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Marriage able ages & penalization on early marriages in Pakistan: a critical analysis in the light of Islamic law

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ABSTRACT

The fixation of the marriageable age and penalization on the early marriages have a significant opposition to Islamic Laws, which is the reason for the novel issues in society. This article analysis the subject considering the Islamic Laws. It addresses the main question that whether the law regarding the fixation of the marriageable age and penalization on the early marriages in Pakistan comply with Islamic Law? For this purpose, the laws of Pakistan, especially, and International Laws and other jurisdictions, generally, have been reviewed to highlight the gaps and disparities. The current findings show that related law on penalization and the fixation of the marriageable age is inadequate and is based on ancient Indian laws, which does not comply with Islamic Law. It concludes that Pakistan needs an amendment in the fixation of marriageable age under Islamic Law. These findings aim to help lawmakers to amend practicable preparedness strategies. The doctrinal legal research methodology has been followed. It adopts critical and analytical method along with qualitative conduct of the research.

Keywords: *Fixation of marriageable age, Penalization, Islamic Law, Early child marriage, Pakistan, Early child marriage law*

1. Section I: Introduction

Early child marriage1 is the solemnization of the marriage of a minor2. Islamic Law has not restrained marriage. A guardian can marry (nikāḥ) his kin at any age, but the commencement (rukhṣāti) will be held after the kin reaches the puberty. However, British masters imposed the "Child Marriage Restraint Act 1929", which remained applicable in Pakistan by the "Independence Act 1947".3 This act has fixed the age for marriage and penalized marriages beneath this fixation4.

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There are two standards; on the one hand, the courts have validated the marriage of minors under sixteen, where the girl got herself married without the permission of the guardian. The Supreme Court of Pakistan validated the marriage of a minor in a case5. The court sets an important principle in another case6 regarding the marriage of a minor pubescent girl7. Federal Sharī'at Court also in a case8, held that the marriage of a pubescent minor girl, even without the permission of the guardian is valid. Similarly, a judgment was passed by the Lahore High Court, where the court stated:

> "The child marriage restraint act does not invalidate the marriage once it has been performed. Having attained puberty under the Muḥammadan law"9.

On the other hand, when guardians conduct the marriages of a minor, police arrest them, but no judgement has passed so far10.

Considering the above facts, it is evident that there is a lot of confusion and controversy regarding this law. Case laws mostly depend upon Islamic Law. Recommendations by the "Council of Islamic Ideology" too could not explain and resolve the matter either. International legislation and treaties made the matter even more complex. According to them, child marriage is against human rights. For this reason, it is the need of the hour to analyse this issue in the light of Islamic and legal perspectives and scrutinize the case laws decided by Pakistani judges and provide recommendations.

Research Question:

Whether the law regarding the fixation of the marriageable age and penalization on the early marriages in Pakistan comply with Islamic Law?

Methodology:

The doctrinal legal research methodology has been followed. It adopts critical and analytical method along with qualitative conduct of the research.

Section II: Literature Review

The classical and contemporary texts have been analysed. It is evident that fuqahā' were aware of an issue relating to the marriageable age. However, most of them have described this without any distinct heading, mostly under "Kitāb-un-Nikāḥ". If the parents or wali marries the kid before the age of puberty, the rulings (احکام) shall be applicated on the kid via his parents or guardian. Puberty is not defined too in the specific bāb of the classical texts, but it came under the "Kitāb-ul-Ḥijr", so in the lines below the researcher has mentioned the texts where the specifically marriageable age and puberty have been described:

For instance, Ḥanafī scholar Qudūrī11 wrote about this in his book "Al-Mukhtaṣar-ul-Qudūr" under the 'kitāb-ul-nikāḥ'. Another ḥanafī scholar

Sarkhasī12 wrote this in his book "Al-Mabsūṭ" under the topic "bāb-ul-nikāḥ-e-al-ṣaghīr wal-ṣhaghīra". Another ḥanafī scholar Zain-ul-dīn 'ibn-e-Nujaīm13, mentioned child marriage under the topic of "bāb-ul-'awliyā wal-'akifā'ī".

Mālikī jurists 'ibn Rushd14 dealt this issue under the topic of "Kitāb-un-Nikāḥ" under "bāb fī mojiāt -e-ṣihat al-nikaḥ". Similarly, he also mentioned puberty in the "Kitāb-ul-Ḥijr". Another mālikī jurist 'ibn-e-Juzey inscribed about it in his book "Al-Qawānīn al-Fiqhiyyah" under the topic of "bāb fil-walī".

