences, and Sexual Offences Act 1956 - Most commonly charged offences. <http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/soa_2003_and_soa_1956/#a08> (accessed: July 27, 2014)

would be dealt with the harshest of punishments. These offences would be gender neutral thus eliminating the issue of "discriminatory law". Sodomy may, or may not, be categorized as a separate crime, for I do believe that the above mentioned definition of rape includes the said offence.

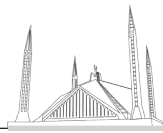
Furthermore, while we are expanding the scope of sexual crimes, we should also add molestation under the banner. The definition could include anything from intentional touching (sexual in nature) to even kissing. A narrow definition would include touching without or from under one's clothes, while the wider definition would not have such a barrier and the nature of touching could be ascertained from the circumstances surrounding the incident.[86] This offence would also be gender neutral and all the above mentioned crimes would accept any and all forms of evidence available, including medical reports, circumstantial evidence, forensic as well as testimony of women and non-Muslims. Procedure and punishments would be decided depending on the nature and intensity of the offence and, in extreme cases, the legislation may even approve the maximum punishment they deem fit, e.g. life imprisonment or capital punishment.

Another crime that is mentioned in the British law which I believe should be incorporated in Pakistani law as well is that of "causing sexual activity without consent". This would be the final step to covering the entirety of sexual crimes, for this would cover everything not previously mentioned. For example it could include any sexual act that the victim is forced to commit on oneself (e.g. masturbation); or, if the victim is forced to commit such an act on a, willing or non-willing, third party (this would also cover the issue of forced prostitution); and/or, if the victim is forced to engage in a sexual act with the offender (e.g. "a women forcing a man to penetrate her"). The idea behind this offence is to expand the range of sexual offences as much as possible as well as to produce a female counterpart of the offence of rape, which would carry the same level of punishment.[87]

In order to resolve the issue of age of the victim and age of the offender, we can either make a separate category of "sexual offences against children" or we may

86 Ibid.

87 Ibid.



take notes from the rape laws in the United States of America, where most states define rape by categorizing it into 1st, 2nd, 3rd and so on degree rape. Each degree of rape would be determined by the age of the victim e.g. 1st degree rape would be if the sexual act was performed upon someone less than 12 years of age, while for 2nd degree rape the victim has to be between the age of 13 and 16, etc. This could include the age of the offender as well or the age of the offender could be categorized under a separate heading. The method of dealing with the offence as well as the intensity of the punishment would, along with other things, depend on the age of both the victim as well as the offender. This could also include the mental capacity of the victim so as to cover a wider range of the victims of the crime.[88] To enlarge the scope even further, the offence of "gang rape" would be properly defined wherein to include the intensity of the crime depending on the number of offenders as well as the amount of injury received by the victim.

One final issue that I believe needs to be resolved is that of a legal definition of "consent". The definition would take into account one's ability to make a free choice regarding any kind of sexual act; in other words, the issue of consent would be irrelevant if the victim were to be a minor and/or mentally unsound. It would include one's free choice and their ability and freedom to make such a choice. Therefore, if consent to the crime is given due to any kind of fear or intoxication through drugs, such consent would be considered invalid by the courts.[89] The said definition would be such as to eradicate the notion brought about by some of our judges in a few previous cases of "possible consent" as well as the claim that the victim did not put up "absolute resistance".[90] This would also mean that any evidence offered in an attempt to prove the victim's previous sexual conduct would be rendered inadmissible;[91] the idea behind this is, primarily, that while adultery

88 "Statutory Rape Laws by State", Sandra Norman-Eady, Christopher Reinhart and Peter Martino (April 14th, 2003 OLR Research Report). <http://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-r-0376.htm> (accessed: July 27, 2014) and Rape Law & Legal Definition. <http://definitions.uslegal.com/r/rape/> (accessed: July 27, 2014)

89 Rape and Sexual Offences: Chapter 3: Consent. < http://www.cps.gov.uk/legal/p_to_r/rape_and_sexual_offences/consent/#a03 > (accessed: July 27, 2014)

90 PCr.LJ 1997FSC 1639, 1982 PCr.LJ 1202 and PCr.LJ 1980 LHC 1037.

91 Rape Law & Legal Definition. <http://definitions.uslegal.com/r/rape/> (accessed: July 27,

is a sin, it still does not justify such bestiality by the offender nor does it lessen any trauma or pain that the victim suffers.

Lastly, as a safeguard against false accusations of rape the law of *qadhf* can be linked with this law as well. However, the current definition of *qadhf* in Pakistani law is not the same as the definition provided to us by Islam. That is to say, that the removal of the exceptions of "good faith" and "public good" are a necessity in order to effectively provide justice and follow the path set down by Islamic law.[92] Since these aforementioned suggestions talk about bringing "rape" under the banner of *siyasah*, it would be reasonable to believe that the laws regarding "false accusation of rape" should also be covered under the same heading.

Conclusion

Our history has proved to us that we have failed to protect the victims of one of the most heinous crimes in the world. Rape is an offence which is difficult to prove everywhere in the world. In Pakistan, due to the constant clash of Pakistan's *ulema* faction with the women rights activists, people are left with questions regarding whether or not Islam really provides justice. This has, in turn, given the impression to the international community that Islam is a barbaric and brutal religion. In an attempt to force rape under the banner of *hadd*, we have lost our face as a proud Muslim nation, and brining rape under *ta'zir* or the Pakistan Penal Code, we have brought down such a beastlike act to the same level as an ordinary crime. The notion of *siyasah* exists to deal with such offences that are too brutal to be handled under *ta'zir* and where *hadd* has remained silent. The legislators need to change their outlook on the crime. Instead of focusing on passing out punishments, we need to protect the girl's honor. The moment any girl is called to the court for anything, especially if it is relating to a case that is sexual in nature, her honor is destroyed. Afterwards, even if the court declares her innocent or uninvolved, it is too late for her honor has already been trampled upon. Islamic law insists over and over again that these laws are made to protect one's honor and if we make any law that plays with one's honor so easily, such law has to be removed or

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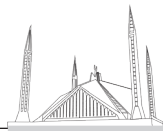
92 VSC-J-1, *A vs. Z.*



amended for this law goes against the spirit of Islamic law. Pakistan is a declared Muslim country, we all believe that the laws provided to us by Allah and His Prophet (P.B.U.H) are the epitome of justice, and while countries like the United States have incorporated Rape Shield laws in their system in an attempt protect the already traumatized victims from the emotional distress of being questioned about their sexual history while on the witness stand, us Muslims have not only failed to provide basic justice to victims, but we have led the world to believe that Islam is another name for barbarianism.

Qawamah in Islamic Legal Discourse: An Analysis of Traditionalist and Modernist Approaches

Shagufta Omar*

Abstract

The status and role of women in Islamic societies has become one of the major topics of discussion ever since the women's rights movement gained momentum globally under the auspices of the United Nations. While discussing the status and rights of women under Islam, it is important to differentiate between the Islamic teachings and the present status of women in the Muslim world with the vast diversity varying from culture to culture and often within the same culture. It is realized that the Islamic perspective concerning many aspects of women related issues of contemporary times is unclear rather misunderstood in the minds of non-Muslims as well as less informed Muslims. The position of women in Islam has been the subject of repeated controversy due to perceived misconception of the religion enforcing gender inequality and oppression for women particularly regarding the family relations. Criticism is raised either on account of doubts created by the Western mind set or on account of some misleading interpretations of basic provisions of the Quran and the hadith; or due to several malpractices or injustices induced by traditions or cultural influences. The present paper is aimed to highlight few deeply engraved misconceptions about the notion of Qawwamah (the family leadership) and in its light the husband wife relationship and family working in Muslim societies focusing Pakistan. It will be discussed in the light of the verse 34 of

Sura Al Nisa which describes the dynamics of family relationships when two equal human beings join together to found an institution of family, the basic and vital unit of the society. The paper further endeavored to highlight some of the inherent tensions existing in traditionalist and modernist interpretive approaches to this concept on two extremes and tried to find out a middle path from these approaches.

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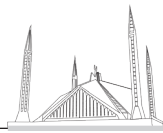


Introduction

The concept of *qawwamah* is one of the most significant issues pertaining to the status and rights of woman in Islam and hence has a far reaching effect on family and society. Foundation of *qawwamah* is the presence of this term in verse 34 of *sura Al Nisa*, but how far this term can be stretched and restricted is a matter of interpretation which is primarily human. The verse elaborates on the position of both spouses in the family structure and describes the required spousal behavior in peace and in conflict. However, of all the Qur'anic passages about men and women perhaps it is the one most often misunderstood by non-Muslims as well as by less informed Muslims. The verse is misunderstood as establishing absolute supremacy of men over women in familial as well as public life on the greater scales and also on the other hand as establishing the patriarchal system endorsing gender inequality and discrimination against women. This paper endeavored to highlight some of the inherent tensions existing in traditionalist and modernist interpretive approaches to this concept on two extremes and tried to find out a middle path from these approaches.

