

Exchange Marriage System and Muslim Family Laws in Pakistan

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Abstract

This essay deals with the statutory legislation regarding marriage and family formation, mate selection, inheritance and its relevancy for the exchange marriage system in Pakistan. It locates the scope of the exchange marriage within the context of the existing legislation and the gaps in it. Generally, there is a 'plethora' of legislation along with constitutional guarantees, but it remains far from securing the fundamental rights of the people of Pakistan due to certain lacunas in it. The tradition of marriage by exchange is stronger than the local legislation. A separate piece of legislation as well as implementation of it may help to reduce the culture of exchange marriage in order to secure the fundamental right of spouse selection without any interference.

Introduction

The reciprocity of spouse selection, in which one family arranges the marriage of a pair of son and daughter with a pair of a son and daughter from the second family, is prevailing for centuries around the globe.¹ As per known

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1 T.N. Madan "Structural Implications of Marriage in North India: Wife-givers and Wife-takers among the Pandits of Kashmir", *Contributions to Indian Sociology*, Vol. 9, No.2 (July 1975), 217-43. Also see, Marcel Mauss,

history, the exchange marriage system emerged centuries back with the development of the family institution. First method of family formation was marriage by capturing a woman. Second method of spouse selection was through fight in which two strong men wrestled with each other in order to win bride. The winner had a right to marry the woman and thus felt self-actualization to be a strong man. The third method of spouse selection was woman by exchange.² Perhaps the exchange marriage system was the “most civilized way” to get married in the early human history because it prevented any fight to acquire bride. However, some societies changed earlier (and many of them developed formal laws), other remained on the edge of the traditions.

Various studies around the globe³ focus the marriage system in structural and individual perspectives in

“The Gift: The Form and Reason for Exchange in Archaic Societies” (Glencoe: Free Press, 1954); C. K. Meek, “Marriage by Exchange in Nigeria: A Disappearing Institution”, *Africa*, Vol. 9, No. 1 (1936), 64-74; Claude Levi-Strauss, *The Elementary Structures of Kinship* (Boston: Beacon Press, 1969).

- 2 Ethel L. Urlin, *A Short History of Marriages* (Detroit: Singing Tree Press, 1969).
- 3 Marilyn Strathern, “Marriage Exchanges: A Melanesian Comment”, *Annual Review of Anthropology*, Vol.13 (1984), 41-74. See also, Eugene Cooper, “Ten-Section Systems, Omaha Kinship, and Dispersed Alliance Among the Ancient Chinese”, *Current Anthropology*, Vol. 24 (3) (1983) 327-41; Eugene Cooper, “Cousin Marriage in Rural China: More and Less than Generalized Exchange”, *American Ethnologist*, Vol. 20 (4) (1993), 758-80; Nancy Tapper, *Bartered Brides: Politics Gender and Marriages in an Afghan Tribal Society* (Cambridge: Cambridge University Press, 1991); Peter Bearman, “Generalized Exchange”, *American Journal of Sociology*, Vol. 102 (5) (1997) 1383-1425; Thomas Schweizer and Douglas R. White, “Emergence, Development, and Transformation of Kin-based Exchange Systems”, 245-50 In *Kinship, Networks and Exchange*, edited by Thomas Schweizer and Douglas R. White (Cambridge: Cambridge University Press, 1998); Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge: Cambridge University Press, 1998); Polly Wiessner and Akii Tumu, “The Capacity and Constraints of Kinship in the Development of the Enga Tee Ceremonial Exchange Network (Papua New Guinea Highlands)”, 277-302 in *Kinship, Networks and Exchange*; Zhang, Weiguo. “Dynamics of Marriage Change in Chinese Rural Society in Transition: A Study of a Northern Chinese Village”, *Population Studies*, Vol. 54 (1) (2000), 57-69; Suzan M. Ilcan, “Marriage Regulation and the Rhetoric of Alliance in

normative context, but they do never focus on the formal legislation. The studies either overlooked or neglected the violence that is spawned due to the exchange system.

