

Journal

1997 PLD 301

Court

LAHORE HIGH COURT

Date

1997-03-10

Appeal No.

CRIMINAL MISCELLANEOUS NO. 425-H OF 1996

Judge

IHSAN-UL-HAQ CHAUDHRY, MALIK MUHAMMAD QAYYUM AND KHALIL-UR-REHMAN RAMDAY

PartiesHAFIZ ABDUL WAHEED—PETITIONER VERSUS MISS ASMA JEHANGIR AND ANOTHER—
RESPONDENTS**Lawyers**MALIK M. NAWAZ, RAO NASIM HYDER KHAN, SYED RIAZ-UL-HASSAN GILANI AND MISS IRAM
NAZIR AHMAD FOR PETITIONER. DR. A. BASIT, ABID SAQI, SALMAN AKRAM RAJA, M. KHALID
ISHAQ, NAZIR AHMAD GHAZI AND AUSHTAR AUSAF ALI FOR RESPONDENTS.

Statutes

MUHAMMADAN LAW-MARRIAGE-VALIDITY-MARRIAGE CONTRACTED BY A FEMALE WITHOUT MUHAMMADAN LAW-MARRIAGE-NIKAH IS SUNNAH OF HOLY PROPHET IN ISLAM MUHAMMADAN LAW-MARRIAGE-DOWER IS NO CONSIDERATION OF MARRIAGE IN ISLAM MUHAMMADAN LAW-MARRIAGE-DOWER IS NO CONSIDERATION MUHAMMADAN LAW-MARRIAGE-VIEW THAT MARRIAGE IS SIMPLY A CONTRACT MUHAMMADAN LAW-MARRIAGE-NO MARRIAGE WITHOUT THE CONSENT OF THE FEMALE MUHAMMADAN LAW-MARRIAGE-DENOUNCEMENT OF MARRIAGE BY FEMALE FOR WANT MUHAMMADAN LAW-MARRIAGE-MODE-APPROVED MODE FOLLOWED BY MUSLIMS ISLAMIC JURISPRUDENCE-INJUNCTIONS OF ISLAM-HADITH WHICH HAS BEEN CONSISTENTLY REPEATED ISLAMIC JURISPRUDENCE-INJUNCTIONS OF ISLAM-DIFFERENCE OF OPINION ON THE POINT MUSLIM FAMILY LAWS ORDINANCE (VIII OF 1961) - S. 5 MUHAMMADAN LAW-MARRIAGE-CONSENT OF FEMALE IS A CONDITION PRECEDENT FOR A VALID MARRIAGE MUHAMMADAN LAW-MARRIAGE-GIRL REFUSING TO MARRY A PARTICULAR CONSTITUTION OF PAKISTAN (1973) - ARTICLE 203-DD ISLAMIC JURISPRUDENCE-INJUNCTIONS OF ISLAM-RIGHTS OF PARENTS IN ISLAM MUHAMMADAN LAW-MARRIAGE-NIKAH CONTRACTED WITHOUT CONSENT OF WALI BY A SUI JURIS MUSLIM GIRL CONSTITUTION OF PAKISTAN (1973) - ARTICLE 203-GG ISLAMIC JURISPRUDENCE-FAITH-MUSLIMS ARE CALLED UPON TO ACCEPT ISLAM IN ITS TOTALITY ISLAMIC JURISPRUDENCE-FAMILY LAWS-ISLAM NOT ONLY RECOGNISED A FEMALE ISLAMIC JURISPRUDENCE-FAMILY LAWS-GOD CREATED MATES FOR MEN FROM ISLAMIC JURISPRUDENCE-FAITH-ONCE GOD HAS ORDAINED A MATTER THEN ONE MUST UNQUESTIONINGLY ISLAMIC JURISPRUDENCE-FAMILY LAWS-TO AVOID UNPLEASANT CONSEQUENCES ISLAMIC JURISPRUDENCE-FAMILY LAWS-ISLAM MANDATES TO ELIMINATE ISLAMIC JURISPRUDENCE-FAMILY LAWS-IN THE MATTER OF OBLIGATION THAT ISLAM CASTS CONSTITUTION OF PAKISTAN (1973) - ARTICLE 203-GG ISLAMIC JURISPRUDENCE-STATUS OF WOMAN-OBLIGATIONS OF WOMEN ISLAMIC JURISPRUDENCE-FAMILY SYSTEM-ISLAM GRANTS RECOGNITION MUHAMMADAN LAW-MARRIAGE-DIVISION AMONGST THE AIMMAH, THE JURISTS MUHAMMADAN LAW-MARRIAGE-INVALIDATING A MARRIAGE BY COURT MUHAMMADAN LAW-MARRIAGE-SECRET MARRIAGE IS FORBIDDEN IN ISLAM MUHAMMADAN LAW-MARRIAGE-CONCEPT OF A YOUNG GIRL OR A BOY VENTURING OUT IN SEARCH MUHAMMADAN LAW-MARRIAGE-SEARCH FOR MARRIAGE PARTNER-NOTIFYING THE REQUIREMENTS AND PREFERENCES CONSTITUTION OF PAKISTAN (1973) - ARTICLE 199 MUHAMMADAN LAW-MARRIAGE-FAILURE OF PARENTS OR THE ELDERS OF THE FAMILY MUHAMMADAN LAW-MARRIAGE-DISPUTE BETWEEN WALI AND THE CHILD IN THE MATTER MUHAMMADAN LAW-MARRIAGE-GIVING A GIRL IN MARRIAGE TO SOMEONE AND TAKING MUHAMMADAN LAW-MARRIAGE-PARENTS OR THE FAMILY ARE NOT ABSOLUTELY ALIENS TO THE INSTITUTION MUHAMMADAN LAW-MARRIAGE-MARRIAGE ON MOMENTARY IMPULSES OR INCOMPATIBLE MARRIAGE MUHAMMADAN LAW0 MARRIAGEPRE-MARITAL OR EXTRA-MARITAL LIAISONS

Judgment

IHSAN-UL-HAQ CHAUDHRY, J.—It is proposed to decide Criminal Miscellaneous No.425/W of 1996 filed by Hafiz Abdul Waheed on 18-4-1996, Criminal Miscellaneous No. 435-H of 1996 habeas corpus petition and Writ Petition No.6484 of 1996 by Saima Waheed under Articles 9, 10, 11 and 15 of the Constitution of Islamic Republic of Pakistan, 1973. During the pendency of these petitions the Hon'ble Chief Justice also referred Writ Petitions Nos.2620/96, 7514/96, 8288/96, 6063/96, 11513/96 and 8912 of 1996 involving the same legal controversy. The same, therefore, were taken up together and are being decided through common judgment.

2. The brief background as ascertained from the arguments and petitions is that Mst. Saima Waheed was a student of 4th year in Government Lahore College for Women. She allegedly contracted marriage on 26-2-1996 with Muhammad Arshad, who was a tutor of her brother. The petitioner Abdul Waheed, her father, came to know of this secret marriage on 9-3-1996. He approached the father and other family members of Muhammad Arshad. Nikahnama was returned to him with the note that no Nikah was performed and in any case same is not subsisting and stands cancelled. The detenu continued living with her father till 9-4-1996 when she was allegedly abducted and her family came to know on 11-4-1996 that she was being detained in the 'Dastak' managed by respondent No.1 and they started negotiation for release of the detenu.

Respondent No.2 feeling that failure of his scheme is evident proceeded to file Criminal Miscellaneous 393-H of 1996 on 14-4-1996 for her release from Dastak but it was dismissed on 16-4-1996.

Criminal Miscellaneous by the father came up for hearing on 18-4-1996 when the Bailiff was deputed to recover the detenu for production in this Court. The order was complied. In the meanwhile, the remaining two petitions were filed. The detenu was lodged initially in Dar-ul-Aman but vide order, dated 22-4-1996 she was allowed to live in 'Dastak'. Thereafter, some arguments were heard and learned counsel for the father of girl raised, inter alia, following questions that:—

- (i) Whether the parents have a right to be obeyed and their right of obedience is judicially enforceable?
- (ii) Whether marriage in Islam is a civil contract? and
- (iii) Whether or not the permission of Wali is one of the main conditions of a valid Nikah?

In view of these important issues involved the matter was referred to the Hon'ble Chief Justice for constituting a Larger Bench and in this background this Full Bench was constituted.

3. Malik Muhammad Nawaz, Advocate argued that a virgin girl stepping out of her house without the consent of the parents can be asked to go back. He added that at the moment in Islamic countries clash of two civilizations is quite prominent because some negligible number of Muslims are playing the role assigned to them by the vested

interest from the west. The purpose is to shake foundation of Muslim Society and introduce, in the words of Dr. Allama Muhammad Iqbal in Guftar-e-Iqbal by Mr. Muhammad Rafique Afzal, moralless society . He in this behalf proceeded to rely on

The Holy Qur'an, Islah-e-Inqlabe Ummat by Maulana Ashraf Ali Thanvi, Volume II, Seerat-un-Nabi (Life of The Holy Prophet, peace be upon him) by M/s. Allama Shibli Naumani (R.H.) and Maulana Syed Suleman Nadvi (R.H.) Vol. VI, Nuzhat-ul-Aula Tafseer Ibne Kaseer (Urdu) translated by Allama Muhammad Mamen Juna Gaddhi (R.H.), Vol. I, Khirj-ul-Malki Sahi Bokhari Sharif by Abu Abdullah Muhammad Bin Islami Bokhari (R.H.), Vol. III, Muqaddama Ibne Khaldoon by Allama Abdul Rehman Ibne Khaldoon Almaghrabi (R.H.), Alauza-ul-Tashria by Almhami Subihee Mahamsani and Holy Bible. The learned counsel in support of his arguments referred to Sura-e-Ahzaab 6.33, Sura-e-Al Baqra 2.221, Sura-e-Alnoor 32.24, Sura-e-Al Baqra 2.232, Sura-e-Alqassas 27.28. He referred to authentic translations and commentaries on The Holy Book and also number of Ahadith in support of his contentions. The learned counsel also submitted detailed written arguments, with reference to verses of The Holy Qur'an, Ahadith Sharif and reference to different textbooks, wherein he discussed the verses of The Holy Qur'an, Ahadith and opinion of Jurists.

4. Mr. Riaz-ul-Hassan Gilani, Advocate adopting the arguments added that children are under the obligation to obey their parents. The learned counsel in this behalf referred to Sura-e-Luqman 31.14, Sura-e-Ankaboot 29.8. He referred to the explanation of Imam Fakhr-ud-Din Razi for interpretation of word 'Ehsan' which meant obedience with heart and soul, and

Hadith Sharif Nos. 915, 916 and 917 of Sahi Bokhari Sharif, Volume III. He added that the orders of parents are judicially enforceable. He further referred to Imam Ghazali, who stated that the order should not be mala fide and also referred to Mizaq-ul-Aarifeen by Imam Muhammad Ghazali (R.H.), Vol. II, Rights of Parents and Children, Tashreeh Imam-ul-Hajri by Imam Hajar Askalani (R.H.) and Sunnan Ibne Maaja Sharif by Imam Abu Abdullah Muhammad Bin Yazeed Ibne Maaja (R.H.), Vol. II Hadith No. 2290.

5. Syed Riaz-ul-Hassan Gilani, Advocate on the second point argued that marriage in Islam is not a civil contract and is one of the Ibadat (iz/ijlis) and at the best may be called social contract (compact). He referred to Mst. Khurshid Bibi v. Baboo Muhammad Amin (PLD 1967 SC 97). He submitted that this theory of civil contract is result of superficial approach to the teachings of Islam. He, in this behalf, referred to cases of Abbas Ali v. Karim Bakhsh (1909) 4 IC 466), Abdul Qadir v. Salima (1886 ILR 8 Allahabad 149) and Saburannessa v. Sabdu Sheikh and others (AIR 1934 Calcutta 693). The learned counsel explained that before the promulgation of Shariat Act of 1936, the Muslim marriage unlike Hindu and Christian was not enforceable and the Courts enforced it as a civil contract but religious scholars like Maulana Ashraf Ali Thanvi in his book Islah-e-Inqlabe Ummat, Volume II condemned it in the strongest possible words. It was argued that after came into being Independence, Shariat was not given effect as complete way of life for the Muslims. This theory of civil contract remained somewhat alive. He submitted that in Christians marriage can only be performed through Church and the same cannot be dissolved by anyone except the church. This was in order to dilute the effect of this strict mode that the second specie common law marriage came into existence. Where male and female would appear before Court/Registrar denounce their

religion's allegiance and claim that according to their religion there is restriction on their marriage. The Court would grant the permission. This type of marriage could be dissolved only by common law Courts. It was emphasised that in both types of marriages there were three parties. In the first type, Church, male and female while in the other type State, male and female were the three parties. It was argued that the 'marriage' is a French word and derived from marri. In this behalf, he referred to Words and Phrases and dictionary meanings of word 'marriage' and in this behalf also referred to die judgment reported as 47 LRA 467. On the other hand, in Islam Nikah means to bind or unite. If looked from this angle then it unites two families besides two persons.

6. It was explained that the dower is not a consideration for marriage and the same was wrongly treated as such in the above cases and even in some of our Courts' judgments. It was submitted that the dower finds mention in Sura 4.4 and it is stated to carry meanings of Nehla which means something given as gift of free-will to the wife. The learned counsel argued that even acceptance by the spouses will not make the marriage a simple contract. The learned counsel in this behalf referred to Encyclopaedia of Religion and Ethics by James Hastings Volume V.

The Age of Faith by Will Durant, Alauza-ul-Tashria by Alama Hamid Subihee Mahmsani Bab-ul-Sadaq in Mishkat-ul-Masabih Urdu translation by Maulana Muhammad Sadiq Khalil, Durr-ul-Mukhtar by Muhammad Ala-ud-Din translated by B.M. Dayal, Islamic Family Law by M/s.

Chibli Mallat & Jane Connors, Muslim Personal Law and Judiciary by Dr. Muhammad Shabbir, Chapter of dower in Mahomedan Jurisprudence by Sir Abdul Rahim and American Society by Robin M. Williams, Jr. It was argued that it was clear from the above books that Nikah in Islam is not a social contract as interpreted and understood in some of judgments without an effort being made to find out the real status of Nikah.

7. It was argued that Nikah without the consent of the Wali is not valid. In this behalf, reliance is placed on Sura-e-Al Baqra 2.232 and 2.221 which would be reproduced in the latter part of this judgment. Thereafter, he referred to following four commands of The Holy Prophet (peace be upon him): It was explained that as far Hadith No.1 is concerned there was no dispute amongst the companions of The Holy Prophet (peace be upon him) Sahaba Karam (R.Z.A.) and even thereafter. The same is the position of Muaddaseen (R.H.). It was argued that the period can be divided into three phases, namely—

(a) from the life of The Holy Prophet (peace be upon him);

(b) from Hidayat and Fatwa Alamgiri to Shah Wali Allah;

and

(c) period starting with Hazrat Shah Wali Allah up to present time.

It was added that it has wrongly been attributed to Imam Abu Hanifa that Nikah without the consent of the Wali is valid. It was explained that Imam Abu Hanifa has not written any book by himself and his views were not recorded in any of the authentic book written

by his pupils or contemporaries.

8. The learned counsel for the petitioner argued that the judgment of Federal Shariat Court in Muhammad Imtiaz and another (supra) is not binding on this Court because the same has been rendered in a criminal appeal directed against the judgment of Additional Sessions Judge, Attack. It was added that it seems the Federal Shariat Court based its judgment on some written papers rather than after referring to the original books tabulated in para. 24 of the judgment. In this behalf, it was pointed out that in Fateh-ul-Bari the translation of the text is that there were arrangements for marriage while in the other cases the mother had married her daughter and not the daughter has contracted marriage herself.

There was no effort to find out the correctness of the view allegedly attributed to Imam Abu Hanifa. It was added that Verse of Holy Qur'an and other three Ahadith were completely lost sight of the fact. It was added that the Federal Shariat Court ignored the centuries old Islamic tradition that marriage is not only union between two individuals but of two families and it was always the head of the family who arranged for the marriage of the children. It was argued that the guideline for Qazi as is clear from the letter written by Hazrat Umar (R.Z.A.) to Qazi; the first comes the Orders of the Almighty God as contained in the Noble Qur'an then Shariah and thereafter, accepted norms in the Society. It was submitted that it is a matter of common knowledge that runaway marriages are not solemnised in accordance with the principles of Islam. There is even no proper Nikah because no Nikahkhawan is prepared to perform the Nikah ceremony, no Registrar is prepared to register Nikah, no person is willing to witness the same and show his participation because they are all afraid of being involved in a case under Offence of Zina (Enforcement of Hudood) Ordinance, 1979.

