

**IN THE FEDERAL SHARIAT COURT**  
(ORIGINAL JURISDICTION)

**PRESENT**

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE  
MR. JUSTICE DR. SYED MUHAMMAD ANWER  
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

**SHARIAT PETITION NO. 01/I OF 2017**

1. MST. SAKEENA BIBI DAUGHTER OF SYED BAKIR HUSSAIN, CASTE SYED, QUBAD SHAH KHEL, VILLAGE ZERAN, PARA CHINAR.
2. SYED MUSHAHID HUSSAIN SON OF SYED IQBAL HUSSAIN.
3. SYED IQBAL HUSSAIN S/O QAZI SYED FAZAL HUSSAIN.

PETITIONERS

**VERSUS**

1. SECRETARY LAW, GOVERNMENT OF PAKISTAN, ISLAMABAD.
2. SECRETARY SAFRON, GOVERNMENT OF PAKISTAN, ISLAMABAD.
3. SECRETARY LAW, GOVERNMENT OF KHYBER PAKHTUNKHWA, PESHAWAR.
4. GOVERNMENT OF KHYBER PAKHTUNKHWA, THROUGH HOME SECRETARY, KHYBER PAKHTUNKHWA, PESHAWAR.
5. CHAIRMAN FCR TRIBUNAL, FEDERAL ADMINISTRATION AREA KHYBER PAKHTUNKHWA, PESHAWAR.
6. COMMISSIONER FCR, GOVERNMENT KHYBER PAKHTUNKHWA, KOHAT.
7. POLITICAL AGENT, KURRAM, FEDERAL ADMINISTRATION AREA KHYER PAKHTUNKHWA, KURRAM AGENCY.

8. ADDITIONAL DISTRICT MAGISTRATE, UPPER KURRAM PARACHINAR.
9. SYED IFTIKHAR HUSSAIN.
10. SYED TAHIR HUSSAIN (SONS OF SYED BAQAR HUSSAIN BOTH RESIDENT OF ZERAN QUBAD SHAH KHEL PARACHINAR.

## RESPONDENTS

COUNSEL FOR THE PETITIONER ...	MR. KHANZADA AJMAL ZEB KHAN, ADVOCATE.
COUNSEL FOR THE STATE ...	SYED ASIF JALAL, AAG, KPK.
DR. HAFIZ MUHAMMAD TUFAIL...	JURIS-CONSULT.
DATE OF INSTITUTION OF PETITION ...	09.01.2017
DATE OF HEARING ...	03.06.2021
DATE OF JUDGMENT ...	25.10.2021
DATE OF DECISION ...	25.10.2021

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**JUDGMENT:**

**DR. SYED MUHAMMAD ANWER, J:** The petitioners have filed Shariat Petition No.01-I of 2017 titled Mst. Sakeena Bibi, etc. Vs. Secretary Law, Government of Pakistan, etc., wherein the petitioners have challenged the concept of Swara / Vani as custom in Kurram Agency (erstwhile FATA) being repugnant to the injunctions of Islam. It is prayed in the petition that the custom of Swara / Vani be declared as null and void in rem being un-Islamic, unconstitutional, repugnant to the injunctions of Sharia and principles of natural justice. In addition to that, the petitioners have challenged the decision of Additional District

Magistrate, Upper Kurram, Parachanar dated 07.12.2016 being repugnant to the injunctions of Islam.

2. The brief facts as stated in the petition are as follows:

i) Petitioner No.1/Mst. Sakeena Bibi, an adult Muslim girl, contracted Nikah with Syed Mushahid Hussain (petitioner No.2) in his house with her consent and freewill on 18.05.2015.

ii) That before the solemnization of Nikah on 18.05.2015, the parents of Syed Mushahid Hussain (petitioner No.2) formally asked the hand of Mst. Sakeena (petitioner No.1) for marriage but the request of the parents of petitioner No.2 was refused by the family of Mst. Sakeena. After refusal, the petitioner No.1 being *sui juris*, herself contracted the Nikah as per injunctions of Islam with her sweet will and full consent with petitioner No.2 on 18.05.2015. The family members of the petitioner No.1 did not like this act of Mst. Sakeena Bibi. Consequently, the brothers of petitioner No.1 alongwith Syed Nazeer Hussain, Syed Imdad Hussain, Syed Iqbal Hussain, Syed Ahmad Ali Shah and Syed Nijat Hussain came to the house of petitioner No.2 and took the petitioner No.1 (Mst. Sakeena Bibi) with them, with a promise that the said issue would be settled within a period of one month.

