Is an Adult Muslim Woman Sui Juris? Some Reflections on the Concept of “Consent in Marriage” without a Wali (with Particular Reference to the Saima Waheed Case)

Shaheen Sardar Ali*

1 INTRODUCTION

The purpose of this article is to discuss the vital question arising from a recently decided case by the Lahore High Court (Pakistan), in Abdul Waheed v. Asma Jehangir regarding the capacity of an adult Muslim woman to enter into a valid contract of marriage without the intervention of her wali (guardian). Issues raised in the petition included, inter alia:

(a) whether parents have a right to be obeyed, and whether this right of obedience is judicially enforceable;\(^2\)

(b) whether marriage in Islam is a civil contract or not; and

(c) whether permission of the wali is or is not one of the main conditions of a valid nikah.

The case, it is submitted, has not only reopened a debate that one believed to have been settled for centuries, at least among Hanafi Sunni Muslims, it has also called into question the entire legal personality of a Muslim woman and the status accorded to her in Islam.

* Professor of Law, University of Peshawar, Pakistan, currently Commonwealth Scholar, Law School, University of Hull, England.

1 More commonly referred to as the Saima Waheed case. See the case comment in Part IV on p. 518. The decision was announced on 10 March 1997 but is not yet available. Page numbers referred to in this paper therefore are based on the judgment sheet. The author acknowledges with gratitude the assistance of the Human Rights Commission of Pakistan, Peshawar Chapter, and the AGHS Legal Aid Cell, Lahore for making the judgment available to her. Editors' note: the case is now reported in PLD 1997 Lahore 331. See also teh case note by Martin Lau in Part IV, p. 518.

2 The issue of judicially enforceable obedience to parents has been raised purely in the context of issue (c), and therefore will not be separately addressed in this paper.
In order to address the issue in hand, it is proposed to provide an overview of the definition of the institution of marriage in Islam, the nature, capacity, form and requisites of a valid contract of marriage. A section will be devoted to the concept of guardianship in marriage and the related right of khiyar ul-bulugh (option of puberty) and how statute law has affected the mould of the traditional Islamic norms surrounding this concept. The interaction and interplay between Islamic law, statutory law and customary norms and practices in relation to marriage will also be discussed, particularly where interpretation of the doctrine of kafat or equality in marriage is concerned. It will be argued that the black letter law is not the sole determinant of what, when and how women's rights are recognized and conceded in a legally pluralistic society such as Pakistan and that, of the three sets of laws/norms, it is customary practices and societal norms that hold sway and influence over dispute resolution fora, whether formal or informal. The final section of the paper will attempt to assess the judgment in the Saima Waheed case in the light of the previous discussion and analysis.

2 DEFINITION OF MARRIAGE

The central idea in Muslim family law is the institution of nikah or marriage. Almost every legal concept revolves around the central focal point of the status of the marriage. It is through marriage that the paternity of children is established and relationship and affinity are traced. Mulla defines marriage (nikah) as “a contract which has for its object the procreation and legalising of children”. However, Baillie states, on authority from Kifayah, that marriage is also instituted for the “solace of life” and is one of the “prime or original necessities of man”. Therefore, marriage remains lawful even in extreme old age, after hope of offspring has ceased or during marz-ul-maut (terminal illness).

All major writers on Islamic law agree that marriage according to Islam is in the nature of a contract, hence all the requisites of a valid contract must be fulfilled. First of all, the parties to the marriage contract must have capacity. Every adult Muslim of sound mind may enter into a valid contract of marriage. Marriage of

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8 Kifayah, vol. iii, p. 577.
13 But a minor may be validly contracted into marriage by his or her guardian. See *ibid.* at pp. 406-409.