9. The runaway marriages offend all norms of a Muslim society beginning to end. The proposition would become clear from answer to the question how a girl would arrange her marriage? There cannot be any other mode but of freely mixing with males and then selecting one of them as future husband. This way of like is not permitted rather than even encouraged by any Fiqha or school of thought because it is against basic teachings of Islam that the people from both sexes should not have free access to each other. In other words the beginning is not commendable.

Then coming to the marriage. The universally accepted principle is that it should be made known and announced. The Nikah ceremony, Walima and giving of dowry are means adopted by people to make the marriage known. On the other hand, runaway marriage is always kept secret.

We have already noted the manner in which it is usually performed. No proper Nikah even takes place.

10. It was argued that history tells us that pre-Islamic civilizations were authoritarian in pattern but the Islam brought democratic pattern in the family as well as the Society. He referred to 'Azwaaj' by Ahmad Bin Ali Bin Hajar Almakki, Volume II. It is argued that parents have right to be obeyed and their rights ,i. 'udicially enforceable provided—(i) their order is not repugnant to Shariah anu they do not ask for Shirk; and (ii) it is not mala fide. The learned counsel in this behalf referred to Hadith Sharif No. 2290, as recorded in Sunnan

Ibn-e-Maaja Sharif. The learned counsel also referred to following Verse of The Holy Book:

- (1) Sura-e-Al Tehreem Verse Nos. 6 and 7
- (2) Sura-e-Bani Israeel Verse Nos. 23 to 25 (3) Sura-e-Kahaf Verse Nos. 15 to 17
- (4) Sura-e-Luqman Verse No.31.14
- (5) Sura-e-Inaam Verse No. 2.151

Thereafter, he referred to Mishkat Sharif, Volume IV, page 23.

11. The learned counsel stated that Nikah by the family of the bride is not only in Islam but also recognized and practised in other religions. He in this behalf referred to American Society by Robin M. Williams, Jr. He submitted that for lawful Nikah following are the conditions that:—

- (a) Aijabo Qabool made in the assembly convened by the family of the girl;
- (b) for lawful Nikah permission of the Wali and consent of the girl are two essential elements; and
- (c) the contracting party is Wali and not the girl herself.

He argued that according to Shia, Imam Abu Hanifa is said to have differed from the other Imams on this point but argued with force that the view attributed to Imam Abu Hanifa is not authentic. There is nothing coming from any authentic and original source to prove Imam Abu Hanifa having said so.

12. It was, argued that it is clear from verse 2.232 that the Wali was restrained from not standing in the way of woman remarrying previous husband. Ammar Bin Yasir and Maaqal Bin Yasar said that this verse related to them. In Tafseer Ibne Kaseer (Urdu), it has been explained that Wali has been stopped. It was, therefore, argued that it was not a permission to woman to marry of her own freewill. This clearly was an exception to the rule that Wali is to arrange for the marriage of his dependent females. The word Wali has been used in Noble Qur'an at numerous places including Sura-e-Kahf, Sura-e-Yousaf and Sura-e-Shoora, etc. It carries different meanings in the context. In Sura-e-Kahf, Wali has been used as person looking after the welfare. According to the Durr-ul-Mukhtar by Muhammad Ala-ud-Din Haskafi, the Wali literally means opposite of enemy. It was argued that these Ahadith were proved authentic from several sources. In this behalf, reference was made to Sunnan Ibne Maaja Sharif, Tirmazi Sharif and Sunnan Abu Dawood Sharif. It was added that in the absence of Wali Sultan would be her Wali. The Nikah was explained by Imam Hafiz Abi Abdullah Hakim Alnishapuri in his book Almustadrak Maa al Takhlees. It was argued that the same was the expression in Neel ul Autar. The literal means are to connect different views. It was added that it is clear from these textbooks that there is a complete unity of views (Ijma) of Sahaba Kiram (R.Z.A.) on this point.

13. The learned counsel thereafter referred to Hanafi Jurists. He in the first instance

referred to Sharah Maani-al-Aasar by Imam Abi Jafar, Ahmad Bin Muhammad Bin Salaamah Bin Abdul Mulk Bin Salamaah Al Azdi, a known jurist as well as Muhaddis, who with reference to Hazrat Aisha and Abu Musa stated that woman cannot perform her Nikah. The ceremony is to be arranged by a male and beside these reliance was again placed on Sura-e-Al Baqra 2.232 to hold that Nikah of a female is the duty of the Wali. Thereafter, he referred to Nasab-ul-Raiya by Allama Jamal-ud-Din and Alsunnan-ul-Kubra. He argued that Federal Shariat Court has wrongly referred in para. 18 of its judgment to marriage by girl, in fact the marriage was performed by her mother. The learned counsel thereafter referred to Sunnan Dar Quatni by Imam-ul- Kabir Ali Bin Umar Dar Quatni, Tohfat-ul-Ahwazi by Hafiz Abdul Rehman Azhar, Moota Imam Muhammad and Sahi Sunnah Tirmazi by Muhammad Nasiruddin Albani, Volume I.

14. It was argued that the girl after attaining majority is master of her property but as far Nikah was concerned the same is subject to consent of Wali. It was argued that the Islam is a natural religion and the unmarried girls are deemed to be under the protection of Wali in the matters of Nikah for the reason that all possible conceivable modes, which may result in Nikah by the female herself, are against decency and against accepted norms of Islamic Society.

15. The learned council thereafter referred to Fuqha to show that even amongst Fuqha for most of the period there was no dissection. It was submitted that Imam Abu Hanifa, who died in 150 Hijri, did not write any book himself. The works of Imam Abu Hanifa were reduced into writing by Imam Abu Yousaf and Imam Muhammad Shaibani. Imam Abu Yousaf left no writing on this subject while the book by Imam Muhammad Shaibani (died in 189 A.H.) is known as Moota Imam Muhammad, which clearly referred to the above Hadith. The learned counsel in this behalf has referred to Moota Imam Muhammad and Aiqaz Hambrao-Ulil-Absaar by Imam Saleh Bin Muhammad. He added that on the one hand this Haidith has been denied by some of the writers but on the other hand, they have quoted Imam Abu Yousaf saying that the Nikah outside Khffaw is invalid. He added that this cuts at the root of the criticism that Hadith is not authentic. The second period starts with Fatawa-i-Kazee Khan and Fatwa-i-Alamgiri when reference was made to certain persons to deny the existence of Hadith No.1 but neither there is any writing to this effect nor they could otherwise support their views with any Sanad. The third period started with Shah Wali Alah Muhaddis Dehlvi, Anwar Shah Kashmiri, Abul Hassan Ali Nadvi and Maulana Maudoodi,. They by and large reverted to the view prevalent in first period. The learned counsel in this behalf referred to Hujjat-ul-Allah Albaligha by Hazrat Imam Shah Wali Allah (R.H.), Volume II, Fatawa-i-Alamgiria, Volume II, Muasharti Massail Din-e-Fitrit Ki Roshni Main by Maulana Muhammad Burhannuddin Sunbhli and Rasail-o- Masail by Maulana Abul Ala Maudoodi, Volume II.

16. The learned counsel referred to Kanz-ul-Daqiq by Maulana Abdullah, who died in 710 A.H. and Tafseer-ul-Haqiq by Fakhar-ud-Din Zaili, who died in 743 A.H. The right of the female to contract marriage has been justified with reference to her right to enter into agreement to sell and purchase property. It was argued that justification is too superficial, ignore norms of Muslim Society and nature of women. Then he referred to Mazzaq-ul-Arifin by Imam Muhammad Ghazali, who died in 500 A.H. and Ghuniyat-ul-Talibeen by Sheikh Abdul Qadir Jillani, where the conditions of valid Nikah have been noted. It was argued that the Court can follow jurists, whcr have given weighty reasons in support of their views or rules relating to social set-up. In this behalf, he has referred to

Mst. Khurshid Bibi v. Baboo Muhammad Amin (PLD 1967 SC 97) and Iqbal Hussain v. Deputy Commissioner/Collector, Lahore and 3 others (PLD 1995 Lahore 381). The learned counsel thereafter reverted back to order, which could be passed by a Court to compell female to join parents. He submitted that these are reformative measures and follow as under:

- (1) Sura-e-Nisa 4.15
- (2) Sura-e-Noor 24.2
- (3) Al-Kashaf by Mahmood Bin Umar Alz Makhshri Alkhawaruzmi
- (4) Tafseer-ul-Kabir by Alfakhar-ul-Razi
- (5) Islam Ka Nizam-e-Iffat-o-Asmat by Maulana Muhammad Zafeer-ud-Din
- (6) Islam and Family Planning by Shaikh Muhammad Mahdi Shamsuddin
- (7) Shariat-e-Islam Main Aurat Aur Mard Ka Rutba in 'Guftar-e-Iqbal' by Muhammad Rafiq Afzal
- (8) An Introduction to Islamic Law by Joseph Schacht
- (9) Kitab-ul-Fiqha by Allama Aljaziri.

17. The learned counsel for the petitioner argued with reference to Sura-e-Nisa 4.15 and Sura-e-Noor 24.2 that the Islam permits reformative measures and compelling the girls to join their parents. He proceeded to refer to Al-Kashaf by Imam Alz Makhshri, Tafseer Baizvi, Tafseer-ul-Kabir by Imam Fakhr-ud-Din Razi, Islamic System of Chastity by Ch. Muhammad Zafar-ud-Din, Islam and Family Planning, Vol. I, Guftar-e-Iqbal (collection of speeches by late Dr. Allama Muhammad Iqbal), An Introduction to Islamic Law by Joseph Schacht and Kitab-ul-Fiqha by Allama Aljaziri.

18. On the other hand, respondent No.1 argued with reference to Article 199 of the Constitution of Islamic Republic of Pakistan and section 491, Cr.P.C. She referred to PLD 1970 SC 323, 1970 SCMR 437, PLD 1972 SC 6, 1972 SCMR 398, 1973 SCMR 189, 1973 SCMR 577, PLD 1976 SC 298, 1987 SCMR 905, 1975 PCr.LJ 472, 1975 P.Cr.U 1049, 1977 P.Cr.U 17, PLD 1978 Kar. 374, PU 1979 Cr C.

Kar. 362, 1987 MLD 1549, 1988 MLD 1822, 1995 PCr.LJ 2085, PLD 1962 (WP) Kar. 725, PLD 1962 (W.P). Kar. 442, PLD 1965 Dacca 553, 1968 PCr.LJ 1785, 1971 PCr.LJ 489, 1971 PCr.LJ 38, 1971 PCr.LJ 523, PLD 1971 Lah. 139, 1972 PCr.LJ 586, 1971 PCr.LJ 640, 1973 PCr.LJ 61, 1973 PCr.LJ 79, 1973 PCr.LJ 559, 1973 PCr.LJ 1012, PLD 1975 Lah. 234, 1976 PCr.LJ 1447, PLD 1980 Lah. 350, PLD 1982 B.J. 74, 1984 MLD 1443, 1985 PCr.LJ 1560, 1984 PCr.LJ 2908, 1985 MLD 485, 1986 PCr.LJ 861, 1986 PCr.LJ 1404, 1986 PCr.LJ 2269, 1986 MLD 2490, 1987 CLC 1496, 1987 MLD 2595, 1988 PCr.LJ 898, 1988 MLD 44, 1989 PCr.LJ 1717; 1995 MLD 1507 to contend that the superior Courts have normally permitted the girl sui juris to have her own way. She, however, added that in the cases reported as PLD 1962 Karachi 725, PLD 1965 Dacca 553, 1968 PCr.LJ 1578, PLD 1972 Lah. 809, 1975 PCr.LJ 1444, 1977 PCr.LJ 499, PLD 1971 Lah. 128, PLD 1971

Lah. 343, PLD 1973 Lah. 591, 1984 PCr.LJ 755, 1984 PCr.LJ 2977, PLD 1995 Lah. 364 and 1968 PCr.U 1758, a different view was taken but this was mostly on account of the girl being minor or there being no Nikahnama or more than one Nikahnames. It was maintained that normally the Courts have allowed female detenu to have her own way. This is the rule. It was argued that restraint on movements of females against their will is unconstitutional and would result in violation of Articles 10, 11, 14, 15, 20 and 25. She submitted that the fundamental rights should not be violated. In this behalf, she has referred to 1983 SCMR 1718, PLD 1993 SC 901, PLD 1992 SC 595, 1994 SCMR 681 and PLD 1993 SC 456. Thereafter she referred to the speech of Quaid-e-Azam Muhammad Ali Jinnah (R.H.) on Hindu Child Marriage Bill in 1929 in the Legislative Assembly and referred to the provisions of Muslim Family Laws Ordinance, 1961 to maintain that there is nothing as to Wali. She also referred to report of Ahtasham-ul-Haq Thanvi, Member Commission on Marriage.

She also referred the Code of Muslim Personal Laws, Volume I by Dr. Tanzil-ur-Rehman to argue that a major Muslim male or female can marry without intervention of the guardian. Thereafter, she referred to the Dictionary of Islam by Thomas Patrick Hughes, according to which the marriage is simply a civil contract. She also referred to Durr-ul-Mukhtar where it is recorded that the consent of Wali on condition of validity of marriage of Nikah of minor, a lunatic and a slave but not of adult. Thereafter, she referred to 'Convention on the Elimination of all forms of discrimination against Woman'. In the end she referred to article titled 'Are Women their Walis puppets on a string' by Mr. Khalid Ishaque, Advocate printed in the issue 11-10-1996 of the Daily 'DAWN', Karachi.

19. Mr. Khalid Ishaque, Advocate argued that so far the Hanifies are concerned an adult girl is at liberty to marry. He referred to book by Allama Ainee Chapter which contained a detailed discussion with reference to the different sayings of The Holy Prophet (peace be upon him).

He also referred to which is Urdu Commentary of Mishkat Sharif by Allama Nawab Muhammad Qutab-ud-Din Khan Dehlvi then which is the commentary on by Al Imam Abi-ul-Fazal Shahabuddin Ahmad Bin Ali Bin Muhammad Bin Hajar-ul-Asqalani, then which is the commentary of Sahi Bokhari Sharif, by Imam Muhammad Bin Ali Bin Muhammad Alsarkani, which is the commentary on

The learned counsel argued that the judgments of the Hon'ble Shariat Court are binding on a High Court. The learned counsel in this behalf has referred to Articles 203-A, 203-DD and 203-GG. He in support of his arguments referred to the judgments reported as PLD 1992 FSC 286, 1988 CLC 1877, PLD 1989 SC 777 (778), PLD 1989 Kar. 481, PLD 1994 SC 1, 1987 CLC 126, PLD 1986 SC 360 (475), PLD 1994 SC 607, PLD 1994 SC 607(620) and PLD 1983 FSC 73.

20. Mr. Nazir Ahmad Ghazi, Advocate argued that the marriage between the male and female, therefore, can be performed validly without intervention of Wali. In this behalf, he referred to Sura-e-Ahzab 22.22 and 22.151, Sura-e-Al Baqra 2.228, 2.230, 2.234 and 2.240.

Thereafter, he supplemented his arguments with the submission that when the adult female is master of her will in the property matters it is not possible to maintain restriction in respect of marriage. He proceeded to refer to following sayings of The Holy

Prophet (peace be upon him):--

Hadith No. Name of the Book Page Other particulars 324 Sunnah Abu Dawood 126 Volume II of translation by Shahjehan Puri and printed by Farid Book Stall, Lahore.

4 Moota Imam Maalik 416 K iutab ul Nikah 67&68 SahiBokhari 51-52 English Volume VII
380 & 381 Sunnan Nissai - Printed by Farid Book Stall, Lahore.

1099 Tirmazi Sharif 566 Volume I, Translated by Siddique Hazarvi and printed by Farid Book Stall, Lahore. 1101 567 1847 Sunnan Ibne Maaja 114 Volume III, English Translation by Qazi Publication 1870 129 1871 " 130 1889 " 140-141

Thereafter, he referred to the different instances which took place in the life of The Holy Prophet (peace be upon him) and during the times of Khulfa-e-Rashideen. Then he referred to Islamic Laws by Dr. Tanzil-ur-Pehman and Haqooq-ul-Zaujain by Maulana Abu A'la Maudoodi.

