

Freedom of Marital Choice in the Light of the Qur'an and Ahadith and its Relevance to Muslim Civil Laws

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This paper deals with a much disputed aspect of Islamic civil law, namely, the position of the *wilayat* (marriage guardianship) and the legal capacity of Muslim women to contract marriage in accordance with the rules laid down in the Qur'an and the *Sunnah* or the Prophetic Tradition. The purpose of this paper is to elucidate that Muslim women are conceded the right to contract a marriage at their own discretion even sans the consent of their *awliya* or agnatic guardians. It will take into consideration the views of the two main schools of Sunni Muslim jurisprudence, namely, the Hanafi and the Shafi'i in this matter and examine their respective positions from an Islamic standpoint.

Marriage in Islam could be defined as a civil contract entered into by a contract of offer or proposal (*ijab*) and acceptance (*qabul*) by the mutual consent of the bridegroom and the guardian or agent (*wali*) of the bride in the presence of two adult male witnesses. The *wali* or marriage guardian is, in the first instance, the father and in the second instance, the paternal grandfather, according to both the Hanafi and Shafi'i schools. This is followed by other close male relatives on the agnatic side, depending on the position of the *madhhabs* (schools of law) regarding the matter. According to the Hanafis the right of *jabr* (i.e. the power to impose the status of marriage on a ward) applies to all minors, whether male or female, and no sooner they attain puberty (*bulughhiyyah*), which in the absence of evidence to the contrary is fixed by law at 15 years, they are freed from their *wali's* right of *jabr* and may validly enter into a marriage contract at their own discretion.

According to the Hanafi *madhhab*, the consent of an adult virgin, widow or divorcee is essential for the validity of the marriage. Consent may, however, not necessarily be expressed. In the case of virgins it may be implied, for silence may be taken as consent. Thus, once a girl attains puberty, the role of *wali* automatically changes to that of an agent, though he may still be known as *wali*. This is a nominal *wilayat*, the *wali* being provided for reasons of propriety and decorum, as is also necessary for arranging the terms of the marriage settlement as well as to act as a check against any rash or unsuitable choices that may be made by his ward, especially, if she is young and immature. However, it is agreed that the will of the woman shall prevail. In fact, a woman may appoint an agent (*wakil*) as her *wali* and so contract a marriage of her own liking. The consent of the *wali* (i.e. her natural guardian; her father, grandfather or brother as the case may be, as distinct from an appointed *wali is* by no means necessary either for a grown up virgin (*bikr*) or a previously married woman (*thayyib*). When the *wali* acts for her, it is presumed that he acts on the power granted to him by her. Under certain conditions, women who have been given in marriage during their minority, are given the option of unilaterally repudiating such marriage upon attaining majority but this will be dealt with later on.

The Shafi'i attitude is in sharp contrast to the Hanafi position. According to the Shafi'i jurists, the consent of a virgin, whether minor or adult, to a marriage, is not necessary. Such a girl remains entirely at the disposal of her *wali* and cannot enter into a valid marriage contract sans his consent. The consent of the previously married woman (i.e. a widow or divorcee) is essential for the marriage, but even then she is still bound to

her *wali*, as his consent too is essential. In case the *wali* withholds his consent, however, unreasonable it may be, it is not possible for remarriage to take place

We shall now examine these respective positions regarding the *wilayat* from an Islamic standpoint. The Qur'an appears to be silent on the question of consent. However, it implies that consent is necessary as it describes marriage as a covenant (*mithaq*), i.e. a covenant between husband and wife, as in the *Surah al-Nisa* (Verse 21):

And how could ye take it when ye have gone in unto each other, and they have taken from you a solemn covenant (mithaqan ghalizan).

As for the *Sunnah*, we have the following two traditions of the Prophet (peace be upon him)

- 1) 'Adi Ibn `Umayrah has narrated a saying of the Prophet (peace be upon him): "No woman who has been previously married (*thayyib*) should be remarried until she gives her permission; similarly a virgin (*bikr*) should not be married until her consent has been obtained" ¹
- 2) Abu Hurayrah has reported that the Prophet (peace be upon him) said: "A grown up girl shall be asked permission about herself. If she is silent, it is her permission; and if she declines, there shall be no compulsion on her" ²

