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## **Walayah (Guardianship): The Authority Over A Woman's Choice in Marriage and How This Reflects A Desire To Control and Kafa'a (Equality): A Barrier To A Woman's Marriage Choice?**

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### **Abstract**

*This article explores the adult woman's consent as a paramount element in contracting a Muslim marriage. It considers whether permission of the wali (male guardian) is a condition, per se, for a valid marriage in the eyes of the law and of Sharia. In order to address the issue in hand, it provides a brief overview of contemporary writers' opinions, in which the appropriate place of a woman's consent in Muslim marriage is highlighted. Key to the idea of a young Muslim woman's marriage, the doctrine of kafā'a (equality or suitability), the match between the man and woman, and its grounding in patriarchal and social norms is also discussed. The main conclusion of this paper is that both concepts are used in a bid to keep the upper hand in the marriage. Also, on the one hand, the marriage guardianship is a desire of controlling position of the man and on the other, kafā'a limits the woman's choice in choosing a life partner.*

**[Keywords]:** Equality, Guardianship, Constraint, Capacity, Consent, Coercion

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## THE MARRIAGE OF A SUI JURIS GIRL: PERMISSION OF A WALI OR CONSENT OF A WARD

According to Muslim jurists, *al-wilayah* or guardianship is the authority to decide, independent of approval from others (Zuhaili, (2001, p.76). That said, it is a legal authority to manage the affairs of another person who lacks the required capacity (Masud, 2010, p.6). Muslim jurists have divided guardianship into two categories, namely: the general guardian who has a general authority of guardianship, such as a ruler or head of a state, and the specific guardian, who is someone with specific authority over daughters, sons or relatives, based on lineage or on blood relationship, from the the male line (patrilineality) (Ibrahim, and Abdul Razak, 2015, p.77). Among this group is the marriage guardian. "[I]n case of marriage, *wali* is [a man] who has been granted an authority to consent to marriage on behalf of someone" (Rafiq, 2015, p.1255). Thus guardians are the men (excluding women) who have been granted a position of authority by the Sharia over others to safeguard their interests and look after their rights.

This article attempts to provide a broad overview of the personal consent of a woman in her marriage and of marital guardianship or the role of the guardian of marriage in Muslim marriage arrangements. The guardianship in this respect means “[a] legal authority vested in a person who is fully competent to safeguard the interests and rights of another person who is incapable of doing so independently”(Rafiq, 2015, p.1255). However, in practice his/her interest is sometimes ignored.

In classical Islamic Fiqh, among other authorities, the guardian’s power in Muslim marriage is inferred from the Qur'an and Sunna, “[t]herefore you may marry them with the permission of their *awliya* (guardians) and give them their dower so that they may live a decent life in wedlock”, the Qur'an 4:25). and the very popular *ahadith* (sayings of the Prophet), for example; “[a]ny woman who is married (or enters into marriage herself) without the permission of her *wali*, her marriage is void, void, void... If they are in dispute, the ruler is *wali* for those who have no *wali*” (at-Tirmidhi, 1102; Book 11, Hadith 23). “No marriage [is valid] without a *wali*” (at-Tirmidhi, 1101 Book 11, Hadith 22). “[A]n *al ayyim* (single woman) who had been previously married has rights regarding herself more than her *wali* (guardian). The virgin's consent regarding herself must be sought; her silence is her consent” (Muslim, 1421 Book 16, Hadith 78). These *ahadith* give us insights into the

formation of Muslim marriage by two types of women, a young unmarried girl, a widow and a divorcee. The latter has the right to make her own decisions and so she can accept, or refuse to accept, a *nikah* (marriage) if solemnised on her behalf. A young woman, however, needs a marriage guardian. The last *hadith* is clear in meaning and can be easily perceived to imply that women are free to enter, or not to enter, into a marriage contract.