The exchange marriages are limited to cousins, close relatives, similar caste and ethnicity in Pakistan.⁴ The marriages are further arranged by the elders without or nominal choice of a person involved (husband and wife). This type of spouse selection has condition that the relations of the both pair of spouses depend upon each other and their respective families. Both of the two pairs and the families concerned have dependency of relationship in good as well as in difficult times on the second pair and the family. This dependency syndrome is creating a number of social problems: child marriages, violence and emotional stress to the actors involved in the system⁵. In case, the young generation deviates from this tradition, they are vulnerable and have to face further violence because of the social mechanism involved in the system of the exchange marriage. The legislation about the system of the exchange may reduce such violence in order to secure the basic right of spouse selection.

Different from the above, this project is aimed at locating the legal aspects of the exchange marriage

North Western Turkey", *Ethnology*, Vol. 33 (4), (1994), 273-96; Kriti Kapila, "Conjugating Marriage: State Legislation and Gaddi Kinship", *Contribution to Indian Sociology*, Vol. 38 (3), (2004), 379-409; Hanan G. Jacoby and Ghazala Mansuri, *Watta Satta: Bride Exchange and Women's Welfare in Rural Pakistan* (Washington D. C.: The World Bank, 2008).

- 4 Muhammad Zaman, "Socio-cultural Security, Emotions and Exchange Marriages in an Agrarian Community", *South Asia Research*, Vol.28 (3) (2008). See also, Muhammad Zaman and Monika Wohlrab-Sahr, "Obstructed Individualization and Social Anomie: Marriage Relations in Rural Pakistan and their Relevance for an Empirically Grounded Theory of Individualization Conflicts," in *Individualisierung: Ein Vierteljahrhundert "Jenseits von Stand und Klasse"?* edited by Peter A. Berger /Ronald Hitzler (Hrsg.) (Wiesbaden: Springer, 2010).
- 5 Human Rights Commission, *State of Human Rights in Pakistan* (Lahore: Human Rights Commission of Pakistan, 1996). See also, Niaz, Unaiza, "Women's Mental Health in Pakistan", *World Psychiatry*, Vol. 3 (1), (2004), 60-62.

system and its relevance with the Muslim Family Laws in Pakistan. It is about the constitutional and legal guarantees to select a spouse independently. This essay identifies the gaps in the legislation.

Constitutional Guarantees in Pakistan

The Constitution of 1973⁶ assures the full protection of the citizen and freedom of expression. Article 35 of the Constitution elaborates on the rights of the citizen and declares that “the state shall protect the marriage, the family, the mother and the child”. However, Pakistan being an Islamic state, does not allow extramarital relations (cohabitation of a man and a woman who are not relative to each other and live together without marriage). Article 31 states that the state shall be responsible: “(b) to promote unity and the observance of the Islamic moral standards”. Cohabitation has been further penalized under The Woman Protection Act 2006 (See the article 493A of this Act).

Extramarital affairs are considered unlawful and illegal relations defined in separate legislation. For instance, The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979⁷ Article 4 states: “A man and a woman are said to commit *Zina* if they wilfully have sexual intercourse without wedlock.” The Muslim citizens are supposed to adopt Islamic norms regarding mate selection in Pakistan. There is a specific legislation with reference to family and marriage under the Islamic principles which are obligatory in Pakistan.

6 Government of Pakistan, *The Constitution of Pakistan, 1973*. Islamabad. Retrieved July 5, 2009. (http://www.pakistanconstitution-law.com/theconst_1973.asp).

7 The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979, Government of Pakistan, retrieved July 5, 2009 (http://www.pakistani.org/pakistan/legislation/zia_po_1979/ord7_1979.html).

