

**“Child Marriage in Pakistani Society: An Analytical Study in
Shariah and International Law”**



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Dedication

Thanks to ALLAH the Exalted, for His never ending mercies and blessings upon me. I dedicate this thesis to my father Arshad Mehmood Tabbasum, my loving mother and my in laws, whose prayers have been an encouragement for me and a source of strength and motivation. I also dedicate to my husband, my siblings, sister in law and to all my friends whose continuous encouragement helped me to move forward and carry on my research. I pray that the problems being faced by us be removed by the better understanding and implementation of Shari'ah.



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Approval Sheet

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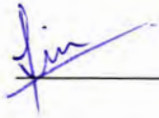
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DECLARATION

I, **Ain-ul-Badar**, hereby declare that this dissertation is original and has never been presented in any other institution. I, moreover, declare that any secondary information used in this dissertation has been duly acknowledged.

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Praises be to the Almighty upon whom depends all who is in this World and the Worlds we know nothing of. It is He who is the "*Khaaliq*" and the "*Raaziq*" of all. We thank Him for blessing us with the honor of being amongst His beloved Prophet's (S.A.W) Ummah, may His everlasting blessings and peace be upon Muhammad (S.A.W). After that, I am highly obliged to the Faculty of Shari'ah and Law, International Islamic University Islamabad and the entire staff.

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Acronyms:

CEDAW: Convention on Elimination of All Forms of Discrimination against Women.

CII: Council of Islamic Ideology

CLC: Civil Law Cases.

CSW: Commission on the Status Of Women.

DMMA: Dissolution of Muslim Marriage Act.

KPK: Khyber Pakhtun'khwa.

MFLO: Muslim Family Law Ordinance.

MLD: Monthly Law Digest.

PLD: Pakistan Law Digest.

PPC: Pakistan Penal Code.

SCMR: Supreme Court Monthly Review.

UDHR: Universal Declaration on Human Rights.

UNCRC: United Nations Convention on Rights Of Child.

UNICEF: United Nation's International Children's Emergency Fund.

YLR: Yearly Law Review.

List of Cases:

- 1) Mushtaq Ahmed Vs. Muhammad Amin PLD 1962 Kar 442
- 2) Mst. Bakhshi Vs. Bashir Ahmed PLD 1970 SC 323
- 3) Mauj Ali Vs. Safdar Hussain 1970 SCMR 437
- 4) Shamsu Mia and others Vs. The State PLD 1964 Dacca 630
- 5) Ghulam Qadir Vs. The Jdgc Family Court, Murree 1988 CLC 113
- 6) Muhammad Riaz v. Mst. Robina and Another 2000 MLD 1886
- 7) Mulazim Hussain versus Mst. Amina BiBi and Another 1994 CLC 1046
- 8) Mst. Daulan vs. Dosa PLD 1956 (W.P.) Lahore 712
- 9) Munni v. Habib Khan 1956 PLD (WP) Lah. 403
- 10) Noor Muhammad v. The State. 1976 PLD Lah. 516.

Abstract:

A marriage contracted between parties who are minors or either of them is a minor is called child marriage. It is the requirement of a valid marriage that the parties must be major. It is also necessary that the parties to marriage consent to it freely. The rationale behind this requirement is that in case of minority they cannot give their fully informed consent.

Child marriage is commonly practiced in Pakistani society, especially in rural areas. As per Child Marriage Restraint Act, 1929 a boy under the age of 18 and a girl under the age of 16 are child and cannot be married. Their marriage will amount to a penal offence. Child marriage is practiced in Pakistan in different forms like *vani/sawara*, *wattasatta* and selling off daughters. These forms of child marriage make the situation more severe. This study discussed the reasons and effect of child marriage in Pakistan.

Moreover, Islamic view is also being discussed in detail which emphasizes upon certain conditions for a valid marriage. As a general rule a minor is not allowed to get married, but in some exceptional cases guardian has been authorized to marry off his ward in accordance with *Shariah*.

International conventions and treaties such as United Nations Convention on the Rights of the Child, Convention of Elimination of all forms of Discrimination Against Women and Universal Declaration on Human Rights also forbid child marriage as it violates the fundamental human rights of the child. Human rights activists also working a lot on eliminating the practice of child marriage from the society.

CHAPTER ONE

INTRODUCTION

The topic of this thesis is “Child Marriage in Pakistani Society: An Analytical Study in *Shariah* and International Law”. The research contains with descriptive and analytical methods so as to study relevant case laws, describes the importance of the enforcement of the principles and analyzes the reasons and effects of the problem on Pakistani society, which creates hurdles in its true application, in the light of current scenario.

The research discusses child marriage as practiced in Pakistani society, its different forms, its reasons and effects on the minors as well as on the society at large. It will discuss child marriage from the perspective of Islam and according to the laws of the land and international laws.

A number of writers have discussed child marriage in their writings. The topic has been discussed nationally and internationally with different perspectives. The topic has also been discussed from Islamic point of view.

In “*The Family Structure in Islam*” by *Hammudah Abd al Ati*, child marriage has been discussed under the heading Marriage of Minors. He discussed child marriage as a formal agreement deferring final consummation to a later date. Option of puberty is there for the parties, according to which upon attaining puberty parties or any of the party may repudiate the marriage.

In "*Family Law in Islam Theory and Application*" by **Dr. Tahir Mansoori**, child marriage has been discussed with reference to the opinions of scholars of Islamic Law and marriageable age in modern legislations.

In his work "*Outlines of Muhammadan Law*" **Asaf A.A Fyzee** states that marriage of minors by their guardian is allowed but marriage of a minor girl without the consent of guardian will be void as per Islam.

In article "*Pakistan: Child Marriages Mock Laws and UN Conventions*" by **Zofeen Ebrahim**, reasons of child marriage in Pakistan are enumerated. The main reasons pointed out are customary practices called *vanni*, poverty, illiteracy and ignorance of law.¹

In Vol. 12-08: No 140 of monthly Islamic Voice, August 1998 on "*Marriage in Islam*"² while discussing marriage at early age **Adil Salahi** states that child marriage is permitted and the girl will have the option of puberty. He says that in such marriage consummation should not be allowed.

The Muslim scholar, **Dr. Bilal Philips** had to say the following about Child marriage in an interview:

"The concept of child marriage, of course in Islam, if a person classified as a child is married, when they reached the age of puberty and maturity, then they have a right to choose whether to go on with that marriage or not. So it becomes a marriage on paper. You know, they take place on paper on agreements with families; it is not going to be done

¹ Zofeen Ebrahim, "Pakistan: Child Marriages Mock Laws and UN Conventions," *IPS News Agency*, March 08, 2009. Available at <http://www.ipsnews.net/2009/03/rights-pakistan-child-marriages-mock-laws-un-conventions/> accessed at June 20th, 2012.

² <http://www.islamicvoice.com/august.98/marriage.htm#EAR>

again between individuals where the possibility of exploitation is, you know, more prevalent; but once the person reaches of age, it could be between two young people or could be a younger person and an older person, you know, either way male-female, female-male and when they reach that age of puberty then the decision is theirs.”³

In “*Age of Marriage: A Position Paper*” presented at the “*Committee for Standardization of Female Age of Marriage*” by *Khawar Mumtaz, Sohail Warraich and Shariq Imam*, Child Marriage has been discussed with reference to the impact of child marriage on the girl and the drivers of Child Marriage. They say Child Marriage directly affect the health and social status of the child bride. Customary practices, poverty, gender discrimination, inadequate implementation of law are the driving factors for Child Marriage according to the paper. National and international laws on Child Marriage, role of judiciary are also comprehensively discussed in the paper.

In a study report “*Child Marriage in Pakistan, A Taboo*” by *UNFPA* child marriage is discussed with reference to its practice in Pakistan. Forms of child marriage e.g. Sawara (giving girl as compensation mostly in cases of murder) and Watta Satta (exchange marriage a tribal custom in Pakistan often result in child marriage) has been discussed. Poverty, political and family ties, cultures and traditions, subjugation of women, protecting chastity are the major reason of child marriage, which has been discussed in the report. According to the report child marriage violates human rights of child. It affects child’s development, domestic life, freedom of choice, reproductive and sexual health and society at large. It also results in domestic violence. Status of child marriage in Islam and Pakistani law has been discussed. Report listed some steps to combat and stop child marriage. It

³ http://www.islamawareness.net/Marriage/Child/cm_fatwa_002.html

suggests creating of an effective human right framework as per UDHR and CRC. To create awareness, recognition of adolescence, removal of gender inequality and supporting married adolescence are the steps pointed out in report to tackle the issue of child marriage.

Al-Azhar Al-Sharif, the highest religious body in the Sunni world, has recently released a new manual on the rights of Muslim children. It reads,

"Marriage in Islam is regulated by certain rules, namely, children must reach puberty and maturity so that they can get married,"⁴

In the light of all these, the present research is aimed to discuss all perspective of child marriage at one place. Firstly through explaining about the practice of child marriage, its reasons and effects. Then its status in national, international and Islamic law will be discussed in detail.

During this research, the hurdles like unavailability of data and inability to understand Arabic language limited the scope of my research, the data related to the contemporary practices e.g *vani*, *watta satta* etc is not available in books due to which reference is made to internet sources and newspaper. While discussing child marriage in Islam recourse to primary source was made limited due to the inability to understand Arabic language. Translations of some classical books of Islamic law has been made part of this work in this regard.

The research consists of five chapters, the first chapter contains the introduction of my thesis. In the **second chapter** a brief introduction of child marriage has been given along with its definition and statistics. Its practice in Pakistani society and various traditions e.g. *vani*, *wattasatta* and selling off daughters has been discussed. The reasons and effects

⁴ Ibid.

of child marriage have been discussed in detail. The topic has been discussed from social, economic and medical point of view.

Chapter three deals with the subject from Islamic perspective. Brief introduction of marriage, its kinds and requisites of marriage have been discussed. Status of child marriage in Islam, opinions of scholars of Islamic law has been given about child marriage. Guardianship, role of guardian in marriage and option of puberty have also been discussed in detail.

