

Women living under muslim laws  
النساء في ظل قوانين المسلمين  
Femmes sous lois musulmanes

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### **Arranged Marriages: Law, Custom, and the Muslim Girl in the U.K.**

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The custom of arranged marriages is generally endorsed by South Asian communities of all religious affiliations. The system may have some advantages if due regard is given to the wishes and preferences of the intended spouses, and if dowry considerations do not turn the exercise into a commercial transaction — both very big “ifs.” It is the ugly side of arranged marriages that has made headlines in the British and American press several times in recent years. The male members of families of (e.g.) Pakistani extraction, concerned about a daughter’s mixing with male students in a co-educational institution, or about rumors that a daughter or a sister or a niece has a “boy friend,” solve the problem and preserve family “honor” by packing the girl off to Pakistan to be married, usually against her will and to a total stranger.

An illustrative example is found in the circumstances leading to a 1992 decision of the Court of Session in Edinburgh annulling a marriage purportedly solemnized in Pakistan nearly a decade previously.<sup>1</sup> Although of Pakistani ethnic origin, the girl (Glaswegian Nasreen Rafiq) was a British citizen and Scottish domiciliary; prior to 1983, she had not been to Pakistan since she was six months old. In 1983 she was taken to Pakistan, ostensibly for a visit, by her father; until the very last minute the fourteen year old girl did not realize that the wedding preparations she witnessed at the house of her relatives in Pakistan were intended for her own marriage to her cousin. She objected to the marriage; during the ceremony itself she vigorously refused her consent. Nevertheless, she was “married” to her cousin and left in what was to her a foreign country whose language she did not speak, without friends or funds, totally dependent on her “husband” and his relatives (who, although related to her, were strangers to her).

Some years later her “husband” obtained a visa and the couple relocated in Scotland. Although children had been born in the interval, the “marriage” was unhappy and the “wife” was determined to do something. She sued in the Scottish court for a decree of nullity on the ground that she, being a Scottish domiciliary and at the time of the marriage subject to Scottish law, could not validly marry below the age of sixteen. She apparently chose this course, rather than suing for divorce, in order to avoid the stigma attached to being a divorcee in her community. When a marriage ends in divorce, it is routinely assumed that the woman was at fault; she somehow failed in her wifely duties and responsibilities. Nasreen Rafiq saw herself as victim rather than culprit, and insisted on an annulment rather than a divorce. Her petition succeeded.

The case created resentment and misunderstanding in the Pakistani community in Britain and Nasreen Rafiq was subjected to insult and abuse.

When she appeared on an English television program in June 1991,<sup>2</sup> she described the ceremony that allegedly constituted the “marriage” performed in Pakistan. According to her narrative, three

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<sup>1</sup> *Daily Telegraph*, 2 Oct. 1992. *The Scotsman*, 2 Oct. 1992.

<sup>2</sup> “On the Other Hand,” Channel 4, 15 June 1991.

times she had been asked if she consented to the marriage, and three times she had answered replied in the negative.

South Asian Muslim law on the point is unambiguous: there is no marriage without the consent of the adult (post-pubescent) bride. Nasreen Rafiq had clearly expressed her rejection of the match and, as she was major under Muslim law, her father's consent could not be substituted for her own. Consequently, there was, under Muslim law and under Pakistani law, no valid marriage. The relief which she claimed from the Scottish court was no less than that to which she was entitled under Muslim and Pakistani law.

In spite of those members of the British-Pakistani community who persisted in seeing it as such, the case of Nasreen Rafiq was not one involving a juxtaposition of "western" law and Muslim or Pakistani law; it was a case involving a "custom" which, as acted upon in the present circumstances, is as violative of Muslim law and Pakistani law as it is of Scottish law or English law, although for different reasons: the marriage is void in (Hanafi and Shia) Muslim law because the post-pubescent bride did not consent; it is void in English or Scottish law because the girl was under sixteen years of age.

Unfortunately, the lawyer representing Nasreen chose to base her claim on the provision of Scottish law voiding the marriage of a girl below the age of sixteen years. This argument falsely highlighted a supposed conflict between "western" and Muslim law, and led to criticism of the young woman who had apparently turned her back on her own community and religion.