Muslim Family Laws

According to the Article 227 (1), the Quran and the *Sunnah* (the way of the Prophet Muhammad) are the prime sources of legislation in Muslim family laws in Pakistan. Other sources of laws including *ijma* [Arabic: consensus of opinion among the religious Muslim scholars], *ijtihad* [Arabic: independent interpretations of Muslim scholars based on the Quran and *Sunnah*], *taqlid* [Arabic: adherence to established legal principles] are the basic guiding principles of Muslim family laws in Pakistan.⁸ Muslim family laws are under the jurisdiction of the *Shari'at*. The constitution of Pakistan further guarantees the protection of basic rights, for instance marriage and family formation in Pakistan as mentioned earlier. It protects the rights of inheritance of heirs (son, daughter and wife), and gives due share of inheritance to the family in accordance with the Islamic laws. Nevertheless, the family laws do not protect cohabitation, illicit and illegal sexual relations, which are declared as crime. There are severe sanctions and penalties for such criminal acts under the *Haddood* Ordinance of 1979 (as mentioned earlier), which have been under discussion. Two persons (man/woman without *nikah*) living together as husband/wife are considered to be in an illegal sexual relation under Article 4 of The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979, despite mutual consent. Therefore, freedom of mate selection exists within the limitations of Islamic law, which is the supreme law of the country. A couple must publicly declare their marriage for it to be legal and has to sign the *Nikah-Nama* [Urdu: marriage contract] in front of eyewitnesses, according to the Muslim Family Laws Ordinance of 1961. It is the responsibility of the parents (guardians) to look after and

8 N. J. Coulson, "Reform of Family Law in Pakistan", *Studia Islamica*, Vol. 7 (1957), 135-55. See also, Salman Akram Raja, "Islamisation of Laws in Pakistan, *South Asian Journal*, Vol. 2 (2003)." Retrieved July 5, 2009 (http://www.southasianmedia.net/Magazine/Journal/islamisation_laws.htm).

manage the marriages of children under 18 as *wali* [Urdu: guardians].

Conjugal Contract and the Legislation

Marriage is a civil contract between two parties (husband and wife), for which consent and willingness of the parties is mandatory.⁹ There is a code of conduct, prescribed in the Islamic traditional laws, emphasizing the rights and duties of each party (groom and bride). This contract is based on the mutual consent of the spouses. This is called *aijabo qabool* [Urdu: asking and acceptance]. A *wali* is required if either of the spouses is under 18 (groom) or 16 (bride). Permission to marry under 18 years may be given if the judge allows it in certain circumstances. A couple's consent is mandatory for marriage according to the Islamic traditions, but according to some family cases it has to be in line with the decision of the guardians in general. However, according to the Lahore High Court 1997¹⁰ (See Abdul Waheed vs. Asma Jahangir case PLD 1997 Lah 331) the consensus of guardians for an adult couple is not required any more.

The violation of the civil contract by either party can lead to the termination of the contract. The termination of the marriage contract by the husband is called *talaq* [Urdu: divorce], while the termination by the wife is called *khula* [Urdu: literally 'untying the knot' or termination of marriage]. The relevant Islamic laws concerning divorce are "The Muslim Family Laws Ordinance, 1961"¹¹ and the Dissolution of Muslim Marriage Act of 1939. The

9 Justice M. I. Chaudhry, "Family and Youth Issues-Pakistan Perspective" Belfast, Northern Ireland: XVII World Congress of The International Association of Youth and Family Judges and Magistrates held on 27 August to 1 September 2006.

10 Government of Pakistan, *Abdul Waheed vs. Asma Jahangir Case*, 301, (Lahore: PLD, 1997).

11 Muslim Family Laws Ordinance, 1961, Government of Pakistan. Retrieved July 5, 2009. (http://www.vakilno1.com/saarclaw/pakistan/muslim_family_laws_ordinance.htm).

Dissolution of Muslim Marriage Act of 1939 is supposed to “consolidate and clarify the provisions of Muslim Laws relating to suits for dissolution of marriage by women married under Muslim Law (...)”. Article 2 (vii) of the Dissolution of Muslim Marriage Act of 1939¹² gives the right to the dissolution of marriage to a female when “she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated.” Article 2 (viii) parts a, b, c, e and f give the conditions and circumstances for dissolving a marriage. To look after family matters, separate courts have been established by the West Pakistan Family Courts Act of 1964, Article 3.