Chapter four discusses the topic under domestic and international laws. Different Pakistani laws governing child marriage and related rules have been examined in the light of case laws. Role of Islamic council of ideology in this regard has been discussed. In addition, international conventions and treaties to which Pakistan is a signatory or ratified by Pakistan are analyzed.

In the **last chapter**, all the above details, situations and issues are followed by conclusion which sums up the issues discussed. And in the light of the current problems of application of laws, recommendations are recorded with feasible suggestions. At the end a detailed bibliography has been specified.

CHAPTER TWO

CHILD MARRIAGE AND THE PRACTICE IN PAKISTANI SOCIETY

2.1 Introduction

Child marriage is a type of marriage, which is commonly practiced in Pakistan with a ratio of 58% in rural areas and 27% in urban areas.⁵ It represents an extensive form of sexual abuse and exploitation of girls; it violates their fundamental human rights.⁶ It is defined as “a marriage to which either of the contracting parties is a child;”⁷ and a child is “a person who, if a male, is under 18 years of age, and if a female, is under 16 years of age;”⁸ it has been converted into a social evil in the society, which endangers not only the health but the life of the young girl. A young girl is not able to withstand the stress and strain of married life which causes problems for her as extreme as early death. “In Pakistan one woman dies every 20 minutes during childbirth and the major cause of high maternal mortality ratio of 276 per 100,000 live births is child marriage.”⁹ The custom of child marriage “is not marriage, but rather sanctioned sexual abuse and human rights

⁵ “SPARC Launches Campaign Against Child Marriages,” *Pakistan Today*, December 15th, 2010, National Section, Karachi Edition. Available at <http://www.pakistantoday.com.pk/2010/12/15/news/national/sparc-launches-campaign-against-child-marriages/> accessed at July 8, 2013.

⁶ “Child Protection Information Sheet: Child Marriage,” *UNICEF*, available at www.unicef.org/child_marriage.pdf accessed at January 07th, 2011.

⁷ Section 2(b) Child Marriage Restraint Act, 1929.

⁸ Section 2(a) Ibid.

⁹ “Child Marriages: 39,000 Everyday,” *World Health Organization*, March 07, 2013. Available at http://www.who.int/mediacentre/news/releases/2013/child_marriage_20130307/en/index.html accessed at March 15, 2013

violation that destroys girls' life."¹⁰ This practice is common in rural areas and amongst economically backward families. "The traditional yardstick among rural communities for a girl to become fit for marriage is her ability to lift a water-filled pitcher."¹¹ Minor girls are married without even realizing that it will destroy her childhood as she will be burdened with heavy responsibilities of an adult after marriage.¹² They marry their daughters early in order to relieve themselves from her economic responsibilities. This practice is common in underdeveloped countries of the world. Sometimes in order to ensure that their daughter may not get indulged in premarital sex and to save her virginity, parents marry their daughters early. In doing all this, prior consent of minor bride is not taken, or considered not necessary, consequently females lose their right to get education, a fair chance to grow and to choose the path of their lives in the manner they wish. It cannot be concluded that the girls are the only sufferers of child marriage; boys are also affected with such practices when they are married to older women but in majority cases girls are the ultimate sufferers.¹³ "No matter how good their intentions may be, the reality is that an early marriage generally offers no protection at all – in fact, the opposite is generally true – and it strips many young girls of their childhood, their dreams, their basic human rights and their health."¹⁴

"In actuality, a child marriage is a violation of human rights, compromising the development of girls and often resulting in early pregnancy and social isolation, with little

¹⁰ Barbara Salvin, "Child Marriages Rife in Nations Getting U.S. Aid," *U.S.A Today*, July 16th, 2007. Available at, http://usatoday.com/news/washington/2007-07-16-child-marriages-aid_N.htm accessed at June 30th 2013

¹¹ "Child Marriages: 39,000 Everyday."

¹² Gulsher Panhwar, "Child Marriages," *The Dawn*, October 13, 2012, archive section, available at <http://dawn.com/2012/10/13/child-marriages/> accessed at January 07, 2013.

¹³ "Child marriages: 39,000 Everyday."

¹⁴ "Early Marriage," *International Women's Health Program*, available at http://iwhp.sogc.org/index.php?page=early-marriage&hl=en_US accessed at June 20th, 2013.

education and poor vocational training reinforcing the gendered nature of poverty."¹⁵

Deep Ray in his article, "*Child Marriage and the Law*" enumerates several reasons and consequences of child marriages. According to him,

"Many factors are responsible for this practice, the most common ones are poverty, protection of girls, family honour and the provision of stability during unstable social periods, lack of opportunities for girls, lack of awareness about the adverse health consequences another big problem is the lack of awareness of the law and also an inadequate implementation of the existing laws."¹⁶

According to Deep Ray the effects of child marriages are,

"Child marriage has many harmful consequences which include lack of freedom, decreased opportunities of education. Child marriage can also result in enslavement, sexual exploitation and violence against the victims, not only that, a child bride who is not physically or psychologically prepared for conjugal life is also exposed to serious health risks such as early unwanted pregnancy, which puts a young girl to a great risk, increase risks of maternal and infant mortality, increased vulnerability to HIV and other sexually transmitted diseases."¹⁷

2.2 Child Marriage Practice In Pakistani Society

Though laws in our country do not allow marriage of a girl and a boy under 16 and 18 years, respectively, as mentioned in "*Pakistan: Enslaved by Traditions*" noted in "IRIN-

¹⁵ "Child Marriage Human Rights Violation: Delhi HC," The Times of India. June 12th, 2010, New Dehli Edition. Available at <http://timesofindia.indiatimes.com/india/Child-marriage-human-rights-violation-Delhi-HC/articleshow/6039271.cms>

¹⁶ Deep Ray, "Child Marriages And the Law", *NALSAR University of Law, Hyderabad*, available at http://paper.ssrn.com/sol3/paper.cfm?abstract_id=1711748 . P. 1 last assessed 6 January 2012

¹⁷ Ibid.

Humanitarian News and Analysis”¹⁸ figures presented by the Family Planning Association of Pakistan at a seminar in Karachi showed that 30% of all marriages in Pakistan are child marriages.

In Pakistan *Vani/Sawara*, *Watta Satta* and Selling off Young Daughters in Marriage are the prevalent customs which are actually different forms of child marriages. Apart from this, in some areas in order to protect family property young boys are being married to older women.¹⁹ These customs, though prohibited and punishable, are practiced in Pakistan are violation of law. These customs do not necessarily involve minors, but in some instances minors are the victims of these traditions. How these traditions destroy lives of minor, innocent girls will be discussed below with examples.

2.4.1 *Vani*

“A girl is married to a person (whatever his age or social status may be) as a penalty for wrong of her elders or family.”²⁰ “These marriages are known as ‘*Vani*’, ‘*Sakh*’, ‘*Sawara*’ and ‘*Sharam*’ with difference of languages in areas.”²¹ “‘*Vani*’ means giving women to an enemy’s family as per of settlement of a feud.”²²

Vani, an ancient custom of Pakistan, which is still practiced in rural areas, is a form of child marriage. It involves marriage of daughter of a family to another family’s son as compensation. In case other family does not have any son, daughter is given in marriage to

¹⁸ A Service of the UN Office for the Coordination of Humanitarian Affairs.

¹⁹ Khawar Mumtaz, Sohail Warraich and Shariq Imam, “Age of Marriage: A Position paper” (Paper presented at the Committee for Standardisation of Female Age of Marriage, 2010). P. 10

²⁰ Khurshid Anwar Khan, “Another Face of Vani Tradition,” *The Dawn*, March 25th, 2006, National Section, Internet Edition. Available at <http://archives.dawn.com/2006/03/25/nat8.htm> accessed at December 22nd, 2012.

²¹ Anwar Hashmi/ Riffat Mushtaq Koukab, “Vani a Social Evil”, *The FACT (Magazine)*, July 2004. 10. Available at <http://www.facts.com.pk/archieves/july/feng/vani.htm> accessed at February 3rd, 2012.

²² Ibid.

any older man of the family most probably the head of the family. When any male or female member of family deviates from tribes norms, *vani* is considered as a peaceful agreement among the two parties. The decision is announced by the leader of the tribe.²³

The custom is known as *Vani* in Punjab, *dand* or *badda* in Sindh and *sawara* or *valvar* in KPK.²⁴ “*Vani* is a *Punjabi*²⁵ word derived from *vanay* which means blood”,²⁶ *Sawara* is a *Pashto* word²⁷ which literally means, “a woman riding on a horse or other animal.”²⁸

The issue is discussed in The Pakistan Penal Code 1886, under the name of “*Badal-i-Sulah*”.²⁹

A decade back, it was known as a “sacred custom of traditional society”. A great sanctity was attached to it, it was considered as a revolt if anyone tries to criticize the custom as the parallel judicial system in vogue for centuries was providing legal protection to these acts.³⁰

When compromise is sought between two belligerent tribes *vani* is followed in order to avoid further bloodshed. It is considered as a gesture of good will to end blood feuds.³¹

²³ “*Vani: Child Marriage in Pakistan*”, *Youth Experia*, October 31st, 2012, available at <http://youthexperia.blogspot.com/2012/10/vani-child-marriage.html> accessed at March 03rd., 2013.

²⁴ <http://www.raahnuma.org/posts/swara-vani/>

²⁵ *Ibid.*

²⁶ Anwar Hashmi/Riffat Mushtaq Koukab, “*Vani a Social Evil*”.

²⁷ <http://www.raahnuma.org/posts/swara-vani/>

²⁸ Waseem Ahmed Shah, “*Present Law Insufficient to Check Sawara, Vani Custom,*” *Child Right Desk*, April 26th, 2010, available at <http://pakistan.childrightsdesk.com/?p=2096> accessed at February 8th, 2012.