There is no agreed way of classifying interpreters into traditionalists and modernists. For the sake of this paper, the term traditionalists is referred to those who consider men to have complete and absolute authority over women affairs and tend to restrict women's all activities and actions in complete obedience to their husbands or sometime to other male family members. They also tend to enlarge this familial working relationship to the wider sphere of public and political life. Rest of the interpreters and scholars will be classified as modernists despite the diversity of opinion amongst them. The verse 34 of *sura al Nisa* is studied and discussed by surveying many of the classical and newer Quranic interpretations (*Tafaseer*) as well as some of the literature dealing with this concept.

Since interpretations are human endeavors, it is likely that different persons overemphasize or under state the implication of the Quranic text. Similarly, it is possible that interpretations are influenced by the contextual understanding of the related facts as well as by personal perception of the interpreter. This very fact provides us with the opportunity to read the text differently and derive meaning suited to the contemporary understanding of the related facts and realities.

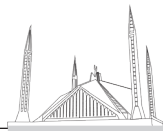
Following questions were raised in an attempt to analyze opinions of interpreters and scholars from both groups:

- Are men and women equal as humans before Allah?
- What is implied by the term *qawwamah?*
- Does this verse declare or provide for superiority or authority of men over women?
- Are the provisions of this verse limited to familial sphere or apply to public life also?
- What is the limit of obedience as a required behavior for a wife? Does it imply functional complying with the administrative authority or means servitude on part of wife?
- Does *nushuz* imply for simple disobedience or it entails rather serious state of rebelliousness?
- What are the implications of three level strategy for dealing with marital discord?
- Do men have a general right of beating their wives or it is an exceptional measure for dealing with marital discord?
- Whether Islam allows domestic violence? Or leaves open the way of misconduct on the part of husband towards his wife?
- What are the effects of traditionalists' point of view on family relationship in our society?

In the light of the questions framed, following conclusions were drawn from both traditionalists' and modernists' regarding equality of husband and wife and the basis of their relationships.

The Quran explicitly rejects any sort of inherent supremacy of one gender over the other and enforces gender equality by aptly describing both men and women as equal human beings in their origin, created from "the same soul", (*the nafs e wahida*)[1] both making up the human race together, as equal partners. They

1 Al Nisa,4: 1; Al Airaf 7: 189; and Az Zumur 39: 6, *Nafs wahida* is translated by Abdul Majid Daryabadi as "single soul" referring to Adam, Maulana Abdul Majid Daryabadi, *Tafseer-e-Majdi*, trans. By himself, (Islamabad: Islamic Book Foundation, 1941), vol. 1, 299. Abdullah Yousuf Ali elaborates *nafs* as meaning "soul, self or person" and then suggests that the mate of



have both been endowed with a heart, brain and adequate reasoning powers, and together they stand in need of physical and intellectual education and training. Their religion allows them access to enjoy the basic fundamental rights on equal grounds. They are both commanded by God to follow the prescribed path for which they will be equally accountable before God and will be rewarded or punished on similar grounds. In effect, the superiority of one over the other is not based on their inherent physical or psychological capabilities rather on performance in the field of knowledge and actions based on the conception of ethical vs unethical and good vs bad.[2]

Thus describing the most intimate relationship between man and woman, it has been pronounced in the Quran that your mate (applies to both) has been created from your own kind. The basis of the marriage relationship is declared as love, affection, harmony, mutual tolerance, respect and trust. And in all these qualities, the husband and wife are interdependent, complementary, reciprocal and mutual. They are expected to find peace and tranquility in each other's company and be bound together not only by the "sexual relationship" but by "love and mercy", depicted by the following verse of the Quran:

"And of His signs is, that He has created for you wives from your own species that you may find peace with them, and created love and mercy between you. Surely in this there are many signs for those who reflect."[3]

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the first soul was created from the like nature and then quotes Razi who used the construction, *min* suggesting "a species, a nature, a similarity", and the pronoun that refers of course to *nafs,* Abdullah Yousuf Ali , *The Holy Quran Translation and Commentary*, (Islamabad: Dawah Academy International Islamic University, 2004), 204.; Abul Ala Maududi, *The Meaning of The Quran,* trans. Ch. Muhammad Akbar,ed. A. A. Kamal,(Lahore: Islamic Publications, 2000), vol.1, 306; Mufti Mohammad Shafi Usmani, *Maarif ul Quran*, trans. Muhammad Hasan Askari & Prof. Muhammad Shamim, Rev. Mufti Muhammad Taqi Usmani, 417, 418, available at: http://www.islamibayanaat.com/EMQ.htm, last accessed on 12.01.2011) by elaborating on the first verse declare it a beautiful introduction for the subsequent laws and regulations about human rights, particularly about the smooth running of the family life. Both refer to creation of Adam from the "single soul" from whom the whole of mankind sprang up and spread over the earth.

2 Al Hujr at 49: 13, Al Ahzab 33: 35, Ale Imran 3: 195, Al Nahal 16: 97, Al Momin 40: 40, An Nisa 4: 124, Al Taubah 9: 71 & 72.

3 Sura Ar Rum 30: 21

Based on the same pedestal of social, legal and moral equality as human beings, Islam differentiates between roles and responsibilities of men and women in the family system, based on equity and justice. With prescribed duties of both, for smooth functioning of the family, whereby one of the two members is being designated as *qawwam* (head of the family) as an administrative measure, in *Surah An-Nisa*, verse 34. The verse reads:

الرِّجَالُ قَوَّامُونَ عَلَى النِّسَاءِ بِمَا فَضَّلَ اللَّهُ بَعْضَهُمْ عَلَىٰ بَعْضٍ وَبِمَا أَنْفَقُوا مِنْ أَمْوَالِهِمْ ۚ فَالصَّالِحَاتُ قَانِتَاتٌ حَافِظَاتٌ لِلْغَيْبِ بِمَا حَفِظَ اللَّهُ ۚ وَاللَّاتِي تَخَافُونَ نُشُوزَهُنَّ فَعِظُوهُنَّ وَاهْجُرُوهُنَّ فِي الْمَضَاجِعِ وَاضْرِبُوهُنَّ فَإِنْ أَطَعْنَكُمْ فَلَا تَبْغُوا عَلَيْهِنَّ سَبِيلًا إِنَّ اللَّهَ كَانَ عَلِيًّا كَبِيرًا

> Men are the managers of the affairs of women because Allah has made the one superior to the others and because men spend of their wealth on women. Virtuous women are, therefore, obedient; they guard their rights carefully in their absences under the care and watch of Allah. As for those women whose defiance you have cause to fear, admonish them and keep them apart from your beds and beat them. Then, if they submit to you, do not look for excuses to punish them: note it well that there is Allah above you, Who is Supreme and Great.[4]

In the simplest manner, the verse 4:34 describes the family set up with husband taking the position of guardian of the family further endorsed by many sahih ahadith which pronounce both as guardian of their families with wife taking role of co-equal of her husband in family affairs.[5] Only in greater matters affecting the welfare of the family, the husband is given a degree of supremacy, duly supported

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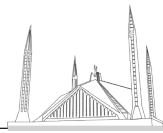
4 Al Nisa 4: 34, Translation from Sayyid Abul Ala Maududi - *Tafhim al-Qur'an - The Meaning of the Qur'an,* englishtafsir.com, Last accessed on 31.12.2013

5 *"All of you are guardians and responsible for your wards and the things under your care; a man is guardian of his family and is responsible for them, a woman is guardian of her husband's home and the children and is responsible for them, all of you are guardians and all of you are responsible for your wards"* Mohammad Ismail al-Bukhari, *Sahih*, Chapter: 566, trans. Allama Waheed-uz-Zaman, (Lahore: Maktaba Rahmania, 1985). Other traditions of the same meaning with variation in words and scope of guardianship are cited in *Bukhari*, implying responsibility of women for the family, house and the household for which she will be accountable. Book of Nikah, Chapter 111, hadith 172, and Chapter 137, hadith 207.



by the Quranic reference, since two co-ordinate authorities with equal power are likely to lead to clashes and conflicts such as may destroy the balance and poise of the family life. On the basis of his being the head of the family, man has been designated with functional supremacy over his family.

The same verse describing men as *qawwam*, goes on to answer the questions regarding woman's response to husband's authority, describing two attitudes of women, one showing obedience towards husband being mindful of her familial duties and the other one depicting rebelliousness or ill conduct resulting in disruption of smooth family functioning. For the other type of women -who consider themselves above their husbands, or don't want to obey them, or who are of ill conduct, or are rebellious and this constant behavior of them results in disruption of family harmony- the verse gives multilateral strategy to deal. But at the same time, it raises many concerns with reference to permission of striking or beating woman, to the husband. The verse ends with the warning to the husband to be mindful of Allah All Knower's authority over all.

Qawwamah in Islamic Legal Discourse

The verse 34 begins with the statement that "*Arrijal-u- qawwamun alan-nisa*", and then provides reason for this using the word *fazeelat* of one over the other. Considering the other part of the verse two more terms *nushuz* (extreme rebelliousness) of women and *wadribohunna/daraba* are used. Interpretation of the term *qawwamun* and *fazeelat* is pivotal in understanding and describing husband-wife relationship, as well as it is imperative to understand *nushuz* and *daraba* for grasping the depth of male/husband's authority in the family. These terms will be discussed in detail in the light of traditionalist approach focusing *muffasireen* at first step and then the modernists' translations, interpretations and approaches.