Another basis for a decree of nullity is that the marriage in question "is void by the law of the place of its celebration." Had Nasreen's case been argued on this ground, it would have been apparent that she was claiming her rights as a Muslim woman, purportedly "married" in Muslim rites in Pakistan; she was not claiming rights incompatible with that status. Also, had Nasreen's case been argued on this basis, the conclusion would have been equally applicable to Pakistani girls and young women taken back to that country for marriage whether or not they could prove that they were under sixteen years of age at the time of the marriage, and whether or not they could prove that they were domiciled in the British Isles at the time of the marriage.

And, had Nasreen's case been argued on the basis of the Muslim law of Pakistan (and the consequent invalidity in English/Scottish law of a purported marriage, allegedly solemnized in Pakistan but void under Pakistani law), the public discussion of the case would have been much more informed and of considerable educative value, both for young women liable to be married off in such a manner and their families and community.

It is tragic that Nasreen had to wait a decade and lose her youth before she could obtain the relief to which she was entitled. Many girls taken back to South Asia for purpose of marriage do not get back to the United Kingdom. The courts of the U.K. can only protect those girls who do return. In the intervening years (often spent waiting for the husband to obtain a visa), the wife will probably have born children (as indeed Nasreen had) — a fact which often leads them to accept as their destiny what a cruel fate has decreed. Nasreen Rafiq apparently thought that she had no remedy in Pakistan. In legal terms she was wrong. In practical terms, however, it is too much to expect a young girl raised in England or Scotland, who suddenly finds herself in a land totally foreign to her, to be able to ascertain and vindicate single-handedly her legal rights under laws foreign to her understanding. If a girl in that situation has at least some idea of what her rights are under Pakistani law, she is at least two steps along the road. Knowledge is power, and Muslim women's ignorance of their rights contributes to their victimization.

### **Post-pubescent bride: consent essential to validity of marriage**

In classical Hanafi and Shia law,<sup>3</sup> a girl who has attained majority (a) is free to contract marriage

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<sup>3</sup> The Muslims of South Asia are overwhelmingly Hanafi, with a significant Shia minority. The Shafi school is also represented in the subcontinent. Although classical Shafi law denies the right of a

without the consent of her father or any other relative; and (b) cannot be contracted in marriage by her father or any other relative without her consent expressed at the time of the contract is entered into.<sup>4</sup>

Majority in this context is defined by reference to physiological phenomena rather than by reference to chronological age: adulthood is signified by the advent of physical puberty. If the point is undisputed, there is an assumption that majority has been attained by the conclusion of the fifteenth year; if the point is disputed, the evidence of the woman and her female relatives is virtually conclusive.

The Majority Act, 1875, applicable in South Asia (including Pakistan), sets the age of eighteen as the age of majority for most purposes. However, this statute does not apply to majority for the purposes of marriage,<sup>5</sup> which continues to be determined by reference to the personal law (Muslim law if the parties are Muslims).

The Child Marriage Restraint Act, 1929, prescribes criminal penalties for the party who marries a "child" and for those involved in arranging or solemnizing a "child marriage." For the purpose of this statute, as presently applicable in Pakistan, a female under the age of sixteen years is a "child."<sup>6</sup> This statute, however, has no effect on the validity of the marriage. While the question of whether a marriage is a "child marriage" inviting criminal sanctions is determined by reference to the Child Marriage Restraint Act, the question of whether the marriage itself is valid is determined, in the case of Muslims, by reference to the uncodified Muslim law.

The classical Muslim (Hanafi and Shia) law on the point may be found in the following passage from the *Hedaya*:

A woman who is an adult, and of sound mind, may be married by virtue of her own consent, although the contract may not have been made or acceded to by her guardians... It is not lawful for a guardian to force into marriage an adult virgin against her consent.<sup>7</sup>

If the girl is an adult by Muslim law — i.e., if the girl has attained puberty — her consent is essential to the validity of any marriage contracted on her behalf; she cannot be contracted into marriage against her will and without her consent. Further, she may validly marry without the consent of her father or guardian.