21. We have given our anxious consideration to the arguments of the learned counsel for the parties, Mr. Muhammad Akram Sheikh, Advocate and Mr. Abdul Rehman Madni, gone through the record and relevant provisions of law, precedents as well as textbooks. Now we proceed to consider the significance of 'family' in human life. The family is the basic sphere of human activity. The child normally is said to learn good manners, discipline and follow religion which he finds his parents and other members of the family practising or following. Therefore, all religions have laid special emphasis on the preservation, strengthening and protection of family. Suffice it is to refer here following para, from 'A Handbook of Sociology' by William F. Ogbum and Meyer F. Nimkoff:

"The type of citizen one becomes is related closely to the type of mother, father, and home life one has."

In 'The Age of Faith1 by Will Durant "A History of Medieval Civilization— Christian, Islamic, and Judaic—from Constantine to Dante" A.D.

325-1300 while dealing with the components of integration has written as under:—

"Despite the comparative looseness of the marriage bond in law, the family was the saving centre of Jewish life. External danger brought internal unity; and hostile witnesses testify to the 'warmth and dignity thoughtfulness, consideration, parental and fraternal affection', that marked and mark the Jewish family...."

Now we proceed to refer to Muqaddama Ibne Khaldoon by Allama Abdul Rehman Ibne Khaldoon Almaghrabi 732 A.H. to 808 A.H. The great philosopher wrote as under:— 22. Islam being religion of nature and covering all human activity from cradle to grave, has taken special care of the integrity, upkeep and preservation of family. In Islam family unit is fully oriented. The Nikah is uniting/linking not only two individuals but also two families. The rights and obligations in Islam are not according to the sex but according to its contribution to the family. The rights and liabilities of members of family are not as male and female, girls and boys, man and woman but are with reference to their status in the

family namely, father, mother, husband, wife, brother and sister. The champions of the women rights are ignorant of the status of mother in Islamic Society. The highest respect which one can conceive has been given by Islam to mother, therefore, to judge rights and obligations in Islam particularly family life with reference to sex would not be justified.

And in the next part he wrote as under:— 23. The parents are responsible for marriage of the children generally and girls particularly. The learned counsel for the petitioner correctly referred to Encyclopaedia of Religion and Ethics by James Hastings to argue that this is not only in Islam but recognized by all religions. Bishop Kenenth appeared to canvass the same point.

24. Mr. M. Khalid Ishaque was asked as to the main reason for moral decline in the west. He rightly remarked that it is on account of legislation against divine law. He proceeded to explain that the law was enacted, of course on the agitation of the women, that if the marriage breaks the spouses shall share the assets equally. He added that the result is that now men and women are living without marriage bond in order to save property. It would be relevant to refer here Armstrong's emphasis on the preservation of family in his article in the Reader's Digest, which appeared at page 39 of May, 1996 issue. The relevant portion reads as under:—

"I thought about the power of a good name when I heard General Colin Powell say that America needs to restore a sense of shame in its neighborhoods. He's right. If pride in a good name keeps families and neighborhoods straight, a sense of shame is the reverse side of that coin.

Doing drugs, abusing alcohol, stealing, getting a young woman pregnant out of wedlock—today, none of these behaviours is the deep embarrassment it should be. Nearly one out of three births in America is to an unwed mother. Many of these children will grow up without the security and guidance of a caring father and mother committed to each other.

Once the social ties and mutual obligation of the family disintegrate, communities fall apart. Politicians may boast that crime is falling, but while the population has increased only 40 per cent, since 1960, violent crime in America has increased a staggering 550 per cent.—and we've become used to it. Teen drug abuse is rising again. No neighborhood is immune. In one North Carolina country, police arrested 73 students from 12 secondary schools for dealing drugs, some of them right in the classroom.

Cultural influences such as television and movies portray mostly a world in which respect goes to the most violent. Life is considered cheap."

25. Mr. Muhammad Akram Sheikh, Advocate in his paper has referred to following portion of the speech of Mrs. Hillary Clinton made by her in election campaign of her husband:—

order to raise a family, a happy family, a confident family, it needs a family, it needs a village, it needs a society, it needs a president and, it needs Bill Clinton."

According to Mr. Muhammad Akram Sheikh, Advocate, who heard the speech himself,

the response of this touching speech was very positive and for one moment it appeared that "evil empire" of United States of America is within the reach of its lost paradise. Although it has become sole power but is feeling hollow and deficient because of collapse of family nucleus. Mr. Muhammad Akram Sheikh referred to social change which is being thrusted upon Pakistan society in somewhat similar fashion, which is seen to have prefaced the subsequent explosion of family unit in the other societies in west. He referred to following statistics:—

"Household sizes.—More than a quarter of households in Great Britain in 1994–95 consisted of one person living alone, almost double the proportion in 1961. This is due to the increasing elderly population who lives alone and the increasing number of men living alone.

The average household size in U.K., fell to 2.4 persons in 1994–95 as compared to 2.9 in 1971. This is due to the increase in the divorce rate and the fall in family size. As the proportion of one person households has been growing, the proportion of traditional one family households of "a couple with children has been declining. In 1961 38% of households in Great Britain comprised of married couples with dependent children, this proportion fell by 13 percentage points to 25% in 1994–95.

Single-parent families.—The proportion of dependent children living in one-parent families in Great Britain has tripled since 1972; 19% of children lived with just their mother and 1% with just their father in 1994–95. This reflects the increase in the number of live births outside marriage and the increase in the divorce rate.

The proportion of lone mother families increased gradually until the late 1980s, but has since increased more rapidly, so that in 1993 one in five mothers with dependent children was a lone mother. Nearly two-fifths of lone mothers were single in Great Britain in 1994–95 while almost the same proportion were divorced. The gradual increase in the proportion of lone mothers until the mid 1980 was caused mainly by the increasing numbers of divorced mothers. Since then the proportion of divorced lone mothers has stabilized, but the proportion of single, never married, mothers has more than doubled.

Cohabitation.—The proportion of unmarried women aged between 18 and 49 who were cohabiting in Great Britain almost doubled between 1981 to 23%. Among single women, 33% of those aged between 25–34 were cohabiting in 1993–94.

Between 1986 and 1994–95 the proportion of non-married men cohabiting increased by 10 percentage points, so that 21% of men aged between 16 to 59 were cohabiting in 1994–95.

Divorce.—In 1993, the U.K. had the highest divorce rate in the European Union, at almost twice the average, difference in the European Union rates may be attributed to the effects of religion, cultural and social differences and legal requirements.

The Reader's Digest has published debate of the presidential candidates of the preset U.S.A., Election in its November 1996 issue. One of the questions and reply thereof by the main candidates read as under:—

"America has witnessed a sharp increase in illegitimacy. In 1965 eight per cent, of all children were born out of wedlock. The latest figure is 33 per cent. What is happening and what can be done?

Clinton: The social stigma of bearing a child out of wedlock is less than it used to be and less than it should be. Once a baby is brought into the world, I don't think we should condemn the mother and the child. But we should say that it is not a good thing when a child is born out of wedlock.

Dole: It's happening for a lot of reasons. Some we can't legislate—it's family breakdown. That's why I want to go back to education; the best place to start is kindergarten. We've got to go back to our churches and service clubs. We've got to have some personal responsibility too.

We've got to go after fathers who, don't support their children."

26. Now we proceed to deal with the Nikah and its significance. It is interesting to note here that the word marriage' commonly used has been derived from word 'marri' and means to take over. On the other hand, the word 'Nikah' means to unite, bind. Robin and William in their book 'American Society¹ wrote that marriage is more than an ordinary civil contract. It contains an element of status in the legal sense. If the family is the basic unit of a society then marriage is the basic material of this unit.

26-A. Before proceeding with the essential ingredients of a valid Nikah, we would take up the issue whether Nikah in Islam is civil contract as held in the cases of Munshi Fazal Rahim, Abdul Qadir and Abbas Ali (*supra*). The marriage was treated as sale purchase with dower its consideration. The background seems to be that in the sub-Continent in early days of British Rule there was no Codified Law dealing with the Muslim marriages. The result was that the suits for restitution of conjugal rights were treated as suits for specific performance and the theory of civil contract developed; as against that Hindu marriages were governed by their personal law and there was no such rule. The decisions were given in utter disregard of the position of Nikah in Islam and the purpose of dower was completely misunderstood. The other reason seems to be the influence of development of English Law of marriage, which was performed through church and the same could be dissolved only with the intervention of the church. Then another specie of marriage came into existence to defy the supremacy of church. Where man and woman would go to the Court of law and after denouncing their religion would seek permission to get married. This also seems to have influenced the mind of Courts in Sub-Continent while treating the marriage as a civil contract.

27. In Islam the Nikah is Sunnah of the Holy Prophet (peace be upon him) and it was made clear who gave up the Sunnat he ceased to be a Muslim. The notion of civil contract was taken serious note by Maulana Ashraf Ali Thanvi in his book *Islah-e-Inqlabe Ummat* at page 52 Volume II.

He opined as under:—

28. The view that marriage was a civil contract in Islam was mainly supported by the argument that dower was its consideration. The view is superficial and advanced without

taking into consideration the philosophy of dower. The dower is no consideration of marriage in Islam. In sura 4.4 it has been called as nehra, which carried the meaning of gifting something of free-will while in Mishqat Sharif translated by Maulana Muhammad Sadiq u Khalil, the same has been dealt in Baab-ul-Sadaq while in Durr-ul-Mukhtar it means. In the Islamic Family Law edited by Chibli Mallat while dealing with Jewish marriage it was noted that "The salient features of the ceremony were that the groom gave the bride an object of a specific worth, which in practice nowadays is the wedding ring. This object must be given to the wife in the presence of two witnesses, whose presence is not merely evidentially but constitutive". Then Ruben Levy in his book 'The Social Structure of Islam' opined that "The fact that in Islam "Mahr" or "Sadaq" was paid to the wife has a bearing on the question whether women in pre-Islamic times and in early Islam could own property". The issue was also dealt by Dr. Muhammad Shabbir in his book 'Muslim Personal Law and Judiciary'. The learned author after reference to The Holy Qur'an, jurists and various judgments rendered in the Sub-Continent concluded as under:—

"The comparison between 'dower' and 'consideration' is mere analogical and the one is not an identical precedent for the other. It will be wrong to scratch the analogy of sale too far. Marriage is not a contract of a sale in the strict sense nor the consideration that is known as dower. In short, both propositions that the marriage is a 'purely civil contract and dower is a price of wife' do not hold much water.

It is really surprising as to how the Courts still treat marriage as a transaction of a sale in spite of weighty judicial precedents to the contrary. The realities of human mind appear to have worked against the true nature of the institution of marriage and dower and judicial sphere of decision-making. As is evidence from the observation of Mr.Justice Mitter in Subrannissa v. Subdu Sheikh AIR 1934 Cal. 693 and opinion of Mookerjee and Amiya Kumar, JJ., in B.M., Mondal v. D.R. Bibi AIR 1971 Cal. 162. It is virtually the outcome of the decision of Abdul Qadir's case."

Dr. Muhammad Shabbir has also referred to case of Syed Sabir Hussain Shah v. Farzand Hussain AIR 1933 PC 80, where it was finally concluded that it was not only a pious obligation but legal responsibility of husband too. While in the judgment of Anis Begum v. Malik Muhammad Istafa Wali Khan AIR 1933 All. 634 Sir Sulaiman, Chief Justice ruled as under:—

"....The analogy of the same cannot be carried out too far. The marriage cannot be regarded as purely sale of the person of the wife in consideration for the payment of the dower."

The same view was expressed by Justice Tek Chand in Fatima Bibi v. Lai Din AIR 1937 Lahore 345 clarifying the scope of dower reads as under:—

"Under the Mahomedan law dower is not exchange or consideration, as understood in the technical sense in the Contract Act, given by the man to the woman for entering into the contract but an effect of the contract imposed by the law on the husband as token of respect for its subject, the woman. So, an agreement by the third person guaranteeing payment of a post-nuptial dower, is not void as being without consideration and the third person cannot escape liability under it."

Allahabad High Court in Kamar-un-Nissa Bibi v. Hussain Bibi (1881) 3 All. 266 (PC) conclusively held as under:—

"consideration not to be taken or has been used in the Indian Contract Act."

And the learned Judge in support of the above view referred to following passage of Mahomedan Jurisprudence by Sir Abdul Rahim:—

marriage is valid though dower is not settled at the time and it is wrong to say that dower is a consideration proceeding from the husband for the contract of marriage. In reality it is an obligation imposed by Muhammadan Law as a mark of respect for the wife."

29. The theory that dower was a consideration for the marriage is otherwise falsified by three basic facts, namely:—

Firstly, the fixation of dower is not a necessary requirement of valid marriage and may not be in terms of money or shape of material things;

Secondly, the amount can be enhanced by mutual agreement and bride can forego the same; and

Lastly but not leastly, dower can be deferred, which would be payable after death or dissolution of marriage, therefore, this fact alone is sufficient to discard the view that dower is a consideration for marriage.

30. The other argument in support of the view that the marriage is a civil contract was acceptance This was introduced by Islam while in the earlier the women were treated as chattel. Syed Riazul Hassan Gilani, Advocate in support of this view has referred to Encyclopaedia of Religion and Ethics, Volume V. The relevant portions read as under:— "Page 464:

....Roman of early times did not think of marriage and manus as inseparable: for the bride must have been properly married under usus, if her children were to be Roman citizens, though for a year at least she was not under manus....

3. The historic period.—(a) Conditions of marriage.—The necessary conditions of marriage were: (1) the families of both parties must possess the ius connubii (as explained above); (2) the parties must not be within the prohibited degrees of relationship cognatio.

Page 470:

5. Abyssinian.—....Such marriages are solemnized by a priest, and the contracting parties partake of the Holy Communion.

Page 471:

When a man desires to marry a girl, he applies directly to her parents or nearest relatives;

Marriage (Slavic).—As early as the pagan period the family life of the Slave was regulated by legal marriages, which were concluded in a solemn manner.

Page 472:

A marriage became legal only after the precise performance of all prescribed observances inherited from the ancestors and consecrated by the family tradition; and this conviction is still to be found among some of the Slavic nations."

Thereafter, he referred to Auza-ul-Tashriah (legal system). The translation of the relevant portions read as under:— 30-A. The view that marriage was simply contract of sale purchase was projected without keeping in mind that the womenfolk has been driven to the status of slaves by this theory of sale purchase. This was not only inhuman but most disgraceful and was completely in derogation to teachings of Islam.

31. Now we take up the institution of Nikah and its ingredients. Dr. Syed Riazul Hassan Gilani, Advocate argued that following are the conditions of a valid Nikah:—

- (1) permission of Wali and consent of the bride;
- (2) the acceptance by the spouses should be in the assembly convened by the family of the girl; and
- (3) it shall be done in the presence of the two witnesses.

The learned counsel added that the contracting party is Wali and not the girl herself because she speaks through Wali. There is not much difference between various sects except the permission of the Wali because Imam Abu Hanifa is said to hold the view that consent of Wali was not necessary for a valid Nikah.

32. The learned counsel for the petitioner, Dr. Syed Riazul Hassan Gilani and Malik Muhammad Nawaz, in support of their contention that sanction/consent of Wali is one of the conditions of valid Nikah, have referred to Sura-e-Al Baqra, Verse 221, which reads as under:— 221. Do not marry. Unbelieving 245-A woman. Until they believe: A slave woman who believes Is better than an unbelieving 245-A woman.

Even though she allure you.

Nor marry (your girls) To unbelievers until. They believe:

A man slave who believes. Is better than an unbeliever 245-a Even though he allure you. 246 Unbelievers do (but). Beckon you to the Pire.

But Allah beckons by His grace To the Garden of Bliss And forgiveness

The latter part of the above Verse is clear command to the men, fathers/head of families

and it negates the marriage by female herself. In the marginal note the literal meanings of unbelieving and unbeliever, are "pagan". Muhammad Yousaf Ondalsy, in his commentary Tafseer-ul- Kabeer has written that the command is to be the Wali of the woman, therefore, for valid Nikah consent of Wali is necessary while Imam Qurtabee in his Tafseer Qurtabee has referred to this verse in support of the rule that the presence/participation of Wali is essential in Nikah.

The great Imam also added that nowhere in the Holy Qur'an, Almighty God has directed other than man to perform the Nikah if the presence of Wali was not necessary then address must have been to be women at least somewhere. The same is the view expressed by Allama Hazam (R.H.) in Tafseer-ul-Minar.

The second Verse relevant on the issue is Sura-e-Noor 32, which reads as under:-

32. Marry those among you who are single, 2988 and The virtuous ones among your slaves, male or female: If they are in poverty., 232. When ye divorce Women, and they fulfil The term of their "Iddat, Do not prevent them 265 From marrying Their former husbands, If they mutually agree-on equitable terms. This instruction is for all amongst you, Who believe in Allah And the Last Day. That is the course Making for most virtue And purity amongst you And Allah knows, And ye know not.