3. That for resolving the issue, a private jirga consisting of 05 elders of village Zeran was constituted. The said jirga delivered a verdict on 17.10.2015 but the said so-called decision of the jirga was not accepted

by the petitioners. Subsequently, another private jirga was constituted by the parties at their own level consisting of two members which also gave a verdict but the same was also not accepted by the petitioners. Thereafter, another private jirga was formed but the parties could not reach at any settlement.

4. That on 06.06.2016 Iqbal Hussain father of the petitioner No.2 Syed Mushahid Hussain submitted an application to Additional District Magistrate under Section 8 of Frontier Crimes Regulation to refer the matter to Council of Elders in consequence of which the Council of Elders passed an order and decided the matter on 06.12.2016 as follows:

“The Council of Elders submitted divided recommendations i.e. three on one side and one on the other side. The majority jirga member submitted recommendations vide page No.106,107, 108 and 111 and 112 of the case file declaring the earlier agreements arrived between the parties dated 17.10.2015 and dated 06.5.2016 as correct since Mst. Bibi Sakina went to the house of respondent taken into confidence by respondents son Syed Mushaid Hussain whereby whole responsibility rests on the shoulders of Syed Mushaid Hussain and according to Rewaj-e-Kurram para No.1 and 2 clause No.2. Respondent is bound to nominate daughter of respondent Syed Iqbal Hussain for marrying appellants cousin Syed Hussain s/o Syed Mir Abdul Hussain so as to convert the bitterness prevailing between appellants and respondents into a respectable relation to avoid future mis-happenings further recommending implementation of the agreements already arrived between the parties.”

5. That the Additional District Magistrate vide its order dated 07.12.2016 declared the above said majority recommendations of jirga members in accordance of Rewaj-e-Kurram, i.e., a custom prevalent in Kurram Agency. Hence, accordingly passed the order in its agreement.

6. The petitioner being seriously aggrieved by the concept of custom of Swara / Vani in Kurram Agency challenged the same before this Court being repugnant to the injunctions of Islam, the Constitution and principles of natural justice. They also prayed to set aside the decision of Additional District Magistrate, Kurram dated 07.12.2016 being repugnant to the injunctions of Islam.

7. The respondent No.4, the Government of Khyber Pakhtunkhwa in its reply stated that the verdict of jirga is against the Sharia Mohammadi in the instant case as the Nikah was solemnized by the mutual consent/agreement of both the parties. The respondent No.4 also stated in its reply that the Additional District Magistrate should have examined the case before agreeing with jirga proceedings.

8. The respondent No.4 also highlighted a fact that as per 25<sup>th</sup> Constitutional Amendment FATA has been merged in the Khyber Pakhtunkhwa. Consequently, all laws have been extended to the merged districts including Kurram Agency of erstwhile FATA and courts have also been established there vide Act No.XXXVII of 2018.

9. We have heard the parties at length and perused the record. At the same time, during pendency of this Shariat Petition, 25<sup>th</sup> Constitutional Amendment was passed by the Parliament on 05.06.2018, whereby the erstwhile Federally Administration Tribunal Areas or (FATA) was merged into Khyber Pakhtunkhwa Province of Pakistan; hence, the legal and constitutional status of Kurram Agency is changed. One of the legal effects of the 25<sup>th</sup> Constitutional amendment was the complete

abrogation of Frontier Crime Regulations (FCR) and extension of all the national laws as well as provincial laws of KPK, i.e., the areas which were previously falling within the territorial limits of FATA.

**10.** Similarly, in the light of 25<sup>th</sup> Constitutional amendment the Hon'ble Supreme Court in its judgment dated 16.01.2019 passed in Constitution Petition No.24 of 2012 and Civil Petition No.773-P of 2018 has also held that:

iv: since no individual or person in the name of a jirga/panchayat or under any other name can assume the jurisdiction of a civil or criminal court without any lawful authority; any order, decision or a direction issued by any such individual or group of persons is hereby declared illegal and against the spirit of the Constitution.

(Reference at page-32, Para No.21(iv), titled National Commission on Status of Women, etc. Vs. Government of Pakistan).

**11.** Above-mentioned changed legal scenario completely changed legal status of this petition because now the Section 310-A of the Pakistan Penal Code, 1860 is applicable in Kurram Agency, which states:

310A. Punishment for giving a female in marriage or otherwise in badal-e-sulh, wanni or swara:Whoever gives a female in marriage or otherwise compels her to enter into marriage, as badal-e-sulh, wanni, or swara or any other custom or practice under any name, in consideration of settling a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.”