The former point may be illustrated by a 1940 Peshawar case which concerned the validity of a marriage of a girl aged seventeen years contracted on her behalf by her paternal grandfather. The

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virgin, even though a major, to marry without the consent of her father, and allows a father to compel his virgin daughter, even though major, into marriage against her will, Shafi law as applicable on the subcontinent has been reinterpreted by the South Asian courts in such a way as to bring it in line with the law of the Hanafi and Shia schools. See Lucy Carroll, "Marriage Guardianship and Minor's Marriage in Islamic Law," *Islamic & Comparative Law Quarterly*, 7(1987): 279-299.

<sup>4</sup> Marriage in Muslim law is essentially a contract, concluded by offer and acceptance given at the same meeting; in Sunni law the formation of the contract must take place in the presence of witnesses. Neither agreement to a proposed marriage given in advance of the ceremony, nor acquiescence in a purported marriage after the ceremony can compensate for lack of consent at the ceremony itself. Without the exchange of mutual consents in the manner prescribed by law, there is no contract, no marriage.

<sup>5</sup> Section 2 of the Majority Act reads: — "Nothing herein contained shall affect the capacity to act in the following matters, namely, marriage, dower, divorce, and adoption."

<sup>6</sup> In Indian and Bangladesh, a female child is defined by the statute as below the age of eighteen years.

<sup>7</sup> al-Mirghinani, *Hedaya*. Trans. by C. Hamilton; Grady edn., p. 34.

girl denied that she had married the man claiming her as his wife. The girl's grandfather<sup>8</sup> apparently believed that he was entitled to contract her in marriage without reference to her wishes and without her specific authority as long as she was below the age of majority as defined in the Majority Act (eighteen years). As the girl was seventeen and had attained puberty, she was a major under the law that governed her marriage and could not be married without her consent.

Although there is no legal impediment in Hanafi or Shia law precluding the bride from personally conveying her own consent to the contract of marriage to the groom in the presence of the witnesses and guests, such behavior would be considered immodest in the context of the practice of purdah and the mores of the community. Customarily the bride remains segregated with the other women and does not personally participate in the actual offer and acceptance of the contract. The form which her consent takes is the authorization of someone else (usually a male relative) to act on her behalf and to convey her consent publicly before the witnesses to the contract. The fact that the person (termed wali or wakil) acting on the bride's behalf has been properly authorized so to act is established by witnesses to the delegation of such authority to him by the bride in the course of the actual ceremony. The Peshawar judgement cited above contains a useful summary of the marriage ceremony when the bride is adult (post-pubescent):

According to Mahomedan law, it is absolutely necessary that the man or someone on his behalf and the woman or someone on her behalf should agree to the marriage at one meeting, and the agreement should be witnessed by two adult witnesses. As women are in purdah in this part of the country[,] it is customary to send a relation of the woman to her inside the house accompanied by two witnesses. The relation asks the girl within the hearing of the witnesses whether she authorizes him to agree to the marriage on her behalf for the dower money offered by the husband. He explains to her the detail[s] of the dower proposed. When the girl says "yes" or signifies her consent by some other method, the three persons come out.

The future husband and those three persons are then placed before the Mullah. The Mullah asks the boy whether he offers to marry the girl on payment of the specified dower. He says "yes." Then the relation, who had gone inside, tells the Mullah that he is the agent of the girl. The Mullah asks him whether he agrees to the marriage on payment of the specified dower. The relation says "yes." The witnesses [who accompanied the girl's wali when he obtained her consent] are present there so that if the Mullah has any doubt he should question them as to whether the relation is duly authorized agent of the girl. Directly both sides have said "yes" the Mullah reads the scriptures and the marriage is complete.<sup>9</sup>

In the Peshawar case there were witnesses to the actual exchange of offer and acceptance of the contract by the bridegroom and the bride's grandfather, but there was no proof that the person acting on behalf of the bride had her permission to do so. The girl denied having authorized her grandfather to contract the marriage by conveying her consent to the mullah and the bridegroom; the mullah who officiated "categorically denied that anyone was sent to the girl to enquire from her whether she agreed to the marriage." The Court held that no valid marriage had taken place.