Amongst traditionalists, Abi Bakar Mohammad Bin Adullah Al Maroof Bi Ibnul Arabi '*Ahkam Al Quran*', Allama Abu Bakar Ahmed bin Ali Al Razi Jasas Al Hanafi '*Ahkam-al-Quran*', Muhammad bin Ahmad Al Ansari Al Qurtabi '*Al Jamai Al Ahkam Al Quran*', Abi Al Hassan Ali Bin Ahmed Alwahidi An Nesha Puri '*Al Wseet Fi Tafseer Al Quran Al Majeed*', Abdur Rahman bin Al Kamal Jalal-

ud-din Sayuti '*Ad Dur ul Mansoor Fi Tafseer Al Ma'soor',* Al Undalasi '*Al Moharrar Alwajeez Fi Tafseer Al Kitab Al Aziz',* Ibn-e-Kathir "*Tafseer Ibn e Kathir'*, as well as translations of Ashraf Ali Thanawi, and Dr. Israr Ahmed, were consulted for this discussion.

From amongst modernists' *tafaseers* of Abul Ala Maududi '*The Meaning of the Quran'*, Abdul Majid Daryabadi '*Tafseer-e-Majdi'*, Syed Qutub '*Fe Zilal-Al Quran*' (In the shade of Quran), Mufti Mohammad Shafi Usmani '*Maarif ul Quran'*, Pir Mohammad Karam Shah Al Azhari *Zia ul Quran*, Abdullah Yousuf Ali '*The Holy Quran Translation and Commentary*'as well as Edip Yuksel & Layth Saleh al-Shaiban '*Quran: A Reformist Translation'*,were consulted. For analysis of modernists' approach scholarly works of Abdul Haleem Abu Shoqah *Tahreer Al-Mara'h Fi Asr Al Resalah*,, Javaid Ahmad Ghamidi *Meezan*, Dr. Mohamed Rida Beshir *Family Leadership Qawamah: An Obligation to fulfill, Not an Excuse to Abuse*, Dr. Ahmad Shafat *Tafseer of Surah an-Nisa, Ayah 34*, Amna Wadud *Quran and Woman, Rereading Sacred Text from a Woman's Perspective,* Dr. Saalih ibn Ghaanim Al-Salaan *Marital Discord (al-Nushuz),* Dr. Riffat Hassan "*Are Women and Men Equal Before Allah*? Dr. Abdulhamid Abusulayman, *Marital Discord, Recapturing the Islamic Spirit of Human Dignity,* Jerald F. Dirks, *The Abrahamic Faiths, Judaism, Christianity, and Islam, Similarities* and *Contrasts* Yvonne Ridley are referenced.

Traditionalist's Interpretations of *Qawwamah*

From amongst the traditionalist *muffasireen* many have narrated the background of the revelation of this verse given by Qurtabi[6] also narrated by Ibn-ul Arabi,[7]

6 Qurtabi explained its background citing the narration from Asadul Ghaba, that the verse was revealed in the context of Saad Bin Ar-Rabee and his wife Habiba Bint-e-Zaidb. Saad was a tribal chief and both were from Ansar. Saad once slapped his wife due to her rebelliousness. Her father took her to Prophet (P.B.U.H) complaining that her daughter shared bed with Saad and he gave her a slap Prophet (P.B.U.H) asked her to take *Qisas* allowing her to slap her husband. Then immediately after Prophet (P.B.U.H) called them back and said that Gibreil had come to me, we intended something and Allah intended some other thing and that which Allah has intended is better, and then he lifted the retaliation. So it was the time and situation when this verse was revealed. Muhammad bin Ahmad Al Ansari Al Qurtabi, *Al Jamai Al Ahkam Al Quran*, (Arabic version), (Dar-ul Fikar, 1952), vol. 5, 168.

7 Abi Bakar Mohammad Bin Adullah Al Maroof Bi Ibnul Arabi, *Ahkam Al Quran,* (Arabic

Nisha Puri,[8] and Al Undalasi who reported that this revealed verse permitted men for *tadeeb* of their wives.[9]

Ibn-ul Arabi explained the term *qawwam* as for one who is *Ameen* (honest custodian) over wife and will maintain her matters, will provide her with a good and satisfactory life. At the same time it implies for imposing on husband the responsibility for making her wife act on good deeds according to Islamic teachings, i.e observance of regular prayers, fasting etc., which is obligatory for all Muslims.[10] Ibn-ul-Arabi describes that the priority in one degree above for men[11] is basically due to his responsibility as *qawwam* and it has two dimensions as given by the Quran: (i) perfection in intellect and manner and perfection in religion, *Jihad, Amar Bil Maroof wa Nahi Anil Munkar;* and (ii) due to his catering for all her expenses of *mehar*, and maintenance.[12] Concerning *qanitat* meaning obedience, Ibn-ul-Arabi says that out of many types of obedience this one is towards husband and that it is obligatory, but in *maruf* (good and allowed in Islam) only.[13] Elaborating on the duties of wife to guard husband's rights in his presence as well as absence, he says it is obligatory upon her to protect his *mal* (property), and house, dealing well with his family members and what he does not like in his presence, she will observe it in his absence also.[14]

Allama Jasas describes *qawwamun* as the men being responsible for protection, supervision, provision of their (women's) necessities and *tadeeb* and maintaining

version), (Al Qahira: Dar-ul-Fikar), Vol. 1, 414

8 Abi Al Hassan Ali Bin Ahmed Alwahidi An Nesha Puri, *Al Wseet Fi Tafseer Al Quran Al Majeed,* (Arabic version), (Berut, Lebanon: Dar Al kutub Al Ilmia), vol.2, 45.

9 Al Abi Mohammad Abdul Haq Bin Attiya Al Undalasi, *Al Moharrar Alwajeez Fi Tafseer Al Kitab Al Aziz,* (Arabic version), vol. 4. (Qatar, 1982), 41.

10 Abi Bakar Mohammad Bin Adullah Al Maroof Bi Ibnul Arabi, *Ahkam Al Quran,* (Al Qahira: Dar-ul-Fikar), Vol. 1, pp, 415-416.

11 Al Baqara 2;228

12 Ibnul Arabi, *Ahkam Al Quran,* Vol. 1, 416.

13 Ibid.

14 Ibnul Arabi, *Ahkam Al Quran,* Vol. 1, pp, 416-417.

them in right position.[15] Allama Jasas describes that men are superior due to their intellect and wisdom and on account of their expenditures for women in dower and maintenance.[16]

Sheikh Tantawi says, "Thus they (men) are like a *wali* and the women are like *rayiat* (meaning the one for which *wali* is accountable)".[17] According to Tantawi the reasons for this responsibility are known for *mehar* and *nafaqa*.[18] Tantawi says she protects and secures in the absence of her husband which has been made obligatory for her and that is the protection of her own *nafs* (self) and property.[19] He elaborates that for this task, by emphasizing the protection and supervision of Allah, women have been motivated as well as warned to be careful in fulfilling their duties.

Al Qartabi explains, "*qawwam* is in the superlative degree of *qiyam*, thus men are responsible for supervision and provision regarding all matters and issues of women".[20] According to Qartabi, men's superiority is due to spending, and in intellect, physical power for j*ehad* (war), inheritance share, and in *amar bil maroof wa nahi anil munkir*.[21] Qurtabi shares the same opinion as Tantavi as to the protection of her *nafs* and property of her husband.[22] Both of them have quoted the Prophet's (P.B.U.H) tradition describing the qualities of best wife, recorded by Bukhari, Nasai and Baihiqi.[23]

15 Allama Abu Bakar Ahmed bin Ali Al Razi Jasas Al Hanafi, *Ahkam-al-Quran,* Urdu trans. Abdul Qayyum, (Islamabad: Shariah Academy IIUI, 1999), 496. In Urdu translation the term is defined as responsible *for hifazat-o-nighabani, zarooriyat muhayya karna, tadeeb karna, aur durust halat mei rakhna.*

16 Ibid., 495, 496.

17 Al Hakeem Al Sheikh Tantawi, *Al Jawahir fi Tafseer Al Quran Al Kareem*, (Arabic version), (Dar-ul-Fikr), vol. 3, 39.

18 Ibid., 39

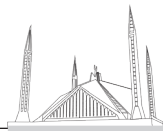
19 Ibid.,, 39

20 Muhammad bin Ahmad Al Ansari Al Qurtabi, *Al Jamai Al Ahkam Al Quran*, (Arabic version), (Dar-ul Fikar, 1952), vol. 5, 169.