**12.** That the custom of Swara or Vani, or any other custom or practice under any name in which the females are given as consideration for settling a civil dispute or criminal liability is clearly an un-Islamic, un-

constitutional and illegal practice which is punishable with imprisonment and fine in accordance with the Pakistan Penal Code.

**13.** This nefarious practice of Swara has been in vogue in different parts of Pakistan under different names and different pretexes; according to such practice girls or females are given and taken in Nikah or otherwise as consideration for compromise. This evil practice of forced marriages of girls in the name of compensation of murder, raping and settling of other disputes has been in prevalence in different parts of Pakistan by different names like vani, swara, sharam, khoon baha, sang chatti and karo-kari, etc. All such evil practices in which females are given in Nikah or otherwise to the victim party in the name of consideration for compromise or badal-i-sulh (بدل صلح) are un-Islamic and against the principles of Holy Quran and Sunnah for the following reasons irrespective of the fact whatever name they are called:

The Quran says in Surah Al-Fatir, Ayah-18:

وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ

No bearer will bear the burden of any other person.

In another Ayah Quran says:

۞ وَلَا تَكْسِبُ كُلُّ نَفْسٍ إِلَّا عَلَيْهَا ۗ وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَىٰ

“And every soul earns not [blame] except against itself, and no bearer of burdens will bear the burden of another.”

(Surrah Al-Anaam, Ayah-164)

This verse was revealed to end a similar social evil of pre-Islamic era or paigion period (زمانہ جا بلیہ) of Arabia.

a) As stated by Muhammad Bin Abdullah Abu Bakar Al-Jassas in Al-Ahkam Al-Quran, that According to the jahiliyah tradition, a man was held responsible for a crime committed by his father, son or ally. The same has been done in different parts of Pakistan where females of the accused family are abused and targeted in the false name and pretext of consideration for compromise.

This principle or legal maxim given in the Quran was also elaborated by the Prophet (PBUH) in a Hadith narrated by Abu Dawood, in which a person came to the Prophet (PBUH) with his son. The Prophet (PBUH) asked; Is he your son? Being look-alike, the Prophet (PBUH) asked again and the person replied the same. Then the Prophet (PBUH) commanded that

"أَمَّا إِنَّهُ لَا يَجْنِي عَلَيْكَ وَلَا تَجْنِي عَلَيْهِ وَقَرَأَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى"

(سنن ابی

داؤد)

كتاب الديات، باب لا يُؤخذ أحدٌ بجريرة  
أحد، حديث نمبر: 4495

He (صلی اللہ علیہ وآلہ وسلم) then said: He (your son) will not bring evil on you, nor will you bring evil on him (upon your son). The Apostle of Allah (صلی اللہ علیہ وآلہ وسلم) recited the verse: "No bearer of burdens can bear the burden of another." [Emphasis added]

آپ (صلی اللہ علیہ وآلہ وسلم) نے فرمایا کہ خبردار نہ تو اس کے گناہ پر اور نہ وہ تیرے گناہ پر پکڑا جائے گا اور رسول اللہ (صلی اللہ علیہ وآلہ وسلم) نے یہ آیت پڑھی۔ (وَلَا تَزِرُ وَازِرَةٌ وِزْرَ أُخْرَى) 35 - فاطر : 18) کہ کوئی انسان کسی دوسرے کے گناہ کا بوجھ نہیں اٹھائے گا۔

b) This maxim of criminal justice is so important that it was stressed upon by the Prophet (BPUH) in his last sermon also, as narrated by Tirmizi in Kitab ul Fitān:



أَلَا لَا يَجْنِي جَانٌ إِلَّا عَلَى نَفْسِهِ ، أَلَا لَا يَجْنِي جَانٌ عَلَى وَلَدِهِ ، وَلَا مَوْلُودٌ عَلَى وَالِدِهِ "

(سنن ترمذی کتاب الفتن)

Indeed, no one commits a crime except against himself. Indeed none commits a crime for which his son is accountable, nor does a child commit a crime for which his father is held accountable.

- جان لو کہ انسان کے جرم کا وبال اس پر ہے۔ سن لو، انسان کے جرم کا وبال نہ اس کے اولاد پر ہے اور نہ باپ پر۔ -

c) The Prophet (PBUH) in a Hadith clearly sets the outline for settling any feud or for entering into a compromise to end any feud or dispute. The Hadith is narrated in Sunnan Abu Daud as follows:

"من أُصِيبَ بِقَتْلِ أَوْ خَبَلٍ، فَإِنَّهُ يَخْتَارُ إِحْدَى ثَلَاثٍ: إِمَّا أَنْ يَقْتَصَّ، وَإِمَّا أَنْ يَعْفُوَ، وَإِمَّا أَنْ يَأْخُذَ الدِّيَةَ، فَإِنْ أَرَادَ الرَّابِعَةَ فَخَذُوا عَلَى يَدَيْهِ، وَمَنْ اعْتَدَى بَعْدَ ذَلِكَ فَلَهُ عَذَابُ أَلِيمٍ."