Thus it is evident from the above *ahadith* that the Prophet (peace be upon him) made it explicitly clear that the consent of both the virgin and the *thayyib* is an indispensable condition, a *sine qua non*, for a valid marriage. As to the question whether the consent of the agnatic *wali* is essential, we would have to deal with this at some length as this is an intricate matter that has been subject to much discussion and dispute. The widely circulated *hadith* attributed to the Prophet (peace be upon him), stating that the marriage of a female who gets married without the permission of her guardian (*wali*) is void ³, appears to be either a fabricated or defective *hadith*. Al-Zuhri, who figures in the *isnad* (chain of transmitters) is said to have disclaimed any knowledge of the *hadith*⁴ and considering the reputation of the other transmitters, it is possible that a forged *isnad* containing his name was surreptitiously introduced so as to give it authority. Not only this *hadith* contradicts the Islamic injunction that a woman may validly enter into a marriage at her own discretion as borne out by both the Qur'an and *Sunnah* (as we shall shortly see) but it is also of a dubious character. Indeed, this *hadith* may be classed as *munkar*, a narration which in itself may not be authentic, and also contradicts other authentic narrations. Other *ahadith* or versions of the *hadith* mention *mawla* and *mawali* in place of *wali* ⁵.

The term *mawla* (pl. *mawah*) has a wide range of meaning and may denote slave, slave owner, freed slave or a former master of a slave who has emancipated the latter, but in the context of the relevant *ahadith*, it probably means slave owner or former master of a slave. This is possibly the reason why Abu Hanifah believed that the *hadith* pertains to the marriage of a slave girl ⁶. It is accepted in Islam that the consent of the master is required for the marriage of a slave girl and finds sanction in the Qur'an (*Surah al-Nisa*, verse 25) where it is stated that "believing girls from among those whom your right hands possess" ⁷ should be wedded with the leave of their masters, clearly distinguishing them from free, believing women in whose case no such obstacles are laid, as will be seen later.

Even if we were to suppose the *isnad* of this *hadith* to be sound, there is no reason why we shouldn't regard the *ahadith* or versions occurring with *mawla* or *mawali* as the correct one, which if interpreted as master of a slave, would in no way contradict the Qur'an or other *ahadith*, but rather complement them.

In fact, the term *mawla* in the plural form *mawali* is frequently used in the sense of 'master of a slave' in *ahadith*. Consider the *hadith* narrated by Abu Musa al-Ash'ari, where the Prophet (peace be upon him) is reported to have said that any slave who observes God's right and his masters (*mawali*) right will get a double reward.⁸ However, it is also possible that the term refers to the former master of a manumitted slave who was responsible for the latter's liberation. Consider the *hadith*:

"Whoever befriend (takes as patrons) other than his manumitters (*mawali*) without their permission, incurs the curse of God, the angels and all the people"⁹.

Thus it can be seen that the term *mawla* is also applied to the former master in his relation to his freed slave. Further, it is probable that the earlier mentioned *ahadith* with *mawla* and *mawali* are not merely different versions, but altogether separate traditions narrated by the Prophet (peace be upon him) at different times, in which case the occurrence of both the singular and plural forms would indicate that these *ahadith* relate to the master/ mistress or masters/mistresses of a slave-girl or of a manumitted slave girl to whose *wala'* they were entitled to. Consider also the following *hadith* where the Prophet (peace be upon him) is reported to have told `Ayishah (R.A.) who wished to buy a slave girl in order to manumit her and whose masters stipulated that her *wala'* would be for them: "What they stipulate should not stop you, for the *wala'* is for the liberator"¹⁰. It could not have meant the woman's agnatic guardian, for then the plural form *mawali* would indicate that she also had to obtain the consent of all her agnatic relatives, a condition not recognised in any of the schools. However, such a plural form pertaining to slave girls or freed slave girls is perfectly logical from an Islamic viewpoint, for as evident in the *hadith* concerning lady Ayishah (R.A.) cited earlier, joint-masters of slave girls were not unknown in those days. Indeed it may be that Zuhri rejected the version with *wali* due to the simple fact that he did not transmit it, but another version with *mawla* or *mawali*. Thus even though the transmitters of the relevant *hadith* may not have lied intentionally, it is possible that a shift to *wali* from an original *mawla* or *mawali* may have occurred some place in the chain of transmission due to confusion between the two on the part of one of the transmitters. This is all the more probable as the terms *mawla* and *mawali* are connected to the same root as *wali* (which is from the Arabic root *wl* 'to be near', 'to be close to', 'to be connected with someone or something'), the difference being that the first two terms connote the relationship between master and slave or manumitter and freed slave. Such a *hadith*, where there is a discrepancy or interpolation (*idraj*) is known as *mudraj*. Such a *hadith* is also *ma`lul* (defective) where though it appears to be sound in its *isnad* or text (*matn*), thorough research reveals a disparaging factor.