21 Ibid., 169.

22 Ibid., 170.

23 *"The best wife is the one who pleases you when you see her, obeys your orders (demands), and guards*



Nishapuri explains the phrase "men are *qawwamun* over women", as men are placed above women for their *tadeeb* and for a man to make his wife to live in obedience of Allah. According to him *qawwam* is the superlative of *Al qiyam*, whereby the man is responsible for his wife's matters and for her safety and security.[24] He describes superiority of men over women in intellect, physical stature, knowledge, *azm, al Jehad*, evidence and inheritance.[25] He has quoted two traditions while giving explanation of required obedience of wife in accepting the dower and maintenance as well as in carrying out her duties of protecting her honor in the absence of her husband. One is in which the Prophet (P.B.U.H) is reported to have said: "*If I were to order anyone to prostrate himself before another, I would order a woman to prostrate herself before her husband*".[26] The other tradition is in which Prophet (P.B.U.H) told a *sahabia*, that "*your husband is your heaven and hell*".[27]

Jalalud Din Sayuti describes that the term *qawwam* means that men take the hands of women and teach them manners.[28] Describing the wife's response, he explains that whatever has been given in their custody by their husbands, they will protect and supervise that, even in their absence.[29]

Al Undalasi explains the term for being in superlative degree denoting to establish upon something, implying that the husband will definitely supervise her matters, and protect her with great (strenuous) efforts. He says that this is the scope or

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you property and her own honor (chastity), when you are not at home." Mohammad Ismail al-Bukhari, *Sahih, Kitab-un-nafaqat, bab hifz-ul-Marat zoujiha fi zat-e-yadehi*, also reported by An-Nasai and Baihaqi

24 Abi Al Hassan Ali Bin Ahmed Alwahidi An Nesha Puri, *Al Wseet Fi Tafseer Al Quran Al Majeed,* (Arabic version), (Berut, Lebanon: Dar Al kutub Al Ilmia), vol.2, 45.

25 Nisha Puri, *Al Wseet Fi Tafseer Al Quran Al Majeed,* 45.

26 Abu Eisa Mohammad bin Eisa Tirmidhi, *Jamia Tirmidhi*, trans. Allama Waheed-uz-Zaman, (Lahore: Islami Kutub Khana). Ahmad

27 Nisha Puri, *Al Wseet Fi Tafseer Al Quran Al Majeed*, 46, with reference of Tibri, *Fil Awsat* 1/321 and Musnad Ahmed 4/341and others.

28 Abdur Rahman bin Al Kamal Jalal-ud-din Sayuti, *Ad Dur ul Mansoor Fi Tafseer Al Ma'soor,* (Berut: Dar-ul-Fikar), vol.3.

29 Ibid.

limit of men being *qawwamun* over women.[30] According to him man spends for *mehar*, *nafaqa* and all other expenses, and describes his *fazeelat* due to perfection of *deen* and intellect, and also for prayers in congregation and Friday prayers, authority of taking in marriage and divorce and revoking the divorce, and in *shahada* (evidence), in inheritance share, and capability of prophethood and *caliphate* (head of state) and leadership and in a lot more issues.[31] Al Undalasi says that "in absence" implies for all those things or matters which cannot come in the knowledge of husband, and for which she is made responsible for.[32]

According to Ibn-e-Kathir, "Men are protectors and maintainers of women", meaning the man is responsible for woman, and he is her maintainer, caretaker and leader who disciplines her if she deviates.[33] For this leadership role, he describes two reasons which are as under:(i) because men excel over women and are better than them for certain tasks, and that is why prophethood was exclusive for men, as well as other positions of leadership. He also reports here the tradition of Prophet (P.B.U.H) recorded by Bukhari on the authority of Fath Al Bari 7: 732, saying, "People who appoint a woman to be their leader will never achieve success." He also links this reason for ineligibility of women to be appointed as judges or on other leadership positions. (ii) The other reason provided in the Quran is that they spend their means; he explains its meaning as the dower and various expenses that Allah ordained in His Book and the *sunnah* of His Messenger for men to spend on women.[34]

Ashraf Ali Thanawi has translated *qawwam* as *hakim* (ruler) over women.[35] Due to his greater influence in Indo-Pak, this adopted meaning had wider and deeper effects on the legal discourse in this regard. The same translation of the word is

30 Al Undalasi, *Al Moharrar Alwajeez Fi Tafseer Al Kitab Al Aziz,* vol. 4, 40

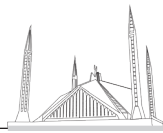
31 Ibid. 41.

32 Ibid. 42-43

33 *Tafsir Abn Kathir*, abridged English version, ed. Shaykh Safiur Rahman Al Mubarakpuri, (Riyad: Dar us Salam, 2000), 442

34 Mubarakpuri, *Tafsir Abn Kathir*, 442-443.

35 Ashragf Ali Thanawi, *Al Quran Al Hakeem Maa' Tarjuma wa Tafseer Biyan Al Quran,* (Lahore, Karachi: Taj Company Ltd), 74, 75.



shared by Dr. Israr Ahmed[36] who explains the word *fazeelat* describing that in few traits men have been given prominent precedence over women; the other reason of course has been described clearly for all the financial responsibility of the family on men.[37]

Traditionalist's Explanation of *Nushuz*

Having said that if you fear or if you know and believe, it is in your knowledge and you believe therein that she is restoring to this attitude of *nushuz*, the verse suggests three level strategy to deal with the situation to regain the marital harmony. Ibn-ul-Arabi and others gave the root word of *nushuz* as *nushz* meaning something which becomes or rises above the ground, or above its limits. Therefore, *nushuz* of wife has been described as her disobedience, considering herself above her husband or above the obedience of her husband and therefore she refrains from obedience.[38] Qurtabi explains they (wives) disobey and behave over and above their obligations in respect of their spouse.[39] Sayuti implies *nushuz* for refraining from her conjugal rights.[40] Al Undalasi, Tantawi and Nishapuri described the term as implying that a wife considers herself superior to her husband.[41]

Traditionalists' Approach for *Yadribohunna* (Beating them) While Dealing with *Nushuz* for Regaining Family Integrity

Ibn-Ul-Arabi, Qurtabi, Jasas, Undalasi, Tantawi, Nishapuri, Dr. Israr Ahmed, Ashraf Ali Thanawi all discussed the three levels: first, to advise her in the first place for recognizing husband's rights as established by Allah, and that Allah has made it obligatory for them to spend a solace and loving life together; secondly, to avoid intimate relationships with them either by leaving the beds, the rooms or

36 Israr Ahmed, *Biyan Al Quran,* comp. Hafiz Khalid Mahmod Khizar and Ashiq Hussain, (Peshawer: Anjuman Khuddam Al Quran, 2013), 5th edition, vol.2, 147.

37 Ibid., 147,148.

38 Ibnul Arabi, *Ahkam Al Quran,* Vol. 1, 417.

39 Qurtabi, *Al Jamai Al Ahkam Al Quran*, 170-171.

40 Sayuti, *Ad dur ul Mansoor Fi Tafseer Al Masoor,* vol.3.

41 Al Undalasi, *Al Moharrar Alwajeez Fi Tafseer Al Kitab Al Aziz,* 44-45.

just avoiding physical contact, to make them realize the intensity of the problem; thirdly and lastly, to take coercive action against her as by allowing to beat her.

All traditionalists are comfortable with the word *wadribohunna* as allowing for men to beat their wives, though all of these *muffasareen* have very clearly and boldly pointed out that this beating will be with the objective, intention and essence of retributive measure and not really the punishment measure. They have equaled it with the measures against children *(ta'deeb*) while teaching them manners of life. That is why all of them detailed the references from Prophet's (P.B.U.H) traditions and the explanation given by companions as to what should be the level and intensity of beating, leaving no sign on the body, making no injuries in which case *dhaman* (reprisal for injuries) would be liable. Other than this, complying with Prophet's (P.B.U.H) instruction, retaliation for this retributive measure will not be liable either in this world or in the hereafter.[42]

Modernists' Interpretations of the term *Qawwamah*

Abul Ala Maududi translates the word meaning "managers of the affairs of women"[43] with the explanation that, "The Arabic word *qawwam* or *qayyam* stands for a person who is responsible for the right conduct, safeguard and maintenance of the affairs of an individual, an institution or an organization. Thus man is governor, director, protector and manager of the affairs of women."[44] According to him, men's superiority to women is in the sense that they have been endowed with certain natural qualities and powers given to women in a less degree, and not superior in the sense that they are above them in honor and excellence. He further explains that wife should remember that the obedience to Allah is of far greater importance than obedience to the husband and has precedence over it. Therefore, it is the duty of the wife to refuse to obey her husband if and when he orders her for anything in disobedience to Allah.[45]

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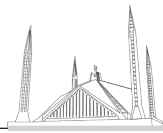
42 Relevant portions of the *tafaseer* of the above quoted *muffassreen* earlier could be seen.

43 Maududi, *The Meaning of the Quran*, vol. 1, 329.

44 .Ibid., 333.