Shāfi'ī mentioned it in his book "'Al-'umm"15 under the heading "bāb al-nikāḥ". Similarly, he also mentioned puberty under the "Kitāb-ul-Ḥijr".

Ḥanbalī scholar 'ibn-e-Qudāmah mentioned this notion under the topic "tazawwaja li-ṣagherin aw majnūnin" and "Kitāb-ul-Ḥijr" in his famous book "Al-Mughnī"16.

Doctor Maḥmūd 'Aḥmed Ghāzī and 'Abdul Rahīm 'Ashraf Balūch, in the book "'Aḥkām-e-Bulūghat", mentioned the puberty and all necessary rulings under this context, also mentioned the child marriage in a sub-chapter but that is not more enough for the topic of the researcher17.

Aparna Bhat and two other editors compiled a book, "Child Marriages and the Law in India"18. This book is divided into two main parts: the first part is consisting of seven chapters. Where child marriage, effects of child marriage, inadequacies in the law and legal system, case law and reports and recommendations on a national consultation on child marriages have been defined. And the second part is consisting of annexures where the local laws and orders of the supreme court have been annexed.

Andrea Büchler, in the article "Marriage Age in Islam and Contemporary Muslim Family Laws a Comparative Survey"19, has discussed a comparative situation in five Arab and Islamic nations. Mainly focused on the minimum marriage age for marriage due to the fact the child marriage is a primary challenge of both human rights institutions and global treaties. The first part of the article has delivered the classical Islamic regulatory role of marriageability. The second part gives a brief define of the global framework regarding age. The third part is devoted to an analysis of legal trends in five Islamic and international states i.e., Morocco, Egypt, Saudia Arabia, Iran, and Afghanistan, in addition to a consideration of the political, historical, and social framework of marriage in those nations and the current legal situations apply there. The fourth and final part of the paper recapitulates the results of this evaluation and offers the conclusions drawn from it.Susanne Louis B. Mikhail in "Child Marriage and Child Prostitution: Two Forms of Sexual Exploitation",20 has discussed both issues and highlighted similarities between both. The author has deeply gone in and firstly he has put up an economic transaction, where dowry payments, short-term contracts, abduction,

and temporary marriage has discussed secondly, it has taken part in the lack of consent because of powerlessness and rights violations. In this article, he has entirely made child marriage as child prostitution, which is just not fair, but it also condemns his lack of knowledge, because both things are different in their way.

Moḥamed Berween, in his article "International Bills of Human Rights: An Islamic Critique", has described three main issues21raised in international bills of human rights22. Article 16 of UDHR23 stated upon the marriage, where it has said that men and women of full age, can marry. The author has criticized the term 'full age' and put-up questions about the limitation for the age of marriage. And he said, 'who has a right to decide'? Because there is no specific rule and principle among the limitation of the age of marriage. In this context, he has raised objections to the United States of America which has no minimum limitation for the age of marriage and the USA also had refused both covenants and even when he ratified it raised the right to execute juvenile offenders.

Dr Muḥammad Shakeel 'Aūj in his publication "Early Marriages, Child Abuse" has defined nikāḥ and child marriage. He has supported himself with the 'Āyāt-e-Qurāniyyah. According to the Qur'ān, nikāḥ is conditional to puberty. In the Quranic verse, the word nikāḥ has been used instead of puberty which shows that nikāḥ presumes puberty. Hence early marriage does not seem to be appropriate according to Qur'ān. He argued that according to the age Imām 'Abū Ḥanīfah the age of puberty of a boy is 18 years, while that of a girl is 17 and according to 'Imām Shāf'ī. He has focused on the maturity of a child and proved that it is necessary to get married after getting puberty of body and mind. He has based upon analytical research. He did not follow any tafsīr and any ḥadith. It is necessary to follow shān-e-nuzūl as the history of āyāt and aḥādith. So, it shall be followed by further research, and it must be proved that the meanings and understandings of āyāt are not just necessary but also some techniques are also.

Dr Mudatharah Sabrīn in her article "Child Marriage and Rights of the Option of Puberty: A Comparative Study of Islamic and Pakistani Law"24, is based upon qualitative, and comparative research. She has in-depth defined that minority means a boy who has not attained puberty. She has defined it according to āyāt-e-qurāniyyah. She also described the option of puberty according to Islamic Law and Pakistani laws. She also has supported her arguments with case laws. According to the research topic, it is supposed to further research that penal laws have been described in the act, shall be criticized in the light of Islamic Law.