Thus the relevant '*hadith*' is either a fabricated or defective one and cannot be taken into consideration. In order to avoid any misgivings as to the interpretation of this *hadith* that may arise in the future, it is necessary to state here that all the three *ahadith* (whether occurring with *wali*, *mawla* or *mawali*) following the pronouncement that such a marriage is invalid, contain a statement to the effect that she (i.e. the girl whose marriage is invalid on account of her being married sans the consent of her *wali*/*mawla*/*mawali*) was to receive a dower on account of the

consummation of the union and that if a dispute were to arise between the parties concerned, the ruler (judge) is the wali for the party that is without one. The mention of *wali* in the last passage occurs in all the three *ahadith*. It is to be noted here that the mention of dower being due to such a woman on account of the consummation of the union may well apply to slave girls who are entitled to a dower as borne out by the Qur'anic verse (4:25) where it is stated:

"Wed them with the leave of their owners, and give them their dowers, according to what is reasonable".

This may likewise be applicable in the case of freed slave girls. As to the last clause that the ruler is the *wali* of the party without one in the event of a dispute arising between the parties concerned, it is unclear as to what is exactly meant by this. However, considering the context in which it occurs, it probably refers to a slave girl or manumitted slave girl. What is probably meant by this is that the ruler was entitled to act as the marriage guardian in the case of a slave girl or manumitted slave girl whose ownership was a matter of dispute and who therefore had no rightful master to sanction her marriage. The very fact that the relevant *ahadith* state that the ruler is the *wali* for the party without one shows that *wali* was not a clearly defined term and was not solely applicable to a woman's agnatic kin as will be seen later in this essay. Besides, considering the relevant *ahadith* where the mention of *wali* occurs in the final passage, it is possible in the context for the term *mawla* or *mawali* occurring in the first passage to have easily become wali, whereas it is hardly possible for the reverse to have taken place. This fact lends further weight to our contention that a shift from *mawla* or *mawali* to *wali* may have occurred someplace in the *isnad*. Indeed, the entire import of these *ahadith* suggests that it is with reference to the marriage of a slave girl or freed slave girl, and not to that of a free woman.

The *hadith* "There is no marriage without a wali" narrated by Abu Musa al-Ash'ari¹¹ is ambiguous. It is not a definite, but an indefinite article that precedes the term *wali*. If indeed an agnatic *wilayat* were recognised, there would have been no need to denote it by an indefinite article. On the contrary, the use of the indefinite article suggests that the *wilayat* envisaged in this *hadith* may not necessarily be confined to agnates. It appears that in this context, *wali* is employed in the sense of agent, for had the Prophet (peace be upon him) meant an agnatic *wali*, in the sense understood by later jurists, he could have said "the wali" (*al-wali*) which could then have referred to the woman's father, brother, or other male relatives as the case may be. This contention is further attested by the fact that the relevant *hadith* does not specifically refer to the consent of the *wali* but implies that his is a function, in this case acting as an agent to contract a marriage on behalf of a woman. If taken in the sense of a fixed agnatic *wilayat*, it would also contradict the Qur'an, which is implicitly in accord with the capacity of women to contract marriage at their own discretion, as well as the *Sunnah*, as we shall shortly see.

We should bear in mind that in the Qur'an itself, the term *wali* (*pl. awliya*) is employed in a number of senses. The term may roughly be translated as close friend', 'ally, 'protector'. In *Surah al-Baqarah* (verse 257) God uses it to refer to Himself:

"God is the Protector (Wali) of those who have faith".

It is also used to indicate closeness between men as in Surah *Al-Imran* (verse 28) :

Let not the believers take friends or helpers (awliya) unbelievers rather than believers".

We also get the following verse in *Surah, at- Tawba* (Verse 71):

The believers, men and women are protectors (awliya) one of another: They enjoin what is just, and forbid what is evil".

The term however also denotes 'close relative' as in the *Surah Bani Isra'il* (verse 33):

"And if anyone is slain wrongfully, we have given his heir (wali) authority (to demand qisas or to forgive)".

The last *surah* however is a Makkan *surah* that was revealed sometime between 610-622 A.C. while the rest are Madinan *surahs* revealed after 622 A.C., so that it is possible that in the early Islamic period (before the Islamic state came to be established in Madinah) the term *wali* was used with reference to a close relative and that in later times it may have also come to mean all those who were regarded as friends or protectors within the Islamic community. It is significant that the Qur'an says in a late *surah* that the believing men and women are *awliya'* of one another. This designation pertains to the Islamic community as a whole and not to any specific relatives.