33. Again the address is to the men and not women. The third verse, of course, the main verse which supports the proposition is Verse No.232 of Sura-e-Al Baqra, which reads as under:- Imam Bokhari (R.H.) has cited above two verses in support of Hadith . The Imam has his own style. He did not incorporate the saying of The Holy Prophet (peace be upon him) one after the other but proceeded to pick up issues, subjects or titles and then incorporated all the Ahadith under the same with reference to Holy Qur'an.

34. Imam Bokhari (R.H.) under this title has mentioned the incident of

Maakkal Bin Yassar (R.Z.A.), according to which, Aasim Bin Addi ex-husband of his sister wanted to remarry her after having pronounced divorce. Maakkal (R.Z.A.), did not approve this move for the reason that he has already caused insult to the family, therefore, he said on Oath that he will not marry his sister once again to him but after revelation of this verse heallowed the marriage of his sister to her ex-husband and paid expiation for breaking the

Oath. Imam Bokhari (R.H.) after citing this instance concluded that woman in spite of wish cannot marry by herself and the command of the Almighty God was directed to her Wali not to stand in her way. The other interpretation that it permitted the woman to contract marriage is not possible because Imam Bokhari (R.H.) has concluded this instance with the words, so Maakal married his sister to this man while according to Imam Shaafi (R.H.) this is the strongest and decisive argument in favour of the rule that the consent of the Wali is necessary for Nikah of a woman. Allama Ibne Kaseer in his work Tafseer Ibne Kaseer has expressed the same opinion as under:- In the end we would refer to commentary of this verse in Tafseer-ul-Jamia Ahkam-ul-Quran bv Imam Ourtabee. which reads as under:- And to the same effect is commentary in 'Tafseer Jamia-ul-Bian-ul-Batri' by Imam Ibne Jareer Tibree and Tafseer-ul-Taheer-o-Tanveer' by Muhammad Tahir Ibne Aashhoor.

35. Now we proceed to refer four Ahadith, relied by the learned counsel for the petitioner on the point of No Nikah without Wali, which are reproduced as under:— Besides this there are other sayings, one of which has already been noted in the foregoing paragraphs.

36. On the other hand, Mr. Nazir Ahmad Ghazi, Advocate, counsel in W.P. 2620 of 1996 argued with reference to seven Verses of the Holy Qur'an noted in his argument that in fact the commands of Almighty God with reference to marriage are to the women and not to the men. He referred to number of complaints brought to The Holy Prophet (peace be upon him) and Khulafa-e-Rashideen (R.Z.A.), where women complained that the marriage has been forced on them and they do not approve the same. These marriages were dissolved. A careful perusal of all these instances would show that in all these cases the consent of the woman was missing or secured through duress and pressure. We have already recorded that there cannot be a marriage without the £ consent of the female. The marriage forced on her is not a valid marriage in accordance with the Injunctions of Islam. This sufficiently disposes of the arguments of Mr. Nazir Ahmad Ghazi, Advocate.

37. It is made clear that if a female wanted to denounce her marriage for want of her consent then she has to do it within shortest possible period from p date of Nikah as option of puberty is exercised immediately on attaining puberty otherwise plea would be rendered doubtful by delay.

37-A. According to Sunnan Abu Dawood Sharif, if there is a difference of opinion between the Walis or there is none then Sultan Ruler is the Wali. In this behalf, reference is made to Hadith No.315, which reads as under:— In the end we would like to refer to views of Hazrat Abdul Qadir Jilani (R.H.) expressed in Ghunia-tul-Talibeen Urdu translation by Maulana Ahmad Sahib Madrasi as under:— 38. We would proceed to examine different types of marriages prevalent in Arab on the dawn of Islam and the type approved and followed as it would make the point further clear. In this behalf, it is relevant to refer following portions of saying of Hazrat Aisha (R.Z.A.) as included in Maaref-ul-Hadith by Maulana Muhammad Manzoor Naumani: — It is clear from the opening passage that the mode which was approved and followed by Muslims was that man desirous of marrying a girl or woman would approach to her father or the head of the family and after settling the dower the Nikah would be performed. In my humble opinion this not only was in line with G command of the Holy Qur'an but also supported the above Hadith that a woman cannot marry herself. It is matter of common knowledge that this mode is in vogue in the Muslim Society including this Sub-Continent till today. What more clear, strong and direct evidence is required to uphold the rule that This is the only known mode of marriage prevalent in our society and to disturb this arrangement would if not wreck then completely shake the structure of the society rather strengthening it. The Holy Qur'an says

(mischief is more devastating than murder). The other established rule is that a Hadith, which has been consistently repeated is to be accepted as correct. Imam Abu Hanifa himself in clear terms told his followers that if they come across a Hadith against his views then they shall follow the Hadith and not him. Above all no writing of the imam to this effect is available.

39. M/s. Khalid Ishaque and Nazir Ahmad Ghazi, Advocates have referred to Code of Islamic Law by Dr. Tanzil-ur-Rehman. Suffice it is to record here that learned author debated the point without keeping in mind startling results. It was lost sight of the fact that it would lead to a society free from all social and moral values and to borrow the words of Dr. Allama Muhammad Iqbal (R.H.)

The Muslims did not strive in the past, they are not making efforts today and they would never endeavour for such a society in future. The views of the learned author also lost sight of the sufferings of west by following the theory of equality and *sui juris*. Hafiz Salah-ud-Din Yousaf, Advisor to Federal Shariat Court, in his Articles printed in the Daily 'Nawa-i-Waqt' has elaborately exposed the pitfalls and shortcomings of the views expressed by the learned author.

40. We have recorded our views on the point with reference to Holy Qur'an, Ahadith, Ijma and in the historical perspective. The admitted position is that there is difference of opinion on the point amongst A'imma and Faqihs. Assuming that there is no Qura'nic Verse or Hadith or Ijma on this point then this Court may form its own opinion. We are fortified in our view by the judgment in the case of Mst. Zohra Begum v.

Sh. Latif Ahmad Munawwar PLD 1965 (W.P.) Lahore 695. The relevant portion reads as under:—

"8. On this view, it would be permissible for Courts to differ from the Rule of Hizanat stated in the textbooks on Muslim Law for there is no Qura'nic or Traditional text on the point. Courts which have taken the place of Qazis can, therefore, come to their own conclusions by process of Ijtihad which, according to Imam-Al-Shafei', is included in the doctrine of Qiyyas. It has been mentioned earlier that the rule propounded in different Textbooks on the subject of Hizanat is not uniform. It would, therefore, be permissible to depart from the rule stated therein if, on the facts of a given case, its application is against the welfare of the minor...."

This was affirmed by the Hon'ble Supreme Court in B.Z. Kaikus and 10 others v. President of Pakistan and 15 others PLD 1980 SC 160. The relevant portion of the judgment reads as under:—

"8. With great humility I venture to submit that it would not be correct to lay it down as a positive rule of law that the present-day Court in this country should have no power or authority to interpret the Qur'an in a way different from that adopted by the earlier jurists and Imams. The adoption of such a view is likely to endanger the dynamic and universal character of the religion and law of Islam. At the same time it is clear that the views of the earlier Imams and Jurists are entitled to the utmost respect, and no Court or Commentator would differ from them except for very compelling and sound reasons. I would also like to make it clear at this stage that this difference of interpretation does not, and cannot, mean a departure from a clear injunction of law as contained in the Qur'an or Sunnah, or even Ijma', on any grounds of equity, good conscience or public policy."

It will be beneficial to refer to another portion of this judgment, which reads as under:—

"6. Islam is not a priest-dominated theocracy. Its principles are neither hidden nor complicated or involved, and not impracticable. It is a law which has within it the capacity or capability of being practised, enforced and applied, and adopted at all time and all places, only if it is understood and interpreted in a true and proper manner and in its true spirit, keeping in view the environments and the circumstances of the situation at the relevant time." We are national Judges and as such custodian of the morals of the citizens, therefore, it is not possible to subscribe to the opinion expressed by Dr. Tanzil-ur-Rehman. Even otherwise rule of interpretation is that view which is in line with the moral standards of the society is to be accepted.

42. The Judges are not debarred from giving their own opinion in the matters for which there is no direction in the Holy Qur'an as well as there is no Hadith to guide the Umma and there is difference of opinion between J various Imams, Muhaddaseen and jurists. We in this behalf may refer to the judgment of the Hon'ble Supreme Court in the case of Mst. Khurshid Bibi v.Baboo Muhammad Amin PLD 1967 SC 1997. The relevant paras, read as under:—

"The fundamental laws of Islam are contained in the Qur'an and this is, by common consent, the primary source of law for Muslims. Hanafide Muslim jurisprudence also recognises Hadith, Ijtehad and Ijma as the three other secondary sources of law. The last two really fall under a single category of subsidiary reasoning, Ijtehad being by individual scholars and Ijma being the consensus of scholars who have resorted to Ijtehad in any one age. That this is the order of priority, in their importance, is clear from the well-known Hadith, relating to Muadh-Ibn-e-Jabal who was sent by the Prophet as Governor and Qazi of Yemen. The Prophet asked him, how he would adjudicate cases. 'By the Book of God', he replied, 'But if you find nothing in the Book of God, how?: 'Then by the precedent of the Prophet', 'but if there be no precedent?' 'Then I will diligently try to form my own judgment'. On this, the Prophet is reported to have said, 'Praise be to God who hath fulfilled in the messenger sent forth by him apostle that which is well pleasing to the apostle of Allah'."

The four orthodox schools of Sunni Fiqh were headed by Imam Abu Hanifa, Imam Malik, Imam Shafei and Imam Ahmad-bin-Hanbil. The learned Imams never claimed finality for their opinions, but due to various historical causes, their followers in subsequent ages, invented the doctrine of Taqlid, under which a Sunni Muslim must follow the opinions of only one of their Imams, exclusively, irrespective of whether reason be in favour of another opinion. There is no warrant for this doctrinaire fossilization, is the Qur'an or authentic Ahadith. In the Almital-wan- Nihal, page 39, it is stated that the great Abu Hanifa used to say "This is my opinion and I consider it to be the best. If someone regards another person's opinion to be better, he is welcome to it 'for him is his opinion and for us ours'."

43. In the case of Mst. Kaneez Fatima v. Wali Muhammad and another PLD 1993 SC 901 the Hon'ble Supreme Court ruled that principle of Islamic Law and Injunctions of Islam have to be kept into consideration while interpreting the statutes. It was held that the Courts are competent to enforce well recognized principles of common law hence such interpretation which is in conformity with the Injunctions of Islam is to be followed.

44. Now coming to the Muslim Family Laws Ordinance, 1961 wherein a pro forma for Nikah has been prescribed and registration of Nikah has been made compulsory under section 5 thereof. Serial No.7 of column I of the K Nikahnama provides for appointment of Wakil of bride.

The same is to be witnessed by two persons.

45. The term 'Wakil' has not been defined in the Ordinance, 1961. The purpose seems to be that as the female is not to appear in the assembly herself, therefore, she should be represented by a male. The Wakil generally is representative of the party appointing/nominating him. We are, at the moment; not concerned with the different views as to the capacity of a minor to act as Wakil in Hanafi and Shaafi schools but one thing is clear that a Wakil representing the female cannot be man from the street because he is to perform Ijab-o-Qabool Therefore, keeping in view the Islamic principles and the general practice prevalent in our society the Wakil of the female has to be one related to her in the prohibited degree. It is normally maternal/paternal uncles, sister's husband, brother, father etc. The stranger cannot represent a female in Nikah. The girl speaks through her Wakil. This is not a restriction on the females but the purpose is to preserve their honour. This way it is requirement of her protocol. She is entitled to this because being the honour of two families. This has to be observed for another reason that it would exclude marriage through duress, pressure, compulsion and fraud. In the case of Saima her Wakil was one Syed Shaukat Hussain. Nobody knows, who he was, but one thing is established that he has no blood relation with her.

This will be in consonance of the Islamic principles otherwise the marriage will lose all its sanctity and the witnesses, Wakil would all be hired/arranged by the Marriage Bureaus as is happening in Reno Nevada U.S.A. Where man and woman just engage a marriage agency and they make all the arrangements including ceremonial dresses, witnesses, priest etc.

46. The assembly is also essential because Nikah has to be made known. It is improper to keep the same secret and according to Imam Malik (R.H.) the declaration is one of the conditions of Nikah because it distinguishes the same from Zina, therefore, he was of the view that if witnesses of Nikah were told to keep it a secret then the Nikah becomes invalid.

47. Before leaving the topic we want to make it clear that it is the duty of the parents to marry the children particularly girls at the earliest point of time. They should not afford opportunity to outsiders in the house or outside to come across the young girls may be visitors, servants, drivers of public conveyance. It is absolutely essential to preserve the purity of the homes and this is why much emphasis has been laid by the Islam that females should not mix up with males.

48. The Government should also regulate, if not totally ban, the marriage bureaus and such like institutions, which have become a menace in the society and most of them are otherwise of not bad character. The innocent parents of both sides and would be spouses become their victims and their whole life is spoiled.

49. We have held that according to Shariah consent of female is a condition precedent

for a valid marriage. There can be cases where the girl refuses to marry a particular person at the instance of her Wali for valid reasons. Then the question would arise as to what is her remedy? We propose that the Government should enact law to provide a detailed machinery in this behalf and in the meanwhile, the petitions may be made to the District Judges of the place where the girl last resided with the parents. This could be done under the Quetta Declaration issued by the Chief Justices Committee on 14-8-1991. The relevant paras, reads as under:—

to ensure that all citizens, particularly the deprived and unaided sections of the society, become conscious and assertive of their rights and obligations as guaranteed and provided by Islam, the Constitution and the Law and in order to achieve this objective, to provide an efficient machinery at the door-steps so that they can protect the rights and fulfil the obligations;

(3) to strive for realizing the objections set out in the "OBJECTIVES RESOLUTION" as well as in the "CONSTITUTION" with particular emphasis on Islamic social justice;"

The female or anybody may petition on her behalf to the District Judge pointing out proposed marriage without her consent. The District Judge should send for the parties and hear them day today till the controversy is resolved and in the interregnum period he would lodge the female in Dar-ul-Aman or allow her to remain with any of the blood relations falling within the prohibited degree as per her choice. In case the District Judge is a non-Muslim, the petition shall be entrusted to the senior most Muslim Additional District Judge. It is not desirable to prescribe a specific form of such petitions and the District Judge should exercise the parental jurisdiction keeping in view the facts of the particular case, Shariat and norms of the Muslim society.

There is no satisfactory arrangement for lodging females and children particularly during the pendency of habeas corpus petitions and other matters in this Court, therefore, it is proposed that the Government may provide for the institutions where females and children could be lodged pending the decision of the Court matters. Such institutions should cater not only for boarding and lodging facilities for the inmates but also for job, vocations according to their education and experience. These institutions should be established at least at the divisional level for the time being. This is Constitutional duty of Government under Article 35 of Constitution, 1973.

50. The Courts at the moment are mainly relying on Dar-ul-Aman established by Anjuman Himayat-e-Islam. The same is voluntarily financed, therefore, sources at their disposal are limited and they have also to face criticism from the parallel institutions run privately. It is not safe at all to lodge a female or child in privately managed institutions. The Government should provide for strict supervision of such institutions which among other matters should prescribe for reporting as to the arrival of anyone in such institution to the Police as well as the District Judge within 24 hours, scrutiny of their q accounts and antecedents of the persons connecting with the management of these institutions.

51. The next question for determination is whether the judgment of the Federal Shariat Court in the case of Muhammad Imtiaz and another v.

The State PLD 1981 FSC 308 rendered in a criminal appeal is binding on this Court. Article

203-D details the powers, jurisdiction and functions of the Federal Shariat Court. It is empowered to examine provision of law, which appears to be repugnant to Injunctions of Islam while under Article 203-DD the Court has suo motu revisional powers in respect of the case decided by a Criminal Court under the enforcement of Hudood. The Federal Shariat Court has not been vested with appellate jurisdiction under this chapter.

However, it has been provided in clause (3) of Article 203-DD that it shall have such other jurisdiction as may be conferred on it by or under any law. The relevant clause reads as under:—

The Court shall have such other jurisdiction as may be conferred on it by or under any law."