²⁹ Section 310A, PPC. For details see, 3.2.2 Pakistan Penal Code 1860 (PPC) Giving Females in Marriage as *Badl-i-Sulh* (Mutually Agreed Consideration of Compromise).

³⁰ Waseem Ahmed Shah, “*Present Law Insufficient to Check Sawara, Vani Custom.*”

³¹ Anwar Hashmi/ Riffat Mushtaq Koukab, “*Vani a Social Evil.*”

Vani is still practiced among ethnic groups of tribal areas of Punjab and Sindh, despite the fact that it is declared illegal in Pakistan. Without having any regard of the lives of young innocent girls, *vani* is considered as a form of conflict resolution among families. Young girl gets punished for the crimes and sins of her other family member. She is forced to spend her whole life with a person and his family who will never love or respect her, which results in depression and other psychological issues.³²

Samar Minnalah,³³ at the launching ceremony of her research work '*Sawara*' said,

"In acknowledgement of its guilt, a group hands over one or more of their girls to their rivals. A *Sawara* girl is just given food and clothing, and not allowed to take part in social gatherings and family rituals. *Sawara* is a human rights abuse which still exists. It is a social crime, which is not restricted to a region or two. In other parts, it is practiced with other names such as *vanni*, *sang chatti*, *sakh*, *khoonbaha*, *stan*, *mayaar* and *laaf*".³⁴

2.2.3.1 Cases Where Girls are Given as Compensation

Initially the custom of *Vani* was followed in the case where long standing blood feuds were required to be settled down between tribes claiming various lives. But later on this inhuman custom has been used for settling other disputes also. Cases of matrimonial disputes, extra matrimonial affairs or issues in which girl of a family leaves her home with a boy and the boy's family may be punished by a jirga to give a girl in sawara to the other

³² "Vani: Child Marriage in Pakistan".

³³ An Anthropologist, Human Rights Activist, and head of Ethnomedia and Development, a Non Government Organization based in Pakistan, and an expert of *Sawara*.

³⁴ Akhtar Amin, "Sawara Practiced with Impunity in Tribal Areas", *Daily Times*, November 13, 2006. Available at http://www.dailytimes.com.pk/default.asp?page=2006%5C11%5C13%5Cstory_13_11_2006_pg7_20 accessed at September 18th, 2012.

family are the instances where *Jirga* resorts to *Sawara*.³⁵

2.2.3.2 History of *Vani*

The tradition of *vani* started almost 400 years ago. It took birth in the land of Mianwali where two Pathan tribes were having a bloody war in which about 800 people were murdered. The Nawab of the time stepped in to resolve the issue. He called the *jirga* who decided that girls are given as *Qisas*, considering it's the only way out of bloody war, which can turn both families into *Baradari*. With the passage of time the decision became the custom. In 1964 after four decades another case decided by *Jirga* where 40 girls are being demanded by the victim party as *vani*. Later, after reconciliations only the 20 girls were decided to be handed over to the rival family, the rest of the 20 girls were left for family marriages. In order to save their male members of family convict admitted the decision. Time goes and this custom turned into an evil of the society.³⁶

2.2.3.3 Procedure of *Vani*.

The family who suffers from any grievance from other receives the virgin daughter or sister of the offender family. The number of murders, length of the dispute between the two families and the power balance between them are the pivotal factors while deciding the conditions of *vani*. Being a forced marriage between enemies there is no wedding ceremony, rather it's more of a mourning looking event. The girl is being driven to the other side by a third party, riding on a donkey, pony or horse. The girl being taken as a punishment of her family by her in-laws, but she is the only one who suffers the compromise, not her family.

³⁵ Waseem Ahmed Shah, "Present Law Insufficient to Check Sawara, Vani Custom,"

³⁶ Anwar Hashmi/Riffat Mushtaq Koukab, "Vani a Social Evil."

Vani has become a norm for resolving disputes involving murder. In each and every murder case *vani* is being applied which results in acquittal of the real culprit and the life of an innocent girl become miserable. Her basic rights are violated by putting her life in horrible situations. Even newly born baby girls are being sacrificed as *vani* to save some grown-up life. Those elders who have played with someone's honor seek shelter behind their sister and daughter and save themselves from the consequences of their wrongs. Members of jirga sacrifices young innocent girls using '*vani*' to save male members the culprits. "Here '*Vani*' no longer remains a tradition, but becomes a disgrace to *Pushtoon* culture."³⁷

2.2.3.4 Cases of *Vani*

1. In a Hadood Ordinance case a six year old girl was handed over as *Vani*. But by the active response of the media the issue was highlighted and both parties were forced to withdraw.³⁸
2. At Kalabagh 17 years old Noor Shah Bibi and 8 years old Sumaira Bibi were given as *Vani* along with 60,000 rupees to a victim girl's brother, who was being raped by brother of *Vani* girl and got pregnant later on.³⁹
3. In June 2004, 7 years old girl given in *vani*, as punishment of the crime of her 10 years old brother, who was accused of illicit relations with a 7 years old boy. To whom the girl had been given as *Vani*.⁴⁰
4. At Dauad Khail a victim of sodomy was compensated by *panchayat* by giving in

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

marriage a nine years old sister of the culprit to his younger brother, as *Vani*.⁴¹

2.4.2 *Watta Satta* or Barter Marriages

Watta satta is another customary practice, which is a form of early marriage in Pakistan.

- *Watta satta* is a tradition, “which literally means ‘give and take’, or ‘throwing a stone’ and receiving something back refers to the exchange of brides between families.”⁴²
- “This is a phenomenon where siblings of one family are married off to the siblings of another family.”⁴³
- “*Watta satta* marriages, a year-old practice of bartering bride for bride.”⁴⁴
- “It is a shocking practice of ‘Giving a pair of brother and sister’ to be exchanged as a BARTER to another ‘pair of brother and sister’ in another family.”⁴⁵
- “Barter marriages involve the simultaneous marriages of a brother-sister pair from one family to a sister-brother pair in another family. Thus, when a man marries a woman, his wife’s brother simultaneously marries the man’s sister.

⁴¹ Ibid.

⁴² “Pakistan: Marriage by Exchange,” *IRIN Humanitarian News and Analysis*, March 08, 2007. Available at <http://www.irinnews.org/Report.aspx?ReportId=70577> accessed at February 26th, 2013

⁴³ Mobeen Chughtai, “Patriarchy and Pakistani Society-II.” *Redtribution*, 2007, available at <http://redtribution.wordpress.com/category/watta-satta/> accessed at May 15th, 2013

⁴⁴ Sajid Chaudhry, “WattaSatta in Women’s Interest: WB study,” *Daily Times*, February 08th, 2007, National section, Islamabad Edition, available also at http://www.dailytimes.com.pk/default.asp?page=2007\02\08\story_8-2-2007_pg7_11 accessed at April 21st, 2013

⁴⁵ Savio Pereira, “Barter Marriages: WattaSatta or Give Take Marriages: Can’t Find Brides, Haryana Barbers Away Little girls,” *Supari*, available at <http://supari.org/sattu/> accessed date April 4th, 2013

This practice is common in rural Pakistan.”⁴⁶

From the above definitions, it is clear that the custom of *watta satta* is an exchange marriage, where a family while receiving a bride for their son also give their daughters to the brother of the bride.

In our society, it is a general phenomenon that a daughter must leave her parent’s house and move to her husband’s house when she gets wedded. In some unfortunate cases of divorce, she will have to move back to her parent’s house being a divorcee. Being a divorcee does not hold a good reputation in the society. For a woman with such a label it becomes impossible to be wedded again and becomes a financial burden to her family. To avoid such issues *watta satta* is considered to be a conflict free arrangement. “This effectively removes the problem of superiority from the equation, leaving both families at the same level of effective power.” In these arrangements also problem occurs, but because of the fact that families are tied to each other in such cases so, there is no space for negotiation. In the long run everyone loses, but the main sufferers are these girls.⁴⁷

Watta satta in its very nature is not a form of child marriage. But it is used in some instances where a family does not have a girl of marriageable age to offer in exchange, in such a situation they marry their minor girls in order to perform their part of the transaction.⁴⁸ In rural Pakistan 36% of all marriages are barter marriages. It varies from area to area, e.g. in Nawabshah, Sindh and Larkana the rate is 65%, but only 7% in Attock,

⁴⁶ Murtaza Haider, “Bartered in Marriage: The Bride Exchange in Rural Pakistan,” *The Dawn*, September 07, 2011, Blog Section, available at <http://beta.dawn.com/news/657239/bartered-in-marriage-the-bride-exchange-in-rural-pakistan> accessed at June 20th, 2013

⁴⁷ Mobeen Chughtai, “Patriarchy and Pakistani Society-II.”

⁴⁸ Savio Pereira, “Barter Marriages: WattaSatta or Give Take Marriages: Can’t Find Brides, Haryana Barthers Away Little girls.”

Punjab. The practice of *watta satta* marriages is more prevalent in Sindh and the Saraiki belt than in Punjab.⁴⁹

2.2.3.1 Motivation behind *Watta Satta* Marriages

There may be different reasons for a *watta satta* arrangement. Some parents link their daughter's welfare with the well-being of their son in law's sister. In such cases, if their daughter is mistreated during a quarrel with her in-laws, they will give the same treatment to their daughter in law in a *quid pro quo*. Some poor and illiterate parents adopt this arrangement for economic reasons. Land lords in rural areas may choose this arrangement to save their title to their property. *Watta satta* marriage is a technique where neither side demands their share in inheritance so they remain intact to their assets. In some instances girls are used as bait for finding a mate for their brothers.⁵⁰ In Pakistani society the woman's dowry is also a huge financial burden for her family which is also a big reason for *watta satta* marriages.⁵¹

2.2.3.2 Procedure of *Watta satta*

In "Pakistan: Marriage by Exchange," noted in "*IRIN Humanitarian News and Analysis*," it is stated that "In *watta satta*, one brother and sister are married to another pair from another family often close relatives. More rarely, an uncle-niece pair, or two cousins, may be exchanged by one household but this is relatively unusual, and practiced only when siblings in the right age brackets are not available."