Dr Farrukh Ṭāhirah in her article "Pakistan Main Jabrī Shadiūn Kay 'Asbāb Wa Muḥarakāt Shara'ī Wa Qānūnī Tanāẓur Main"25 has described forced marriages and their causes and consequences. In the first part forced marriage has been described and linked with slavery in the era before Islam. The causes of forced

marriage have been defined into many types of child marriage, exchange marriage, selling a girl for marriage, etc. All causes have been deeply described according to every province. She has headed causes of forced marriages specifically under the heading of foreign countries. In the end, it has been said that in Pakistan women's abuse is available by other names. Islam has been measured by name, but it is going against the teachings of Islam.

The above review of the literature reveals that although much has been written on the topic but after humble endeavours, the researcher is unable to find single research where child marriage or the fixation on the marriageable age has been defined under the circumstances of Islamic Law; i.e., is the opinion of majority of the classical jurists. Therefore, the provisions in the laws must be recommended. Because there are flows in sections 4, 5 and 6 of CMRA that are to be scrutinized and changed.

2. Section I: Child Marriage: A Conceptual Study

English masters replaced the local laws with colonial laws in British India. However, the family laws were left as the religious laws of the different communities. For Muslims, it was the 'Muḥammadan Law', and 'Hindu law' was applied to Hindus and other communities in British India26, however, the 'Child Marriage Restraint Act 1929,' is the one law that is related to the area of family law, yet colonial power legislated it and promulgated on all subjects of British India. This law fixed a minimum age for marriage for both boys and girls. Alongside many Hindus, the Muslim community both displeased with this law too. Ironically, the law remained the same in the Pakistan even after the partition. Rather, it was made even more stringent in the past decade. This highlighted the illegality of this law once again and Islamic scholars started debating this issue. For this reason, the article includes with the historical background and theoretical framework of the said issue. This encapsulates the historical perspective of the issue in Islamic Law, keyword definitions in the Islamic and legal perceptive and theoretical framework of the discussion around the said issue.

Section II: Marriageable age: in a historical perspective

According to the majority of classical and contemporary Muslim jurists, Islamic Law has neither fixed any age for marriage nor given the option to fix the age. However, there have been minority viewpoints amongst classical and contemporary Muslim jurists, who permitted it. For instance, classical Muslim jurists like 'imām 'ibn-e-Shubramah27 'ibn-e-Ḥazam28 and 'Abū Al-Āṣam29 and some contemporary scholars, like Muḥammad Shakīl Aūj and 'Aḥmed Javaid Ghamidi etc.In Islamic Law, marriageable age is based on the puberty of the child. Puberty is established when either of the following signs is visible i.e., ejaculation and wet dreams in both males and females. For females, there is an

additional sign of menstruation too. If these signs are not visible and puberty could not be established, then one has to recourse to age. However, there is a difference of opinion among Muslim jurists regarding the age when a boy or girl is considered pubescent in the absence of the signs.

Imām ’Abū Ḥanīfah has three criteria for puberty. One is minimum i.e., 9 years for girls and 12 years for boys and one is maximum i.e., 17 years for girls and 18 years for boys and the third is of intensity i.e., age and full maturity as 25 years. ’Imām ’Abū Ḥanīfah students say that it is fifteen years in the absence of signs of puberty.

The practice of marriage at a young age is not something that was exclusively practised by Muslims. Rather, it was common practice all over the world including in British India. Rather, it was practised as a religious obligation by the father to wed his girl at a young age. One of the reasons for early marriage in ancient India was the danger of attacks from landlords, and rulers. Consequently, guardians wed kids at an early age to save their virginity. Indeed, even in British times, this practice was pervasive30.

The legal history of the prohibition of child marriage started with the efforts of Ishwar Chandra Vidyasagar in 1860 when due to his effort, the consummation of the marriage was prohibited by the ‘Indian Penal Code’ [hereinafter it is referred as IPC] if the girl was less than ten years old31. The 1869 ‘Age of Consent Act’ was also passed which fixed 10 as the minimum age for marriage. However, it was ineffective due to non-enforcement. This age was considered low by later reformers like Keshab Chandra Sen (a social reformer) and Behramji Malabari (a Parsi social reformer). In 1871, Keshab Chandra Sen of the Brahmo Samaj asked medical experts of Calcutta to give their expert opinion on the minimum age for marriage in India. The age of marriage, under the ‘Brahmo Act of 1872’ later known as the ‘Native Marriage Act’, fixed 14 years for girls and 18 years for boys. The Act made difficulties in the marriages of begami, polygamy and infants. Sen’s social reforms were promoted through schools and organizations under which circumstances will be aware of social evils. Another social reformer of that time was Malabari, who aimed to legislate on forced widowhood and child marriage in the nineties. He published a pamphlet titled the marriage of new-borns and the enforcement of widowing.