The words jurisdiction as may be conferred in the above clause are all important, p This way the Federal Shariat Court has two-fold jurisdiction, namely (i) Constitutional; and (ii) under other law. The other relevant Article is 203-GG, which reads as under:—

"203-GG. Subject to Articles 203-D and 203-F, any decision of the Court in the exercise of its jurisdiction under this Chapter shall be binding on a High Court and on all Courts subordinate to a High Court."

The keywords in this Article are exercise of its jurisdiction under 3-A Chapter of Part VII of 1973 Constitution. Now when this Article is read with clause (3) of Article 203-DD then it becomes clear that an appeal from judgment of Criminal Court is dealt by the Federal Shariat Court not under this Chapter, therefore, the decision in appeal is not binding on High Court. It is interesting to note that while Federal Shariat Court enjoys revisional jurisdiction, as already noted, in respect of the cases decided by the Criminal Courts under any law relating to the enforcement of Hudood but no appeal has been provided in this Chapter. The intention of the Legislature clearly seems to be not to make a judgment passed in criminal appeal by the Federal Shariat Court binding on this Court.

52. Now we proceed to examine the rights and obligations of the parents and children inter se. We are here concerned whether the obedience of the orders of the parents is obligation of the children or not? Before proceeding any further we would like to refer to the rights of the parents as appearing in the Holy Qur'an. First of all would be referred to some of the Verses and first in the series is Sura-e-Nisa, Verse No.1. The English translation reads as under:—

10 mankind! fear Your Guardian Lord who created you From a single person, 504 Created, out of it, His mate, and from them twain Scattered (like seeds) Countless men and women;—Fear Allah, through Whom 505 Ye demand your mutual (rights), And be heedful of the wombs 506 (That bore you): for Allah Ever watches over you.

(504. Nafs may mean: (1) soul; (2) self; (3) person, living person; (4) will, good pleasure, as in iv. 4 below. Minha: I follow the construction suggested by Imam Razi. The particle min would then suggest here a species, a nature, a similarity. The pronoun ha refers of course to Nafs).

(505. All our mutual rights and duties are referred to Allah. We are His creatures: His Will is the standard and measure of Allah; and our duties are measured by our conformity with

His Will. "Our wills are ours, to make them Thine," says Tennyson In Memoriam. Among ourselves human beings our mutual rights and duties arise out of Allah's Law, the sense Right that is implanted in us by Him).

(506. Among the most wonderful mysteries of our nature is that of sex. The unregenerate male is apt, in the pride of his physical strength, to forget the all-important part which the female plays in his very existence, and in all the social relationships that arise in our collective human lives.

The mother that bore us must ever have our reverence. The wife, through whom we enter parentage, must have our reverence. Sex which governs so much of our physical life, and has so much influence on our emotional and higher nature, deserves—not our fear, or our contempt, or our amused indulgence, but—our reverence in the highest sense of the term. With this fitting introduction we enter on a discussion of women, orphans, and family relationships).

The other relevant Verse is Sura-e-Inam Verse No. 151. The English translation reads as under:—

"151. Say: "Come, I will rehearse What Allah hath (really) Prohibited you from" join not Anything with Him:

Be good to your parents;

Kill not your children On a plea of want;—We

(976. Instead of following pagan superstitions, and being in constant terror of imaginary taboos and prohibitions, we should study the true moral law, whose sanction is Allah's Law. The first step is that we should recognize that He is the One and Only Lord and Cherisher. The mention of goodness to parents immediately afterwards suggests: (1) that Allah's love of us and care for us may—on an infinitely higher plane—be understood by our ideal of parental love, which is purely unselfish; (2) that our first duty among our fellow creatures is to our father and mother, whose love leads us to the conception of divine love. Arising from that is the conception of our converse duties to our children, Allah provides sustenance (material and spiritual) not only for us, but for them; hence any custom like to Pagan custom of sacrificing children to Moloch stands condemned. Then come the moral prohibitions against lewdness and all unseemly acts, relating to sex or otherwise, open or secret. This is followed by the prohibition of killing. All these things are conformable to our own interests, and therefore, true wisdom from our own point of view).

Thereafter, we would refer to Sura-e-Bani Israil Verses Nos.23 and 24. The

English translation reads as under:—

"23. Thy Lord hath decreed That ye worship none but Him, And that ye be kind To parents. Whether one Or both of them attain Old age in thy life, 2204 Say not to them a word Of contempt, nor repel them But address them, In terms of honour.

24. And, our of kindness, Lower to them the wing 2205 Of humility, and say:

"My lord! bestow on them Thy Mercy even as they (2204. The spiritual and moral duties are now brought into juxtaposition. We are to worship none but Allah, because none but Allah is worthy of worship, not because "the Lord thy God is a jealous God, visiting the inquiry of the fathers upon the children unto the third and fourth generation of them that hate Me)"

Note that the act of worship may be collective as well as individual; hence the plural ta budu. The kindness to parents is an individual act of piety; hence the singular taqul, qul, etc.

(2205. Cf. xv. 88 and n. 2011. The metaphor is that of a high-flying bird which lowers her wing out of tenderness to her offspring. There is a double aptness. (1) When the parent was strong and the child was helpless, parental affection was showered on the child: when the child grows up and is strong, and the parent is helpless, can he do less than bestow similar tender care on the parent? (2) But more; he must approach the matter with gentle humility: for does not parental love, remind him of the great love with which Allah cherishes His creatures? There is something here more than simple human gratitude; it goes up into the highest spiritual region).

(2206. Note that we are asked to honour our father and mother, not "that thy days may be long upon the land which the Lord thy God giveth thee" (Exod. xx. 12), but upon much higher and more universal grounds, such as befit a perfected revelation. In the first place, not merely respect, but cherishing kindness, and humility to parents, are commanded. In the second place, this command is bracketed with the command to worship the One True God. Parental love should be to us a type of divine love: nothing that we can do can ever really compensate for that which we have received. In the third place (see next Verse) our spiritual advancement is tested by this: we cannot expect Allah's forgiveness if we are rude or unkind to those who unselfishly brought us up.)

Then we refer to Sura-e-Luqman Verses Nos. 14 and 15. The English translation reads as under:—

" 14. And We have enjoined on man (To be good) to his parents:

In travail upon travail Did his mother bear him.

And in years twain 3596 Was his weaning: (hear The command), "Show gratitude To Me and to thy parents:

To Me is thy final Goal.

15. "But if they strive 3597 To make thee join In worship with Me Things of which thou hast No knowledge, obey them not; Yet bear them company In this life with justice (And consideration), and follow The way of those who Turn to Me: 3598

In the End the return Of you all is to Me,

And I will tell you All that ye did. 3599

(3596. The set of milk teeth in a human child is completed at the age of two years, which is, therefore, the natural extreme limit for breastfeeding. In our artificial life the duration is muchless.)

(3597. Where the duty to man conflicts with the duty to Allah, it means that there is something wrong with the human will, and we should obey Allah rather than man. But even here, it does not mean that we should be arrogant or insolent. To parents and those in authority, we must be kind, considerate, and courteous, even where they command things which we should not do and, therefore, disobedience becomes our highest duty.)

(The worship of things other than Allah is the worship of false things, things which are alien to our true knowledge, things that go against our own pure nature as created by Allah.)

(3598. In any apparent conflict of duties our standard should be Allah's Will, as declared to us by His command. That is the way of those who love Allah; and their motive in disobedience to parents or human authority where disobedience is necessary by Allah's Law is not self-willed rebellion or defiance, but love of Allah, which means the true love of man in the highest sense of the word. And the reason we should give is: "Both you and I have to return to Allah; therefore, not only must I follow Allah's Will, but you must command' nothing against Allah's Will".)

(3599. These conflicts may appear to us strange and puzzling in this life. But in Allah's Presence we shall see their real meaning and significance.

It may be that that was one way in which our true mettle could be tested: for it is not easy to disobey and love man at the same time.

53. Now we proceed to refer to Ahadith. Imam Bokhari (R.H.) has dealt Ahadith under the heading that disobedience of the parents is a major sin and quoted following Ahadith, which are also included in the Sahi

Muslim:— There are number of other Ahadith, according to which, the children are bound to obey their parents. Imam Fakhr-ud-Din Razi explained the word' Ehsan appearing in Sura-e-Luqman as total obedience or to accept the orders of the parents willingly with heart and soul. The rule accepted is that whatever a person wants to do of his own volition he is bound to obey the parents in that behalf. Imam Ghazali (R.H.) besides has put another condition that basis or reasons for such order should not be mala fide

Now the question is whether such obedience could be enforced through Court. In this behalf, the well-known precedent narrated by Abdullah Bin Umar (R.Z.A.), that he was married to a woman whom he loved but Hazrat Umar (R.Z.A.), his father, did not like this woman and asked him to divorce but Abdullah (R.Z.A.), did not comply with the direction. Thereupon, Hazrat Umar (R.Z.A.), complained to the Holy Prophet (peace be upon him) about this. Thereupon the Prophet (peace be upon him) ordered Abdullah (R.Z.A.) to divorce that woman. It is amply clear from the above instance that the obedience of the parents could be enforced by the Courts.

54. The next question is that how it should be enforced in the present date.

We propose amendment in the schedule to the Muslim Family Courts Act, 1964 and in the meanwhile, parents may petition to the District Judge where they are putting up under Quetta Declaration to enforce their rights against the children.

55. We are conscious of the fact that some principles, rules of Sharia look harsh or offending to fundamental rights and other laws. The legal position is that as per section 3 of the Sharia Act, 1991 Sharia is the supreme law of the country. The difficulty is that although we profess Islam but do not practise. But once we accept the Islam from core of heart as ordained by the Almighty God in Sura-e-Al Baqra Verse No.208

Until we follow this golden rule prescribed by the Creator we would continue facing the superficial difficulties.

56. It is, therefore, held that Mst. Saima Waheed and Arshad were not validly married. However, it is observed that petitioner-Hafiz Abdul Waheed as well as Mst. Saima Waheed may approach the learned District Judge, Lahore in view of our findings recorded in earlier portion of this judgment.

57. It is made clear that the rule as to participation of Wali in the marriage would have no application to the marriages solemnised in past except those which are subject-matter of this and other connected petitions.

58. In this view of the matter, this Criminal Miscellaneous No.425-H of 1996 is allowed.

(Sd.) (Sd.)

Malik Muhammad Qayyum, Ihsan-ul-Haq Chaudhry,

Judge. Judge.

(Sd.)

Khalil-ur-Rehman Ramday, Judge.

MALIK MUHAMMAD QAYYUM, J.—I have had the privilege of going through the judgment proposed to be rendered by my learned brother Irsan-ul-Haq Chaudhry, J. Despite my high respect and regard for him, I am not in a position to subscribe to the opinion expressed by him on certain aspects in his judgment. To me the sole question which arises for determination is as to whether a Muslim adult girl can marry without consent of her Wali. While sharing the anxiety of my learned brother that Islamic norms of our society and the sanity which Islam attaches to a family must be protected and safeguarded, my answer to the above question has to be in the affirmative. True enough that runaway marriages are abhorrent and against the norms of our society and must, therefore, be deplored but I have despite my best efforts not been able to discover any principle on the basis of which it can be held that Nikah of sui juris Muslim girl without consent of her Wali would be invalid.

However, the nature of the marriage and the manner in which it has been performed may be relevant consideration for granting or withholding relief in a matter in which the Courts of law are called upon to exercise their discretion.

2. Though we had heard lengthy arguments of the learned counsel for the parties yet I agree with Mr. Khalid Ishaque, Advocate that it is not necessary for us to enter into detailed discussion on the subject as the Federal Shariat Court in the case of Muhammad Imtiaz and another v.

The State PLD 1981 FSC 308 after examining all aspects of the matter has ruled that in Islam, a Muslim adult girl can marry without the consent of her Wali. This judgment of the Federal Shariat Court is not only binding on us in view of Article 203-GG of the Constitution of Islamic Republic of Pakistan, 1973 but also commands great respect in view of the eminence of the learned Judges and Ulema forming Bench.

3. It has been argued on behalf of the petitioner that the aforesaid judgment was delivered in the exercise of appellate jurisdiction by the Federal Shariat Court and has, therefore, no binding effect. The distinction pointed out is specious. It matters little whether the judgment was delivered in the exercise of appellate or revisional jurisdiction as it would be anomalous to hold that one judgment of a Court is binding, another of its judgment can be ignored. It is idle to draw any such distinction.

4. Even otherwise Article 203-DD(3) of the Constitution envisaged conferment of any other power by law upon the Federal Shariat Court and as such it cannot be said that the appellate jurisdiction in the exercise of which the above-cited judgment was delivered by the Federal Shariat Court was outside the contemplation of Chapter 3-A of the Constitution. In view of the clear provision of Article 203-GG, the said judgment is binding on this Court.

5. Be that as it may, coming from a high Constitutional Court like Federal Shariat Court constituted for the specific purpose of dealing with the questions as to interpretation of Islamic principles, the judgment in any case is entitled to great respect. Therefore, respectfully following the judgment on the vital question, I am of the view that Nikah contracted without the consent of Wali by a sui juris Muslim girl would be valid.

(sd.)

MALIK MUHAMMAD QAYYUM,

JUDGE.

KHALIL-UR-REHMAN RAMDAY, J.—I have had the privilege of reading the elaborate, well considered and learned judgments proposed to be delivered by my learned brothers, Ihsan-ul-Haq Chaudhry and Malik Muhammad Qayyum, JJ. In Criminal Miscellaneous No.425/H-96, Criminal Miscellaneous No.435/H-96, W.P. No.6468/96, W.P. No.8288/96, W.P. No.8912/96, W.P. No.6063/96, W.P. No. 11513/96 and W.P. No.2620/96.

2. In view of the importance of the issues, involved in these petitions, I have considered it

appropriate to give my own views and my own decision thereon and the reasons therefor.

3. The facts and circumstances leading up to all these petitions have been noticed in some detail by my learned brother Ihsan-ul-Haq Chaudhry, J., and I do not wish to unnecessarily burden this judgment by repeating the same. Suffice it, however, to say that in all those cases, each young, unmarried girl had managed to establish contact with a man; this contact then developed into a secret liaison and this secret affair then allegedly culminated into a secret marriage; each girl disappeared from her parental home; apprehending worst of consequences, the family in each case commenced a frantic search for their daughter/sister to ultimately find out, after weeks in some cases and after months in others, that their dear- one had contracted an alleged marriage.

4. The one crucial question, amongst others, which is common in all these petitions is as to whether such a NIKAH marriage, surreptitiously contracted, by a male or a female of his or her own accord and otherwise than through a WALI (a guardian or an elder) was or was not valid in terms of the Injunctions of ISLAM?

5. Since the task before me is to identify the Commands of ALLAH and his PROPHET (S.A.W.) on the issues in question, therefore, I consider it imperative, at the very outset, to notice some of the basic principles ordained by ALLAH about His Injunctions and the light in which they have to be viewed and appreciated. The Muslims are called upon to:—

"Enter into Islam Whole heartedly;

And follow not The footsteps Of the Evil One;

For he is to you An avowed enemy".

SURAH 2.208.

We must also understand the purpose which had, inter alia, led the Creator to create us and which is:—

"Blessed be He In Whose hands In Dominion:

And He over all things Hath Power.

He Who created Death And Life, that He May try which of you Is best in deed."

SURAH 67.1 and 2.

ALLAH ALMIGHTY further declared that:—

"It is your Lord That knoweth best all beings That are in the heavens And on earth."

SURAH 17.55.

And that:—

"Should He not know,

He that created?"

SURAH 67.14.

We also need to know that ALLAH had condemned, in rather strong terms, the ones who used to accept only that part of His revelations which suited them and who used to reject the other part of the Divine Book which was not to their liking. One such Verse is reproduced hereunder for ready reference:—

"Then is it only a part of the Book That-ye believe in,

And do you reject the rest?

But what is the reward for those Among you who behave like this But disgrace in this life?

—

And on the Day of Judgment They shall be consigned To the most grievous penalty.

For Allah is not unmindful Of what ye do."

SURAH 2.85.

It has been further ordained by the ALMIGHTY ALLAH that we should not question the Commands of ALLAH when He has decided some issue and should willingly accept the same. The relevant Verse is as under:—

"It is not fitting

For a Believer, man or woman,

When a matter has been decided By Allah and His Apostle,

To have any option About their decision If anyone disobeys Allah And His Apostle, he is indeed On a clearly wrong Path."

SURAH 33.36.

It is thus obvious that the Muslims are called upon to accept ISLAM in its totality and not just to follow what tastes sweet to them and to discard what is not to their liking. It is also the belief of a Muslim that ALLAH is the Creator of all things and He knows his creations the best.

And finally that when a Command of the Creator is available with respect to a particular matter, then the believers must accept and follow the same.