45 Ibid., 333.



Abdul Majid Daryabadi explains the term as "overseers over women" with the explanation that "A *qawwam* is, in the parlance of modern sociology, a protector or guardian of the family, and this is a position to which a man is by his very nature and constitution entitled".[46] He elaborates that the functions of the husband and father in the family are not merely of the sexual and procreative kind, but involve the duties of supporting and protecting the wife and children[47] and provides two reasons for this role as men excelling by their very nature and constitution and spending for the support and maintenance of their wives.[48]

Syed Qutub explains this term, "Men shall take full care of women". He emphasizes that this verse deals with the institution of family, its management, delegation of responsibilities and defining duties, giving instructions for the strength, stability and protection of family from internal conflicts.[49] He describes devotion within obedience motivated by love and not the one enforced against one's will. According to him *Qawwamah* does not by any means lead to the negation of the women's character and role in the family home and in society at large nor does it mean the cancellation of her civil status.[50]

Mufti Mohammad Shafi Usmani elaborates that verse opens with an important statement of men as *Qawwam* meaning a person holding the responsibility or having the duty and charge to manage a job or run a system or take care of what has to be done about something, controlling all related factors therein. The standard role of a man, with regard to woman, has been mentioned in this verse through the word, *qawwam* which has been translated in various ways, the most common being in the sense of *'hakim'* or one who rules, governs or decides. Other alternates used are guardians, custodians, overseers and protectors. According to

46 Daryabadi, *Tafseer-e-Majdi*, vol. 1, 325, 326. He has given references from bible as to the subjective position of women to their husbands marking the difference in attitude and instructions for dealing with women by Islam. He also provides references from sociological literature for the family structures and systems in dealing with the issue.

47 Ibid.

48 Ibid., 325-327.

49 Sayyid Qutb, *Fe Zilal-Al Quran* (In the shade of Quran), trans.and ed. Adil Salahi Ashur Shamis, (The Islamic Foundation, 2000), vol.4, 129.

50 Ibid.

him, if the meaning is taken in the sense of a carer, a functional head, and not in the political sense of a ruler or dictator; the *qawwam* or *hakim* of the Qur'an offers a base of understanding from common experience to have a head or chief or authority for any group-living or for any organized system to arbitrate in the case of a difference and take decisions to run affairs smoothly. Allah elected men for this responsibility because their natural capabilities are more pronounced than those of women and children, an undeniable fact of human life.[51] According to him, the gist of the matter as seen from this verse and verse of *Al Baqara* 2:228 the message is that the rights of both man and woman are similar to each other and are as incumbent upon men as the rights of men are upon women, with only one exception that men have a certain precedence in functional authority, hemmed too with other balancing factors. The authority specified is not that of a dictator and a tyrant for exercising which he is bound by the supreme law of Islam, the *Shari'ah*. Taking on the probability of women taking this unhappily, Allah has explained two reasons for this authority, one relating to the wisdom of creation beyond the control of any human being, and the other refers to a factor which comes through one's efforts and endeavors i.e. earning.[52] Referring to the required obedience of wife, he says righteous women accept the rule of the precedence of men and obey them, and even in the absence of their husbands stand guard on their own selves, husband's earnings, and everything else in the house under their charge.[53]

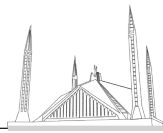
Pir Mohammad Karam Shah Al Azhari translates the term *qawwam* as *Mohafiz and Nigran* with the explanation that the Arabic term *qawwam* means someone who provides all life necessities, protects and monitors, and is responsible for maintaining the appropriate conduct.[54] He warns that it should in no way be considered by this arrangement as if the women are being enslaved as they have

51 Mohammad Shafi Usmani , *Maarif ul Quran*, trans. Muhammad Hasan Askari & Prof. Muhammad Shamim, Revised by Justice Mufti Muhammad Taqi Usmani, 417, 418, available at: http://www.islamibayanaat.com/EMQ.htm, last accessed on 12.01.2011. Urdu version of the Tafseer is also consulted, vol.2, p395-397

52 Ibid.

53 Ibid., 421-422.

54 Pir Mohammad Karam Shah Al Azhari, *Zia Al Quran*, (Lahore: Zia Al Quran Publications, 1995), vol.1, 341.



their established rights to those for men according to *Al Baqara*, verse 238. He further says that getting close to Allah is open for both of them according to their efforts denying supremacy of men on women.[55]

Abdullah Yousuf Ali translates the term as, "protectors and maintainers of women" with the explanation as, "one who stands firm in another's business, protects his interests, and looks after his affairs; or it may be, standing firm in his own business, managing affairs with a steady purpose."[56]

Abdul Haleem Abu Shoqah, describes spousal relations as based on *Mawaddah* (positive and healthy relations and *Rahmah* (mercy and kindness) describing mutual obligations. According to him, *qawwamah* or family leadership is a responsibility and duty entrusted by Allah to husbands who must strive hard to fulfill this duty in the best possible manner. He relates verse 2:228, describing a *daraja* with the *qawwamah* meaning men have to be more forgiving towards wife and overlooking their minor mistakes in spousal relations. He emphasizes the cooperation between husband and wife for the fulfillment of the *qawwamah* (the family leadership) through husband fulfilling his responsibilities, avoiding misuse of the authority by the husband, voluntary obedience of wife towards husband not contradicting Allah's orders, mutual consultation in family matters, and wife's fulfillment of her responsibilities during presence as well as absence of husband. In his opinion, to resolve marital conflicts, Islam proposes many methods starting from preventive measures to ending with a separation or divorce. *Darb*, beating/ strike, in his opinion, should only be used when wife has reached the stage of obscenity (*fahisha).*[57]

Javaid Ahmad Ghamidi has used the term *qawwam* without translating it and he is of the opinion that the verse refers to the family organization only. Reading this verse in conjunction with verse 4: 32, he infers that there are certain Godly endowed differences necessary for family organization, which (natural differences) are in no

55 Ibid., p.342

56 Abdullah Yousuf Ali , *The Holy Quran Translation and Commentary*, (Islamabad: Dawah Academy International Islamic University, 2004), 204.

57 Abdul Haleem Abu Shoqah, *Tahreer Al-Mara'h Fi Asr Al Resalah*, vol.5, *The Place of Women in the Family,* (Kuwait: Dar al Aqalam for Publications and Distribution)

way a source of religious or moral superiority of anyone as a general rule. He is convinced that family organization certainly requires a certain level of hierarchy. Giving reference from Amin Ahsan Islahi, he considers it an obligation for a pious wife to be obedient and cooperative for managing the family life and to keep guard of their secrets and honor. Discussing *nushuz* on behalf of wife, he writes that the word is not used for each and every mistake or defiance rather for the extreme rebelliousness when she refuses to accept the leadership of husband and family system is collapsed. In such a case, the last resort of three level remedial strategy only allows the slight punishment same to that applied by a teacher to their student or a father to his child for teaching them manners, and in doing so one should be mindful of Allah who is over and above of all.[58]

Dr. Mohamed Rida Beshir,[59] a contemporary scholar/dawah worker from USA, has carried on an in-depth research on this topic.[60] He has provided definitions of *qawwamah* from some of the most authentic Arabic dictionaries such as, *Al Misbah Al Muneer,*[61] *Al Sahee Fi Allogah Wal Oloom,*[62] *Al Qamoos Al Muheet,*[63] *Lesan*

58 Javaid Ahmad Ghamidi, Meezan, (Lahore: Almawrud, 2010), 420-421

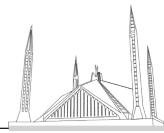
59 Mohamed Rida Beshir with over thirty years of experience in dawah work is: Teaching Islamic courses in the Islamic American University; author and co-author of many books on marriage and parenting in Islam; recipient of several awards in the area of education from the city of Ottawa; held various volunteer elected positions with MSA, ISNA and MAS and is a regular speaker in ISNA, ICNA, MSA and MAS conventions.

60 Mohamed Rida Beshir, *Family Leadership Qawwamah: An Obligation to fulfill, Not an Excuse to Abuse*, (USA: Amana Publications, 2009)

61 Under explanation of word *qawm*, it indicates the root word as *qaam* meaning to take care of. It continues to describe a person who takes care of something with the word *qawwam*. When the word is *qewam*, it means the provision or the food that supports humans. When it is *qawam* it means just and fair. The word *aqaam* means to establish and make something superior and recognized as such, as in *aqaam al salat*, which means to establish regular prayers or *aqaam al-share'* which means to establish rules and regulations according to the Quran and the teachings of Prophet Mohammad (P.B.U.H). Al Alammah Ahmad Ibn Muhammad Ibn Aly Almaqry Al Faiomy, *Ketab Al Mesbah Al Muneer Fi Gharabeeb Al Sharh Al Kabeer*, part 1 and 2, Sixth edition, Al Matabah Al Amereiah, Cairo, 1925, 714

62 *Alqawwam* means a person who is just, cited on the authority of Nademm Marashly and Osama Marashly, *Al Saheeh Fi Alloghah Wa Al Oloom*, Dar Alhadarah Al-Arabiah, Beirut, first edition 1975, p965-967.

63 Similar explanations for the word *qawm* and *qawwamah* are discussed with great emphasis on



Al Arab,[64] *Moheet Al Moheet*[65]and *Quranic Keywords: A Referance Guide*[66]. He has further provided analysis of various verses of the Quran where *qawwam* and its derivatives are used. According to him, *qawwam* in its plural form –*qawwamoon*– appears three times in the Quran.[67] Other words that come from the same root appear in the Quran in 663 places, 383 of them are related to the word "*qawm*"[68] such as al *qawm*, *qawmy*, *qawman*, *qawmak* etc. 77 instances are of the word "*Al- qeiamah*" which means "the day of resurrection". 47 instances are related to the word "*Al mustaqeem*" and other words such as *estaqamo*, *yastaqeen*, *estaqan*, *estaqeema* and *estaqeemo* which more or less means to be straight and upright. Other words are *qama* and the like *aqamoo*, *maqam*, *Al qaiyoom*.

