

Marriage (Nikāh) in Islam: A Critical Appraisal

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Abstract

In pre-Islamic era, women were victim of gender discrimination and inequalities. The phenomenon of superiority and inferiority was practiced in the society where women were considered inferior to men. The era of Islam introduced the place and status of woman and, also, declared that woman should be treated with honour in societies of Muslim communities. However, the true spirit of Islam has to be implemented for the welfare of humanity and religiosity. The free consent of a woman before giving her hand in marriage (Nikāh) has to be attained but more often this right is being violated. The status of a marriage, without a Walī’s consent, of a girl who has attained her puberty is still questionable. Another menace relating to marriage is dowry, which has become a source of contention between the two partners. However, this research article is critical discussion and thorough analyses of case laws to dig out the root causes and suggest solutions which could help two parties of marriage.

Key words: Free consent, Dowry demands, Mahar, Swara and Walī.

Introduction

In general there were many social evils, which prevailed among the Pagan Arabs, and Islam denounced them in unambiguous words. Many of such evils related to women, for example, female infanticide. Qurān condemned and prohibited it in clear words. It says;

“When the female child is buried alive and when she questions you, for what crime was she killed¹”

At another place it is mentioned;

“Kill not your children for want of sustenance, for it is Allah that will provide sustenance to you and your children, for killing of children is a major sin²,”

Similarly, God denounced the attitude of parents who reject the birth of a female child³.

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The true family structure of Islam has been erected on the edifice of due respect for every one living within that social bond. Woman as a mother in a family set up is highly honoured in the sacred scriptures of Islam. Islam considers the woman, being a wife, as the best companion for the husband, in company of whom he enjoys peace and tranquillity. It is mentioned as;

“And among His signs is that He created for you mates from among yourselves, that ye may dwell in tranquillity with them, and He has put love and mercy between your (hearts): Verily in that are signs for those who reflect ⁴,”

The spousal relation between husband and wife has been magnificently described as garments for each other. The Qurān says that:

“They are your garments, and ye are their garments ⁵,”

Nothing is much closer than one’s garments or clothes to his or her body, which protect the body from the caprice of the weather on one hand while maintaining the modesty on the other hand. In other words, the couple keeps each other protected from the social evils like adultery and ‘lewdness’⁶. While having stated these statements mentioned in Qurān, woman still is facing difficulties in achieving her due status. The following discussion will highlight and critically analyse the issue of marriage, identify the causes that make it contentious and controversial and finally an attempt would be made to offer solutions and remedies in order to resolve it.

Marriage (Nikōh)

Marriage according to Islam is a civil contract between a man and a woman which gives rise to many rights and obligations mutually agreed by them and binding equally on the contracting parties. It is not only a contract but also a method of legalising cohabitation of man and woman. One of the essentials of this contract is the free consent of both the parties without any coercion or undue influence. Using compulsive or coercive methods to conduct a marriage without one’s consent is against the Hadith of the Holy Prophet’. The particular Hadith has been reported by Abu Huraira in Bukhari and Muslim [Collections of Traditions or Hadith of the Prophet Muhammad (PBUH)], According to that Hadith, a woman whose marriage has been dissolved or a virgin “shall not be married till her consent is sought ⁷”.

It is quite clear from the above tradition of the Prophet (SAW) that the custom of obtaining no consent or the concept of any type of forced marriages in a patriarchal set up of many Muslim societies is totally against the spirit of

Islam. The woman has been given the right of choosing her husband just like the man has been given in choosing his wife⁸. Moreover, the woman has been given the right to offer the contract or propose to the man, just as the man has been given this right. However, it is very unfortunate to note that there are some abhorrent institutionalized customs prevalent in a few sections of Muslim societies that deny women the above rights, which are otherwise guaranteed by the religion.

Swara, a custom of handing over of a woman as a blood money (compensation) to the deceased family by the aggressor, is still common in Afghanistan and many parts of the Pushtoon dominated areas within Pakistan. The literal meaning of Swara is that:

“A woman would ride on a horseback to the enemy camp and would come back⁹.”

The same practice of this kind forced marriage is prevailing in different parts of Pakistan and Afghanistan with another name as Vanī.