2.4.3 Selling off Young Daughters

Another cruel form of child marriage in our society exploiting little girls, is selling

⁴⁹ Murtaza Haider, "Bartered in Marriage: The Bride Exchange in Rural Pakistan."

⁵⁰ Ibid.

⁵¹ "Pakistan: Marriage by Exchange."

off young daughters by parents. Out of economic necessities and poverty some parents treat their daughters as a commodity, which they can cash at the time of dire economic need. Poverty and greed motivates parents to sell their daughters into marriage.

In rural areas, marriages are arranged at childhood and little girls are married to older men. These marriages take place for economic and political purposes. Such marriages may have three fold motives. Firstly, parents sell off their daughters to satisfy the needs of their family; the money they get can help them meet their needs. Secondly, they sell off their daughters in marriage in order to pay off loan taken by them, in this form, due to the lack of the required amount. Thirdly, in the anticipation of some future gain, they marry off their daughter to gratify an aged political figurehead. These practices results in mental, physical and psychological damages to the girl, high birth rate, high infant mortality rate, lack of education in rural areas of the country, etc. These girls, if disobeyed their parents' decision they face threats of violence against them.⁵²

In order to pay back some loan, parents sell off their daughters and from the money received by son-in-law satisfy their loan in the negation of Islamic teachings that has granted many basic rights and respect to women, in many parts of our country she is still considered as a commodity.⁵³ Parents argue that, for the girls and the rest of the family, these marriages offer an escape from poverty.⁵⁴ Sometimes parents not only sell their daughters into marriage, but in some cases these girls face trafficking, they are being sold

⁵² Mobeen Chughtai, "Patriarchy and Pakistani Society-II."

⁵³ Zofeen Ebrahim, "Pakistan: Child Marriages Mock Laws and UN Conventions," *IPS News Agency*, March 08, 2009. available at <http://www.ipsnews.net/2009/03/rights-pakistan-child-marriages-mock-laws-un-conventions/> accessed at June 20th, 2012.

⁵⁴ Molly Moore, "Poverty, Greed Motivates Indians To Sell Young Daughters As Brides - - Government Crackdown On Forced Marriages Andes Families," *The Seattle Times*, Washington Post, July 21st, 1994. Available at <http://community.seattletimes.nwsourc.com/archive/?date=19940721&slug=1921382> accessed at April 08th, 2013.

into prostitution and such transaction provides large sums of money.⁵⁵ Sole reason of selling daughter is poverty. They sell their daughters into marriage either to settle debts or to make some money and escape the cycle of poverty. But the issue remains constant as the girl does not get the chance of education nor she is able to take part in the developmental race *i.e* she lacks work force.⁵⁶

2.2.3.1 Girl Managed to Escape and Seek Help from Court.⁵⁷

A young girl in her early teens came to know about her wedding to a man of 50 years for an amount of Rs.50, 000. She managed to escape and reached the police station for seeking rescue. Police produced her before a local court for recording her statement. Court ordered to stop the transaction. Later on police handed over the girl to her father after recording his statement that she won't be forced into marriage. The father said that poverty forced him to sell his daughter into marriage for Rs.50, 000 as he was unable to feed the family. And the year's rains added to crops already damaged by the floods of 2010, subsequently leaving them at naught.

2.3 Reasons For Child Marriage

2.4.1 Poverty

Poverty is the root cause of all the evils in the world all the time. All the problems mankind is facing are the ultimate result of poverty. It has been examined that main reason of child marriage is poverty and lack of education, the proof of which is a higher rate of

⁵⁵ Pierre Tristam, "Child Marriages:Facts, Causes and consequences," *Middleeast-About*, available at <http://middleeast.about.com/od/humanrightsdemocracy/a/child-brides.htm> accessed at April 08th, 2013.

⁵⁶ Ibid.

⁵⁷ Qurban Ali Khushk, "Man Tries to Sell off Teenaged Daughter," *Pakistan Press Foundation*, October 15th, 2011. Available at <http://www.pakistanpressfoundation.org/news-archives/4117/man-tries-to-sell-off-teenaged-daughter/> accessed at April 8th, 2013.

child marriages in underdeveloped countries of Asia, Africa and Middle East than the rest of the world. In Pakistan, the areas where the rate of poverty is relatively higher or the rural areas of Sindh and Baluchistan and in Tribal areas of KPK the practice of child marriage is more prevalent. The evil finds its way to get encouraged in such areas. Parents may consent to child marriages out of economic necessity. Marriage may be seen as a way to provide male guardianship for their daughter.⁵⁸ Parents of such families think it's economically better for their daughters to get married at an early age as it may save her from economic crisis and her parents from feeding her. In order to lessen their own burden they marry their daughter at an early age. The other thought which motivates them is that early marriage may cause betterment of her social status. It may enable her to spend a good life and she might get all the things which her parents are not in a position to provide her. Huge families where there is only one earning head, the whole burden of feeding them and provide livelihood to them lies with one person; such circumstances are also a big reason of child marriages.

“Most often, parents promote child marriage to ensure their daughter's financial security and to reduce the economic burden placed on the family.”⁵⁹ Child marriage is considered as a way out of poverty, but the study indicates that in developing countries it makes the cycle of “*intergenerational poverty*” even more pathetic.⁶⁰

2.4.2 Lack of Education/Flaws of Education System

Blemishes of our education system are the factors which allow customs like *vani* to

⁵⁸ Deep Ray, “Child Marriages And the Law.”

⁵⁹ “Child Marriage and Child Health,” *Unite For Sight*, available at http://www.uniteforsight.org/women-children-course/child-marriage#_ftn4 accessed at June 20th, 2013.

⁶⁰ Khawar Mumtaz, Sohail Warraich and Shariq Imam, “Age of Marriage: A Position paper” (Paper presented at the Committee for Standardisation of Female Age of Marriage, 2010) page # 11

flourish in this modern world. Education plays a vital role in social and psychological development of society.⁶¹

The economic condition of a family is a huge factor for such practices. Parents think young daughters as an economic burden, so spending on her education is a waste of money. They send their daughters to workplaces with their mothers.⁶² In such situations, these young girls lost the opportunity of getting educated, but help their parents in earning. Not only her right of education is affected in such cases, but her right to personal development is also affected badly, which results in her disability in contributing to the family and the society. Resultantly she becomes unable to realize and resist such injustices with her.

2.4.3 Customs/Traditions

“Child marriage is a product of cultures that devolve women and girls and discriminate against them.”⁶³ *Vani, WattaSatta*, Selling off daughters are the famous customs which are practiced in Pakistan. These customs have been discussed earlier in detail in the section “Child Marriage’s Practice in Pakistani Society.”

Belief of parents that, for the betterment of their daughter they should marry her off as early as possible, leads to the early marriage of young girls to the older man sometimes, even of the age of her father. As their ‘traditions’ don’t allow them to marry her outside their tribe or caste and no reasonable match could be found in their tribe or caste.⁶⁴ Paired with all other causes there is a deep rooted belief that a girl should be married as soon as

⁶¹ “Vani: Child Marriage in Pakistan.”

⁶² Alice Garrick, “Pakistan-Raiwind Diocese,” Newsletter, *International Anglican Family Network*, July 2011, <http://iafn.anglicancommunion.org/newsletters/2011/july/pakistan.cfm> accessed at June 20th, 2013

⁶³ Pierre Tristam, “Child Marriages:Facts, Causes and consequences,” *Middleeast-About*, available at <http://middleeast.about.com/od/humanrightsdemocracy/a/child-brides.htm> accessed at April 08th, 2013.

⁶⁴ Gulsher Panhwar, “Child Marriages.”

after she reaches puberty since "Puberty=Maturity=Marriage."⁶⁵ In some areas practice of marrying young boys to older women is also carried out, where in order to protect family property such marriages are performed.⁶⁶ Another custom named *valvar* is also practiced in some areas of the country. *Valvar* is a custom where a man pays money to the girl's family for the costs of marriage and dowry, that money often acts as bribe money. For a man, lack of required money results in delayed marriage which results in marriage between older men and younger girls.⁶⁷

2.4.4 Social Reasons

Some parents marry off their daughters out of social pressures. They fear that their daughters may not indulge in premarital sex, to avoid pregnancy outside marriage and to extend their childbearing years.⁶⁸ Daughters are considered as "*amanat*" till they get married and go to their husband's home, which is said to be their real home. In order to pass on her responsibilities as soon as possible girls are married at a young age.⁶⁹ "Parents in poor countries often marry off young daughters to ensure that they will be cared for and because traditional cultures preferred that brides be virgin."⁷⁰

2.4.5 Flaws in Legal System

Laws relating to the age of marriage are not properly enforced in our country. The fact that birth registration is neither widely practiced nor properly maintained in records

⁶⁵ Khawar Mumtaz, Sohail Warraich and Shariq Imam, "Age of Marriage: A Position paper." P. 9

⁶⁶ Ibid. Page 10

⁶⁷ Ibid.

⁶⁸ "Child Protection Information Sheet: Child Marriage." Also Alice Garrick, "Pakistan-Raiwind Diocese," Newsletter, *International Anglican Family Network*, July 2011, available at <http://iafn.anglicancommunion.org/newsletters/2011/july/pakistan.cfm> accessed at June 20th, 2013

⁶⁹ Khawar Mumtaz, Sohail Warraich and Shariq Imam, "Age of Marriage: A Position paper" P. 11

⁷⁰ Barbara Salvin, "Child Marriages Rife in Nations Getting U.S. Aid," *U.S.A Today*, July 16th, 2007. Available at, http://usatoday.com/news/washington/2007-07-16-child-marriages-aid_N.htm accessed at July 09th, 2013.

makes it difficult at the time of marriage to determine the exact age of marriage.⁷¹ In “Pakistan: Enslaved by Tradition” noted in “IRIN-Humanitarian News And Analysis” Samar Minallah said that, because of the sanctions provided by laws, people started covering their wrongs and make secret transactions, for example in case of *sawara* they do not announce the deal within community as *sawara* but the concerned families know the truth that woman has been given as *sawara* and the deal is treated accordingly.