In Sharia, there is a lengthy and extensive discussion in respect of the above and different opinions in all four Sunni schools. In short, in the case of a minor, and someone with mental health problems, regardless of gender, there is consensus of opinion (*ijma'*) amongst Muslim jurists that the consent of a *wali* is required on behalf of a ward to deal with his or her affairs, including marriage (Nasir, 1994, p.1). Here, the guardian is of two kinds: one with the right of compulsion to deal with the affairs of a minor, a woman and an insane person; thus, there are three grounds for this: minority, insanity and feminine gender. The second category is the one without the right of compulsion. The guardian in the first case is usually from the male lineage, like a son or his son, father or his father, brothers and the ward's uncles and then their sons, respectively. Where none such exist, then the state representatives step in (Rafiq, 2015, pp.1265-61). "[A]ll of these guardians have the power of compulsion over a female or a male during minority, and over insane persons even if they are adults" (Baillie, 1875, p.46).

Three Sunni: the Malikis, the Hanbalis and Shafis Schools, do not permit a mentally competent woman to contract her own marriage at any stage in her life, but to be represented at the time of contract by her guardian. That is to say, the *wali's* permission and representation are a must in the marriage of an adult young woman, and the *wali*, at his discretion, can make arrangements for such a purpose. In the case of a woman previously married, however, the *wali* cannot give her in marriage without her consent (Immenkamp, 1994, p.67). Conversely, according to Hanafis, she (being a virgin or not) is entitled to give or withhold her consent. In their view, she requires a guardian for marriage purposes only when she is a minor or of limited legal capacity (adult but insane) (Masud, pp.6-7). Also, most jurists belonging to the Shia Imamiyyah School put no restrictions at all on a mentally competent adult woman regarding marriage. She can choose her own partner and contract the marriage without anyone else's permission, and no one can object later. (Immenkamp, 1994, pp.67-

68). The *Zahiris* School holds an intermediate view in this regard. According to them, it is essential in the contract of marriage to have the consent of the woman and her guardian. Ibn Hazm al-Zahiri believes that the taking of sole charge by either of them in an individual capacity is not permitted, as the contract is not about the two persons but it is a family matter, as a consequence of which the couple bring and join two families together (El Alami 1991, p.196).

Adversely, for contemporary Muslim jurists, there is no ruling to support the binding authority of guardians, as advocated by the *fuqaha* (Muslim Jurists) in legal texts from the Qur'an and Sunna. According to H. Adal. Ati, neither the Qur'an nor the Prophet advocate such a forceful authority. In rare cases where fathers have given their daughters in marriage without the daughter's consent, good intentions were presumed. Nevertheless, such marriages can be overturned should the woman concerned object. There is no evidence of enforced marriages lawfully continuing. Abd al-Ati, 1995, p.83.) His view also finds support from *Ibn Rushd al-Qrtubi*, who concluded that guardianship is not a legal requirement of a valid marriage but may have an optional supervisory role for care of the ward (Kamali, 2017, p.155).

In support, Adal. Ati argues that "[i]f coercion in religion itself is forbidden in the Qur'an, how much more so with respect to marriage!" (Abd al-Ati, 1995, pp.83-84). In his opinion, textual and historical evidence seems to suggest that these juristic views about the marriage guardianship are little more than academic or mental exercises. Mawdudi is of the same view and considers it only an *ijtihadi* opinion (personal reasoning) of the Muslim jurists (Mawdudi, 1943, p.113).

Unfortunately, this is how sometimes the so-called arranged marriage turns into a forced marriage. It was reported that "[m]arriage imposed on a woman not by explicit force, but by subjecting her to relentless pressure and/or manipulation, often by telling her that her refusal of a suitor will harm her family's standing in the community, can also be understood as forced marriage" (Huda, 2007, p.10).

As we have read, the Hanafis consider a major female legally competent to marry at her free will. However, they have a high standard of *kafā'a* (equality) to be there in the man to be equal to a woman. Further, this requirement is only for the woman not for the man, he can marry any woman

regardless of *kafā'a*. As result, this prerequisite becomes an obstacle in her choice. It seems that the School gives her such opportunity with one hand and takes it away with the other.