Phulmani Dasi case (1889) was the reason that prompted the legislation32. An eleven-year-old girl-child was married to an adult. She died because of sexual intercourse. It made the lady doctors plead to the government to enact laws that could prevent child marriages. Fifteen hundred women joined the petition and sent a representation to Queen Victoria asking for reforms in India33. A committee was formed that presented its committee in 1891. The census of 1891

revealed a high proportion of widows in India. Behramji Malabari felt that early marriage of girls is the reason for the problems of widows and propagated the same. As a result, the 'Age of Consent Bill' was passed by the government whereby cohabitation with a wife under the age of 12 years was prohibited.

Joshi Committee (1925) re-examined these questions and its recommendations resulted in the legislation of the 'Child Marriage Restraint Act' famously known as 'The Sarda Act' which was passed in 1929. It increased the marriageable age for girls to 14 and boys to 18 years.

This Act could not bore the desired fruits due to multiple factors. Knowledge of this law couldn't reach rural areas. Moreover, it only prescribed a fine and that too if someone would complain about child marriage.

The Act was promulgated on Muslims too. It fixed the minimum age of marriage and restricts the age of marriage of the parties which was opposed by Islamic scholars back then34. This Act introduced penalties for contracting child marriages. It prescribed punishments for the guardian of the minor, the prospective husband, his family and nikāḥ khawn35. According to Islamic scholars, Islamic Law has given the right to the guardian to marry his kid before puberty. Moreover, after marriage, all the rights of the child have been given to the guardian, in the sense he is not capable(**مکلف**). After puberty, the child becomes the owner of those rights. This opinion could be protected by the verse of the Qur'ān:

وَٱبۡتَلُواْ ٱلۡيَتَٰمَىٰ حَتَّىٰٓ إِذَا بَلَغُواْ ٱلنِّكَاحَ فَإِنۡ ءَانَسۡتُم مِّنۡهُمۡ رُشۡدٗا فَٱدۡفَعُوٓاْ إِلَيۡهِمۡ أَمۡوَٰلَهُمۡۖ 36

"Make trial of orphans until they reach the age of marriage; if you find sound judgment in them, release their property to them"37.

It means to keep examining children until they reach the age of marriage. This makes it clear that the guardian has a fundamental right over the child, and he can put him in various trials to teach him till he becomes an adult, which makes the quality of the child's intellect clear. In this way, it not only preserves the right of wilayat but also protects the right of puberty of the child given by the Quran and Sunnah. The discussion elucidates the historical background of laws in British India related to the marriageable age of the child and the response of Islamic scholars.

Who is the child?

A very important question regarding the laws of marriageable age is the determination of a person as a child and adult. In Islamic Law, the term child refers to a person from the moment of birth till the attainment of puberty. The entire period is classified as childhood38. A fetus in its prenatal stage is called janīn. The rules and regulations of janīn are different from childhood in Islamic Law. The constitution of the Islamic Republic of Pakistan in 1973 prohibits the

involvement of a child in any type of employment before the age of fourteen 39. Accordingly, the 'Employment of Children Act of 1991' defines a child as "a person who has not completed his fourteenth age"40. The CRC41, the most ratified convention within the international community, defines a child as, "every person under the age of eighteen unless, under the law applicable to the child, the majority is attained earlier"42. There is no specific standard for the ending of the childhood period in International Law. Nonetheless, the following is a preliminary discussion about the term 'child' in Islamic Law and western legal jurisprudence.

Signs of puberty: an Islamic perspective

Puberty is accomplished in males and females when specific signs appear. The primary indication of puberty is ejaculation**.**

وَإِذَا بَلَغَ الْأَطْفَٰلُ مِنكُمُ الْحُلُمَ..... 43

"But when the children among you come of age, let them (also) ask for permission, as do those senior to them (in age)"44.

