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IN THE SUPREME COURT OF PAKISTAN  
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ  
MR. JUSTICE MIAN SHAKIRULLAH JAN

SUO MOTO CASE NO. 2 OF 2006.

Pollution of Atomic Wastage being buried by  
Atomic Energy Authorities, D.G. Khan.

ATTENDENCE.

Mrs. Naheeda Mehboob Elahi, Dy.A.G.

Date of hearing: 15.03.2006

ORDER.

Learned Dy. A.G. stated that she needs some time to establish contact with  
the concerned quarter for the purpose of collecting necessary information.

2. Adjourned to 29<sup>th</sup> March, 2006.

ISLAMABAD.

15.03.2006.

MAZ.

*M. Aziz*  
16/3/06

IN THE SUPREME COURT OF PAKISTAN  
(Appellate Jurisdiction)

PRESENT: MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, C.J.  
MR. JUSTICE MIAN SHAKIRULLAH JAN.  
MR. JUSTICE M. JAVED BUTTAR.

SUO MOTO CASE NO. 2/2006.

Pollution of Atomic Wastage being Buried by  
Atomic Energy Authorities D.G. Khan.

Applicant:

Mr. Nazir Ahmed.  
Mr. Nasir Shah.  
Mr. Yaqoob Shah.  
Mr. Shakkal Khan.

On Court Notice:

Mrs. Naheeda Mehboob Elahi, DAG.  
with Mr. Shabbir Hussain, Sr. Law Officer, P.A.E.C.

*Date of Hearing : 29.3.06*

**ORDER**

Learned Dy. Attorney General requests for adjournment to file the reply in a sealed cover in view of the importance of the issue involved in this case. Request is allowed. Adjourned to a date in office. The reply shall be filed in the sealed cover and shall not be opened by anyone unless otherwise directed by this Court.

ISLAMABAD.

29.03.2006.

MAZ

*[Signature]*

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IN THE SUPREME COURT OF PAKISTAN  
(ORIGINAL JURISDICTION)

*Plexamine.*

*28/4/04*

*[Handwritten signature]*

Constitutional Petition No 16 of 2004

1. Samar Minallah, Freelance Consultant & Anthropologist, 55-DA, Jamal-ud-din Afghani Road, Peshawar.
2. Gul Bibi, daughter of, Abdul Zaman, c/o Afridi, Shah & Minallah, Advocates and Legal Consultants, 2<sup>nd</sup> Floor, Beverly Centre, Blue Area, Islamabad.
3. Syed Mansoor Ali Shah, Advocate Supreme Court of Pakistan, 15/2 FCC, Syed Maratab Ali Road, Gulberg-4, Lahore.
4. Nusrat Jahan Nabeela, Advocate, 15/2 FCC, Syed Maratab Ali Road, Gulberg-4, Lahore.

... Petitioners

Vs

1. Federation of Pakistan, Ministry of Women Development, Social Welfare and Special Education, through its Secretary, Islamabad.
2. Ministry of Law, Justice, Human Rights and Parliamentary Affairs through its Secretary, Islamabad.
3. Ministry of Religious Affairs, Zakat, Ushr and Minorities Affairs through its Secretary, Islamabad.
4. National Commission on the Status of Women, House no.39, Street no.56, F-6/4, Islamabad.
5. Ministry of Kashmir Affairs & Northern Areas and States & Frontier Regions, through its Secretary, Islamabad.
6. Government of NWFP, through its Chief Secretary Civil Secretariat Peshawar
7. Government of Punjab through its Chief Secretary Civil Secretariat, Lahore.
8. Government of Sindh through its Chief Secretary Civil Secretariat, Karachi.
9. Government of Balochistan through its Chief Secretary Civil Secretariat, Quetta.