6. In order to discover the essentials of a valid marriage, I propose first to examine the

status, social and legal, which ISLAM has conferred on females. The next aspect that I shall attend to would be the Code of Conduct prescribed by ALLAH and His PROPHET (S.A.W.) which the men and women are expected to abide by. This shall be followed by a discourse on how ALLAH and His PROPHET (S.A.W.) view the premarital and extra-marital relationships between a man and a woman. I shall thereafter try and identify the obligations of the children towards their parents and the place which the family occupies in terms of the HOLY QUR'AN and the SUNNAH of the HOLY PROPHET (S.A.W.) and then venture to determine the crucial question of the validity of a marriage without the intervention of a WALL.

7. To appreciate the status which ISLAM conferred on a woman, it would be of advantage to notice the place of a woman in the pre-Islamic societies and also her position in post-Islamic societies which did not follow ISLAM. The Greeks believed that the cause of all evil and all worldly calamities was the woman. PANDORA whose box is proverbial for being a collection of evil and mischief was a mythical woman amongst the Greeks. APHRODITUS, according to their mythology, had sexual relations with three gods and a MORTAL being and CUPID was the product of extra-marital sexual relationship between APHRODITUS and the said MORTAL being. Amongst the Greeks, a woman had no rights; was considered evil and was treated only as a source catering for satisfaction of sexual lust. Abuse of woman even amongst the Romans was rampant. She was never regarded as an independent respectable entity and her status stood degenerated to that of a child-bearing slave who was never considered equal to man in any respect. Encyclopedia Britannica, 1984 Edition, Vol.19, p.909. In ancient Israel, men had proprietary rights over women and the father could even sell his daughter into bond-service Encyclopedia of Religion and Ethics, Vol.5, p.724.

In civilized countries like England and America, a woman was hardly ever treated as an independent legal entity. By the rules of Common Law in England, the legal capacity of a wife got sunk in that of her husband; husband and wife were regarded as one person and a married woman was incapable of acquiring and enjoying, independently of her husband, any property, real or personal. The age of faith by Will Durrant, p.36 and Halsbury's Laws of England, Lord Simonds Ed. Vol.19, p.822. It was only through the Law of Propeny Act of 1925 that a married woman was recognized as an independent legal entity and was permitted to own and enjoy property independent of her husband. In the year 1935, another enactment called the Law Reforms Married Women and Tortfeasors Act was promulgated which made a married woman capable of entering into contracts as if she were a female sole. In America, a married woman had no legal existence apart from her husband till the 19th Century Conds of Women by Nancy F.Cott, p.5. Needless to mention here that all these rights which the West conceded to the women in the 19th and the 20th Century stood conferred, by ISLAM, on the females in the beginning of the 7th Century A.D. while I am on the subject, I also feel tempted to reproduce a quotation from the Old Testament which is as under:—

"The woman that you had given me, gave me this fruit and I ate it" and then God told Eve "I will increase your pain in labour; you shall deliver a child with pain; you shall be attracted towards your husband and he shall rule over you."

Old Testament-Birth-Chapter 3.

8. The Holy Qur'an also notices how girls were treated in the pre-Islamic societies and the relevant Verses are as under:—

"When news is brought To one of them, of the birth Of a female child, his face Darkens and he is filled With inward grief!

With shame does he hide Himself from his people, Because of the bad news He has had!

Shall he retain it with the Sufferance on contempt Or bury it in the dust?

What an evil choice They decide on!

SURAH 16.58 AND 59.

"When the female (infant),

Burried alive, is questioned—For what crime She was killed.

SURAH 81.8 AND 9.

9. This was then the contempt with which a female was treated in the pre-Islamic societies and also in the contemporary extra-Islamic societies of the world.

10. ISLAM hastened not only to recognize a female as an independent legal entity, vested with all legal rights but also refuted the false conceptions amongst the earlier societies that it was Eve (a woman) who had yielded to the false temptations offered by the serpentine and it was thus she who was responsible for the fall of man from heavens and all his consequent miseries. It may be mentioned here that the word 'Evil' coined by the English is derived from the word 'Eve'.

11. The Holy Qur'an declared, almost 1400 years ago, that it was not just the EVE but both the ADAM and the EVE who had got misled and lured by SATAN into eating the forbidden fruit, The relevant Verses are as under:—

"Then began Satan to whisper Suggestions to them, bringing Openly before their minds And their shame That was hidden from them Before he said 'Your Lord Only forbade you this tree,

Let ye should become angels Or such beings as live for ever'.

And he swore to them Both, that he was Their sincere adviser."

SURAH 7.20 AND 21.

"Then did Satan make them slip From the Garden, and get them out Of the state of felicity in which They had been. We said:

Get ye down, all ye people,

With enmity between yourselves.

On earth will be your dwelling-place And your means of livelihood For a time SURAH 2.36.

12. ISLAM thus contradicted and condemned the pre-Islamic contemptuous!

concepts about women and lifted her to a place of honour and respect. I

13. ALLAH declared in Surah 30.21 and to the same effect is ALLAH'S revelation through Surah 16.72 that He created mates for men from amongst themselves and thus declaring that all men and women were alike and that it was not a case where man had been made of a superior material than the woman. And from this it also follows that although a man and a woman may be different from each other in certain aspects but one was not better than or superior to the other. Surah 2.228 tells us that:

"Women shall have rights Similar to the rights Against them, according To what is equitable;

Only that men had a degree Of advantage over them In certain matters."

SURAH 2.228.

ALLAH informs the females that:

"Never will I suffer to be lost The work of any of you,

Be he male or female:

Ye are members, one of another:"

SURAH 3.195.

To the same effect are the Verses of Surahs 4. 124, 16.97 and Surah 40.40. How much and what a woman means to a man and what is her place in the heart of a man and how close according to the will of ALLAH she is to a man, is indicated by the following verses:—

"They are your garments And ye are their garments."

SURAH 2.187.

"O ye who believe!

Ye are forbidden to inherit Women against their will.

Nor should ye treat them With harshness, that ye may Take away part of the dower Ye have given them,-except Where they have been guilty Of open lewdness;

On the contrary live with them On a footing of kindness and equity.

If ye take a dislike to them It may be that ye dislike A thing, and Allah brings about Through it a great deal of good."

SURAH 4.19.

"It is He who created You from a single person,

And made his mate Of like nature, in order That he might dwell with her In love. When they are United, she bears a light Burden and carries it about Unnoticed. When she grows Heavy, they both pray To ALLAH their Lord, saying:

If thou givest us A goodly child,

We vow we shall Ever be grateful."

SURAH 7.189.

"And among His Signs

Is this, 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."

SURAH 30.21.

14. These declarations of ALLAH are further reflected and lucidated by the HOLY PROPHET (S.A.W.) through His following sayings:— (i) "And God has forbidden you to disobey your mothers and to bury alive your daughters."

BUKHARI SHARIF.

(ii) "Whoever has a daughter and he does not bury her alive and does not treat her with contempt and does not prefer his son over his daughter then ALLAH shall bless him with Heaven."

ABU DAUD.

(iii) "Whoever has daughters and brings them up well; these daughters shall save him from Hell."

MUSLIM SHARIF.

(iv) "Do not manhandle the females."

IBN-E-MAJA.

(v) "ABI HURAIRA a companion of the HOLY PORPHET (S.A.W.) and HAZARAT AISHA (R.A.) a wife of the HOLY PROPHET (S.A.W.) reported the HOLY PROPHET (S.A.W.) saying that the best amongst you is he who is best with the members of his family and also the best vis-a-vis his females."

(vi) "A woman is the ruler of her husband's house and is also answerable for her acts vis-a-vis this rule."

SAHI BUKHARI;

And one need not dwell much upon the oft quoted and well-known saying of the HOLY PROPHET (S.A.W.) through which he had declared that heavens lay under the feet of our mothers and one entitled most to a man's care and benevolence was his mother.

15. ISLAM also conferred on women, almost 1400 years ago, the right to hold and to enjoy property, independent of their husbands; their fathers and their brothers. One of the indispensable conditions of a Muslim marriage is payment of dower money which is either a specified amount of money or a specified item of property. This payment of dower by the husband to his wife at the time of marriage is, amongst other things, a recognition on the part of the husband, of the wife's right to acquire, hold and enjoy property. Needless also to mention here that ISLAM made a female a shareholder in the estate left behind by her father, mother, husband and children. One of the Verses on the subject is reproduced as under:

"From what is left by parents And those nearest related There is a share for men And a share for women,

Whether the property be small Or large,—a determinate share."

SURAH 4.7.

16. I conclude this aspect of the judgment by summarizing hereunder, the status conferred on the females by ISLAM—

- (i) woman was granted recognition as an independent, social and legal entity;
- (ii) woman was declared worthy of the same honour and respect to which a man was entitled;
- (iii) it was declared that it was not the woman alone who was responsible for the man's fall from heaven but it was both, the woman and the man T who had fallen a prey to the deceit of SATAN;
- (iv) woman was permitted the same social and legal status which was due to a man except in certain specified spheres which distinction had been created by ALLAH not to lower the prestige of a woman but for the smooth and proper running of the society, and finally that
- (v) woman had same rights to acquire, hold and enjoy property as a man possessed.

17. An impression, though incorrect, is, however, in currency in certain quarters that according to the Islamic set-up of society, men were the masters and women the slaves. Although the above-quoted Verses of the HOLY QUR'AN and the AHADITHS the sayings of the Holy Prophet (S.A.W.) are sufficient to dispel such an inference yet I consider it necessary to discuss this matter in some further detail. The relevant Verses quoted in this context are as under:—

"Men are the protectors And maintainers of women, Because Allah has given The one more strength Than the other, and because They support them From their means...."

SURAH 4.34.

And women shall have rights Similar to the rights Against them, according To what is equitable:

But men have a degree Of advantage over them.

And Allah is Exalted in Power, Wise." SURAH 2.228.

In the first-quoted Verse, ALLAH declares that He had given more strength to the men as compared to the females. Needless to mention here that only because one was physically stronger than the other did not mean that the one stronger had to be the ruler and the weaker in physical strength thus had to withdraw to the position of the ruled. A guard employed by an individual to protect and defend him does not become the master of his employer only because the guard happens to be superior in physical strength. We know that the basic unit of the society is the family and in a family a number of functions need to be performed. There has to be someone to defend and protect the members of the family from any threat to their safety or security. There also has to be someone in the family who would go out and arrange food by hunting birds and animals as in the olden days and by earning of livelihood as in modern terminology. The family also has the nature urged towards reproduction, thus the necessity to produce and then to bring up the new borns. Since it would not have been practically possible for the same individual to have undertaken all these assignments, therefore, in His ultimate wisdom, ALLAH ALMIGHTY distributed the performance of these functions between the PAIR. As the security and the protection of the family and doing the hunting and earning the livelihood for them required more physical strength, therefore, the Creator bestowed the strength on one member of the couple and granted the other the capacity to produce their like and to bring them up. The men have one kind of obligations to discharge while the females have certain other duties to perform. Thus, the man and the woman might well be different from each other in some ways but it would be fallacious to hold that this differentiation implied the superiority of one over the other. If men have certain qualities reserved only for them, then the females also have certain characteristics peculiar to them alone.

18. It is also common knowledge that a group or a team of individuals which has to exist and operate together, has to have a leader or a captain, otherwise anarchical consequences could follow. Never has the captain of a team or a leader of a group been considered the ruler. He might at best be the first amongst the equals. And I may add

here that never has it ever been mentioned by ALLAH that men were the rulers and the women were their servants or slaves. As has been mentioned above, it is just a matter of division of labour and I may also refer here to a saying of the HOLY PROPHET (S.A.W.) which is as under:-

"A women is the in-charge of the household and shall be questioned about the same."

SAHI BOKHARI. KITAB-UL-AMAARAH.

19. A reference is at times also made to the Commands of ALLAH where He, while granting share to a woman in the inheritance, decided that a woman shall get half of what a man gets. This is not because the man is twice a superior but because in His infinite wisdom ALLAH had charged the man with the responsibility of supporting and maintaining the family. This is so mentioned in SURAH 4.34 quoted above.

20. Curiosity and rebellion is inherent in every human being which is exemplified by the eating of the forbidden fruit. And it is also ingrained in the nature of the mortals that to him or her, grass on the other side of the fence always looks greener. Therefore, I am not surprised to find females craving to be left outdoors to become professionals and the men yearning for opportunities to be able to stay home. The above notice is, however, the DIVINE division of labour and it is our faith that Creator knows his creations the best (SURAH 67.14 (supra)) and it is also a part of our faith that once He has ordained a 2 matter then we must unquestioningly submit to His will (Surah 33.36 (supra)).

21. However, ALLAH has, for our benefit explained that some have edge over others in certain matters not only as between men and women but also between men and men so that the system could be made to work and that we could also be tested:

"Is it they who would portion out The Mercy of the Lord?

It is We Who portion out Between them their livelihood In the life of this world:

And We raise some of them Above others in ranks,

So that some may command Work from others:

But the Mercy of thy Lord Is better than the wealth Which they amass."

SURAH 43.32.

"It is He Who hath made You His agents, inheritors Of the earth: He hath raised You in ranks, some above Others: that He may try you In the gifts He hath given you:

For thy Lord is quick In punishment: yet He Is indeed Oft-Forgiving, Most Merciful."

SURAH 6.165.

22. Since this distribution of gifts and blessings was with a purpose, therefore, ALLAH commanded us not to cry and grumble over this DIVINE will. Reference is made to the

following Verse:—

"And in no wise covet Those things in which ALLAH Hath bestowed His gifts More freely On some of you. Than on others: to men Is allotted what they earn, And to Women what they earn: But ask Allah of His bounty: For ALLAH hath full Knowledge of all things."

SURAH 4.32.

23. It might be of consolation to us that this differentiation exists not only 'between men and women and men and men but was there even amongst the Prophets and Apostles. We know that one of them could ride the air; could understand the language of the birds and animals and had control over JINS while another had the gift of conversing directly with ALLAH and yet another was endowed with the power to cure the blind and to put life into the dead. The following Verses confirm the excellence which some Prophets had over the others:—

"Those apostles we endowed with gifts, Some above others: To one of them ALLAH Spoke; others He raised to degrees of Honour; to Jesus the son of Mary We gave Clear signs, and strengthened him with The Holy Spirit....."

SURAH 2.253.

"And it is your Lord that knoweth best all Beings that are in the heavens and on Earth: We did bestow on some Prophets more And other gifts than on others: and We gave To David the gift of the Psalms."

SURAH 17.55.

And yet We stand commanded to say that:—

".....We make no distinction between One and another of His messengers...."

SURAH 2.285.

Therefore, the conclusion is inevitable that this differentiation in certain matters, amongst various creations, as noticed above, is not intended to make some superior to the others or to make some the masters and others the servants.

24. Having this identified the status and the placement of the women in our society; their rights and obligations, I now proceed to the next question which requires attention i.e., how does ALLAH expect the females to conduct themselves indoors and outdoors and also vis-a-vis the men.

25. Amongst the basic urges inherent in every being, be it an animal or a human being, one of the strongest is the sex. The Creator knew that if the human beings were to be left unchecked and unguided in the matter of sex then the same would lead to disastrous results. The unfortunate and the unpleasant consequences faced today by the more permissive societies are unknown to none and thus need not be mentioned in any detail. It was for this reason that we find some emphasis in the HOLY QUR'AN and the AHADITHS

of the HOLY A PROPHET in the matter of unbridled interaction between the two sexes which A stand bestowed with physical attraction for each other. Thus, the command to all human beings to:—

"Guard the private parts."

SURAH 23.5.

and:.

"Nor come nigh to adultery:

For it is a shameful deed And an evil opening the road To other evils."

SURAH 17.32.

It may be appreciated that ALLAH did not just say that, "do not commit , adultery" but commanded that do not come near it. Therefore, what is forbidden is not just the commission of ZINA fornication but all gestures, every act. and every conduct which could ultimately lead to it. It could be noticed also from the verses which are being reproduced below that ALLAH forbade all FAWAHISH shameful and indecent deeds.

These Verses are as follows:—

".....come not Nigh to shameful deeds, Whether open or secret;

it

SURAH 6.151.

"Say: The things that my Lord Hath indeed forbidden are:

Shameful deeds, whether open Or secret;....."

SURAH 7.33.

He forbidsAll shameful deeds,....."

SURAH 16.90.

"Those who avoid the greater Crimes and shameful deeds, And, when they are angry Even then forgive;...." SURAH 42.37.

"Say: Nay, ALLAH never Commands what is shameful:

Do ye say of ALLAH What ye know not?"