Based upon the word *qawwamah* and its derivative used in the Quran and its meanings in dictionaries, Dr. Beshir concluded that *qawwamah* means family leadership or guardianship, covering and encompassing wide spectrum of qualities and meanings that can contain the elements of protecting and safeguarding, caring for or taking care of, carrying responsibility and trust, maintaining, supporting,

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the element of protection for *qawm* and on the elements of being just and upright for a person who is given the state of *qawwamah*. Majd Al Deen Al Fayrooz Abady, *Al Qamoos al Moheet*, vol.3, Al-Sa'adah Print house, Egypt, 1913, 1332H, 168.

64 Similar explanation for the word *qawm* is given adding as the moderate way *qayema mellah,* carrying the connotation of being excellent, straight and upright. It indicates that the same root of the word *qawm* is used for one of the most beautiful names of Allah, *Al Qayoom* which means The One Who is in full charge of His creation and their provision and has full knowledge of everything and may mean the One Who is in charge of everything. Aby Al Fadl Jamal al Deen Muhammad Ibn Makram Ibn Manzoor Al-Afriqey Al-Masry, *Lesan al Arab*, vol. 12, Sadar House for printing and publishing, Bairut, 1956, 1375H, p.530-506.

65 It explains *qawwam* as a person who is one who is just, is fair, and does what it takes to provide his family with the adequate means needed for them to live a dignified life. This person strives hard to be upright and moderate. This person also takes good care of his family from a religious perspective, by teaching them their religious duties and helping them to be closer to Allah and live according to His guidance. Al Mo'alem Bottos al Bostany *Qamoos Motawwal for Arabic Language, Moheet al Moheet*, (Maktaba Lobnan, Reyad al Solh Square, Beruit: 1987).

66 Abdur Rasheed Siddiqui, *Quranic Keywords: A Referance Guide,* The Islamic Foundation, United Kingdom, 2008, p111-114

67 Al Nisa 4: 34, Al Nisa4: 135, Al Maida 5:8

68 The word *qawm* means a group of people including men and women sharing the same habitat and taking care of those who live with them.

helping and assisting, cooperating consulting and counseling, providing security and safety, managing the affairs of, administrating and supervising, and/or bringing good values to the relationship.[69]

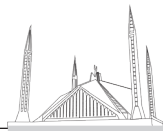
Dr. Ahmad Shafat, one of the contemporary *dawah* worker working in Europe, explains that *Qawwam* is an intensive form of *qa'im* and has a sense of continuity in the action involved. So it means one who is continuously standing over something (as, for example, a guard or caretaker) or one who is continuously making something stand, i.e. is maintaining it. In the Qur'anic usage of *qawwam* and related words, an idea of propriety is almost always present. For example, *aqamah* of *salah* is not only praying but also praying properly. The function of *qawwam* is also understood in the Qur'an to be characterized by fairness. Thus to be a *qawwam* over something or someone is to guard, maintain or take care of that something or someone in a proper and fair manner. According to him, if there is any single word in English that can convey the meaning of the word as used in the present word it is probably the one used by Muhammad Pickthal, namely, guardian.[70] He gives the translation of the word *fazeelat,* as "more favoured" and opines that it is not explicitly stated as to who is favored more than whom and in what way? However, in view of the context, it is probable that men are understood in some way to be favored more than women, and the preference can be taken to mean physical strength and energy in which men generally excel women and which enables men to guard women against some of the dangers to which they may be exposed in society and to take care of some of their needs.[71] He further discusses that there may be other areas where women may be favoured more than men. Still there are other favours of Allah like wealth, health, strength, intelligence education, status which cannot establish the superiority of one over the other except the one of *taqwa* (piety).[72] Concerning the second reason, his opinion is that although the Qur'an permits women to earn and own wealth, it

69 Mohamed Rida Beshir, *Family Leadership Qawamah: An Obligation to fulfill, Not an Excuse to Abuse*, 8.

70 Ahmad Shaffat, *Tafseer of Surah an-Nisa, Ayah 34*, (Islamic Perspective,1984), available at: http://www.islamicperspectives.com/Quran-4-34.htm, last accessed on 12.01.2011.

71 Ibid.

72 Ibid. with reference to Al Hujrat 49: 13.



expects that men will generally be able to earn more than women because of the natural differences between them; hence he will generally be responsible for the economic needs of woman. He also explains that men's greater rights within the marriage relationship do not mean that men also enjoy greater rights outside that relationship and that within the marriage relationship men's greater rights are completely justified by their greater responsibility.[73] The same verse describing men as *qawwam* goes on to answer the questions regarding woman's response to husband's authority describing two attitudes of women; one showing obedience towards husband being mindful of her familial duties and the other one depicting rebelliousness or ill conduct resulting in disruption of smooth family functioning. For the first attitude, Shafaat discusses that the Quran provides the term *qanitat* for first type of women in family situation. *Qanit* means devoted, and *qanitat* refers to pious women here. All the *mufassereen* consulted herewith have given two aspects for this: (i) devoted to God and (ii) devoted to God and husband. Outside of the present verse, the word *qanit,* in its various forms, occurs seven times in the Quran and is used for both men and women. In six out of these seven places, the object of devotion and obedience is understood to be God; in one place it is God and His Messenger. According to many of the *mufassereen,* in view of the context, the idea of devotion and obedience to the husband along with God is evident. Since men are *qawwamun* over their wives, they must have some authority to make decisions and manage the family institution, without which one cannot be an effective guardian or maintainer. Other responsibility of wife as *hafizat lil-ghayb* refers to the guarding of husband's honor and property when he is absent as well as to the wife's secret feelings and thoughts which the husband cannot perceive even if he is present.[74]

Amna Wadud[75] considers the verse describing functional distinction in the family system taking support from Syed Qutb. She rejects the idea of supremacy of all males over all females or of males vs females in all the spheres of life. Discussing

73 Ibid.

74 Ibid.

75 Amina Wadud is an Islamic Studies professor in the Department of Philosophy and Religious Studies at Virginia Commonwealth University.

the verse she elaborates on all related concepts of *daraja, fadala (fazeelat), qawwam, nushuz* and *darab*.[76].

Providing detailed analysis of the Quranic passages which have been interpreted to imply the superiority of males over females, she discusses that the Quran treats woman as an individual in the same manner as it treats a man with declared distinction on the basis of *Taqwa* not determined by gender. According to her, humans are operating in social systems with certain God endowed functional distinctions, which are misused to support the idea of inherent male superiority. She brings forth two role distinctions for women and men respectively to support her argument. For women, child bearing has been a primary distinction (not the primary role for her declared in any text of thr Quran or the *hadith*) which is given due respect in 4:1. Similarly, selection of males for the *risalat* has been quoted as depicting male supremacy over female which though was endowed on exceptionally chosen males, yet it did not have a biological association with males representing their primary function and creating a universal norm for all men. Still women have been included as recipients of divine communication, *wahy*[77]. Analyzing the *daraja* (step, degree or level) as quoted from verse 2:228 in combination with verse 4:34 to support and claim the inherent male superiority, she cites examples of the word usage in the Quran irrespective of functional distinctions. The Quran describes *darajat* of *Ilm* (12:76), social and economic distinction (43:32), and also ascribes it to test the human beings (6: 165). The said verse is taken to mean that a higher *daraja* exists for all men over all women in every context though the context of discussion here is with regard to divorce when men have an advantage over women being individually able to perform divorce without arbitration or assistance. Finally, the verse states, '(the rights) due to women are similar to (the rights) against them, (or responsibilities they owe) with regard to the *ma'ruf* where by *ma'ruf* means 'obvious', 'well known' or 'conventionally accepted'.[78] Describing *fadala* (preference), she cites from the

76 Amina Wadud, *Quran and Woman, Rereading Sacred Text from a Woman's Perspective,* (New York: Oxford University Press, 1999).

77 Hazrat Maryam and Umme Musa

78 Amina Wadud, *Quran and Woman, Rereading Sacred Text from a Woman's Perspective,* 66-69

Quran again different contexts for use of the term, relevant and not in absolute terms. Like *daraja, fadala* is also given to test the one to whom it is given, but unlike *daraja,* it cannot be earned by performing certain deeds rather is given by God only. Therefore, the *qawwamah* verse 4:34 describing family relationships (referring to the men of the family or the marital tie[79]) cannot be taken as the single important verse for describing relationship between men and women for all men as *qawwamun ala* all women and or it cannot be absolute in describing preference of men over women by pointing out the *fadala* (two reasons appropriate for this responsibility of *qawwamah*) provided to men.[80]

Wadud's emphasis on *qanitat* as referring to obedience of God in consistence with other Quranic usage of the term for both males and females (2:238, 3:17, 33:35, 4:34, 33:34, 66:5, 66:12) is shared by majority of the traditionalists and modernists, along with the contextual meaning of husband's obedience also, which is denied by Wadud.