The term also finds expression in a number of traditions pertaining to events during the Prophet's lifetime. The term occurs in the plural (*awliya*) where Umm Salamah gives as one of her reasons for refusing the Prophet's (peace be upon him) proposal of marriage, the fact that none of her *awliya'* were present¹². The use of the plural appears to indicate that she refers thus to members of her clan, who would have constituted her friends and protectors; and not to any specific relative who had the right to sanction her marriage (Note: The other reasons she cites are her jealousy and the fact that she had children, showing clearly that her hesitation due to the absence of any of her *awliya'* was her personal idea). Another tradition mentions that Umm Salamah instructed her son `Umar, a young lad at the time, to marry her to the Prophet (peace be upon him)¹³ and yet another tradition states that the Prophet (peace be upon him) mentioned his proposal to her nephew, or her son, and her *wali* and that Umm Salamah instructed her *wali* to accept the offer should the Prophet (peace be upon him) repeat it¹⁴. A stronger case is provided by the tradition concerning Maymunah bint al-Harith's marriage to the Prophet (peace be upon him) where it is said that al-`Abbas was entrusted with arranging his sister-in-law Maymunah's marriage to the Prophet (peace be upon him) - the verb *waliya* being used to express the function¹⁵ and another tradition states that Maymunah (R.A.) entrusted her affairs (*ja'ala amraha*) to al-'Abbas.¹⁶ According to yet another tradition, although Maymunah (R.A.) entrusted her affairs to the Prophet (Peace be upon him), he asked her hand in marriage from al Al Abbas¹⁷. All this would indicate that the arrangement of the marriage was a function al-Abbas acquired by being so appointed by Maymunah (R.A.) as her agent or representative (Note: The *wilayat* if conceived as an agnatic one, could not have devolved upon al-'Abbas as he was Maymunah's brother-in-law i.e. her sister Umm Fadl's husband).¹⁸.

(Note: The Prophet (peace be upon him) is said to have married Maymunah (R.A.) in 7 A.H. ¹⁹ (629 A.D.) when the Islamic state had been firmly established and the Prophet's (peace be upon him) mission was drawing to a close. The Prophet (peace be upon him) passed away in *Rabi' al-Awwal 11* A.H. (632 A.D.). Thus Maymunah (R.A.) was the last lady whom the Prophet (peace be upon him) espoused).

This is also supported by the tradition concerning Sawdah bint Zama'ah, who, following the Prophet's (peace be upon him) proposal of marriage, said "My affair is in your hands". The Prophet (peace be upon him) subsequently appointed a third party to represent her ²⁰. We also have the tradition where it is stated that al-Mughirah bin Shu'bah asked for the hand of a lady in marriage and he was the nearest guardian to her, so he asked another man to marry her to him ²¹ (Note: Al-Mughirah was a contemporary of the Prophet (peace be upon him) who embraced Islam in 5 or 6 A.H.) ²². Abd ar-Rahman bin `Awf asked Umm Hakim, Qariz's daughter "Do you entrust the question of your marriage to me?". She said "yes". He said to her "I have married you". ²³ Also interesting is the *hadith* narrated by Sahl bin Sa'd where it is said that a woman presented herself to the Prophet (peace be upon him) (for marriage). A man said: "O Allah's Messenger (peace be upon him)! Marry her to me", and the Prophet (peace be upon him) married her to him ²⁴. All these only go to show that a woman could not give herself in marriage, but that she could appoint a third party as an agent to represent her and so contract a marriage of her choice.

Our contention that a woman may not give herself in marriage, but may appoint an agent to contract a marriage on her behalf is supported by yet another *hadith*, namely the *hadith* narrated by Abu Hurayrah where the Prophet (peace be upon him) is reported to have said: "No woman shall give a woman in marriage, nor a woman shall give herself in marriage" ²⁵.

The first part of the *hadith* stating that no woman shall give a woman in marriage would imply that a fixed agnatic *wilayat* was not recognised in Islam. If it were, then there would have been no point in the Prophet's (peace be upon him) saying that a woman may not give another in marriage. Does not this *hadith* presuppose the recognition of the institution of an appointed *wilayat* in the sense of an agency as distinct from a fixed agnatic one? The latter part of the *hadith* stating that no woman shall give herself in marriage possibly refers to the practice in the Prophet's (peace be upon him) day when women gave themselves in marriage sans an agent or go-between who represented the woman, such as was the case of Umm Sharik's marriage to the Prophet (peace be upon him) ²⁶. Khawla bint Hakim is also known to have presented herself in marriage to the Prophet (peace be upon him) ²⁷. This practice appears to have been made lawful only for the Prophet (peace be upon him) and is specifically mentioned in the Qur'an (*Surah al-Ahzab*, verse 50) which states that any believing woman who offers herself to the Prophet (peace be upon him) and if the Prophet (peace be upon him) wishes to wed her, has been made lawful for him - a privilege for him only, and not for the rest of the believers. There is also the *hadith* narrated by Ibn 'Abbas where it is stated that the fornicatrices are those who marry by themselves without witnesses ²⁸. It is here evident that what is condemned is women marrying by themselves and not their marrying sans the consent of their guardians. It may now be asked why the *wilayat* even in the form of an agency should have been enjoined. This is not a difficult question to answer. It would have been deemed necessary to ensure propriety in the marriage contract and also to act as a safeguard for a woman liable to make a hasty move by giving herself to some man without some sort of intervention. Such a marriage, without witnesses, could have also led to much intrigue. The rationale here seems to be that there should be some form or order in contracting a marriage without prejudicing a woman's free choice.