This verse establishes that puberty is accomplished by ejaculation or wet dream i.e., a spontaneous orgasm during sleep, which includes ejaculation for male and virginal wetness for a female45. The Prophet Muḥammad (ﷺ) said:

"عَنِ النَّبِيِّ ﷺ قَالَ: " رُفِعَ الْقَلَمُ عَنْ ثَلَاثَةٍ: عَنِ النَّائِمِ حَتَّى يَسْتَيْقِظَ، وَعَنِ الصَّبِيِّ حَتَّى يَحْتَلِمَ، وَعَنِ الْمَجْنُونِ حَتَّى يَعْقِلَ" 46

No obligation, charge lapses upon three people, the person who is sleeping till he awakens, the child till he wets dream, and the mad (insane) till he is the fate of the rational brain47.

Apart from ejaculation, there are signs of the establishment of puberty too.

According to Ḥanafī school:

"A male is set up by nocturnal emission/ejaculation, impregnating a lady, or emitting in the act of coition; and if none of these is known to exist, this puberty is not established until he has finished his fifteenth year48. Female puberty is set up by menstruation, emission/ejaculation, or pregnancy. If none of these has occurred, her puberty is set up at the end of her fifteenth year"49.

15 years of age seems to be the preferred opinion. If the signs of puberty do not appear then both the boy and the girl shall be considered an adult at the age of fifteen, it is the opinion of the Imām Abū Yūsuf and Imām Muḥammad i.e., two pupils of Imām Abū Ḥanīfah. Another ḥadith of companion ḥaḍrat 'Abdullah bin 'Umar supports this viewpoint when he narrated that in the battle of 'Ohud, I was fourteen years old and offered myself before ḥaḍrat Muḥammad ﷺ for jihād, He ﷺ has rejected me because I was minor, in the next year I had offered again then ḥaḍrat Muḥammad ﷺ has accepted and permitted me. This narration is supporting the opinion i.e., fifteen years for puberty50.

Child: in Pakistani law

Pakistan has various laws prescribing different ages as the age of majority. Some acts declared eighteen as the age of majority51, while others have prescribed the age of majority as twenty-one52.

'Child Marriage Restraint Act of 1929' fixed the marriageable age as i.e., eighteen and sixteen for males and females respectively. The law in Punjab entails the same and defines a minor as: "a person who is a male is under eighteen years old, and if female, is under sixteen years old".53 Recently54, a bill was presented in parliament that proposed eighteen years standard for both. The province of Sindh has already legislated the marriageable age as 18 and considered a person as a child if he or she is below that age".55

The 'Constitution of 1973' prohibits the employment of a child who has yet to attain 14 years of age56. 'Employment of Children Act 1991' also considers a person as a minor "who has not attained his fourteenth year"57.

Islamic Law considers a person as major when his signs of puberty appear, but these laws are declaring them children if they haven't reached the required age even if they are pubescent for four or five years.58

Child: in International Law

The 'Convention on the Rights of the Child' has characterized a child: as "each individual beneath the age of eighteen years except if, under the law applicable to the child, the majority is achieved before".59 The committee on the freedoms of the child has forced the nations to amend the age of majority and increase it to eighteen years for both.

States should be given the discretionary powers for the enactment of the majority age according to the nation's necessities. Moreover, there should be a single age adopted by Pakistan for all matters and remove the disparity in different laws. For instance: the age for economic transactions is to be maturity, which is to be 12 to onwards, and the age for marriage shall be fifteen as per the preferred opinion of the Islamic jurists.

The discussion reveals that different laws have fixed different ages of the majority in the country. Moreover, there is a disparity in local and International Law. In International Law, there are major differences, but the term underage refers to people younger than the majority, but it can also refer to a person younger than other legal age ranges, such as the age of drinking, age of smoking, age of consent, age of driving, voting age, etc.

Child marriage

Child marriage is a marriage where both parties to the marriage contract are minors. There is a debate about a child's adolescence under the circumstances of marriageable age. There is a procedure, i.e., whether signs of puberty have been

shown; if not, age shall be considered. There are two different opinions of classical and contemporary scholars on the age of puberty. Accordingly, the main issue of the research is whether the fixation of the age for marriage is according to the teachings of Islam or not.

Marriageable age and its fixation

The Quranic āyāt, 'aḥādith-e-Nabawiyyah ﷺ and the 'Consensus of the Ṣaḥābah' have made it clear that marriage could be held at any age. Marriage is possible at all ages and pubescence will be anticipated for consummation. Until pubescence, the guardians reserve the option to wilāyat and the child has the privilege of the option of puberty.