... Respondents

*30-4-04*  
*SA*  
*SA*  
*SA*

*8*

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PETITION UNDER ARTICLE 184 (3)  
OF THE CONSTITUTION OF ISLAMIC REPUBLIC OF  
PAKISTAN, 1973

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Respectfully Sheweth:

- A. That the petitioners bring under challenge the unconstitutional, unlawful and un-Islamic custom of "SWARA". The custom of SWARA is a mode of dispute settlement whereby young girl(s) of the offenders family is given in marriage to the family of the victim as a compensation for the offence/crime committed by the male member of the family (e.g., father, brother or uncle, etc.).
- B. That the inhuman custom of SWARA is being practiced unchecked in various parts of Pakistan and a large number of women are being exchanged as compensation for the crimes of their men folk. This practice is abhorred by Islam and the Constitution of Islamic Republic of Pakistan.
- C. That the petitioners are citizens and members of the civil society of Pakistan. Petitioner no.1 is an anthropologist and has done research and prepared a documentary film on the custom of SWARA. Petitioner no. 2 was given as a SWARA i.e., compensation for the murder committed by her father. She is now 18 years of age and is residing with her parents. Her so-called husband under the custom of SWARA is an old man. She has no option but to remain wedded to this old man for the rest of her life. She is caught in the shackles of this intolerant custom and has no life and no future. Petitioners 3 & 4 are advocates and consider it their duty to uphold the Constitution and the rule of law in this country. The petitioners therefore in their respective capacities and as members of the civil society of this country are seriously aggrieved of the custom of SWARA being practiced in Pakistan.
- D. That the titled petition is in the nature of public interest litigation raising a serious question of public importance i.e., the practice of the custom of SWARA and seeks enforcement of fundamental rights of women guaranteed under the Constitution.

FACTS

1. That SWARA is a customary practice largely prevalent in various areas of all the Provinces of Pakistan, by virtue of which families, instead of giving blood money as *badl-e-sulha*, give away their girl(s), at times even minors, in marriage, to an aggrieved family as "compensation" to settle a blood feud between them. The said compensation can also be for any offense or crime other than murder. Daughters of the family are compelled to sacrifice their lives to protect their father, brother or uncle for the crime they have committed. Demanding the hand of the women of the family of the victim, in SWARA, is considered to be a matter of prestige. In case a famous or important person gets killed, even two women are given in SWARA marriage. The quantum of compensation i.e. that is no. of girls/women to be given as SWARA is determined according to status of aggrieved party.

2. That girls are given in SWARA marriage as compensation for murder, adultery, abduction and kidnapping committed by the men of their family. Local Jirga decides the fate of women and the pronouncement of SWARA by the Jirga, without the consent of the woman concerned. It is important to note that Jirgas constitute only male members of the village or community.
3. That this practice of giving away women of the family to the enemy, though illegal, is historically entrenched in the pukhtoon culture. However, this custom is not limited to the province of NWFP, but also extends to other provinces. In Punjab it is called *VINNI*.
4. That in case there is no major female present in the family, minor daughter is given away as SWARA. The "*nukhsatee*" (ceremony of marriage) generally takes place when the girl attains majority, but at times the young girls given in SWARA are made to spend one night at their in-laws just to demonstrate the SWARA arrangement. In many cases when minor girls are given in SWARA, they either run away from the houses or commit suicide once they attain majority realizing the hopelessness of the situation.
5. That sometimes a blood feud between two families is settled by mere handing over of a female to the enemy without even a marriage taking place and the women who are subjected to this arrangement suffer even more.
6. That the female given in a SWARA marriage is treated as a commodity and is never asked whether she is willing and happy with the arrangement or not. Consent of the women subjected to SWARA marriage is considered to be irrelevant and never obtained. Women made to marry under the custom of SWARA are either forced into a marriage or emotionally blackmailed for the SWARA marriage and asked to sacrifice their lives for their father or some other male member of the family.
7. That the logic to justify this custom given by its advocates is that it's a way to put off the fire of revenge and to end the enmity between two rival tribes. Even that be so the consent of the woman is essential which is missing. However the reality is entirely different and this demand for the hand of one of the girls of the enemy family is often made just to degrade the guilty family, and the women, who are subjected to the custom of SWARA, face all sorts of humiliations and hatred from their in-laws all their lives. At times the girl given in the name of SWARA is shared by the male members of the victims' family. Where a minor girl is given away under the custom of SWARA, her parents pray for the death of their daughter before she attains majority so that she does not have to go through all the pain and sufferings mentioned hereinabove.
8. That the custom of SWARA is unconstitutional, illegal and un Islamic on the following amongst other:

GROUNDS

- a. That the custom of SWARA is violative of Article 9 of the Constitution. Right to life enshrined in the said article guarantees right to marry with free consent. Right to life includes right to marry or not to marry. The custom of SWARA thrusts upon the woman the forced obligation to marry, leaving no choice, consent or freedom to make her own choice. The so-called marriage under SWARA is not marriage at all, as the status of woman as an individual person does not exist and the woman is treated as a commodity. Any such

marriage cannot possibly lead to a happy or balanced life and therefore clearly impairs one's right to life.

b. That Article 9 further guarantees freedom of liberty. Custom of SWARA stifles personal liberty, choice and consent and treats women as commodities and a chattel who is subjected to the shackles of this custom for the rest of life. Under SWARA personal liberty of a woman is arrested for the rest of her life against all norms of justice.

c. That the custom of SWARA offends Article 4 of the Constitution. In spite of the fact that no law in the country permits the custom of SWARA, it is being blatantly put to practice in various pockets of this country to the detriment of the women. To enjoy the protection of law and to be treated in accordance with law is an inalienable right of every citizen, still the same is not being extended to the women.

d. That women are being discriminated on the basis of sex alone which further violates another constitutional guarantee envisaged in Article 25 of the Constitution. The custom of SWARA is particularly discriminatory against women because firstly only a woman is the subject victim of the practice of SWARA and once subjected to SWARA marriage the said woman is deprived of a basic right to divorce.

e. That the custom of SWARA relegates the position of women to that of slaves. Infact, SWARA is no different than slavery which is explicitly prohibited under Article 11 of the Constitution. In spite of clear constitutional guarantees in favour of women, the practice of SWARA continues.

f. That the custom of SWARA reduces women to property and household goods. SWARA, therefore, totally tarnishes the dignity of women who are responsible members of this country and mothers to our founding fathers. The impugned custom I therefore violates Article 14 of the Constitution.

g. That the custom of SWARA is against the principle of policy enumerated in Article 35 of the Constitution which provides, that the State shall protect the marriage, the family, the mother and the child. When a female is given in SWARA marriage, she is not accepted as normal bride and all the rights which are part and parcel of the contract of marriage are not bestowed on her. Her rights as a wife and mother are not recognized under the custom of SWARA, and she is treated as a commodity and not as a human being. It is not difficult to assume that the children this woman bears will never become responsible members of our society resulting in total destruction of our next generation. The custom of SWARA eats at the very foundation of any balanced society and must be nipped in the bud. The custom of SWARA is, therefore, in violation of this basic principle of policy.

h. That under Article 29 of the Constitution the State is under the duty to act in accordance with the principles of policy. Yet, the unconstitutional custom of SWARA is being allowed to be practiced.

i. That the custom of SWARA also violates Section 5 of the Child Marriage Restraint Act, 1929.

j. That the custom of SWARA also goes against the provisions of Dissolution of Muslim Marriages Act, 1939. Section 2 of the said Act deals with the grounds for the dissolution of marriage and provides that if a minor

girl is given in marriage by her father or guardian, before she turns 16 years of age, she shall be entitled to obtain a decree for the dissolution of marriage before attaining the age of 18 years, provided that marriage is not consummated. This option known as "option of puberty," is not available to a woman given as SWARA, and she has no choice but to say yes to an imposed marriage in order to save her father or brother's life. Therefore the practice is completely unlawful and liable to be declared void.

k. That section 2 of the West Pakistan Muslim personal law (Shariat) Application Act, 1962 has abolished customs with respect to marriage, dower, and divorce etc. and Muhammadan Law has been held to be the rule of decision where the parties are Muslims. The custom of SWARA is patently illegal being contrary to the said Act.

l. That in Islam, in case of murder, there are only three options available to the victims' family. One is taking the life of the murderer (*qisas*) in case the victims' family is not willing to pardon the murderer. The other two options are blood money (*diyat*) and completely forgiving the murderer for *badl-e-sulh*. There is no other punishment for murder, recognized in Islam, therefore SWARA falls outside the ambit of Islamic punishments.