SURAH 7.28.

Knowing that a contact between man and woman was liable to lead to undesirable, nay, horrifying results, ALLAH advised the women to stay indoors, as is apparent from the following Verse:—

"And stay quietly in Your houses, and make not A dazzling display, like That of the former Times Of Ignorance; and establish Regular Prayer and give Regular Charity; and obey ALLAH and His Apostle.

And ALLAH only wishes To remove all abomination From you, ye Members Of the Family, and to make You pure and spotless."

SURAH 33.33.

And further commanded that if at all the women are required go outdoors, then following rules were to be observed:—

"And say to the believing women That they should lower Their gaze and guard Their modesty; that they Should not display their Beauty and ornaments except What must ordinarily appear Thereof; that they should Draw their veils over Their bosoms and not display Their beauty except To their husband their fathers, Their husbands' fathers, their sons,

Their husbands' sons,

Their brothers or their brothers' sons,

Or their sisters' sons,

Or their women, or the slaves Whom their right hands Possess, or male servants Free of physical needs,

Or small children who Have no sense of the shame Of sex; and that they Should not strike their feet In order to draw attention To their hidden ornaments.

And O ye Believers!

Turn ye all together

Towards ALLAH, that ye May attain Bliss."

SURAH 24.31.

"O Prophet! tell

Thy wives and daughters,

And the believing women,

That they should cast Their outer garments over Their persons when abroad:

That is most convenient,

That they should be known As such and not molested:

And ALLAH is Oft-Forgiving,

Most Merciful."

SURAH 33.59.

The caution that ALLAH expects the females to exercise when they come into contact with men is further evident from the following Verses:—

"O Consorts of the Prophet! ye are Not like any of the other women: If Ye do fear ALLAH, be not too complainant Of speech, lest one in whose heart is a Disease should be moved with desire: but Speak ye a speech that is just."

SURAH 33.32.

when ye ask his ladies

For anything ye want, ask them from Behind a screen: that makes for greater Purity for your hearts and for theirs.

it

SURAH 33.53.

26. The intention of ALLAH and consequently of His PROPHET (S.A.W.) appears to be to eliminate all possibilities which could attract men to women and B women to men who were not married to each other. On one of the occasions B" HAZRAT IBN-E-UME-MAKTOOM (R.A.) who was a companion of the HOLY PROPHET (S.A.W.) and was totally blind came to the house of the HOLY PROPHET (S.A.W.) who asked his wife HAZRAT UME-SALMA (R.A.) to observe HIJAB (veil) to which HAZRAT UME-SALMA (R.A.) replied that the gentleman was totally blind and could not see her. The HOLY PROPHET (S.A.W,) remarked that the gentleman was blind but She was not

(SUNAIN ABI DAWOOD.) The HOLY PROPHET (S.A.W.) had also prohibited the females from using perfumes when going outdoors lest the fragrance attracted some men towards them (SUNAIN ABI DAWOOD) (KITAB-AL-RAJL).

27. Having thus examined the commands of ALLAH regulating the conduct of the females vis-a-vis their contact with men, the inference is obvious that ALLAH and His PROPHET (S.A.W.) abhor any liaison between men and women except between the legally-wedded spouses or between the ones in the C prohibited degree and of course the children and the ones who are too old. The C logical conclusion would obviously be that pre-marital and extra-marital liaisons between men and women stand prohibited and bannished in an Islamic set-up. Thus, any courtship or romantic affairs between a man and woman

other than between the ones married to each other, are not permitted in ISLAM. The Verses of the HOLY QUR'AN are also available which verify and sanctify this conclusion. They are as under:—

do not make a secret contact with

Them except in terms Honourable....."

SURAH 2.235.

"Also prohibited are women already married,

Except those whom your right hands possess.

Thus, hath ALLAH 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...."

SURAH 4.24.

".....Lawful unto you in marriage are not

Only chaste women who are believers, bu)

Chaste women among the People of the Book,

Revealed before your time,—When ye give Them their due dowers, and desire'

Chastity, not lewdness, nor Secret intrigues...."

SURAH 5.6.

28. It is thus clear that making secret love affairs and taking paramours is a Q

conduct condemned and prohibited by ALLAH. D

29. Some of us decry the restrictions envisaged by the above noticed regulations as a clog on one's basic rights. The exponents of this claim forget that no rights, anywhere, even in the most democratic of societies, are ever absolute. Look at any Constitution of any country of the world and one would find that every right guaranteed therein was subject to reasonable restrictions. American, is perhaps the only Constitution where fundamental rights are couched in unconditional terms but then the U.S. Supreme Court moved in to declare that even if it was not specifically so stated that the rights could be subjected to reasonable restrictions the State always had the right to impose reasonable conditions thereon. This is what came to be called the POLICE POWERS of the State. And then it was not an orthodox religious scholar of the East but a political philosopher of the West who said that the man -was only born free but was in chains everywhere.

30. We have before us the examples of those societies which could not maintain a proper balance between the extent of the individual's freedom and the limits to which the individual's rights extended. The result is legalisation of carnal intercourse against the order of nature; the so-called marriages between brothers and sisters; unmarried 'wives'; unmarried 'husbands'; unwed mothers and parentless children. If this is freedom then I am afraid this is only a freedom from all civilised norms of society and a freedom to take human beings back into the animal world. Sex, cohabitation and the instinct of procreation exist both, among animals and among the human beings. The civilization, the DIVINE BOOKS and His MESSANGERS transformed, for us, a mere animal cohabitation into an institution of marriage and raised a temporary carnal relationship to an honourable and durable union between men and women which also provided for a lasting bondage with the products of this union.

31. Some of us also clamour to break all shackles of morality and reasonableness on the pretext of following the more knowledgeable and the more progressive West. This, to my mind, is a false accusation on the people inhabiting that part of the globe. Not many years ago, a rather strong Presidential candidate in one of the countries of the West appeared to be found involved in an extra-marital relationship with a lady. Not only that the gentleman had to withdraw from the race but has in fact disappeared into oblivion eversince. Another gentleman from the same country who stood nominated for the Judgeship of a superior Court got accused of having, some times in the past, made passes on a female colleague. The gentleman was put through a humiliating, worldly televised, public test and was cleared to be a judge only after he had cleared himself of the charge as a result of a marathon and a deeply embarrassing bout. These are the values to which the West still holds steadfastly.

It is just that the common man in the streets of the West has got led astray which is definitely a source of great concern and anxiety amongst the leaders of those nations. I am tempted to quote some passages from two judgments of U.S. Supreme Court in verification of this fact. The first case is *Myra Bradwell v. State of Illinois* 83 U.S. 442:-

the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong or should belong to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career.....

The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases....."

The next case, and a more recent one, decided on 20-11-1961 is *Gwendolyn Hoyt v. Florida* 368 U.S. 57:-

".....Despite the enlightened emancipation of women from the restrictions and protections of bygone years, and their entry into many parts of community life formerly considered to be reserved to men, women is still regarded as the center of home and family life....."

32. This brings me to the consideration of the question of relationship between the children and their parents and the obligations, if any, arising therefrom. The relevant Verses of the HOLY QUR'AN are as under:-

"And remember We took a covenant from the children of Israel to this effect:

Worship none but ALLAH; Treat with Kindness your parents and kindred, and Orphans and those in need; Speak fair To the people; be steadfast in prayer;

And practise regular charity. Then did ye turn back, except a few among you, And ye backslid even now."

SURAH 2.83.

"They ask thee what they should spend In charity. Say: whatever ye spend That is good, is for parents and kindred And orphans and those in want and for Wayfarers. And whatever ye do that is Good,—ALLAH knoweth it well."

SURAH 2.215.

"Serve Allah, and join not any partners With Him: and do good—to parents, Kinsfolk, orphans, those in need, Neighbours who are near, neighbours Who are strangers, the companion by Your side, the wayfarer ye meet, and What your right hands possess. For ALLAH loveth not the arrogant,

The vain glorious—."

SURAH 4.36.

"Say: 'Come, I will rehearse what Allah hath really prohibited from you': Join not anything as equal with Him:

Be good to your parents....."

SURAH 6.151.

"Thy Lord hath decreed that ye worship none but Him, and that ye be kind to Parents. Whether one or both of them Attain old age in thy life, say not to Them a work of contempt, nor repel them, But address them in terms of honour.

And, out of kindness, lower to them the wing of humility, and say:

'My Lord: bestow on them thy Mercy Even as they cherished me in childhood!.

SURAHS 17.23 AND 24.

"We have enjoined on man kindness To parents....." SURAH 29.8.

"And We have enjoined on man to be Good to his parents: In travail upon Travail did his mother bear him,

And in years twain was his weaning:

Hear the command, show gratitude To Me and to thy parents: To Me Is thy final Goal'.

SURAH 31.14.

"We have enjoined on man kindness to his Parents: In pain did his mother bear him,

And in pain did she give him birth. The carrying of the child to his weaning is A period of thirty months. At length, when He reaches the age of full strength and Attains forty years, he says, O my Lord!

Grant me that I may be grateful for Thy Favour which Thou hast bestowed upon me And upon both my parents, and that I may Work Righteousness. Such as Thou Mayest approve; and be grievous to me in my issue.

Truly have I turned to Thee and truly Do I bow to Thee in Islam'."

SURAH 46.15.

"Then, when the son reached the age of Serious work with him, he said: 'O my Son! I see in vision that I offer thee in sacrifice: Now see what is Thy view!

The son said: 'O my father! do as thou Art commanded: Thou wilt find me, If Allah so wills, one practising patience And constancy'."

SURAH 37.102.

"O mankind! reverence your Guardian-Lord, Who created you from a single person,

Created, of like nature, His mate, and From them twain scattered like seeds Countless men and women;—Reverence Allah, through Whom ye demand your Mutual rights, and reverence the wombs That bore you: for Allah ever watches over you."

SURAH 4.1.

"O ye who believe! save yourselves and your families from a Fire...."

SURAH 66.6.

Having read these Verses what becomes obvious is that in addition to the will of ALLAH, a human being owes his creation and his existence to his parents. How can one not remember the pain and misery that his mother had suffered while conceiving him and

then carrying him in her womb for nine months; the discomfort that she had faced in delivering him and the suffering that she experienced in bringing him up in that part of his age when he could neither walk nor talk and when he could not even express or describe his wants? How can one become oblivious of how his father had toiled day in and day out; how his father had shed his blood and sweat and how he had remained unrested and unslept so that he could earn enough to cater for his child's needs and to make his child's life comfortable and secure? Should then this child, when he comes of age, discard these benefactors and either dump them in the old peoples' homes or throw them in the bin like one throws away the used and the useless articles. Thus, if ALLAH commands us to be kind and gentle to our parents then this command is not without a cause. In HAZRAT ISMAIL (A.A.), we find the right example of what a person owes to his parents and how a person should willingly submit to the wish of his parents even if it involved laying down of his life. Does it behove a person when he is grown-up, to say that since he or she had become SUI JURIS, therefore, she or he did not need to listen to his or her parents any more or even to consult them in any matter concerning him or her?

33. Needless to add here that one would notice from the above Verses that in the matter of obligations that ALLAH casts on individuals, one's obligations _ and one's gentle and kind conduct towards one's parents stands placed immediately after the command to worship ALLAH and none other than Him. This is then the divine indication of what importance ALLAH attaches to one's parents and to one's obligations towards them.

34. Besides SURAH 4.1 quoted above, SURAH 6.6 above-referred, is also an evidence of the importance that ALLAH attaches to a family system. This inference is further strengthened when we find that when ALLAH orders us to be gentle and kind to our parents, He also commands us to show similar kindness to the AQRABEEN (the ones near and around us). ALLAH emphasises strengthening of the family bondages because He knew that welfare of society lay in the protection and preservation of the family system. The lessons of the societies which did not and could not maintain this system and the consequent miseries that they suffered and are still suffering, are not far to find. It is not surprising that in the 1992 American Presidential Elections, one of the issues on which the campaign of both the candidates revolved was the steps that were required to be taken to restore the family system so that the fabric of their society could be reconstructed on correct lines.

35. Needless to mention here that inherent in the existence and the preservation of social groups, the family system and the society, is the basic requirement for each member of such groups, families and societies to be willing to surrender some of his rights and desires and if every such member, claiming to be SUI JURIS had to go his or her way without being prepared to sacrifice any of his pleasures or desires then the societies shall get blown off on account of disorder and anarchy.

36. The cardinal principle of enjoying one's rights is to exercise them in a manner that others did not get deprived of the opportunities of enjoying the rights vesting in them. One's rights and where the nose of another begins. And also that one is expected not to pursue one's pleasures in a manner that it causes disgrace, embarrassment and at times even injury and death of another. The parents sacrificed their rights and pleasures so that their children flourished. Should the children then insist on exercising their rights

and pursuing their pleasure in a manner which sinks the parents in shame, is a question not difficult to answer.

37. It is said that the commands of ALLAH such as the ones regulating one's conduct towards one's parents were only directory in nature and not mandatory because the HOLY QUR'AN did not envisage any corporeal penalties for the ones contravening them. The interpretation is appalling. Should one not pay ZAKAT religious tax or not keep fasts nor offer prayers or should one worship others besides ALLAH because not doing or doing all this did not entail corporeal punishment in this world? What an appreciation of DIVINITY and His messages? Even if it be presumed for the sake of discussion that the above noticed is just a pious wish of ALLAH, or a command neither mandatory nor culpable, then how many have we seen ignoring a wish of the ruler or violating his command only because the breach was not punishable? And here we are talking of a desire, even if it be just a desire, of the RULER of all rulers.

38. Having found that as per the Islamic Principles and Injunctions a woman was a social and legal entity independent of her father, husband, brothers and the like; that she had the same status as that of a man except in certain specified matters; that this edge which men had over women in certain matters did not make the men the rulers and the women their slaves; that no man whatever his capacity, had any proprietary rights over females and also having found that ALLAH and His PROPHET (S.A.W.) did not encourage women to leave their homes and to go outdoors and further that ALLAH and His PROPHET (S.A.W.) abhorred unchecked intermingling of the two sexes: and having thus assessed the parameters prescribed by ISLAM in this context, I now proceed to determine whether a marriage contracted by a female otherwise than through her WALI (guardian) was or was not valid in terms of the Islamic Commands.

39. Dr. Syed Riaz-ul-Hassan Gillani, Advocate and Malik Muhammad Nawaz, Advocate, who addressed the Court on behalf of the parents of the females who are parties to the marriages in question, submitted that a NIKAH marriage contracted by a maiden female even if she was an adult and sane, was invalid if this marriage had been contracted without the consent of her WALI (guardian). Reliance was placed on the AHADITHS allegedly emanating from the HOLY PROPHET (S.A.W.) which are as under:— The women who contracts marriage without the permission of her WALI, her NIKAH marriage is invalid, invalid, invalid. And if the husband has cohabited, then he shall have to pay dower money. If there is difference of opinion or if one has no WALI then the ruler is the WALL.

Reference had also been made by these learned Advocates to various other Works and Commentaries carrying the same view. Most of the authors of these authorities belong to SHAAFI and MALIKI Schools of Thought. The learned counsel also attempted to show that some Jurists, though the followers of IMAM ABU HANIFA also held the same view. An effort was also made to demonstrate that Muhammad Imtiaz's case decided by the Federal Shariat Court and reported as PLD 1981 FSC 308 proceeded on inaccurate authorities and was thus not a good law. The learned counsel had also placed reliance on certain judgments of the Supreme Court but I am not noticing the same because they were not specifically relevant to the question in issue.

40. Mr. Khalid Ishaq, Advocate, Dr. Abdul Basit, Advocate and Mrs. Asma Jehangir, Advocate who led the arguments in defence to the marriages contracted by the girls

without intervention and the consent of their WALIS, however, contended that the FIQAH being followed generally in sub-Continent and in Pakistan was HANFI FIQAH and that IMAM ABU HANIFA (R.A.) was of the considered opinion that the above-noticed AHADITH, relied upon by the other side were not sound and had not been followed by IMAM ABU HANIFA (R.A.). These learned Advocates also brought out books and Works in support of the view canvassed by them.

41. Having examined the literature produced by both the sides and also having considered the opinions of the AAIMMA (Leaders of different Schools of thought) I find that the AAIMMA are rather sharply divided on the issue in question. According to the SHAFI, MALIKI and the HUMBALI Schools, the marriage of an unmarried girl even though she was sane and adult, was invalid if she had entered into such a marriage without the consent of her WALI (guardian) but if cohabitation had ensued as a result of this marriage, then the man was required to pay proportionate dower money to the female and further that the man and the woman involved in this cohabitation were not liable to be punished for fornication.