Ironically, the honour of a woman is much dearer to a Pushtoon than his own life on one hand while he doesn't give respect to her consent or feelings on the other hand when he becomes prepared to give his sister or daughter in compensation for the crime which she never committed. Sometimes two girls were given in Swara depending upon the severity of the crime. How can a girl who is given into marriage without her consent to a man belonging to an enemy family, lead a happy life? (BBC, 1996) And is there any guarantee that it would be the ultimate end of enmity between the two tribes? Why should the girl be a victim or scapegoat for bringing peace between the two enemies and why should the male member of that family not pay the compensation particularly the one who has committed the crime¹⁰?

Bakht Mana VS Hamīsh Gul case

This is a very famous case (PHC, 2000) decided by a Divisional Bench of Peshawar High Court, Pakistan against the custom of Swara common in many parts of NWFP, now commonly known as Khyber Pakhtūkhwa. The brief history of the case is as under;

BakhtMana was a minor girl who was given in marriage to the plaintiff's son HameshGul as blood money. She was to be sent with her husband upon attaining puberty. HameshGul didn't make any arrangements to bring her wife even after 25 years. Instead, he refused to do so and contracted another marriage. He also refused to divorce her or give any rights as a wife on the ground that she was a Swara. Consequently BakhtMana filed a suit in the

Family Court of District Buner against her husband for the dissolution of marriage and asked for maintenance of Rs.500/month. Her suit for maintenance was dismissed but she was given the right to dissolve her marriage based on orders of the court that there was no Rukhsati (wife being taken from her parent's home to her husband's house). Furthermore, it was declared that there is no room for Swara in Islam¹¹.

Hamīsh Gul filed an appeal in the Peshawar High Court against the decision of the Family Court. The Peshawar High Court dismissed the appeal and observed in its remarks that the practice of Swara is the:

“Degradation, humiliation and abasement of the importance and value of human being¹²”

The Bench also declared in the following words in paragraph 7 as:

“Elegance of ingeniousness in tyranny is further compounded when beneficiary of such oppressor sometime refuses to marry the victim of such tyrant act. The legislature, realizing this violent innovation, has made a provision in the Pakistan Penal Code; 1860. Section 310 of PPC clearly forbids such an act.” They further added in paragraph 10 that Swara “is a barbaric act and not compatible with the law of Shari’at, as often claimed¹³.”

Pushūns, who call themselves ‘Muslims by birth’ as a nation, should condemn it in loud voice not only because it is totally un-Islamic but it also overshadows their good qualities of chivalry, honour and hospitality for which they are known to the world. This custom of giving women in marriage to an enemy as part of settlement of dispute clearly violates their basic human rights, treating them as a property that is used to resolve disputes¹⁴.

In most cases of marriage no importance is given to the consent of the girl. Instead, the consent of an intermediary is always given preference, which decides the future of the girl. The legal age capacity or puberty of a male and female to enter a marriage is normally presumed on the completion of 15 years. A Walī or guardian is normally appointed for that girl who though has attained puberty but still is a minor (Badlishah, 2003) i.e. under Eighteen years of age regulated by Majority Act IX of 1875¹⁵. Guardian or Walī can be a father, grandfather or brother. The problem can arise if the Walī refuses to give his consent. Three of the four major schools of Sunnī Jurisprudence i.e. the Mālikī, Shāfi and Hanbalī Schools are of the opinion that the Nikāh is invalid if the marriage has been contracted without a Walī. They give preference to marriage entered into by a girl who has attained the age of puberty if it has also been conducted through her Walī’s consent. However, the founder of Hanafī

School, Imām Abū Hanīfa does not consider the appointment of a Walī, necessary if the girl is of sound mind and has reached the age of maturity or puberty. He says that she can marry at her own will without the appointment of a Walī or his consent. In a famous Pakistani case ‘Abdul Wāhid v. Asma’ Jehāngīr¹⁶, the Majority of Court recognized the capacity of a Muslim girl to go into marriage without the consent of a Walī or guardian as valid. The Court observed that all those persons who are ‘parties’ to such weddings have violated “the established values of society” and therefore they do not deserve “any relief in equity¹⁷”.