We shall now cite some Qur'anic verses revealed during the Madinan period in order to show the futility of those arguments in support of an agnatic *wilayat* from a Qur'anic standpoint. Says the Qur'an in *Surah al-Nisa'* (verse 19):

"O ye who believe! Ye are forbidden to inherit women against their will".

Although the inheriting of women as existed in pre- Islamic times where the widows of deceased men passed on to the latter's relatives ²⁹ with or without their consent is illegal in Islam, this verse is relevant to our discussion here as it shows that the right to dispose of their persons has been given to the women themselves and not their guardians. If their guardians had any right over them, the right to decide would have been given to them, which is however not at all the case.

The Qur'an says of divorced women in *Surah al-Baqarah* (verse 230):

"If he has divorced her, then she is not lawful to him until she marries another man"

The Qur'an further says in *Surah al-Baqarah* (verse 232): *"When ye divorce women, and they fulfill the term of their (`iddat), do not prevent them from marrying their (former) husbands, if they mutually agree on equitable terms"* ³⁰.

In the above verse, the Qur'an expressly forbids divorcees being prevented from remarrying their former husbands if they so chose.

It also says of widowed women in *Surah al-Baqarah* (verse 234):

"If any of you die and leave widows behind, they shall wait concerning themselves four months and ten days: when they have fulfilled their term, there is no blame on you if they dispose of themselves in a just and reasonable manner, and God is well acquainted with what ye do".

Here we are told that widows could dispose of themselves in a just and reasonable manner, implying that they could enter into a marriage contract at their own discretion. In the following verse (235) we are told:

"There is no blame on you if ye make an offer of betrothal or hold it in your hearts. God knows that ye cherish them in your hearts: But do not make a secret contract with them except in terms honourable, nor resolve on the tie of marriage till the term prescribed is fulfilled".

Do not the above Qur'anic verses imply that the decision to wed is a matter for the men and women concerned and that none else has the right to interfere in such affairs? We here find that the act of marrying as in 2:30 which uses the verb *tankiha* in the feminine singular mode is specific to the woman and not her *wali* and is not even conjoined with that of her *wali*.

It may, however, be argued by some, that the above verses relate only to the marriages of *thayyibs*, i.e. divorced or widowed women, and not virgins. Be it as it may, the Quran, after specifying the forbidden degrees of marriage, whether due to consanguinity, fosterage or marital status, states in *Surah al-Nisa'* (verse 24):

"Thus hath God ordained (prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property, desiring chastity, not lust".

The following passage (verse 25) states:

"If any of you have not the means wherewith to wed free believing women, they may wed believing girls from among those whom your right hands possess: And God hath full knowledge about your faith. Ye are one from another: wed them with the leave of their owners, and give them their dowers, according to what is reasonable".

As may be inferred from the above two verses, the Qur'an lays down the rule that slave girls should be wedded with the consent of their masters, clearly distinguishing them from free, believing women in whose case no such obstacles are laid. This in itself shows that there was a difference in the capacities of free women, whether previously married or virgins, and slave women to contract marriage, in that the latter had to be wedded with the consent of their masters. The absence of any such rule pertaining to the consent of the father or any other male guardians in the case of free women –whether previously married or virgin- only goes on to prove that such consent is not necessary. Further, it is not only female slaves who could not contract a marriage sans the consent of their masters. The rule is also applicable to male slaves as is evident in the following *hadith*: "Whose of slaves gets married without permission of his master is a fornicator" which is to say that such marriage is invalid. This shows that the consent of masters in the case of slaves did not have any sex bias. It was merely on account of their enslaved state. So just as the consent of their masters or mistresses was necessary for the marriage of slaves, whether male or female, it appears from the Qur'an that free persons, whether male or female, are free to contract marriage sans any third party sanction.

The Qur'anic verse (Surah al-Baqarah, verse 221):

" Do not marry idolatresses, until they believe: A slave woman who believes is better than a (free) idolatress, even though she allures you. Nor marry (believing women) to idolaters until they believe"

which has been cited as presupposing the recognition of an agnatic *wilayat* in Islam, is probably addressed to the Muslim community as a whole, as on so many other occasions, and not specifically to their agnatic guardians. This verse should be understood in a context where other verses clearly establish the permissibility of women to marry at their own discretion.