42. According to IMAM ABU HANIFA (R.A.) and the SHIA Schools of thought, a maiden, if adult and sane, was competent to enter into a marriage and did not require the consent of a WALI for its validity. Some of the later HANIFIS (however) added that a marriage contracted without the consent of a WALI would be valid only if the man qualified as a KUFW of the female and also if the dower fixed in respect of this marriage was not inadequate. These Scholars and Jurists further opined that if these two conditions relating to KUFW and dower money did not stand satisfied then the WALI of the bride was entitled to approach the QAZI Court of Law and could demand annulment of the same. It may be mentioned here that KUFW is stated to mean, inter alia, that the man should come from a background similar to that of the woman and should have a status in the matters of education, wealth and family background which is similar to that of the female. To demonstrate the SHIA view, reliance is placed on MARRIAGE, ACCORDING TO FIVE SCHOOLS OF ISLAMIC FIQA PART-2 by Allama Muhammad Jawad Maghniyyah. The SHAAFI and the MALIKI view can be found, amongst others, in TRIMZI SHARIF SUNNAN ABU DAWOOD, SUNNAN IBN-E-MAAJA, ALMUSTRADRAK-ALASSAHIHAIN by Imam Abne-e-Abdullah Al-Hakim Naishapuri, NEEL-UL-AUTAR and SHARAH MUANI-AL-AUTAR.

43. Inter alia, FAT A AW A-ALMGIRI, FATAH-UL-BARI, TUHFAT-UL-AHWAZI SHARAH FATAH-UL-QADEER by Ibn-e- Humman and AL-BINAI FEIE SHARAH-AL-HIDAYA of Allama Aaine, are the Works carrying the above-noticed HANAFI view.

44. MUHAMMADAN LAW, RASSAIL-O-MASSAIL by Syed Abul-A'la Modoodi, FATAH-UL-BARI, A DICTIONARY OF ISLAM by Thomas Patric Hughes and the CODE OF MUSLIM PERSONAL LAW by Dr. Tanzil-ur-Rehman, notice the difference of opinions between the various Schools of thoughts as abovementioned.

45. SARAKHSI who belonged to SHAAFI School explains in his book AL-MABSOOT that the insistence of the SHAAFI view of the consent of WALI was based on the reason that the young girl intending to get married may not be able to take proper care of KUFW and adequacy of dower. Similar is the view of IMAM SHAH WALI ULLAH MOHADDIS DEHLVI expressed through his book HUJATUL- BALAGHA.

46. NEEL-UL-AUTAR makes a mention also of IMAM ABU-YOUSAF'S view according to which if a marriage without WALI was amongst the KUFW then it was valid otherwise, it was liable to be annulled at the instance of the WALI. Similar view also finds mention in Dr.

Tanzil-ur-Rehman's Code of Muslim Personal Law as also in MUAARIF-UL-QUR'AN by Maulana Mufti Muhammad Shafi.

47. Dr. Muhammad Rawass Qallaji of Dharaan University of Saudi Arabia has compiled the FIQAH of various CALIPHS (R.A.) In his book FIQAH HAZRAT UMER (R.A.), while he mentions that HAZRAT UMER (R.A.) was of the opinion that a marriage without WALI was invalid yet he quotes a case from HAZRAT UMER'S Court that in respect of a female who had contracted marriage without her WALI, the CALIPH had ordered that she be punished with 100 stripes. No indication is available as to whether the marriage contracted by this female had also been annulled by the CALIPH. The possibility thus could not be ruled out that the CALIPH punished the female for having entered into a marriage in a manner which was not proper and then permitted the marriage to continue. In FIQAH HAZRAT ALI (R.A.), we find at page 751 that HAZRAT ALI (R.A.) was also rather strict about females getting married without the consent of their WALIS. But two cases decided by CALIPH ALI (R.A.) are also quoted: one relating to a lady by the name of Salma from AIZ-ULLAH tribe where the marriage had been arranged not by a male guardian but by the mother of the girl and since the marriage had got consummated the CALIPH ALI (R.A.) did not annul the same. Then there was the case of a girl by the name of BEHRIAH who was the daughter of one HANI-BIN-QABISA and had on her own entered into marriage with QAQA-BIN-SHORE and on a complaint made by the father of the girl, the CALIPH ALI (R.A.) did not annul the marriage because cohabitation had taken place. About this Behriah's case there is also a tradition that her marriage had been arranged by her mother to which the father was not a party. This case is also reported by SARKHASI in KITAB-AL-MABSOOT.

48. Dr. Syed Riaz-ul-Hassan Gillani, Advocate made an effort to show that the above-referred Federal Shariat Court judgment was not binding on this F Court. In view of the provision of Article 203-GG of the Constitution, I cannot F accept this view.

49. The position which thus emerges is that:—

- (i) MALIKIS, SHAFES and HAMBALS find that the marriages of the type in question, without WALIS, are void;
- (ii) HANAFIS and SHIAS hold just the opposite view;
- (iii) according to the AHDITH mentioned at No.(ii) above, such a marriage is void but if cohabitation takes place then proportionate dower has to be paid and the two are not guilty of fornication. If marriage was void then why dower?
- (iv) then there are other Jurists and Scholars who declare that a marriage without a WALI is not void if contracted with a KUFW and with adequate dower money;
- (v) HAZRAT UMER (R.A.) only punished the girl but there is no evidence that he annulled the marriage;

- (vi) HAZRAT ALI (R.A.) also did not annul the marriage without a WALI where it had been consummated;
- (vii) the Federal Shariat Court does not consider such a marriage as void and finally that
- (viii) the authenticity of the AHADITH in question is in serious doubt.

50. There is thus a division amongst the AIMMAH, the Jurists and the Scholars of the UMMAH (the Muslim) on the issue in question as a result of jj which the veracity or soundness of the AHADITH in question becomes hazy and open to doubt.

51. But there are certain other matters relating to the controversy under adjudication which are open to no doubt and are incontrovertible i.e.

the revelations of ALLAH on the subject which stand quoted by me (supra). The position obtaining therefrom is as under:—

- (a) The females should ordinarily stay indoors;
- (b) if a woman needs to go outdoors then she must extend her veil over her I face; must cover her chest and should not indulge in any act which could attract men, and that,
- (c) if it becomes inevitable for her to talk to a man then she should not talk in a mild and a pliable tone and further that if someone needs to ask her for something then she should talk to the man from behind a screen or a veil.

52. Then there is the command of ALLAH:— (a) not to go near fornication or adultery;

- (b) not to indulge in FAWAAHISH (shameful, immoral and indecent deeds), and finally
- (c) the prohibition about pre-marital or extra-marital relationships and the secret courtships and secret marriages.

53. The detailed discussion supra, reveals also that children are ordained to obey their parents; to be kind to them; not to offend them by words or by deeds J and not even to say VUFF' (expression of displeasure) if the parents were to say J something which was not to their liking.

54. The Verses of the HOLY QUR'AN noticed in the earlier part of this judgment further demonstrate the recognition granted to the FAMILY SYSTEM K and the respect and importance which ALLAH and His PROPHET attach to it.

55. There is yet another aspect of this matter. Societies are known to be cautious and careful in the matter of admitting strangers to their fold.

The laws recognizing and consequently granting the right of pre-emption provide ample evidence of the existence of this norm amongst the human beings. If an outsider is ought to be introduced in a vicinity or a locality, the law of pre-emption confers a right on the

ones in the neighbourhood to decide whether they would or would not accept such a person in their midst. Needless to state that a family is a much more closely knit entity than a neighbourhood and the members of a family have far greater rights and claims on each other than the neighbours in a locality. If the neighbours have legal rights in the matter of outsiders entering their locality then how could it be said or maintained, legally, logically, socially or religiously that the members of a family would have no such right in the matter of strangers being brought into the household either in the form of a son-in-law or the form of a daughter-in-law?

56. This being so, let us now examine the marriages which are in dispute before us. Take the case of Ms. Saima. Her family had employed her alleged husband as a tutor to coach her brother and thus trusted him with access to their household. She came into contact with him. Says she developed a liking for him. The two then established a secret liaison and instead of approaching their respective families or parents to persuade them to accept the two in their respective families, they surreptitiously contracted a secret marriage. More than a month after this alleged marriage, Ms. Saima suddenly disappeared from the house to the horror of the family who ultimately found her parked in a destitute home.

57. Which part of this entire exercise is in consonance either with the abovementioned commands of ALLAH and his PROPHET (S.A.W.) or in conformity with the dictates of the established norms of our society? When we put this question Mr. Khalid Ishaq, Advocate, he frankly conceded that he did not approve of such a conduct either on the part of Ms. Saima or on the part of her husband.

58 This brings me to the conclusions that I draw from all that has been discussed by me above and the same are as follows:—

(a) invalidating a marriage entails rather serious and even penal consequences not only for the wife and the husband but even for the innocent children born out of such a union. Such a declaration could, therefore, not be given unless material was available which was of an unimpeachable character admitting of no doubt. The authenticity of the L AHADITH relied upon for the purpose is not incontrovertible. L Therefore, it could not be said that the marriages in question were invalid and I hold accordingly;

(b) the consent of the man and the woman who are getting married is an indispensable condition for the validity of a marriage and a WALI has no right to grant such a consent on behalf of the woman without her approval;

(c) ISLAM abhors establishment of liaison between men and women and courtships, pre-marital relationship, secret friendships and secret N marriages are forbidden in ISLAM; N

(d) the parents and the family have a definite importance and place in the social set-up ordained by ALLAH. Although, it is not possible for me q to hold that the parents or the family could have a right to force q someone to marry a particular individual yet they have a right to be consulted and their wishes were entitled to respect;

(e) the concept of a young girl or a boy for that matter, venturing out in search of a spouse is alien to the teachings of ISLAM' and even p otherwise this scheme of HUSBAND-

SHOPPING which obviously P involves testing and trial of the desired material is fraught and pregnant with dangers and cannot be viewed with favour;

(f) instances are not unknown where certain person or class of persons, for certain acceptable reasons, do not go out shopping. They notify their requirements and preference to their agents who look for the required items; report back about whatever is available in the required category and the concerned person then makes the final choice of whatever appears attractive to him from the available lot. In the light of Q ISLAMIC INJUNCTIONS and the established social and moral norms Q of our society, this appears to be the ideal scheme for choosing marriage partners. Let the elders of the family—males or females do the search and even research and then let whatever is available be put before the boy or the girl, as the case may be, who should then have the final choice in the matter. This procedure would also be in consonance with respect and dignity of all concerned and would even eliminate crime which erupts where marriages are contracted in a manner which injures honour and pride;

(g) discretionary relief in equity is available only to those who approach a Court of Law with clean hands. Persons having acted in a manner not honourable or having acted in breach of the established social and moral norms of the society, disentitle themselves to any relief in equity. As R has been mentioned above, the persons who are parties to the kind of R marriages which are in question, are ones who have contravened the wishes of ALLAH; who have offended their parents and families and who have violated the established values of the society. It is, therefore, declared that such-like persons are not worthy of any relief in equity; (h) There may be cases where the parents or the elders or the family have either failed to discharge their obligations in the matter of looking for marriage partners for their children or are intentionally avoiding it for g ulterior motives. In such a case, any such child shall have a right to g approach the competent Court complaining of this inaction on the part of his/her parents etc. and if the Court finds that the elders etc. are in default, then the Court shall grant a certificate to that effect whereafter no blame shall lie on such a person he or she gets married, of his or her own accord;

(i) authority is also available in ISLAM that in case of a dispute between the WALI and the child, in the matter of the choice of a spouse, the QAZI Court of Law can be approached who shall then resolve the issue -j-It will, therefore, be open to a person, if his or her parents do not j accept the choice made by him or her having acted not in breach of social or religious values, to approach a Court of Law for the settlement of this dispute;

(j) the menace of SHIGHAAR (giving a girl in marriage to someone and taking a girl in return) and the menace of giving daughters and sisters etc. in marriage for money, are rampant in certain sections of our society. ALLAH condemns such-like practices. Any girl who is being U forced into such a marriage shall also have right to approach a Court of Law to seek protection and if the Court finds that the girl is being bartered away, then the Court shall pass necessary orders including an order absolving the girl from her obligations towards such-like parents and elders etc.;

(k) it has been held by me above that parents or the family are not absolute aliens to the institution of marriage. In one of the cases before us, the girl had allegedly eloped with a Christian driver. The situation though could be reverse also in so far as it relates to the

matter of faith etc.

There are thus cases where the boy or the girl act on sheer momentary impulses which decisions are patently not in their interest and which are also a cause for shame and disgrace to the whole family. In such a situation, the aggrieved person shall have a right to initiate proceedings in the competent Court seeking annulment of such a marriage. The Court shall then have the power to annul a marriage if after hearing all concerned; after taking into account the wishes of the family and after considering all the attending facts and circumstances, in the exercise of its parental jurisdiction, it finds that it shall be in the interest of all concerned if the marriage in question was not permitted to continue.

The aggrieved person, for the purposes of these proceedings, shall mean the parents; in their absence, the brothers and in their absence, any one falling within the prohibited degree of the concerned girl as prescribed by ISLAM. In providing this remedy, I am moved and fortified by the fact that law permits rescission of contracts which are against law, against morality and against public policy etc.; and by the fact that the marriage of HAZRAT ZAINAB (R.A.) who was a cousin of HOLY PROPHET MUHAMMAD (S.A.W.) and had been married off to HAZRAT ZAID (R.A.) who had been a slave, had been dissolved at the instance of HAZRAT ZAINAB (R.A.) on account of incompatibility of the parties, and finally by the fact that it will eliminate cases where aggrieved persons, finding no remedy, resort to extreme measures by taking law into their hands.

59. Premarital and extra-marital liaisons, courtships, secret friendships and secret marriages are not only offensive to the Commands of ALLAH but are also one major source of serious crime in our society. I would, therefore, recommend 2 that the Executive and the Legislature examine the desirability of enacting laws 2 to take care of this menace and to provide remedies as mentioned by me in para. 58 above. I would further recommend that the Legislature also consider the advisability of making such-like immoral relationships and secret marriages etc.a penal offence.

60. Till such time that the Legislature moves in the matter, the remedies that have been made available, in the larger public interest of the society in terms of para. 58 above, shall lie before the Family Courts of the concerned areas and the decision and the orders etc. passed in these proceedings or as a result of the same shall be subject to appeals etc. as if they were orders and judgments etc. passed by the Family Court in exercise of the jurisdiction conferred on them under the West Pakistan Family Courts Act of 1964.

61. Since I have held that the marriage between Ms. Saima Waheed and Arshad Ahmad cannot be declared to be invalid and since Ms. Saima Waheed had started residing in 'DASTAK' of her own free will, therefore, she could not be said to be in illegal custody at the said 'DASTAK'.

She is, therefore, declared to be at liberty to reside wherever she pleases.

62. Criminal Miscellaneous No.425/H-96 filed by Hafiz Abdul Waheed is disposed of in these terms.

63. Since I have declared that Ms. Saima Waheed is at liberty to stay wherever she pleases, Criminal Miscellaneous No.435/H-96 and W.P.

No.6468/96 filed by her seeking the said relief have become infructuous and are disposed of accordingly.

64. Having decided the issue in question, all other matters shall be placed before a learned Single Bench for disposal in accordance with law.

65. Before parting with this judgment, I would like to bring on record my deep appreciation of the valuable assistance rendered to us by all the learned counsel representing various parties before us, especially Mr. Khalid Ishaq, Advocate, Dr. Syed Riaz-ul-Hassan Gillani, Advocate, Ms.

Asma Jahangir, Advocate, Malik Muhammad Nawaz, Advocate and Dr. A. Basit, Advocate.

(Sd.)

(Khalil-ur-Rehman Ramday), Judge.

ORDER OF THE COURT

For reasons stated in our respective judgments it is held and declared as per majority (Malik Muhammad Qayyum and Khalil-ur-Rehman Ramday, JJ.) that the marriage in question contracted without the consent of the Wali is not invalid.

In this view of the matter, Criminal Miscellaneous No.425-H/96 is dismissed while Criminal Miscellaneous No.435-H/96 and Writ Petition No.6468/96 are disposed of as having become infructuous.

All the other matters shall be placed before a learned Single Judge of this Court for decision in accordance with law.

(Sd.) (Sd.)

Malik Muhammad Qayyum, Ihsan-ul-Haq Chaudhry,

Judge. Judge.

(Sd.)

Khalil-ur-Rehman Ramday,

Judge.