The West Pakistan Family Courts Act 1964 provides for the establishment of Family Courts in each district for the expeditious settlement and disposal of disputes relating to marriage and family affairs and at least one Family Court in each district shall be presided over by a woman Judge. The Family Court, at the pre-trial, ascertains the points at issue between the parties and attempts to affect a compromise or reconciliation between them. With a view to expediting the trial of family disputes, section 12-A was inserted into the Act of 1964, which obliges a Family Court to dispose of a suit for dissolution of marriage within a period of six months from the date of institution.¹³

These courts look after family affairs like marriage and family disputes, including age of marriage, forced marriages, and love-marriages in Pakistan. Separate legislation has been done for minority groups residing in the country as part of the legal code of conduct. The Guardians and Wards Act, 1890 gives majority and minority laws regarding the marriage institution: “section 3 of the Act fixes 21 years as the age of majority in respect

12 The Dissolution of Muslim Marriages Act, 1939, Government of Pakistan. Retrieved July 5, 2009

(http://www.vakilno1.com/saarclaw/pakistan/dissolution_of_muslim_marriages_act.htm).

13 M.I. Chaudhry, “Family and Youth Issues–Pakistan Perspective”, Belfast, Northern Ireland.

of the above matters. Otherwise the age of majority is fixed at 18 years by the Majority Act, the child marriage is prohibited under the Child¹⁴ Marriage Restraint Act, 1929.¹⁵

This legislation was passed during the colonial era, and rules and regulations were framed taking into account the Islamic jurisprudence and its sources to avoid confrontation with the local culture. These legislations were a major source of law for the newly independent state of Pakistan in 1947, and the same legislation was also adopted for minorities living in Pakistan. However, the Muslim Family Laws Ordinance of 1961 dealing with family and marriage of Muslims was issued after the independence of the country. The Muslim Family Laws Ordinance of 1961, Article 2, creates the 'arbitration council', which mediates between a husband and wife. Article 5 of the Ordinance gives the provisions for registration of a marriage. Article 6 allows polygamy under conditions defined by the Ordinance. Article 7 and 8 refer to '*talaq*' and the conditions of dissolution of a marriage. Article 9 of the ordinance describes the maintenance of a wife or wives. After that another important piece of legislation was "The Protection of Women (Criminal Law Amendment) Act" of 2006 that promotes the protection of women's rights in Pakistan. This act has replaced some parts of "The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979" which were criticized by human rights activist. According to offence of *Zina* [Urdu: non-marital relationships], a person was liable to stone to death. The article 10 of The Offence of *Zina* (Enforcement of *Hudood*) Ordinance, 1979 states:

- i. Subject to the provisions of section 7, whoever commits *zina* [non-marital relationship] or *zina-bil-jabr* [rape] which is not liable to *hadd* [limit], or for which proof in

14 The Child Marriage Restraint Act 1929, Government of Pakistan, Islamabad. Retrieved July 5, 2009 (<http://wcd.nic.in/cm1929.htm>).

15 Chaudhry, "Family and Youth Issues-Pakistan Perspective", Belfast, Northern Ireland.

either of the forms mentioned in section 8 is not available and the punishment of *qazf* [unaccountable] liable to *hadd* has not been awarded to the complainant, or for which *hadd* may not be enforced under this Ordinance, shall be liable to *tazir* [punishment].

- ii. Whoever commits *zina* liable to *tazir* shall be punished with rigorous imprisonment for a term which may extend to ten years and with whipping numbering thirty stripes, and shall also be liable to fine.
- iii. Whoever commits *zina-bil-jabr* liable to *tazir* shall be punished with imprisonment for a term which shall not be less than four years nor more than¹⁶ twenty-five years and shall also be awarded the punishment of whipping numbering thirty stripes. When *zina-bil-jabr* liable to *tazir* is committed by two or more persons in furtherance of common intention of all each of such persons shall be punished with death.¹⁷

The Protection of Women (Criminal Law Amendment) Act 2006¹⁸ brought some major changes in The Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979:

1. Rape and *zina* are separated now. Consensual non-marital sex will be punished with imprisonment up to 5 years and with a fine of 10,000 Rupees. Rape will be punished with imprisonment up to 25 years or under specific circumstances with stoning to death. The Article 376 of The Protection of Women (Criminal Law Amendment) Act 2006 states:

- 1. Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and shall also be liable to fine.

16 Government of Pakistan, *The Offence of Zina (Enforcement of Hudood) Ordinance, 1979*. Retrieved July 5, 2009. Available online: (http://pakistan.org/pakistan/legislation/zia_po_1979/ord7_1979.html.)