Besides, there also exists evidence in the *Sunnah* to support our contention, namely the *hadith* ³² where Ibn Buraydah is reported to have said on his father's authority that a young woman came to the Prophet (peace be upon him) and complained that her father had married his brother's son in order to elevate his status through her. The Prophet (peace be upon him) is then said to have given her the option of accepting or rejecting the marriage upon which she said: *"I declare lawful what my father did, but (by my action), I simply wanted women to know that no authority is invested in their fathers"*. This narration is very relevant to our discussion. Firstly, it shows that the legality of a marriage is dependent on the approval of the female party. Secondly, it shows that fathers have no authority over their daughters' affairs such as enforcing, or the right to sanction their Marriages. The fact that the Prophet (peace be upon him) remained silent and did not reproach the girl for her bold words suggests that he tacitly approved of her statement.

Another *hadith* or perhaps a version of it has it that Khansa bint Khidam said:

" My father married me to his nephew and I did not like this match. So I complained to the Messenger of Allah. He said to me "Accept what your father has arranged". I said" I do not wish to accept what my father has arranged". He said: "Then this marriage is invalid, go and marry whomsoever you wish". I said: I have accepted what my father has arranged, but I wanted women to know that fathers have no right in their daughters' matters" ³³.

Yet another hadith has Umm Salama saying: “*Subai’a al-Aslamiyya had delivered after her husband’s death by half a month. Two men asked to marry her. One was young and the other was old. She preferred the young man. The old man said: “You are not free yet (to marry). Her family was away, and he hoped that when her family would come, they may prefer him over the other man. She went to the Messenger of Allah, may Allah bless him and grant him Peace, and he said: “You are free to marry, so marry whomever you wish”*”³⁴.

We also have some evidence supporting this view from the early Islamic period. For instance it is narrated that Hazrat Ali (R.A) strongly discouraged marriage without the approval of a woman’s wali, but considered such a marriage valid nevertheless³⁵.

Thus in the light of the evidence in both the Qur'an and *Sunnah*, it is evident that woman has been conceded the right to enter into a marriage contract at her own discretion, which however has to be accomplished by a guardian or agent acting on her behalf. Thus we may conclude that the Hanafi position as to the nature of the wilayat is fully in accordance with the *Shari`ah*.

However three more aspects of the Hanafi law relating to the *wilayat* or freedom to contract marriage, which contravene Islamic teachings are thought here necessary to be dealt with.

- 1) The Hanafi position that a girl given in marriage as a minor has the option of repudiating such marriage upon attaining puberty (*khiyar albulugh*) is well and good. However, the early jurists of that *madhhab* had attached a condition, namely that if she were given in marriage by her father or paternal grandfather she shall have no such option. This ruling finds no support from either the Qur'an or the *Sunnah* and seems to have taken a precedent from the pre-Islamic Arab society. *Hadith* bears testimony to the fact that when the Prophet (peace be upon him) married the minor daughter of Hamzah to Amir bin Abi Salma, he stated that they had the option of repudiating the marriage upon attaining puberty. This was a general statement. As Maudoodi, a well known authority on Islamic law notes, the Prophet (peace be upon him) never stated that the girl had the option because he was her cousin and not her father³⁶. This goes on to prove that when the Prophet (peace be upon him) departed from the necessity of obtaining consent from a virgin due to the fact that she was a minor, and therefore perhaps incapable of discretion in the matter, he attached a condition, namely, that the option of repudiation would become effective once she attained majority. This clearly establishes the right of the minor spouse to exercise option on attaining puberty, regardless of who the *wali* was. This provision has in fact found legal recognition in the Dissolution of Muslim Marriages Act (1939) which recognises the right of the girl to exercise the option of repudiation even in case she had been given in marriage by her father or paternal grandfather. It should however be noted that jurists are of the view that the option of annulling the marriage exists so long as it is exercised immediately. In the event of a girl not exercising her option upon attaining puberty, the marriage will be deemed to be binding as she may be taken to have acquiesced in it. However, ignorance regarding the right to annul the marriage, or even that of immediacy is a sufficient excuse.