Modernists' Approches to *Nushuz*

Pir Karam Shah describes *nushuz* as defiance of husband's authority on account of arrogance and hatred by those types of women who are outrageous and ill-behaved and it should be well clarified and obvious.[81] According to Dr. Shaffat, in the verse under consideration and in verse 128, the reference to *nushuz* is followed by a reference to the break-up of the marriage. Keeping this context in mind, it becomes evident that *nushuz* means the type of behavior on the part of the husband or the wife which is so disturbing for the other that their living together becomes difficult.[82]

Dr. Saalih ibn Ghaanim Al-Salaan, in his work *Marital Discord (al-Nushuz),* also shares this opinion (for *nushuz*) citing all four schools of thought that it could be from both spouses, regardless of whether it is due to disobedience, hatred,

79 Husbands are *qawwamuna ala* wives or men of the family are *qawwamun ala* family

80 Amina Wadud, *Quran and Woman, Rereading Sacred Text from a Woman's Perspective*69-72

81 Pir Mohammad Karam Shah Al Azhari, *Zia Al Quran*, vol.1, 342.

82 Shafaat *Tafseer of Surah an-Nisa, Ayah 34,* available at: http://www.islamicperspectives.com/Quran-4-34.htm, last accessed on 12.01.2011.

harshness or aggression. In his opinion, third step for dealing with the marital discord can only be applied in case of wife behaving unruly and committing sin or transgression.[83] This view is also shared by Wadud who describes *nushuz* as "general state of marital disorder" and not mere disobedience to husband, point of view shared by some of the traditionalists also very clearly.[84] Similarly, Dr. Riffat Hassan, a contemporary Muslim feminist, answering the same question with reference to beating of wife in the light of verse 34 of *sura Al-Nisa* , elaborates that the Quranic discussion of *nushuz* is not restricted to this verse. Quoting Sayyid Qutb, she says it means a disruption of marital harmony for which the Quran suggests mechanisms i.e. consultation, "time out" and a strike.[85]

Modernists' Contemporary Approach for *Yadribohunna* (Beating them) While Dealing with *Nushuz* for Regaining Family Integrity

From amongst the Modernists discussed uptil now, Abul Ala Maududi, Abdul Majid Daryabadi, Syed Qutb, Mufti Muhammad Shafi, Pir Muhammad Karam Shah, Abdullah Yousuf Ali, Javaid Ahmad Ghamidi, Dr. Rida Beshir, Dr. Ahmad Shafat are all sharing the same point of view with traditionalists for the three level strategy with the last resort to having the permission of beating the wife. The difference is that the reason for this limit as dictated by *nushuz* has stricter criteria found with modernists. To some it is equal to engaging in *fawahish* or adultery. This view is also supported by the saying of the Prophet Mohammad (P.B.U.H) in his last sermon on the occasion of *Hajj*.[86]

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83 Saalih ibn Ghaanim Al-Salaan, *Marital Discord (al-Nushuz),* trans. Jamal al Din M. Zaraboza, Al-Basheer Publications and Translation, 1996.

84 Translation to be given

85 Woman Myth &Realities, Riffat Hassan, "*Are Women and Men Equal Before Allah*," com. Kishwar Naheed, (Lahore: Sang-e-Meel Publications, 2008), 197,198.

86 "*You have rights over your wives and they have rights over you. You have the right that they should not* defile your bed *and that they should not* commit acts of indecency. *If they do, Allah allows you to put them in separate rooms and to beat them but not with severity. If they refrain from these things, they have the right to their food and clothing with kindness. Give instructions to them kindly, for they are placed under you. You have taken them only as a trust from Allah, and you have the enjoyment of their persons by the word of Allah, so understand my words, o men, for I have told you.'* Muslim, Kitab-ul-Hajj.

Riffat Hassan[87] and Ridley[88] conclude that the verse is not permissive rather restrictive of the prevailing practices of abuse and violence against women. Wadud[89], Edip Yuksel & Layth Saleh al-Shaiban, [90] Jerald F. Dirks[91] and Abu Sulayman[92] further argue that *daraba* does not mean to beat or strike here altogether.

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87 Hassan, "Are Women and Men Equal Before Allah, 197,198.

88 Considering the question of permission in Islam for men to beat their wives, her response would be "sorry, it's not true". She thinks that if and when a man does raise a finger to his wife, he is not allowed to leave a mark on her body. This is another way of the Qur'an and hadith saying; "Don't beat your wife, stupid"Yvonne Ridley, on *"The Agenda, Press T.V. "How I came to Love the Veil",* available at: http://yvonneridley.org/yvonne-ridley/articles/how-i-came-to-love-the-veil-4.html, last accessed on 12.01.2011.

89 Wadud, *Quran and Woman, Rereading Sacred Text from a Woman's Perspective,* p66-69

90 A Coherent Understanding suggested by the translators is that while reading 4:34, we should not understand *idribuhunna* as "beat those women", as this word has multiple meanings. They provide numerous meanings ascribed to it in the Quran as: To travel, to get out: 3:156; 4:101; 38:44; 73:20; 2:273; to strike: 2:60,73; 7:160; 8:12; 20:77; 24:31; 26:63; 37:93; 47:4; to beat: 8:50; 47:27' to set up: 43:58; 57:13; to give (examples): 14:24,45; 16:75,76,112; 18:32,45; 24:35; 30:28,58; 36:78; 39:27,29; 43:17; 59:21; 66:10,11; to take away, to ignore: 43:5; to condemn: 2:61; to seal, to draw over: 18:11; to cover: 24:31; or to explain: 13:17*Quran: A Reformist Translation,* trans. Edip Yuksel, layth Saleh al-Shaiba and Martha Schelte-Nafel, (USA: Brainbow press, 2007), available at: http://www.19.org/books/quran-a-reformist-translation, Last accessed on; 23.03.2014

91 He considers translation of "*Wadribohunna*" meaning "to beat" as an unfortunate translation conveying the erroneous impression of beating being administered, whereas "strike" covers the whole range of possibilities from a slight tap to a forceful punch. In his opinion, correct understanding of this is only possible by referring to Prophet's (P.B.U.H) sayings in this regard which allows it only in case of flagrant misbehavior and with other cautions of not striking on face or inflicting severe punch/ forcefully. Jerald F. Dirks, The Abrahamic Faiths, Judaism, Christianity, and Islam, Similarities and Contrasts, (Beltsville, Maryland, USA: amana publications, 2004)

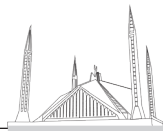
92 Dr. Abdulhamid Abusulayman, in his valuable work, *Marital Discord, Recapturing the Islamic Spirit of Human Dignity,* discusses the use of *daraba* and its derivatives and the Quran yielding possibly seventeen multiple meanings other than slapping, beating and striking. These are propounds, held up as an example, similes by strike, travel through, covered, take away, draw their veils, strike their feet, strike the sea your staff, use the similitude, go abroad, shall be erected. Abdulhamid Abusulayman, *Marital Discord, Recapturing the Islamic Spirit of Human Dignity,* The (Herndon, VA, USA: International Institute of Islamic Thought, 2003)

Conclusion

Traditionalists believe that the concept of *qawwamah* has very far reaching implications for women in almost all matters dealing with family sphere and public life as if it is a general principle for regulation of whole genre of man-woman interaction. This tension is due to the assumption by them that the verse is adhered to the whole community and not limited to husband and wife within family. Traditionalists are more comfortable with extended export of the verse despite the fact that the verse itself militates against such interpretation. Certain physical and mental differences have naturally been between both sexes, but traditionalists think that there are naturally discernible and Godly endowed different spheres of activities for men and women. This opinion does not cater to the realities and requirements of contemporary times, as with the civilizational change and progress of institutions, the role of women in public sphere cannot be denied. What will then be the answer of traditionalists approach for catering to the education of girls, requirement of medical treatment (doctors, para-medical staff, laborites services), security checking's and many other areas required to be accessed by women.

Elaborating the term *qawwamah,* all traditionalists entail a long list of responsibilities for men as must for this responsibility. They very clearly and boldly describe that *qawwamah* means taking care of women and family in multiple and diverse areas yet implying the meaning of monitoring and supervising her conduct regarding obedience to Allah and all other matters of life with the authority or powers of *tadeeb* in achieving all these goals. Discussing the reasons for man being made *qawwam*, *fazelat* of men over women is described by traditionalists endorsing it with the reference of *Al Baqara* 2:228.[93] Traditionalists are convinced of male superiority over women implied by the verse 4:34. They describe men being superior in physical power, intellect, wisdom and *azm*. To them family matters include husband's privilege of spending for *mehar* and *nafaqa*, having four wives, authority of taking into marriage, right of being obeyed, exclusive divorce

93 *"Wives have the* same rights *as the husbands have on them in accordance with the generally known principles. Of course, men are a degree above them in status, and above all is Allah, the All-Mighty, the All-Wise."*



right and revoking of divorce etc. To them, public law issues include differences in law of evidence, different inheritance share, *diyat* amount (blood money), leading prayers, giving *adhan*, capabilities of prophethood and becoming a ruler, physical power for *jihad*, and *amar bil maroof wa nahi unil munkir*. They further include the exceptional matters for women provided to her as an exemption to be her inferiority to men like exemption from *jihad*, congregational and Friday prayers, *shahada* in *hudood* cases, and similarly being *qazi* for *hadood* cases(which is an inference and not a declared issue) etc. In the light of all these interpretations by *muffasireen*, it is a general notion amongst traditionalists that all men are better or superior than all women.