سنن لابی داؤد: کتاب الدیات: بابُ الأمام  
يَأْمُرُ بِالْعَفْوِ فِي الدَّمِ، حَدِيثُ نُمَيْرٍ: 4496 -

If a relative of anyone is killed, or if he suffers khabl, which means a wound, he may choose one of the three things: he may retaliate, or forgive, or receive compensation. But if he wishes a fourth (i.e. something more), hold his hands. After this whoever exceeds the limits shall be in grave penalty.

"جس شخص کو (اپنے کسی رشتہ دار کے) قتل ہونے، یا زخمی ہونے کی تکلیف پہنچی ہو اسے تین میں سے ایک چیز کا اختیار ہو گا: یا تو قصاص لے لے، یا معاف کر دے، یا دیت لے لے، اگر وہ ان کے علاوہ کوئی چوتھی بات کرنا چاہے تو اس کا ہاتھ پکڑ لو، اور جس نے ان (اختیارات) میں زیادتی کی تو اس کے لیے درد ناک عذاب ہے۔"

أبو داود (حدیث نمبر ۴۴۹۶)، وابن ماجہ (۲۶۲۳)، وأحمد (۱۶۳۷۵)

14. On the basis of these Quranic verses and Ahadith all or any such evil practice of this type, which is being conducted by any segment of our society anywhere in Pakistan and is called by

different names in different parts of the country like Swara or Vani, etc., or is given any other name under any garb or pretext of custom or tradition is un-Islamic and against the injunctions of Quran and Sunna. There is a consensus of all the Muslim Jurist on this issue.

**15.** To eradicate this self-imposed menace from the society the government has amended Pakistan Penal Code (P.P.C.) by inserting the amended section of 310-A, P.P.C., vide Criminal Law Third Amendment Act 2011 which is reproduced as under:--

**“310-A. Punishment for giving a female in marriage or otherwise in ‘badict-e-sulh’, wanni or Swara:**

“Whoever gives a female in marriage or otherwise compels her to enter into marriage, ‘badal-e-sulh’, wanni, or swara or any other custom or practice under any name, in consideration of settling a civil dispute or a criminal liability, shall be punished with imprisonment of either description for a term which may extend to seven years but shall not be less than three years and shall also be liable to fine of five hundred thousand rupees.”

**(Mohammad Sultan and another Vs. The State and another (2013 PCr.L.J. 950)**

(underline supplied)

Prior to that, Government of Pakistan followed a draft of the Council of Islamic Ideology and amended Section 310 of PPC, 1860 in addition to some other amendments to eradicate this social evil of our society. Subsequently, vide Criminal Law (Amendment) Act (1 of 2005) through which a proviso was inserted in Section 310(1) to bring clarity in law by stating:

“Provided that a female shall not be given in marriage or otherwise in badal-i-sulh”

[Ref: Banning the tradition of Vani (giving female as consideration for compromise) Report No.51 page-169 to 175 Law & Justice Commission of Pakistan, Report No.36 to 53.

According to Shariah Badal-i-Sulah can only be a property moveable or immovable which is accordingly explained in an Explanation to Section 310 PPC which states as:

“Explanation:-- In this section Badal-i-sulh means the mutually agreed compensation according to Shari’ah to be paid or given by the offender to a wali in cash or in kind or in the form of moveable or immovable property.”

**16.** For the reasons stated herein above and after the promulgation of 25<sup>th</sup> Constitutional amendment resultantly the erstwhile Federally Administration Tribunal Areas has already been merged into Khyber Pakhtunkhwa Province of Pakistan. Consequently, the constitutional and legal status of the Kurram Agency is changed. The Frontier Crime Regulations are abrogated from FATA, Pakistan Penal Code, 1860 and other laws are now applicable in that area. Hence, the instant petition is accordingly disposed of.

**JUSTICE DR. SYED MUHAMMAD ANWER**

**JUSTICE MUHAMMAD NOOR MESKANZAI,  
CHIEF JUSTICE**

**JUSTICE KHADIM HUSSAIN M. SHAIKH**

**Announced in open Court  
On 25.10.2021 at Islamabad**

*Mubashir\**