- 2) Under the traditional Hanafi law, none has the right to object to a woman's choice, provided she chooses one her equal and does not stipulate less than the proper dower (*mahr al mithl*) for the marriage. If she marries one who is not her equal, the person entitled to act as *wali* during her period of minority (i.e. her natural guardian) has the right to object and demand the annulment of the contract by the *qadi*. If she marries her equal for less than the proper dower he has the right to demand annulment if the husband does not agree to a proper dower. We will first deal with the doctrine of equality in marriage (*al-kafa'ah*). *Al-kafa'ah* means that the man has to be the equal of the woman in certain respects. *Kafa'ah* is required of men only, since it is not disapprovable for a man to marry a woman lower in status. The Hanafi, Shafi'i and Hanbali schools agree in requiring *kafa'ah* in religion (Islam), freedom (the state of not being a slave), profession and lineage. The Hanafi and Hanbali schools also require *kafa'ah* in wealth, whereas the Shafi'i school does not. The Maliki school, on the other hand, does not require *kafa'ah* save in religion. It is, however, our contention that *kafa'ah* can in no way be made a legal requisite, save in religion, which is mandatory. The danger of *kafa'ah* in other respects is that it could be easily manipulated by a woman's agnatic *wali so* as to deny her the choice of a partner. Says the Qur'an in the *Surah al-Nur* (verse 32):

"Marry those among you who are single (i.e. a man who has no wife and a woman who has no husband) or the virtuous ones (salihun) among your slaves, male or female".

This verse may be taken to have sounded the death-knell of status in marriage. In fact, a number of Hanafite jurists such as Sufyan Al IThawri, al-Hasan al-Basri and al-Kharki have disregarded the notion of *kafa'ah* as a condition in marriage. As to the provision pertaining to *mahr al-mithl*, it is our view that the amount of dower given should not be a ground for dissolution of a marriage already solemnised. How much dower a woman should be given may vary according to her social status etc. so that there is a very real danger that such a requirement may easily be manipulated by her agnatic *wali who* may not be keen on her choice of a marriage partner, especially if he be a destitute person.

- 3) The Hanafite ruling that a marriage contracted under compulsion being valid is questionable. Such a ruling has no basis in Islam at all since consent implies free consent and not that obtained by force. Indeed, could consent obtained by compulsion be called consent at all? The Prophet (peace be upon him) said: "A grown-up girl shall be asked permission about herself ... if she declines, there shall be no compulsion on her". What more is necessary to debunk this ruling. Such marriages are simply void from an Islamic standpoint.

At the same time, however, we must stress that this freedom of choosing a marriage partner conceded by Islam is one that ought not to be abused. It has to be exercised with immense responsibility. Parents usually desire what is best for their children and are better qualified to judge the character of prospective partners for their daughters, especially if they are young and not too immersed in the ways of the world. Thus this right, we believe, should be exercised only in case a woman's father or next of kin unreasonably withholds his consent when a suitable match is found. In fact, there are those Hanafi scholars who even go to the extent of pronouncing that such a marriage contracted sans the consent of a woman's father though legal is not proper may even be considered sinful if contracted without valid reason

As seen earlier, Hadhrat Ali (R.A.) despite recognizing such marriages as valid strongly discouraged women marrying without the permission of their awliya and in more recent times we had the renowned Qur'anic scholar Abu Zahra conceding that although Qur'anic citations validate the conclusion of a marriage contract by a woman without her wali, it was preferable if the Wali contracted for her.

At the same time, however, a system which denies women such a basic human right and civil liberty as freedom in choosing one's spouse is a vestige of a barbaric age and cannot be permitted to exist in a civilised Muslim society. Laws supportive of non-consensual marriage are still known to obtain in certain parts of the Muslim world, such as in certain states of Malaysia and in Singapore. In certain other states, although consent is essential, the agnatic *wali's* right to sanction the marriage has not been dispensed with, such as for example in Saudi Arabia, Kuwait and Algeria. It is, however, fortunate that the great majority of Muslim states have chosen to follow the Hanafi ruling on the matter. This includes Iraq, Syria, Egypt, Tunisia, Palestine, Pakistan and Bangladesh. India too follows the Hanafi law while in Sri Lanka the Hanafi *madhhab* has been recognised alongside the dominant Shafi'i *madhhab*. Tunisia, traditionally a Malikite country (whose rules concerning the incapacity of women to contract marriage is similar to the Shafi) adopted the Hanafi rule concerning the capacity of women to enter into marriage contracts as far back as 1957 and more recently we saw the introduction of the New Moroccan Family Law of 2004 spearheaded by King Muhammad VI which also recognized the Hanafi ruling and conceded the women of the kingdom full legal capacity to contract their own marriages, thereby doing away with the earlier Maliki ruling that prevented them from doing so.

In Pakistan, a country where the Hanafi code has traditionally prevailed, there have been some unfortunate cases where attempts have been made to deny women a free hand in choosing their partners. Take the recent case (1996) where the marriage certificates of Ayesha Ijaz and Shabina Zafar were voided on the grounds that they married sans their fathers' consent. The judgement was fortunately overturned in favour of the women concerned. However, the fact remains that a number of abuses can take place if freedom of marital choice is denied to women. For instance, in Sindh and the Punjab, wealthy landlords have been known to 'marry' their daughters to the Qur'an in order to avoid the division of their properties. In certain Gulf states, fathers of marriageable girls are known to demand exorbitant dowers from suitors, prompting the latter to marry foreign women.