### ***Kafā'a* (equality): a barrier to a woman's marriage choice?**

In the current discussion there is another relevant concept, called *kafā'a* (equality), between the marital couple prior to entering into a marriage that is stressed by some Muslim jurists. The authorities of the Hanafi School strongly recognise it (Ziadeh, 1957, p.505). So much so that "[a] key consideration for the Hanafis in evaluating the validity of a marriage contract is *kafa'a* or socioeconomic compatibility. The perceived absence of *kafa'a* gives considerable power to the *wali* to have the marriage in question annulled" (Zaman, 2012, p.189). Again, "...the more authoritative view is that if an adult woman marries on her own, the *wali* cannot challenge the validity of her marriage as long as the groom is her equal in socioeconomic standing" (Zaman, 2012, p.189). *kafā'a* relates mainly to four things: religion, freedom, ancestry and profession. However, in the eyes of Shafi a marriage is not prohibited on this ground in Islam, as the consent of the parties removes any disability on account of the lack of *kafā'a* (equality). Malik was of the opinion that equality is brought about through religion, and all Muslims are alike or equal in that sense (Syed, 2004, p.38).

Also, it was narrated from Abu Hurairah that the Prophet said: "[w]omen are married for four things: their wealth, their nobility, their beauty and their religious commitment. Choose the one who is religiously committed" (an-Nasa'i, 3226). In the researcher's view, these examples, and the following arguments, underline the significance of the issue of equality.

According to Al-Kasani, many Muslim jurists, such as *Malik, Karkhi, Hasan al-Basri and Sufyan al-Thawri*, do not accept the rule of *kafā'a* for the following reasons:

- a) Bilal (the Prophet's companion), a liberated slave, was married to an Arab girl.
- b) The Prophet has said that an Arab has no precedence over a non-Arab.
- c) The Prophet and his companions did not follow the principle of *kafā'a*.

The Qur'an categorically opposes this concept by saying "(lawful unto you in marriage) are (not only) chaste women who are believers, but chaste women among the people of the book..." (The Qur'an, 5:6, Syed, p.38). and in another verse "...if they are in poverty, God will give them means out His Grace..." (The Qur'an, 24:32, Syed, p.38). The Qur'an permits marriage with poor partners and thereby denies the importance of this concept. Thus, from the Qur'anic perspective, if a man is a Muslim of sound moral character that is sufficient qualification for him to marry a Muslim woman of sound character (Ali, 1996, p.167).

Besides, more recent scholarship, for example, Welchman argues that *kafā'a* is originally a Hanafi doctrine and is attributed to the influences of the social environment in Iraq in which the early Hanafi jurists were working. For this, she investigated the early jurisprudential debates and the sources invoked for and against the doctrine. She finds that it is noted in Ziadeh's work that "[t]here can be no doubt that there is a preponderance of evidence to show that *kafa'ah* is contrary to the spirit of Islam" (Welchman, 2016, p.8). In terms of *kafa'a* (equality), al-Hibri contends that Abu Hanifah's view, about the ability of the *wali* to invalidate the marriage if the husband is ineligible, goes beyond the Sunnah of the Prophet (al-Hibri, 2005, p.207).

Furthermore, *kafā'a* applies at the time of the contract, and as Khalid al-Azri explains, it is closely connected with the authority of the guardian. In his view, "[g]uardianship and *kafa'a* exist to control the attitude of a woman in her marriage choice. This is achieved by making the woman's choice secondary to that of the family's " (Al-Azri, 2012, p.39).

## Conclusion

In summation, the guardianship of some people is established under legal necessity; when the necessity comes to an end the guardianship also terminates. Rationally speaking, the boy becomes the master of his own will after his puberty; likewise, the girl becomes free of the supervision of others (Al-Azri, 2012, p. 53). In practical life, the parties in a marriage contract are a man and a woman not the guardian; they will live their future life, as they wish, not the guardian. Also, in Sharia, the girl is given the rights that come with majority or puberty as the consequence of having become a prudent individual. Due to the *sui juris* factor, she becomes able to cancel any marriage

contracted during her minority using the right of puberty. So, in the case of contracting her marriage, she is competent as well to do so.

Moreover, essentially, coercion and force are not allowed in Sharia, particularly when that *ijbar* (power of constraint) or compulsive behaviour on the part of the marriage guardian is made into an instrument of imposition and abuse, as is often the case (Kamali, 2017, p.138).

Additionally, *kafā'a* or proportionality of social status is not very much recommended by Sharia. It is, therefore, right to say that, owing to the evolutionary process of human society, the matter of equality between a man and woman in Islamic marriage has lost its significance, these days educational and professional equality and other factors have gained more importance (Rahman, 1978, pp.199-200).

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