m. In Islamic jurisprudence, there are four characteristics of punishment i.e Punitive, Retributive, Reformative and Deterrent and none of the above characteristics exist in the customary practice of SWARA. In SWARA the actual murderer gets away completely and an innocent woman has to pay the price for the crime committed by her father or some other male member of the family. Custom of SWARA is being practiced unlawfully and in complete ignorance of the teachings of Islam and thus liable to be struck down.

n. That the key component of any marriage is consent and willingness of the spouses. However in SWARA, the marriage is forced on the woman, making it completely deplorable. In essence, the SWARA arrangement amounts to *zina-bil-jabr*, and the women forced to marry under this custom gravely need the protection of law. The said custom is in direct violation of section 6 of Offences of Zina (Enforcement of Hudood ) Ordinance, 1979.

o. That Jirga is a dispute settlement forum and at best can act as a mediator or an arbitrator. It, therefore, can function on a consensual basis if acting as a mediator/arbitrator and after hearing the parties. The decision of Jirga can also be challenged like any other award of an Arbitrator. More importantly, the Jirga which draws wisdom from the local customs and practice can at no time decide against the mandate of the Constitution or the law of the land. SWARA is a decision that outsteps the Constitution and is, therefore, unlawful and no Jirga in the country has the jurisdiction to declare or decide the same. Similarly in criminal matters Jirga has no jurisdiction and cannot assume the role of parallel judiciary.

p. That Article 1, 2, 3, 7, 16, and 25 (2) of Universal Declaration of Human Rights 1948 (UDHR) ensure basic fundamental rights to all persons. Pakistan being the signatory of UDHR is required to uphold these minimum standards provided under the Declaration.

q. That Article 16 of Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) clearly states that women

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are free to choose their spouses for marriage and all appropriate measure shall be taken to eliminate any discrimination against women in this regard. Again, Pakistan being signatory to the convention, has to take all serious steps to eradicate all practices, customs and laws that are in violation of this right.


r. That Pakistan is signatory to International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 10 of ICESCR provides for protection of family, and right to free consent to marriage. Pakistan is required to send a report updating the Human Right issues. Custom of SWARA is in complete violation of freedom of consent to marriage provided in the said Article.

s. That Convention on the Rights of the Child (CRC), 1989 is also violated. Under Article 2(2) of CRC, State parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians, or family members.

IN VIEW OF THE ABOVE SUBMISSIONS it is most respectfully prayed that this Hon'ble Court may graciously declare:

- a. That a woman cannot be given as compensation in any form of settlement under the Constitution of the Islamic Republic of Pakistan, 1973.
- b. That marriage under the custom of SWARA does not constitute marriage under the law of the land and therefore has no legal status.
- c. That Jirga decisions in this respect have no legal value as they violate fundamental rights, the Constitution and law of the land.
- d. That the custom of SWARA is unconstitutional, illegal and un-Islamic and violative of the fundamental rights of women.
- e. That proviso to section 310(1) of the PPC may kindly be declared to be unconstitutional as being violative of the fundamental rights of women.
- f. It is further prayed that the relevant local governments be directed to ensure that the custom of SWARA by whatever name called is immediately stopped and the victims of SWARA be released to lead a new life in accordance with the Constitution and law of the land.
- g. Order prohibiting the custom of SWARA be graciously passed and state functionaries be also kindly directed to ensure that no such custom is practiced within the area of their respective jurisdiction.
- h. Any other relief this Hon'ble Court may deem fair just and appropriate may also be granted to the petitioners.

Drawn by  
  
Syed Mansoor Ali Shah  
Advocate Supreme Court  
Of Pakistan  
15/2 FCC  
Syed Maratab Ali Road  
Gulberg-4, Lahore.

Filed By  
  
EJAZ MOHAMMED KHAN  
Advocate on Record  
Supreme Court of Pakistan  
176, Sarwar Road Rawalpindi Cantt.  
Phon : 3611

*This petition may be  
fixed for hearing.*