17 *Ibid.*

18 Protection of Women (Criminal Laws Amendment) Act, 2006. Government of Pakistan. Retrieved July 5, 2009 (<http://www.pakistan.org/pakistan/legislation/2006/wpb.html>).

2. When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.”

2. The Major change refers to the proof of *zina*. According to the Article 8 of The Offence of *Zina* (Enforcement of Hudood) Ordinance, 1979, proof of *zina* was given:

- a. by a confession of the accused or
- b. by at least 4 Muslim adult male witnesses.

Owing to the criticism, this procedure of the evidence has been amended, and now forensic evidence is required rather than four persons' evidences (The Protection of Women (Criminal Law Amendment Act, 2006). *De facto* this implies that consensual non-marital relations are not anymore penalized by law. This produced a controversy between Islamists and human right activists in Pakistan. The human right activists still criticized the law as being not up to the standards of international human rights charters. The Islamic activists criticize if *de facto* allows non-consensual sexual relations and that claim that the law is not according to the *Shari'at*.

3. The act also outlaws sex with a girl age of 16 even if done with her consent. This also covers marital relations.

Marriage by Exchange and the Gaps in Legislation

Article 25 of the 1973 Constitution of Pakistan provides equality of citizens before law and equal protection and it eliminates discrimination among citizen. Meanwhile, the family laws in Pakistan provide protection to the family, the marriage, woman and children. Section 2 of the Child Marriage Restraint Act, 1929, denounces child marriages (males under the age of 18 and females under the age of 16). Marriage and family laws in Pakistan emphasize the strength of the family. The legislation promotes the family institution and empowers the family to make decisions (see Article 35 of the 1973 Constitution of Pakistan and the Guardians and Wards Act, 1890).

Even if there have been substantial changes in the marriage law of Pakistan, an individual's choice is still limited. It is still in line with official protection that guardians are the representative to arrange a marriage for their son/daughter. Although a person enjoys some liberty to select a spouse by law, yet couples are still bound to abide by the traditions and the control of the family. In Pakistan, the traditions are stronger than state laws. Therefore, it is difficult to claim that an individual is allowed to deal with family issues independently related to the issue of marriage by exchange.

Nonetheless, there are gaps in constitutional guarantees (freedom of choice of the mate selection) and legislation (authority of the family as guardian). The gaps in legislation do not restrict customary practices (like *watta satta*) that limit and restrain the choice of a person with regards to spouse selection and marriage. *Watta satta* is a traditional system that provides social security to the community in a country which other-wise is unable to offer social security to its people.¹⁹ Thus, the exchange system serves an important purpose, and is for this reason finds support by the people.

The implementation of the present legislation is another issue. The existing legislation and the constitutional guarantees often only exist on paper and are hardly applied in practice. People often are not even aware of the legislation, and the state has not shown the 'political will' to implement the existing laws. Therefore, customary practices like exchange marriages that limit personal choice still continue. The exchange marriage practices have not only generated child marriages/engagement, forced marriage, consanguineous and caste marriages, but also domestic violence and crimes of honour in the society. Such problems are the outcome of this traditional practice

19 Muhammad Zaman, "Socio-cultural Security, Emotions and Exchange Marriages in an Agrarian Community", *South Asia Research*, Vol.28 (3) (2008).

as well as of gaps in existing legislation and of a lack of its practical implementation.

Conclusion

Although the constitution and other legislations allow a sui-juris person to enter into any civil contract, yet practical situation is different. The traditional system of the exchange marriage supersedes the state legislation. Article 35 of the constitution is the part of the chapter related to the Principles of Policy and requires the need for the legislation to protect the human rights. However, there is no specific legislation on the issue of *watta satta* [Punjabi: exchange marriage system] in Pakistan. The only choice for the person of forced marriage is to take divorce. The Higher Courts in Pakistan have showed their displeasure over the exchange marriages and they termed it a major contributor to the family disputes in Pakistan. So far the parliament has shown no ruling with reference to exchange marriage system. The majority of marriages occur with nominal or no consent of the spouses, which is being dealt with existing Muslim Family laws of the country. Therefore, there is a need for a specific legislation that guarantees freedom of choice of spouse selection and mutual consent of the parties concerned rather than the family or guardians. There is also a need to show a "political-will" in the implementation of these laws.