Some major reforms have already been introduced to safeguard the rights of a minor. In Pakistan a minor whose marriage has been conducted fraudulently or negligently by his or her Walī, the marriage is voidable and can be annulled by the minor on attaining puberty (option of puberty), provided the marriage has not been consummated after attaining puberty¹⁸.

In Humāra Mehmood case (PLD. 1999), the court while defining the case on Sharī’ah, referred to International Convention on the Elimination of all forms of Discrimination against Women (CEDAW 1979). It was quite a rare occasion when the Higher Courts in Pakistan emphasized on its global role to discourage any form of sex discrimination being a signatory to the said instrument¹⁹.

Dower or Mahr is a sum of money or property mutually agreed by the husband and wife to be paid to the wife at the time of Nikāḥ. There is no maximum limit under Islamic Law but the minimum amount is considered to be equal to ten dirhms²⁰.

RatnaBatarra argues that there is a biased perception about the Mahr which is considered as a ‘Bride price’ and as a symbol of man’s power of ‘ownership of his wife’ but it was pointed out during the discussion on Women’s Rights Workshop held in Malaysia that Islam considers the dower in consideration of the marriage as a wife’s financial right over her husband to secure her interests, though despite this offer many feminist movements in Indonesia have favoured to waive their right to dower²¹. However, the real issue is not dower but dowry, which the woman brings with her to her husband’s house in the shape of clothing, jewellery and other valuable stuff that has become a real stigma of society.

Dr. Zākir Nāiek says that:

“Making ‘dowry demands’ whether “directly or indirectly” are totally un-Islamic²²”

The Dharamshastras (an ancient primary source of Hindu laws) dates back to the history of dowry revealing that the presents and jewels given at that time to the wife for honouring her were later confused with Vardakshina i.e. gifts meant for the bridegroom²³. Dowry has no roots in Islamic law but of course is a deeply established custom. The responsibility to make the bulk of dowry is put on the bride's family²⁴.

The high demands of dowry are often made from the bridegroom's side and more often than not, marriages have been seen broken up when the demands were not met²⁵. Continuing and excessive demands one after another even after marriage have become strong motives behind spousal murders or maltreatment of wives to say the least. In *Muhammad M'oidin v. State* the husband was accused of murdering his wife for not fulfilling the demand of fifty thousand Rupees from her father's home to start his business with²⁶. The husband took the plea that she committed suicide and that she wanted to have a separate family life which was later confirmed by her father as well. Perhaps the non-payment would have resulted in beating her up by the husband so badly that ultimately took her life. The court held that "the demand for money to start business was not so grave" that would be included as 'dowry demand' and hence the husband was not found guilty in Madras High Court. Poonam Saxena criticises the decision by saying that first of all the father-in-law is not responsible for the financial help of his son-in-law and secondly that the court was also wrong by not putting this demand under the category of 'dowry demands' made by the husband which "is no different from any other demand²⁷."

Dr. Taslima Monsur condemning the curse of dowry says that 'dowry deaths' are the shocking reminder of the "authoritativeness of patriarchy". She says that one of the major causes of murder in Bangladesh is dowry demands i.e. 50% murders in 1983-84²⁸. Poonam Saxena says that woman can easily be made "submissive" because she is in most cases not aware of her rights but "duties". She puts straightaway her dowry under husband's control and "serves" yet every member of the family as a binding liability on herself²⁹.

Conclusions

The current era demands to curb the menace of dowry prevail anywhere in Muslim and sub-continental societies by imposing strict legislation either fixing certain maximum limit of dowry to be paid by the bride's side or make it strictly according to the financial status of the girl's parents. In Pakistan a

legislation of Dowry and Bridal Gifts (Restriction) Act 1976 (ljcp, 2010) was introduced which made the bride the sole owner of her dowry and gifts and limiting the total value of all property she can receive to 25000 Rupees, putting some restrictions on lavish expenditures on meals (Esposito, 1982). But again, my emphasis would be more on implementation, which needs the utmost attention rather than merely legislation of such laws. Similarly ignoring the consent of a girl before giving her hand in marriage is utterly un-Islamic. She must be treated as equal as an individual and not as a commodity.

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