Laws are available on the issue, but there are hurdles in their implementations, which results in failure in culmination of the practice of child marriage.

2.4 Effects Of Child Marriages

2.4.1 Psychological Effects

Child marriages have varied negative effects on children leading from psychological pressures and anxieties to the premature burden of domestic responsibilities and risk of increased number of marriages and lack of kinship and bonding in a marital relationship.⁷²

Sins and crimes of her family members become the reason of her ill fate and she is forced to spend her whole life with a person and his family who will never love and respect her. Rather, she will be exposed to hatred and disgrace being the sister or daughter of the culprit. This results in immense psychological damages and traumas.⁷³ Till her death she will have to face the anger of revenge and abuse by her in laws. She will be like a fish out of water.⁷⁴

⁷¹ Khawar Mumtaz, Sohail Warraich and Shariq Imam, “Age of Marriage: A Position Paper” P. 11

⁷² Gulsher Panhwar, “Child Marriages.”

⁷³ “Vani: Child Marriage in Pakistan.”

⁷⁴ Anwar Hashmi/Riffat Mushtaq Koukab, “Vani a Social Evil.”

2.4.2 Medical Effects

“In developing countries, the leading cause of death for young girls between the ages of 15 and 19 is early pregnancy.”⁷⁵ Girls who marry comparatively later and delay pregnancy get more chances to stay healthy, to complete their education and provide a better life for their family and for themselves.⁷⁶ Early marriages put a girl’s health at stake; her health is directly affected by such marriages. “In Pakistan one woman dies every 20 minutes during childbirth and the major cause of high maternal mortality ratio of 276 per 100,000 lives is child marriage.”⁷⁷ Not only the health and life of the mother is in danger, but babies of such child brides are sicker and weaker, such babies in many cases do not survive childhood. Apart from this these girls are at a higher risk of being infected with sexually transmitted diseases.⁷⁸ Such babies are likely to die before their first birthday compared with babies of mothers older than 20 years of age. The young mothers themselves are in a phase of their life where they need food for their own growth as well as for their baby. As a result of not getting proper food, baby gain low birth weight and become vulnerable to diseases.⁷⁹

In this regard, I have interviewed some gynaecologists so that their expert opinions may be made part of this research.

In reply of the question that, does child marriage really affect the health of a child bride? Dr. Nusrat Khan⁸⁰ replied, due to the lack of proper medical facilities in rural areas

⁷⁵ Sheri & Bob Stritof, “Child Brides-The Problem of Early, forced Marriages,” *About*, available at <http://marriage.about.com/od/arrangedmarriages/a/childbrides.htm> accessed at January 5th, 2012.

⁷⁶ “Child marriages: 39,000 Everyday.”

⁷⁷ Ibid.

⁷⁸ Sheri & Bob Stritof, “Child Brides-The Problem of Early, forced Marriages.”

⁷⁹ Khawar Mumtaz, Sohail Warraich and Shariq Imam, “Age of Marriage: A Position Paper” P. 7

⁸⁰ Professor Army Medical Rawalpindi, Consultant Gynaecologist, M.H and C.M.H. Rawalpindi.

(where the practice of child marriage is prevalent) child marriage could be risky as such females need extra medical care during pregnancy. In cities it might not be that much a problem as medical facilities are available there.

Dr. Jehan Ara⁸¹, when asked the same question, replied that a child bride is not ready for the responsibilities of a marriage as she is not physically mature to conceive a baby or to deliver him. She said that early pregnancy might be the cause of death of such mothers when they do not get proper medical aid. Cases of such nature are witnessed from tribal or rural areas. She added such child brides themselves are in a phase of growth, so early pregnancy can be dangerous for baby and mother.

As discussed earlier, child marriage is practiced mainly in rural areas so, the risk of getting effected of it become higher due to the lack of medical care.

2.4.3 Social and Developmental Effects

Child marriages not only affect girl's health, but also affect her right of education and her social life. Early marriage deprives a girl from the opportunity to get educated, as a result, she does not avail the chance to expand her horizon. Due to lack of quantum of education, she does not have all the equipment to play her role in life effectively. Uninformed about her rights she suffers a lot. Early marriage and early childbirth put huge responsibilities on her shoulders and limits career opportunities, at the end of the day she and her family suffers economically.⁸² Early marriages results in social isolation of the girl as she is deprived of getting an education which prevents her from fully participating in the life of family, community and society at large. She is prevented from realizing and showing

⁸¹ Gynaecologist, D.H.Q Mardan.

⁸² Khawar Mumtaz, Sohail Warraich and Shariq Imam, "Age of Marriage: A Position Paper" P. 8

her full potential. Leaving a negative impact on her position in the society and affect her potential contribution to the society.⁸³ In the long run it affects the country's progress.

2.4.4 Child Brides Open to Violence

Marriage before the age of 18 may lead marital and physical violence to the girl by her partner, specifically where the age gap between the spouses is large.⁸⁴ "Statistically, child brides have a higher risk of becoming a victim of domestic violence, sexual abuse, and murder."⁸⁵ In the cases of *Sawara* even if the girl is not physically killed, the humiliation and misery she faces for the crime she is not guilty of being, is a terrible punishment.⁸⁶

2.5 Conclusion

Child marriage being a social issue affects Pakistani society. Its different forms are a threat to the fundamental rights of children. Minor girls become victim of their male family member's enmity in *Vani*. Their life becomes miserable with every passing day and they are forced to live a life which is worse than animals. In *wattasatta* also they have no choice but to surrender for the happiness and better future of their male family member. She has to face a lot of consequences in such arrangements in order to save her as well as her bartered male family member. Similarly, in the custom of selling off daughters, she is treated like a commodity and faces the same consequences. She does not have her own choice in any matter of her life.

⁸³ Deep Ray, "Child Marriages and The Law."

⁸⁴ "Child Marriages: 39,000 Everyday."

⁸⁵ Sheri & Bob Stritof, "Child Brides-The Problem of Early, forced Marriages."

⁸⁶ "'Sawara' Practice in Pakistan Caused Young Women's Death," *ISIS International*, November 08, 2006. Available at

http://www.isiswomen.org/index.php?option=com_content&view=article&id=318:swara-practise-in-pakistan-caused-young-womens-deaths&catid=22:movements-within&Itemid=229 accessed at September 18th, 2012.

Poverty, lack of education, ignorance of law and customary practices are the motivations behind such arrangements. The reasons should overcome in order to safeguard minor girls from exploitation by their own family members. There is a need for education of girls, so that they may know what their rights are. When they will be given the education, ultimately they will come to know how they can seek the help from the law. It is good for a society to follow its customs, but customs that are spoiling the lives of its innocent followers must be banned.

These early marriages affect the minor girls psychologically, medically and socially. All this can only be stopped when the reasons of this practice will be overcome. Spreading of education and easy access of education should be guaranteed. Most of the reasons will be solved by the increasing ratio of education and literacy rate.

CHAPTER THREE

Child Marriage in Islam

3.1 Definition of Marriage in Islam:

Islamic law being a complete code of life provides a guideline for each and every step of life for its followers. Being Muslims, we are duty bound to consult and seek guidance from its rulings to conform our lives in accordance with it. Marriage being an important institute of Islamic society is highly debated by scholars of Islamic jurisprudence. A number of traditions from the *Qur'an*, *the Sunnah* and the practices of companions are there to guide us in this regard. For parties to marriage, there are some conditions to be fulfilled, among which one is the attainment of majority. As a general rule it is required that the parties must be major and pubert. A minor is not allowed to get married in Islam. But in some exceptional cases Islamic law provides a relaxation for those who are too minor, but their marriage is a need of the situation they are living in for such a situation, Islam introduces marriage of a minor in the presence and by the guardians on behalf of a minor, with the condition that the parties may exercise their right of option of puberty on attaining puberty and the marriage will depend on their repudiation.

To understand the concept of child marriage in Islam, it is important to be aware of what marriage is? In order to clarify the notion it is essential to go through different definitions of marriage provided by eminent scholars. Object of marriage, capacity to contract marriage and different kinds of marriage are also important to understand the concept of marriage and child marriage in Islam.

3.1.1 Definition of Marriage:

1. Syed Ameer Ali defines marriage as “an institution ordained for the protection of society, and in order that human beings may guard themselves from foulness and unchastity.”⁸⁷

This definition defines the objectives of marriage, i.e. protection of society and to avoid unchastity. Marriage not only protects an individual from indulging in acts of foulness, but it protects society at large from all such evils of unchastity.

2. Another definition of marriage is, “Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union.”⁸⁸

This definition gives yet another dimension of marriage that it is a relationship between parties based on their mutual consent. It articulates the consent of the parties as the foremost ingredient of marriage. It further says that this relationship constitutes between a man and a woman who do not have any legal bar in their marriage.

3. “It is allowed between two people of different sexes to whose mutual cohabitation there is no natural or legal bar or prohibition. For example, a man cannot marry a hermaphrodite nor any woman within the degrees prohibited by divine law.”⁸⁹

This definition says marriage is allowed between the people of two different sexes, e.g. between man and woman and that these man and woman do not have any natural or legal bar in their marriage.

⁸⁷ Syed Ameer Ali, *Mohammadan Law*, 7th ed. (Law Publisher, 1979), p. 97.

⁸⁸ Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam* (New Delhi: Pentagon Press, 2007),

p. 1

⁸⁹ Ibid.