Main tension here appears that the inherent male capabilities suitable for this responsibility and then earned capacity of spending has led them to declare the absolute superiority in homes and outside world, whereas Allah has not declared these differing natural capabilities between males and males or females and females or between males and females to be the source of superiority over each other. This opinion does not find support in the Quran and the *hadith*.[94]

Traditionalists' attitude of annexing privilege to those distinctions and differences which are God endowed poses tension. In this regard, traditionalists' arguments for women to be mentally deficient and yet portrayed to be morally responsible to God on same pedestal also raise many questions. How can a person be declared morally responsible on equal basis when not mentally so capable? Besides, the Quran and the *hadith,* in general, as a principle, nowhere declare women to be mentally deficient.

Similarly, the earning and spending responsibility given to men for wives and families provides them family leadership role but how can it be a source of superiority in the sphere where women are not given the role to compete with them or excel in it anyway?.

Considering the obedience as required behavior on part of women in response

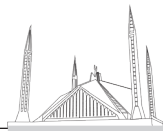
94 Al Hujr at 49: 13, Al Ahzab 33: 35, Ale Imran 3: 195, Al Nahal 16: 97, Al Momin 40: 40, An Nisa 4: 124, Al Taubah 9: 71 & 72.

to *qawwamah*, traditionalists do consider the limits ordained by Allah and the Prophet (P.B.U.H), but after that they suggest a state of servitude for women which is not endorsed by other Quranic references or role model of the Prophet (P.B.U.H). Explanations given by the traditionalists for the term *qawwamah* encompass a broad range of traits and responsibilities to be fulfilled by men as husbands. However, the implied meaning of *tadeeb* or monitoring have affected their opinion for seeing no tension in translation of *darba* as beating wife, though all of them have cited the *ahadith* for being restrictive and careful in this act.

Modernists do not consider this verse to apply to wider public life as it is believed to be applicable to the family life by them. The public life area has been left open depending upon the individual requirements or needs of the time, which is not barred by the Quran or examples found in the time period of the Prophet (P.B.U.H).

Modernists' views on the issue of family leadership can be divided into two groups. One group is convinced of hierarchy in the family as no workable institution can be based on complete equality. They believe that there are certain Godly endowed differences which are necessary for family leadership but these differences are not in any way source of religious or moral superiority of anyone for which all have to compete on equal pedestal. Therefore according to modernists, husband is head of the family, but this leadership does not in any way confer license of dictatorship or misuse. To them, *qawwamah* is a heavy and sensitive responsibility and obligation to be fulfilled and not merely an authority to abuse. They infer the verse 2:228 combined with verse 4:34 as describing the degree of responsibility and not a privilege or preference. Still some of them consider verse 2:228 related to the right of divorce discussed in that verse and not in conjunction with *qawwamah* verse. The feminist group further does not feel comfortable with the idea of permanent leadership role of men in the family considering it to be a contextual matter.

Considering earning and spending of men as one of the reason given for responsibility of *qawwam*, question is raised for this authority in case of not discharging this responsibility. The answer, however, is provided by someone from this group that in such a case the wife cannot be burdened with this responsibility rather it allows wife to resort to other measures for enforcement



of her rights including getting maintenance through court or seeking *khula* or dissolution through court on this basis.

Majority of the Modernists share the same point of view with traditionalists for the three level strategy with the last resort to having the permission of beating the wife. The difference is that the reason for this limit as dictated by *nushuz* has stricter criteria found here. To some, it is equal to engaging in *fawahish* or adultery. This view is also supported by the saying of the Prophet Mohammad (P.B.U.H) in his last sermon on the occasion of *Hajj* implying this definition

Modernists also consider *nushuz* as "general state of marital disorder" and not mere disobedience to husband; this point of view is shared by some of the traditionalists also very clearly. This meaning of *nushuz* sounds more appropriate as it is not restricted to the wife in the Quran as mostly understood and described by the traditionalists rather has been employed for husbands also as in 4:128 for the same state of marital disorder.[95] It is also emphasized by modernists that *nushuz* has to be well clarified and obvious and not verily a suspicion.

Considering the permission to beat, the modernists believe that the verse is not permissive rather restrictive of the prevailing practices of abuse and violence against women. Many *dawah* workers specially working in the West are still of the opinion that with multiple meanings of the word *darab* and its usage in the Quran and otherwise it is not meant to strike or beat here rather to get separated from each other finally or for the stage of inviting arbiters from the family. This view though sounding well harmonized with today's world with well understood human rights standards raises a question when one goes through those *ahadith* which in spite of disliking refer to wife beating.

Traditionalist's point of view has resulted in improper understanding of the concept of *qawwamah* or family leadership in our society. It has endorsed and strengthened the patriarchal set up and mode of family and society which was not meant to be established by Islam. Following are the salient features resultant of such thoughts of scholars:

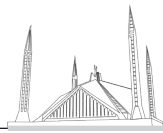
95 Al Quran Al Nisa 4:128, "And if a woman fears cruelty or desertion on her husband's part, there is no sin on them both if they make terms of peace between themselves, and making peace is better".

- Consideration of absolute authority of men over women
- Ruler like attitude (patriarchal) resulting in ruler-ruled relationships.
- Constant expected servility/servitude on part of wife or daughter in law resulting in totally controlling their lives as what to do and what not to do.
- Domestic violence taking form of all kinds of psychological, physical or sexual abuse (scolding, using abusive language, swearing demonizing, condemning her abilities or likes and dislikes, taunting, de naming or defaming in laws relatives, pushing, hitting, severe beating, crimes against body, injuring, throwing acid and even killing)
- Considering all household activities and child rearing and upbringing as sole responsibility of women

It is evident that the verse 4:34 describes the family set up with husband taking the position of guardian of the family further endorsed by many *sahih ahadith* which pronounce both as guardian of their families' with wife taking role of co-equal of her husband in family affairs.[96] Only in greater matters affecting the welfare of the family, the husband is given a degree of supremacy, duly supported by the Quranic reference, since two co-ordinate authorities with equal powers are likely to lead to clashes and conflicts which may destroy the balance and poise of the family life. On the basis of his being the head of the family, man has been designated with functional supremacy over his family, which in no way gives a man the absolute supremacy over women. The reasons provided by the Quran for this responsibility are not endorsing man's superiority over women rather describing functional distinctive abilities suited for this responsibility.

The required characteristics of a balanced notion for the *qawwamah* -Family leadership- should be: Taking responsibility of family affairs; having consultative approach to family members; cherish love and equality; ignoring or forgiving the shortcomings of family members; respect the human independence of wife and others; respect the social, legal and cultural rights of wife and others; appreciate

96 *"All of you are guardians and responsible for your wards and the things under your care; a man is guardian of his family and is responsible for them, a woman is guardian of her husband's home and the children and is responsible for them, all of you are guardians and all of you are responsible for your wards* Mohammad Ismail al-Bukhari, *Sahih*, Chapter: 566, trans. Allama Waheed-uz-Zaman, (Lahore: Maktaba Rahmania, 1985).



the natural capabilities and inclinations of wife; respect likes and dislikes; acknowledge her contribution to the family, companionship, child bearing and rearing; providing help in her domestic responsibilities; sharing child education and *tarbiyah* responsibilities and so on and so forth.

Concerning the required obedience from the wife, the balanced approach is that the meaning of obedience is the recognition of the role of husband as the head of the family unit and the submission and loyalty of both husband and wife to a higher law, the *Shariah.* The best role a woman can play in keeping the marital tie intact and strong is to recognize her husband as the one responsible for running of family affairs and not challenge his leadership. She is supposed to obey him even if his judgment is not acceptable to her in any particular matter provided he does not go beyond the limits of Islam. In no way this entails the relationship like a ruler-ruled or a master-servant.

Balanced approach for dealing with marital disruption is the understanding that provisions for dealing with marital discord are situation specific. Therefore, the third stage permission, even if taken to beat or strike, has in no way the general permission leaving aside an order, which even has the stringent criteria of extreme rebelliousness. Therefore, the practice of ill-informed Muslims of beating their wives on tiny issues of house chores or attitude differences has no place in Islam. Linking this verse to domestic violence by the Westerners has no basis as leaving aside domestic violence, Islam condemns all kinds of violence as it commands that the life, property and honor of all human beings is sacred which cannot be transgressed by any individual. It, therefore, ordered capital punishment for certain crimes including crimes against body (killings or injuries).

Ideally, both partners should make utmost efforts for performing their responsibilities respecting each other to fulfill the true purpose of marriage based on love and mercy. Each and every family thus will be contributing towards the peace and tranquility of society which is replica of a family on a macro scale.

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