It is, therefore, imperative that Muslim legal systems the world over adopt the Hanafite ruling with regard to consent and the legal capacity of women to contract marriage at their own discretion, which as we have shown above is in accordance with Islamic law. The implementation of such a law could be greatly facilitated if provision is made for the registration of the marriage including the signature of the bride as an expression of her consent. Of course, a marriage contracted sans registration cannot be deemed invalid. However, in cases of disputes regarding the matter of consent, unless there is evidence to the contrary, the female party's position that she did not consent to the marriage ought to be given legal recognition so as to invalidate such marriage as she would be the party most affected in such an event ³⁷.

Notes and References:

1. Ibn Majah, Kitabun Nikah, Vol. 1, Darul Rayyan Li'tturas, Beirut.
2. This *hadith* is cited by a number of authorities including Tirmidhi, Abu Dawud and Nisai.
3. Ibn Hanbal, Musnad, Cairo, 1313 (H).
4. Musnad. It is stated by Imam Zaylai in the Nasabur Raya that Ibn Juraij said regarding this "I met Zuhri and asked him about this hadith and he did not know this. Then I said to him: "Sulaiman narrates this to us from you". He spoke well of Sulaiman and he said: "I fear he had an illusion about me". We also know that Zuhri himself considered such a marriage as valid. Ma 'mar has narrated: "I asked Zuhri about a woman marrying without a guardian and he said: "If they are suitable it is permitted" (Musannaf, Ibn Abi Shayba, Al- Sha 'bi, Ibn Sirin, Qatadah). We also know that Hazrat Ayisha (R.A.) to whom the initial narration of the tradition: "*If any woman marries without the consent of her guardian, then her marriage is void, her marriage is void, her marriage is void*" is attributed (Tirmidhi) herself does not seem to have adhered to this ruling as she solemnized her niece Hafsa's marriage to Munzar Ibn Zubayr when her father Abdur-Rahman was away in Syria and without his approval (Sharh Ma 'ani Al-Athar. Al Tahawi). We also know that this narration unlike the earlier one regarding marriage without a wali being invalid (which as we have shown above is defective) is *Sahih* or rigorously authentic as established by Ibn Hajar Asqalani in his Al-Diraya. It is hardly possible that Hazrat Ayisha (R.A.) would have acted contrary to the Sunnah. Thus we will see that both the original narrator Hazrat Ayisha (R.A.) and another important narrator in the chain of narration (isnad) Al-Zuhri, both acted contrary to what was attributed to them, further establishing our contention that the 'hadith' concerned is not authentic or at any rate is defective and cannot be taken into consideration.
5. Musnad.
6. Karim, Fazlul, Trans. and commentary of Mishkatul Masabih, second edition, Dacca, 1963
7. As noted in footnote 540 of the translation And commentary of the Qur'an by Abdullah Yusuf Ali (Lahore, 1975), this refers to captives taken in holy war (*Jihad*). "Your right hand" does not mean necessarily that she has been assigned to you, or is your property. All captures in war belong to the community, they are "yours" in that sense".
8. Khan, Dr. Muhammad Muhsin, Sahih AI-Bukhari, Arabic- English, Lahore, 1979.
9. Ibid.
10. Ibid.
11. In Abu Dawud, Tirmidhi, Bayhaqi.
12. Ibn Sa'd, Kitabut-Tabaqat al-Kabir, Ed. E. Sachau, 9 vols., Leiden (1904-1940).

13. ibid
14. ibid
15. ibid
16. ibid
17. ibid
18. ibid
19. ibid
20. ibid
21. Bukhari
22. Ibn Hajar, *AI-Isibah*, Calcutta, 1856-1893.
23. Bukhari
24. ibid
25. Ibn Majah.
26. Ibn Sa'd.
27. Bukhari.
28. Tirmidhi.
29. Alluded to by Ibn 'Abbas in Bukhari.
30. Ma'qu'il bin Yasir has narrated that this verse was revealed after he refused to give his sister in marriage to her former husband (Bukhari)
31. Transmitted by Tirmidhi, Abu Dawud, Darimi.
32. Sunan Ibn Majah.
33. *Fath Al Bari*, Ibn Majah
34. *Muwatta*, Malik
35. *Kanz Al-Ummal*
36. Maudoodi, A., *The Laws of Marriage and Divorce in Islam*. Trans. Prof. Fazl Ahmed, Delhi, 1989.
37. This is supported by the *hadith* narrated by Khansa bint Khidam who states that her father gave her in marriage and she disliked the marriage. So she went to the Prophet (peace be upon him) and he declared the marriage invalid (*Bukhari*).