4. Tahir Mehmood, "A solemn pact between a man and a woman soliciting each other's life companionship which in law takes the form of a contract ('*aqd*)."⁹⁰
5. David Pearl and Werner Menski state that, "A Muslim marriage is in essence a solemn contract between a man and a woman."⁹¹
6. Dr. Tanzil ur Rehman defines marriage as, "Marriage or Nikkah (Nuptiae) is a religious legal contract that regularizes the sexual relationship between man and woman, establishes the lineage of their progeny and creates civil rights and obligations between them".⁹²
7. "Nikkah is a legal contract, in consequences whereof, the married couple acquires the right of enjoyment of all benign association between themselves allowed under the Shariah".⁹³

Hence, Under Islamic law, marriage is taken as a sacred legal relationship between man and a woman to live a life in accordance to the rules of Islamic law and to avoid the illegal and un-Islamic acts.

3.1.2 Objectives of Marriage:

Marriage in Islam has many fold purposes which include the spiritual serenity and peace, cooperation and partnership in fulfilling the divine mandate. Islam is a complete way of life, it takes into account all of genuine human instincts such as physical, spiritual, intellectual, emotional.⁹⁴ Allah Almighty in the *Qur'an* says;

⁹⁰ Tahir Mehmood, *The Muslim Law of India*, (Lexis Nexis Butterworth, Dehli, 2002), p. 48

⁹¹ David Pearl and Werner Menski, *Muslim Family Law*, (Sweet and Maxwell, London, 1998), p. 139

⁹² Tanzil-ur-Rehman, *A Code of Muslim Personal Law Vol.1* (Karachi: Hamdard National Foundation, 1978). Pg. 17

⁹³ *Ibid.* P. 18.

⁹⁴ Yusuf Al-Qaradawi, "The Philosophy of Marriage in Islam," Islamic Research Foundation International, Inc, available at

Accession No. TH-5374

“And among His signs is this, that He created For you mates from among Yourself, that ye may dwell in tranquility with them, and He has put love And mercy between your (hearts): Verily, in that are signs for those who reflect.”⁹⁵

This verse clearly mentioned that serenity and peace through a successful bond is considered the primary objective of marriage.

The basic entity of Islamic society is the family, beginning of which is considered in the formation of the relationship of a husband and a wife. Thereby it extends to their further generation and thus the human society is formed. For safeguarding its subjects, values, the society and mankind at large, the *Shari'ah* has industrialized a unique system. In Islam, marriage is the only way to fulfill the natural needs of human beings and to construct and protect morality and ethos. The Holy *Qur'an* described certain prohibited degrees of women and says:

“Except for these, all others Are Lawful, provided ye seek (them in marriage) with gift from your property, desiring chastity not lust.”⁹⁶

The Prophet (PBUH) said,

"Whoever is able to marry, should marry, for that will help him lower his gaze and guard his modesty."⁹⁷

Therefore, marriage is the means of avoiding evil deeds and purging one's soul of sins. It should be a mean of acquiring nearness to the Almighty Allah.

http://www.irfi.org/articles2/articles_3401_3450/the%20philosophy%20of%20marriage%20in%20islam.html.htm

Accessed at November 13, 2014.

⁹⁵ Al-Qur'an 30: 21. Translation of The Holy Qur'an by Abdullah Yusuf Ali. (Islamabad: Da'wah Academy IIU).

⁹⁶ Al-Qur'an 4:24. Ibid.

⁹⁷ M. Muhsin Khan, Trans., *Sahih al Bukhari Vol. vii, Kitab un Nikkah, Hadith # 5065*. (Dar ul Fikr. n.d.), pg. 3

Prophet (P.B.U.H) denominated *nikkah* as his *Sunnah* and advised his followers to bind themselves in *nikkah* in order to save themselves from illegal acts. A person who has the apprehension of indulging in some unlawful act it is obligatory for him to marry. He will be committing a sin if he does not contract himself in *nikkah*. However a person who has the apprehension that he will not be able to abide by the teachings of Islam and might cross the limits defined by Allah if he marries someone it is *makkruh* for him to marry.⁹⁸

3.1.3 Essential Conditions of Marriage:⁹⁹

For a marriage to be solemnized in accordance with *Shariah*, there are some conditions put forth by *Shariah*, after the fulfillment of which a man and a woman are declared as husband and wife and allowed to live together and carry their conjugal rights and duties. These essential conditions have been classified by jurists as below:

1. Conditions for constituting a marriage contract.
2. Conditions for the validity of a marriage contract.
3. Conditions for completion of the marriage contract.

The conditions for constituting a marriage contract have been further sub-divided into two categories:-

- A. Conditions concerning the parties.
- B. Conditions concerning the marriage congregation or meeting.

Here for the purposes of relevancy only conditions concerning the parties will be discussed.

⁹⁸ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 20.

⁹⁹ Ibid.

3.1.3.1 Conditions Concerning the Parties:¹⁰⁰

For parties, to contract a valid marriage, it is the foremost condition that they should be of sound mind with common sense. Prudence is necessary for marriage as mad and imprudent youth is not competent to contract marriage. However, the validity of marriage of prudent minor depends on the permission of his guardian.

The other condition for parties to constitute a valid contract of marriage is their age. The competency of parties to contract a valid marriage depends upon their having attained the age of majority. In case either party to the marriage contract is minor the contract of marriage shall not be valid. In such a situation there is an exception that a guardian may propose or accept on behalf of the minor.

3.1.3.1.1 Age of Puberty:

A girl or a boy is considered to be major in law when she begins to menstruate or when he starts ejaculating respectively. There is some disagreement among scholars of Islamic schools of thought as to the age of puberty.

A. Imam Abu Hanifah

According to Imam Abu Hanifah, in case of a girl if she is non-menstruation or in the absence of other evidence of her puberty, her age of majority is sixteen years and for a boy where no evidence for his attaining majority is available he will be considered major at the age of eighteen years.¹⁰¹

¹⁰⁰ Ibid.

¹⁰¹ Charles Hamilton, trans., *The Hedaya* (Lahore: Premium Book House, 1963). Pg. 37.

B. *Imam Abu Yusuf and Imam Muhammad Al-Shabani (Sahiban)*

According to them if a girl begins to menstruate or a boy starts ejaculation or in the absence of any evidence thereto, if both have completed fifteen years of their age they shall be considered major.¹⁰²

C. *Imam Shafi'i*

Imam Shafi'i holds the same opinion of Sahiban.¹⁰³

3.1.3.1.2 Consent of Parties:

The other condition concerning parties for constituting a marriage contract is the consent of the parties to it. Consent of the party is so important that a marriage without their consent is invalid. Consent of woman, whether she is a major virgin or with coverture experience is necessary. Her guardian cannot compel her to a marriage contract. And if a father or guardian contracts herself into a marriage without her consent the marriage will not take effect. This is the view point of Imam Abu Hanifah. However, Imam Shafi'i holds the opinion that if a father or grandfather contracts her into marriage then her consent is not necessary. But no person other than the father or grandfather can do this. In such a situation her consent in clear terms is necessary.¹⁰⁴ In a case where both or either party to marriage contract is a minor, according to Hanafi, Maliki, Shafi'i and Hanbali jurists, father, grandfather, brother or uncle on paternal side can act as guardian and contract the minor into marriage, with a condition that on attaining puberty parties can repudiate the marriage.

¹⁰² Ibid.

¹⁰³ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. Pg. 63

¹⁰⁴ Ibid. Pg. 67.

This right to annul marriage contract on attaining puberty is known as “Option of puberty”.¹⁰⁵

3.1.4 Types of Marriage:

According to Islamic law, marriages are of three types:

- 1) Valid Marriage,
- 2) Irregular Marriage and
- 3) Void Marriage.

As defined by Tanzil-ur-Rehman in his book, “A Code of Muslim Personal Law”.

3.1.4.1 Valid Marriage:

Valid marriage is a “Marriage contracted and solemnized in accordance with *Shari’ah* with all its constituents and conditions, without any legal impediment”.¹⁰⁶

A marriage, in which all the requirements have been fulfilled and is solemnized in accordance with *Shariah* will be a valid marriage and will give rise to certain conjugal rights and obligations.

3.1.4.2 Irregular Marriage:

An “Irregular marriage contract is the one from which some condition of a valid marriage contract is missing.”¹⁰⁷

An irregular marriage is also known as voidable marriage. It is a marriage in which any or some conditions necessary for valid marriage is missing or at the time of marriage

¹⁰⁵ Al-Shirbini, *Mughani al-Muhtaj ila Ma’rifat al-Ma’ani Alfaz Sharh al-Minhaj Vol.3* (Berut: Ahya al Tarat ul Arbi, n.d.). Pg 163-164.

¹⁰⁶ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 102

¹⁰⁷ Ibid. Pg. 104

some illegal conditions have been stipulated which is against the purposes of *nikkah*. For example the husband stipulates the condition that the wife will not meet her parents after the marriage, this condition is against the purposes of *nikkah*. So, the marriage will be irregular and by removing this condition the marriage will be valid.

3.1.4.3 Void Marriage:

“A void marriage contract is one which is intrinsically null and void.”¹⁰⁸

A contract of marriage which is void *ab initio* such marriage does not have any effect and it does not give rise to any right or obligation towards the parties. For example a marriage contracted between foster sister and brother.

3.2 Child Marriage:

As discussed in earlier chapter child marriage is a marriage where both or either party to marriage contract is a minor. In Islamic law a person who has not attained puberty is a minor. For the purpose to bind a person in any type of obligation, whether social, economic, civil or criminal it is necessary that the person should understand the nature of the responsibility he is subject to. Similarly, marriage is a great responsibility for a girl or a boy so the parties need to be able to understand it. Islamic law has categorized a number of conditions for the parties to fulfill before they enter the contract of marriage. The requisites along with others, put forward by Islamic law for the contract of marriage are that the parties must be major, of sound mind and must possess discretion. Islamic law requires that while contracting marriage parties must understand the consequences of their actions. The

¹⁰⁸ Ibid. pg.108

real consent to marriage may be given by the parties when they really understand what they are going to do.