However, the real problem here is the age of pubescence in the case that the signs of adolescence have not shown up. Ages are different for each hot and cold region. In places, children mature early and in places, they mature late. Currently, for this situation, age is one of the conditions for puberty, which is not necessary for marriage. The basic condition of marriage is pubescence, and this can appear at any time. Neither it is necessary to have an age for marriage nor does it affect the implementation of marriage.

Child marriage: an Islamic Law perspective

In Islamic Law child marriage is not prohibited. There are basically two concepts, child marriage and early marriage. Both are valid in Islamic Law. According to the Qur'ān, marriage/consummation is conditional to puberty:

وَٱبۡتَلُواْ ٱلۡيَتَٰمَىٰ حَتَّىٰٓ إِذَا بَلَغُواْ ٱلنِّكَاحَ فَإِنۡ ءَانَسۡتُم مِّنۡهُمۡ رُشۡدٗا فَٱدۡفَعُوٓاْ إِلَيۡهِمۡ أَمۡوَٰلَهُمۡۖ 60

"Make trial of orphans until they reach the age of marriage; if you find sound judgment in them, release their property to them."61

In this verse, guardians are instructed to train the boy or girl till they reach the age of marriage and judge their sensibility regarding financial matters before they hand over their assets to them. In this verse, nikāḥ means puberty. According to the Ḥanafī fiqh, the matter of marriage is the same. Just as a wali must train the child in financial matters, and then check his sensibility regarding financial matters and then give him his assets, similarly, the guardian of the child can wed him and put him under a magnifying glass so he can learn shrewdness and consummate the marriage when he arrives at adulthood.

According to the teachings of Islam, a child could be married at any stage. However, a verse has been mentioned above, and this issue must be discussed under domestic laws.

Child marriage: in the law of Pakistan perspective

In Pakistan, child marriage is defined as a marriage contracted between two parties who are minors, or either of them is minor. The CMRA, 1929 prohibited

marriage. Although this Act has not invalidated child marriage, it is a punishable offence62. The Pakistan Penal Code [hereafter it is referred as PPC] also prohibits the marriage of either minor63.

In this regard, the Initial case law was the Ishwar Chandra Vidyasagar case, which was instituted in 1860. According to the IPC, a man's intercourse with his spouse was considered rape when younger than 15.64 Keshab Chandra Sen and Behramji Malabari have viewed this age. Keshab Chandra Sen of the Brahmo Samaj presented the function by which the spouse's consent must be taken securely65. The following important Act has fixed the age of fourteen and eighteen for females and males, respectively.

The age of marriage, under the Brahmo Act of 1872, later known as the Native Marriage Act, has fixed 14 years for girls and 18 years for boys. The case of Phulmani Dasi is another incident that supported the legislation66. In this case, she was married to an adult husband and died. It was an essential fact that empowered the doctors to refer a memorandum to the government for the institution of laws preventing Child marriages. Almost fifteen hundred women moved a complaint to Queen Victoria for legislation.67 Accordingly, under these circumstances, a committee was formed. On the committee's recommendations, the government passed the Consent Age Bill of 1891, which banned marriage under 12 years. In 1929 this issue was taken up by the Joshi Committee. They had recommended the Sarda Act, which has raised girls' marriage age to 14 and boys to 18 years. The Act was promulgated during colonial times. It restricts the age of marriage of the parties, which was opposed the Islamic scholars68. This Act introduced penalties for contracting child marriages. It prescribed punishments of imprisonment and fines for the guardian of the minor, the prospective husband, his family and nikāḥ khawṇ69.

In the discussion mentioned above, it has been revealed that in early ages, the age was not fixed by the legislatures. But, in the Ishwar Chandra Vidyasagar case, in 1860, it started and is still increasing. Accordingly, the issue of the marriageable age started in the British era, and the British government's laws are also repugnant to their customs. In this regard, it must be mentioned ahead of time. Now, after the domestic laws, it is also necessary to describe the marriageable age under international conventions.

Child marriage: an International Law perspective

Child marriage is discussed in international instruments under the ambit of human and women's rights and invalidated child marriage. Many states have ratified these laws, consequently, they are required to legislate and regulate the laws accordingly. The General Assembly of the United Nations has adopted the conventions on the rights of the child, i.e., Convention on the rights of the child,

1989 (CRC), Convention of Elimination of all forms of Discrimination against Women, 1946 (CEDAW), Universal Declaration of Human Rights, 1948 (UDHR) and others. These conventions entail specific articles about the rights of the child.

The Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages states that:

> *"(1) No marriage shall be legally placed into without the full and free consent of the two parties, such consent to be communicated by their face to face as prescribed by law; (2) states parties to the present show shall specify a minimum age for marriage ("not less than 15 years" as per the non-binding recommendations accompanying this convention). No marriage shall be legally placed by any individual under this age, apart from where an able authority has conceded a regulation as to age, for serious reasons, considering a legitimate concern for the meaning of spouses; (3) all marriages shall be registered by the competent authority"70.*

Article 16.1 of the CEDAW endorses equality for people

> *"(a) A similar right to go into marriage; (b) a similar right openly to pick a spouse and to go into marriage just with their free and full consent. Article 16.2 states: The pledge/brothel and the marriage of a child shall make no legal difference, and all necessary actions, including regulation, shall be made to specify a minimum age for marriage"71.*

Section IV: Child marriage: in the theoretical perspective

Early marriage is not taboo. Its legality or liability is proved in Islamic Law. However, the ḥadith of the Prophet (ﷺ), the deeds of the companions and the opinion of the scholars have proved that it is based on consensus too. According to the researcher, parents can marry their children whenever they want. And if there is a fear of falling into sin, then marriage is obligatory for them. The next question is whether there is any age fixed for commencement.

Therefore, scholars have two views on this. One is that some scholars have determined the age according to puberty so that when the child becomes an adult, he could marry. And some have determined age as an integral part of the majority which is considered a main sign of puberty. According to 'imām 'abū Ḥanīfah, a minimum of nine years and a maximum of 17 years for a girl, a minimum of 12 years for a boy and a maximum of 18 years. According to 'imām 'abū Yūsuf and 'imām Muḥammad, it is 15 years. It is the preferred opinion according to all contemporary and classical jurists. The abovementioned facts indicate that puberty is the actual criteria for marriage. If the signs of puberty don't appear then the recourse is to age.

Now the question is, is it correct to fix the age for marriage? And if married at an early age, is it right to punish? Marriage is permissible in Islām and but sometimes it can be an obligation as there are five levels in the rulings of marriage: Farḍ (obligatory), Mubāḥ (permissible), Makrūh (abominable) and Ḥarām (prohibited). If two children engage in Ḥarām, it is obligatory to protect them from it and get them married. Waiting for them to become 18 years old and letting them do ḥarām is a difficult pill to swallow.

The main question of this research is whether the sections of child marriage law prevalent in Pakistan are under Islamic Law. In this context, the researcher has presented the principle of Islamic jurisprudence (’usūl ul-fiqh) that reflected the concerns and goals of Islamic Law. There is a theory of necessity (**الضرورة**).

According to the theory of law, the query of the researcher has been also supported by the ḥadith of the marriage of ḥaḍrat Muḥammad (ﷺ) with ḥaḍrat ‘Ai’sha. Where the commencement was held after the puberty of ḥaḍrat ‘Ai’sha, but the nikāḥ was held when she was a minor. There are also some examples of companions of the Prophet who married at an early age.

The theory of necessity

This theory has relied upon the rule of fiqh, i.e., the fact of the things is that they are permissible unless there is an argument that they are ḥarām.

(الاصل فی الاشیاء الاباحة حتی یدل الدلیل علی التحریم) 72

> The real thing is to do, but if the law has prohibited it, then it is prohibited.

In this sense, the fixation of the marriageable age is not prohibited because Islamic Law has discussed it within the provision of the Qur’an and ḥadith, if the Shari‘ah did not talk about the fixation of the age of marriage, why did the jurists talk about it? According to ’imām ’abū Ḥanīfah, 17 years are appointed for a girl and 18 years for a boy. According to ’imām ’abū Yūsuf and ’imām Muḥammad, they appointed 15 years? In response, the researcher replies that in Islamic Law there is a difference in the opinion on the age when the symptoms of puberty do not come, fiqh has set the age of puberty and not for marriage. And our view is corroborated by a jurisprudential rule that the command of something is proved by subjecting it to another thing. (**الشئ قد یثبت تبعا لغیره**). That is, puberty is a condition for marriage and age is the condition in the absence of symptoms for puberty, so it proves that puberty is subject to marriage and the order of puberty will be for marriage or departure73.