From the description of events related by Nasreen Rafiq in her televised interview, it is clear that she was being married as an adult (i.e, as a woman who had attained puberty); had she been married as a minor (i.e., a pre-pubescent girl), the question of her consent would not have arisen at all, for the consent of the father (or, in his absence, the paternal grandfather) binds his minor ward in marriage.<sup>10</sup> In the course of the marriage ceremony Nasreen's father came to where she

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<sup>8</sup> *Mst. Ghulam Kubra Bibi v. Mohammad Shafi Mohammad Din*, AIR 1940 Peshawar 2; Mir Ahmad, J.

<sup>9</sup> *Ibid.*, p. 3. See also *Mt. Bibi Ahmad-un-Nisa Begum v. Ali Akbar Shah*, AIR 1942 Peshawar 19.

<sup>10</sup> Subject to the right of the child to repudiate the marriage on attaining majority (puberty). This traditional right is available on expanded terms in South Asia; see section 2(vii) of the Dissolution of Muslim Marriages Act, 1939. See also Lucy Carroll, "Muslim Family Law in South Asia: The Right to Avoid an Arranged Marriage Contracted During Minority," *Journal of the Indian Law Institute*, 23(1981):149-180. Since Nasreen was below sixteen (the lower age in the option clause of the

was with the women and formally asked for her consent to the marriage no less than three times. She asserted that she emphatically refused her consent each time. Although her father went ahead with the marriage ceremony, there was, according to both Muslim law and Pakistani law, no marriage at all.

Consent on the part of a woman may be implied if she is a virgin. A shy and modest virgin, when asked whether she consents to the marriage, is not expected to answer directly. Averting her eyes, covering her face, smiling, or indeed even weeping quietly<sup>11</sup> may be taken as tokens of consent. That is, the virgin bride does not have to affirm her consent verbally; consent is assumed in the absence of her verbal rejection of the marriage. But rejection clearly expressed at the appropriate point in the proceedings is conclusive: there is no marriage without the consent of the adult (post-pubescent) bride.

This proposition covers Nasreen Rafiq's situation: she clearly indicated her lack of consent to the match and, as she was major under Muslim law, her father's consent could not take the place of her own consent, which was essential for the validity of any marriage to which she allegedly was a party.

### **Concluding remarks**

Since the ceremony in Pakistan as described by Nasreen Rafiq did not amount to a valid solemnization of marriage under Pakistani law, she was entitled to a nullity decree in the United Kingdom on the ground that the alleged marriage was no marriage at all according to the law of the place where it had purportedly been solemnized, just as she was entitled to a judicial declaration from the Pakistani court affirming her status as an unmarried woman. It is unfortunate that this was not the line taken by her lawyers, and that instead of a reaffirmation of rights conferred upon women by Muslim law (including the right of the adult woman to refuse to consent to a marriage proposed or arranged by her parent or guardian), the case was presented as a clash between Muslim law and "western" law, initiated by a "liberated," "westernized" woman who had forsaken her community and religion.

It is unnecessary to remark that it is not easy for a girl to stand up to family pressure and reject a marriage that is being, in effect, forced upon her. Difficult as the position may be for a girl being married in the United Kingdom, it is far more difficult when the English or Scottish or American girl finds herself in Pakistan on the eve of a marriage suddenly sprung upon her. But, as Nasreen Rafiq has shown, some young women have the character and the courage to take such a step and to claim for themselves rights to which they are entitled in Muslim law and Pakistani law, no less than in British law.

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Dissolution of Muslim Marriages Act as applicable in Pakistan) at the time of her marriage, even if she had consented to the marriage, she could have had recourse to this provision had she acted before she attained the age of eighteen, and had she been able to avoid or resist coition after she reached the age of sixteen. Note, however, that consummation (at any age and for whatever period) cannot validate a marriage void *ab initio* for non-consent of the adult bride.

<sup>11</sup> Weeping "accompanied by noise and lamentation" does not imply consent. (*Hedaya* [Grady edn.], p. 35.)