The essential conditions for the capacity to enter into a valid contract of marriage are constituted by puberty and discretion. An infant person in the eye of the law cannot enter into any legal transaction; consequently he is disqualified from entering into a marriage contract. There is a distinction between a contract made by a minor possessing discretion and the one made by a minor who does not possess understanding. A minor not having reached the age of discretion and does not understand and comprehend the consequences of the contract of marriage it will be a mere nullity. The marriage will be null and void, whether the minor is a girl or a boy.¹⁰⁹

3.2.1 Islamic Scholar's View about Child Marriage:

Being the primary sources of Islamic jurisprudence, the *Qur'an* and the *Sunnah* do not provide any clear verdict about the age of marriage. The scholars of Islamic law, thus, have given their reasoning on the question of the age of marriage. There are two opinions of scholars regarding this.

A. First Opinion:

The Imams of four Sunni schools, Imam Abu Hanifa, Imam Abu Malik, Imam Shafi and Imam Hanbal agree that the guardian of a minor may contract him/her into a marriage contract.¹¹⁰ They say that father, grandfather, brother or uncle on paternal side can act as

¹⁰⁹ Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P. 5

¹¹⁰ Ibn Rushd, *Badayat-al-Mujtahid wa Nihayat al-Muqtasid*, Trans. Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II*. P. 6.

guardian in such marriage contract. They further added that such a marriage is at the option¹¹¹ of the parties and may be ratified by the parties on reaching the age of majority.¹¹²

B. Second Opinion:

The other opinion is held by a contemporary of Imam Abu Hanifa, Imam Shubrāmah a famous jurist from Iraq and Abu Bakar al-Asim, a Qadi. They are of the view that the marriage of a minor is forbidden and it is against the biddings of Allah.¹¹³

Their Arguments:

These scholars of Islamic law based their opinions on some evidences from sources of Islamic law.

Imam Shubramah and Abu Bakar al-Asim says that a marriage should be contracted when parties attain the marriageable age *i.e.* puberty. They say that there could be no need of the verse of Holy Quran “*until they reach the age of marriage*”¹¹⁴ if the marriage of a minor is lawful before his attaining the age of puberty.¹¹⁵

They further argue that marriage is based on necessity and a minor is under no need of a marriage. They say, fulfillment of natural passion and lawful procreation are the purposes of marriage, a minor does not possess any power to carry out these purposes. So, there is no necessity for him to contract into a marriage.¹¹⁶

¹¹¹ Commonly known as “*Option of Puberty*”. It will be discussed in detail later in this chapter.

¹¹² Muhammad Tahir Mansoori, *Family Law in Islam Theory and Application*. P. 48

¹¹³ Wahaba Zuhaili, *Fiqh al-Islami Wa Adillatuhu Vol. 9*. (Peshawar: Maktabah Faridiyah, n.d.)P. 6682.

¹¹⁴ Al-Quran: (IV:6)

¹¹⁵ Wahaba Zuhaili, *Fiqh al-Islami Wa Adillatuhu Vol. 9*. P. 6682

¹¹⁶ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P.184

Their third argument is that the provisions of law related to the marriage and its incidents are applied when a minor attains puberty. Due to this reason, such marriage of a minor is unjustified.¹¹⁷

Jurists supporting child marriage justifies their view with the act of marriage of the Holy Prophet (P.B.U.H) with *Aishah* during her minority.¹¹⁸ In addition to its they quote a number of precedents from the Companions of Holy Prophet (P.B.U.H).

1. *Hazrat* Ali contracted his minor daughter with Urwah b. Zubayr.¹¹⁹
2. Urwah b. Zubayr married his minor niece to his minor nephew.¹²⁰
3. A person gifted his daughter to Abdullah b. Hassan. *Hazrat* Ali validated it.¹²¹
4. Abdullah b. Masud held a marriage to be valid where a woman contracted her minor daughter into marriage with Musayyib b. Nukhabah.¹²²

3.3 Marriage of Holy Prophet (P.B.U.H) With *Hazrat* Ayesha and Her Age at the Time of Marriage:

The evidence on which majority of scholars relies while justifying child marriage is that the Holy Prophet (P.B.U.H) married *Hazrat* Ayesha during her minority. The question of age of *Hazrat* Ayesha at the time of her marriage is of a controversial nature. Many modern scholars pondered upon the question and gave their respective opinions with

¹¹⁷ Ibid.

¹¹⁸ Ibn Rushd, *Badayat-al-Mujtahid wa Nihayat al-Muqtasid*, Trans. Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II. P. 6.*

¹¹⁹ Wahaba Zuhaili, *Fiqh al-Islami Wa Adillatuhu Vol. 9* 6683

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid.

arguments. The contentions in this regard are: firstly, that she was 6 years old at the time of her *nikkah* with Holy Prophet (P.B.U.H) and at the age of 9 her marriage was consummated. Secondly, that she was 10 years old at the time of *nikkah* and at the age of 15 years she went to the house of her husband. The years of her birth have not proven in any narration, but an account of historical data and related events her age can be calculated easily.

The narration, which indicates the age of *Hazrat Ayesha* as 6 at the time of her *nikkah* and 9 at the time of consummation of her marriage was reported by Hisham Ibn Urwah who is not regarded as a reliable reporter of Hadith. He is the only reporter of this narration who spent a part of his life in *Madinah* and rest in *Iraq*. For his *Iraqi* period he was known for his loss of memory due to old age. It is worth mentioning here that all the narrators of this narration are *Iraqi* who heard it from Hasham.¹²³

After the death of *Hazrat Khadija*, a companion and comforter in the times of hardship, the Holy Prophet (P.B.U.H) remained sad and depressed. His companions were worried for his loneliness. One of the companions *Hazrat Usman Bin Mazoon* sent his wife *Khaula Bint-e-Hakim* to Holy Prophet (P.B.U.H). She went to him and asked him to marry again; she put the name of *Ayesha*, daughter of *Hazrat Abu Bakar* in front of him for marriage. The Holy Prophet (P.B.U.H) agreed and asked her to proceed with this proposal.¹²⁴

¹²³ Nelofer Ahmed, "Of Aisha's Age at Marriage," Atif Salman, March 2nd, 2012. Available at <https://atifsalman.wordpress.com/2012/03/02/of-aishas-age-at-marriage/> accessed at November 24th, 2014.

¹²⁴ Allama Syed Suleman Nadvi, *Seerat-e-Sayedah Ayesha Sadiqah (R.A)* (Lahore: Islam Book Depot, 2010) pg. 24.

Syed Suleman Nadvi in his famous book, "*Seerat e Sayedena Ayesha (R.A)*" enumerated the reasons why the Prophet (P.B.U.H) needed to marry again. According to him the reasons were, to lessen the loneliness, burden of household tasks and the presence of two young daughters for whom there was the need of a house wife.¹²⁵ A girl of 6 years could not be a comforter nor could she take care of the household matters neither looks after children. She could be an addition to the problems of Holy Prophet (P.B.U.H) owing to her young age. Prophet (P.B.U.H) must have selected *Hazrat Ayesha* keeping in view all his necessities. He did not question her minority. If she would have been a girl of 6 years, an experienced lady like *Khaula* would not have suggested her name for marriage with the Holy Prophet (P.B.U.H). Similarly, when *Abu Bakar* was asked for the hand of her daughter, he did not raise the objection of her being underage, but he asked to settle the matter with *Jubair Bin Mautaam* first with whose son *Hazrat Ayesha* was engaged.¹²⁶

Maullana Muhammad Ali, in his book "Muhammad the Prophet" writes that it is the admitted fact that at the time of *nikkah Hazrat Ayesha* had not attained majority, but it is not true that she was 6 years old. It is obvious that at that time she was of the age when normally girls were engaged.¹²⁷ *Isabah* says that *Hazrat Fatima*, daughter of Holy Prophet (P.B.U.H) was 5 years older than *Hazrat Ayesha*. Birth of *Hazrat Fatima* at the time of renovation of Holy *Kabaa* is a well-established fact. The event of renovation of Holy *Kabaa* took place 5 years before the call. This shows that *Hazrat Ayesha* was born in the year of call or a bit earlier. She could not have been less than 10 years at the time of her

¹²⁵ Ibid.

¹²⁶ Tahir Irfani, *Rukhsati kay Waqt Uml-Momineen Sayedah Ayesha Sidiqah (R.A) ki Umer* (Mumbai: The Ahmadiyyah Anjuman Isha'at Islam, n.d.). P. 6

¹²⁷ Earlier to the proposal of Holy Prophet (P.B.U.H) *Hazrat Ayesha* was engaged with *Jubair Bin Mutaam*, when *Abu Bakar* went to him to ask about the proposal, he withdrew from it as he did not embarrass Islam yet and did not wish to have a Muslim girl in her family.

nikkah. Hazrat Ayesha by herself narrated that while playing with her friends she used to recite “*Surah Qamar*” (the 54th chapter of the *Quran*). The *Surah* was revealed on 4th or 5th year of call. So, it is not admissible that she was 6 years old at the time of her *nikkah* as in such situation the year of revelation of “*Surah Qamar*” would be her year of birth. In the light of these evidences she could not have been less than 15 years at the time of consummation of her marriage, as consummation took place after 5 years of *nikkah* in *Madinah*.¹²⁸

Allama Imad-ud-Deen Ibn Katheer a well-known historian writes in his famous book, “*Al-Bidayah wan Nihayah*” that *Sayedah Asma* elder sister of *Hazrat Ayesha* was 10 years older than her sister. *Sayedah Asma* died in 73 A.H at the age of 100 years. According to this *Asma* would have been 27-28 years at the time of migration to *Madinah* and *Hazrat Ayesha* would have been 17-18 years old. Now if we deduct 13 years of *Maki* life from this then it shows that at the time of the call she was 4-5 years old. And at the time of consummation of her marriage, she was 19-20 years old.¹²⁹

In the light of above mentioned narrations it is very clear that though at the time of her *nikkah* *Hazrat Ayesha* was a minor, but at the time of consummation of her marriage she was not a minor, but a girl of 15 or more. Not a single evidence supports the narration reported by Hasham.