CONCLUSION

The Shari'ah has not clearly defined the age of marriage of children, in which it is defined at which age the marriage should be done. It is permissible if parents

marry their children before puberty. At this stage, according to ’Aḥnāf, until the child becomes an adult, all his affairs are the responsibility of the wali, he can marry him, and he has the right to divorce on behalf of the child. But on the day the child becomes an adult, the Shari‘ah has given him this right, whether he maintains the marriage or cancels it. That is, the child has the right to khayar al-balugh.

There is a clear ruling in the Qur'an that wali should marry the ’ayyāmā. ’Ayyim refers to every boy or girl who is unmarried. When the Holy Prophet ﷺ was asked about the ‘iddah of the women who have disappointed from menstruation or due to lower-age not-menstruated, then the Qur'anic verse was revealed i.e., their waiting period is three months. Now the question arises that when she did not menstruate, she did not reach puberty, so marriage with her is not right, when marriage is not valid, then the concept of ‘iddah is over. In response, it will be said that ‘iddah is proved not only by penetration (دخول) but also by seclusion(خلوت). When there is seclusion, ‘iddah will be three months.

Similarly, there are many incidents from the ’aḥādiths of the Prophet ﷺ in which children were married before puberty. At the top of which, is Haḍrat ‘Aisha’s marriage with the Prophet ﷺ. Haḍrat ‘Umar married Haḍrat ’Umm-e-Kulthumرضی اللہ عنہا bint Haḍrat ‘Aliرضی اللہ عنہ, while she was young. In the gathering of Haḍrat ‘Ali, a woman married her daughter to the son of ‘Ubaidullah bin Al-Ḥar, and Haḍrat ‘Ali formally allowed this marriage.

On the other hand, if we look at the opinion of Ẓawāhir, they do not consider marriage to be valid before puberty. Rather, looking at the outward texts, consider reliable marriage after puberty. In society, many problems and difficulties arise due to the marriage of a girl after puberty. And some people also marry before puberty under this justification, which is illegal(ناجائز). In this way, this age in society gives rise to evil. On this basis, if ’Aulil-’amr sets a certain age for marriage so that evil will be eliminated from society, then it is right for them to do so. And the people must obey, and those who disobey the order can be punished according to the laws. On this basis, some contemporary researchers say that there will be no early marriage after the prohibition’ of Aulil-’amr. However, if the child is married at an early age before puberty by disobeying the order, then this marriage will be held. Because its holding is proved by clear and correct texts. ’Aulil-’amr intervention in permissible affairs (مباح امور) may be to eliminate evils, but the basis of the ruling cannot be eliminated.

Now if we look at the law implemented by ’Aulil-’amr, there are also contradictions in it. First, if seen in state affairs, most of the decisions issued by

Pakistani courts have been ruled opposing the laws issued by 'Aulil-'amr. And the second thing is that if the parents get the children married, then they, the groom and the nikāḥ khāwn are caught by the police and the courts punish them according to the punishment prescribed in the law. And if the same marriage is done by the children of their own will, whether it is the will of the guardians or not, then neither the court upholds their marriage nor there is police interference. After the above discussion, it is recommended that:

- The punishment for the marriage of children is not a solution to the laws, but not just to come before the mafāsid, but to find a solution.
- The provisions of the Child Marriage Restraint Act of 1929 must be amended to make it compatible with Islamic Law.
- The requirement for marriage should be linked with puberty and not age.
- There should be a unanimous stance of the legislature and judiciary in such cases. Disparity should be removed in cases of guardians marrying off their wards and where parties themselves enter the contract of marriage.
- Steps should be taken to make sure that all girls complete their schooling whether married or unmarried.
- Schools should introduce skill-based training that could have made them financially independent.
- Special Forces should be launched for the security of the children and women who should be expedient in responding to any situation of emergency.

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3"(3) Save as otherwise expressly provided in this act, the law of British India and of the several parts thereof existing immediately before the appointed day shall, as far as applicable and with the necessary adaptations, continue as the law of each of the new dominions and the several parts thereof until laws make another provision of the legislature of the dominion in question or by any legislature or other authority having power in that behalf"

4 "Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to [one month and fine of one thousand rupees" s 5, Child Marriage Restraint Act 1929; in Sindh Child Marriages Restraint Act 2013; 2-3 years of rigorous imprisonment with a fine is prescribed; in Child Marriage Restraint Act 2015; (Punjab amendment), six months and a fine of fifty thousand rupees or both are prescribed

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