¹²⁸ Muhammad Ali, *Muhammad The Prophet* (Canada: Payette and Simms, 1993). Pgs. 183-184

¹²⁹ Ibn Khateer, *Al-Bidayah wan Nihayah Vol. iv. Part 7*. (Bairut: Dar ul Kutab al Ilmiya, n.d.). Pg. 351-352

3.4 Guardianship in Marriage:

The majority of Muslim scholars allow child marriage, if contracted by the guardian. It is therefore essential to know who can act as guardian for a minor. What is guardianship and what are its kinds? What is the criterion for the appointment of a guardian?

3.4.1 Guardian:

Guardian as defined in *the Oxford Dictionary* is “a person who guards or protects something”.¹³⁰ It is the opposite of the enemy.¹³¹ Technically, it means “an adult or discreet heir”¹³²

3.4.2 Guardianship:

Guardianship is “the position or office of guardian”.¹³³ It means helping, caring and supporting.¹³⁴ In legal terminology, it means “acting for somebody, with or without his will, due to the failure in his person’s capacity to act for himself”.¹³⁵ “Guardianship is the enforcing of one’s own orders over another”.¹³⁶

Where a person lacks the capacity to act in a certain affair for himself, he/she is bestowed with the supervision of a person to act on his/her behalf with or without his/her consent. That supervisor known as guardian enforces his orders on the person so

¹³⁰ Oxford Advanced Learner’s Dictionary.

¹³¹ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar* (Lahore: Law Publishing Company, n.d.). P. 30

¹³² Ibid.

¹³³ Oxford Advanced Learner’s Dictionary.

¹³⁴ Ala’eddin Kharofa, *Islamic Family Law A Comparative Study With Other Religion* (Malaysia: International Law Book Services. 2004). P. 64

¹³⁵ Ibid.

¹³⁶ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. Pg.30

incapacitated. It is important to mention here that this incapacity can be due to minority, insanity, or for some other reason as the case may be.

3.4.3 Kinds of Guardianship:

Guardianship is mainly divided into two categories;

- Guardianship over property. Where a guardian is authorized to handle the financial and other matters related to the property of that incapacitated person.
- Guardianship over person. Where a guardian is authorized to make decisions regarding marriage, etc. of that person. This type of guardianship is further divided as;
 - Restricted guardianship. Where it is contingent on the will of the party.
 - Compulsory guardianship. Where guardianship is not contingent on the will of the party.

3.4.3.1 Restricted Guardianship:

Restricted guardianship is a guardianship contingent on the will of the person whose guardianship is required, e.g. a guardian for an adult virgin woman for the purposes of her *Nikkah*. If she allows the guardianship over her then the guardian can perform her *Nikkah* after obtaining her consent not otherwise. But if she refuses the guardianship she is competent and allowed under Islam to contract herself in marriage.

This is the guardianship over an adult female when she is a virgin. *Nikkah* of a minor without the consent of the guardian is not lawful, but *nikkah* of a free and adult woman without the guardian's consent will be valid.¹³⁷

The issue is that whether *nikkah* of a free, sane and adult female takes place with her consent alone, without the consent of a *wali* or not. In a tradition in *Zahir ur Riwayah* from Imam Abu Hanifah and Imam Abu Yusuf such a *nikkah* is valid. There is another tradition from Imam Abu Yusuf in *Ghair Zahir ur Riwayah* that such a *nikkah* i.e. without the consent of a *wali*, is not valid. Similarly, as per Imam Muhammad the *nikkah* shall take place, but it will be voidable and if the *wali* gives his consent for it then it shall be valid else it shall be void. Whereas, Imam Malik and Imam Shafi said that a *nikkah* can never take place with the words of females alone and hence is not valid Imam Malik and Imam Shafi base their ruling on the argument that by *nikkah* it means the purposes of *nikkah* and to give the control of the purposes of *nikkah* to females is to hinder the fulfillment of these purposes as the females have faulty intellect (*naqis ul aqal*), therefore, the authority to perform a *nikkah* cannot be granted to them.¹³⁸

Imam Muhammad in reply substantiated that indeed it is correct, but when a *wali* allows or permits the *nikkah* then this hindrance is lifted because if he deems it fit then he will allow it otherwise he will refuse it. The reason behind this is that she has done an act solely related to her and she had the ability to do that because she possesses a level of understanding. This is the reason through which a female has the authority to dispose of the property at her own will. If on the basis of this a person asks that if a female has the

¹³⁷ Ibid.

¹³⁸ Jameel Ahmed Sakarodhoi, Trans., *Ashraf ul Hadaya Vol. 4* (Karachi: Daar ul Ashaat, 2006). P. 55

authority, then why to ask a *wali* for the *nikkah* and not the females? To this Imam Muhammad replies that in such a case vulgarity may be attributed to a female. Because a female shall feel shame in going to a gathering of men and if she will go there then she shall be ascribed as shameless. Also, in such a case, there shall be no difference in *Zahir ur Riwayah* between *kufu* or *ghair kufu* (compatibility or non-compatibility), because if a free, sane and adult female then conducts her *nikkah* at her own will, in *kufu* or *ghair kufu*, then her *nikkah* shall be valid but in case of *ghair kufu* the *wali* has the authority to repudiate such a *nikkah* in order to safeguard himself from humiliation. There is a tradition in *nawadir* from Imam Abu Hanifah and Imam Abu Yousaf that *nikkah* in *ghair kufu* is not permissible at all because there are many incidents where after the *nikkah* had been performed none had the authority to repudiate it, because neither every *wali* can defend it nor every judge is just. Therefore, it is better to close the door of marriage in *ghair kufu* without the consent of *wali*, and it is narrated by Imam Muhammad in *zahir ur riwayah* that he reverted to the ruling of *Shaikhain* (Imam Abu Hanifah and Imam Abu Yousaf). It means that, according to Imam Muhammad as well, a *nikah* shall be valid without the consent of a *wali* and shall not be considered voidable on the consent of a *wali*.¹³⁹

A major person can contract with himself in marriage, whether male or female without the consent of a guardian. But general practice is that guardians perform marriages. In such situations the consent of the parties is quite necessary. The guardian should acquire their consent first.¹⁴⁰

¹³⁹ Ibid. P. 55 56

¹⁴⁰ Kazi Mohammad Ashraf, *The Muslim Law of Marriage* (Lahore: The All Pakistan Legal Decisions, 1953). P. 55

Where a guardian marries an adult virgin in her presence and she remains silent the *nikkah* will be valid and effective.¹⁴¹

3.4.3.2 Compulsory Guardianship:

A minor boy or girl who has not attained puberty is not competent to enter into a contract of marriage. But his or her guardian may give him or her into a marriage contract validly.¹⁴² This is the guardianship over a minor, an imbecile or a slave. The existence of a *wali* (guardian) is a condition for the validity of the *Nikkah* of a minor, a lunatic and a slave.¹⁴³ All scholars of Islamic law agree on the point that the consent of a guardian is necessary for the marriage of a minor.¹⁴⁴ Guardians can be of four types. (1) Guardian by *Qarabat*, (2) *Milk*, (3) *Valla* and (4) *Immamat*.¹⁴⁵

Guardian by *Qarabat*

This guardianship is given due to relation to the ward. For example father, grandfather, son and uncle can be a guardian by *Qarabat*.¹⁴⁶

Guardian by *Milk*

This guardianship belongs to the master over his slave with the condition that the master is major and sane.¹⁴⁷

¹⁴¹ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P.36

¹⁴² Mohammad Ashraf, *The Muslim Law of Marriage*. P. 56

¹⁴³ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. Pgs. 30-31.

¹⁴⁴ Ala'eddinKharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 67.

¹⁴⁵ Wahaba Zuhaili, *Fiqh al-Islami Wa Adillatuhu* Vol. 9. P. 6691

¹⁴⁶ Ibid. P. 6692

¹⁴⁷ Ibid.

Guardian by *Valla*

A contract between two people that they shall support each other and in the case of crime shall pay the compensation and in case of death shall become the legal heir; therefore, through this contract the right to get the other person married shall be attained. Provided that the guardian shall be sane, adult and free man and the one whose guardian, he is (*MuwalaAlaih*) has no blood, residuary or causative heir.¹⁴⁸

Guardian by *Imamat*

This guardianship belongs to the head of the state or Qazi (judge). Guardianship evolves to them in the event of the absence of guardian by *Qarabat*.¹⁴⁹

Marriage of an infant contracted by the father or grandfather will be valid and binding, the infant will not have the option of repudiation on attaining maturity. The choice of nearer guardian will be given weightage over remoter guardian when nearer guardian is present. For example, marriage of infant contracted by a guardian other than father or grandfather will be valid, but he will have the option to annul the marriage on attaining majority with a condition that he or she repudiate it at earliest opportunity, otherwise it will be considered his/her willingness.¹⁵⁰ In the presence of the father, a mother cannot be the guardian of her daughter for the purposes of giving her in marriage. She cannot marry her without the consent of rightful guardian. In the absence of father, mother is the guardian *ad litem*¹⁵¹ of her minor married daughter who has not joined her husband yet. Maternal

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Mohammad Ashraf, *The Muslim Law of Marriage*. P. 56

¹⁵¹ A guardian appointed by the court to represent the interests of Infants, the unborn or incompetent persons in legal actions.

kindred may marry an underage child in the absence of paternal guardian.¹⁵² In the absence of nearer guardian a remote guardian can marry a minor into a contract of marriage.¹⁵³ Among paternal grandfather and paternal uncle, grandfather will be the guardian in the absence of a father. In case of disability of nearer guardian due to minority or insanity, marriage contracted by remote guardian will be lawful. A marriage contracted by a remote guardian in the absence of nearer will not be annulled on the return of nearer guardian, it will remain valid.¹⁵⁴ In case the proper guardian refuses the proposal of marriage than the guardian next to degree cannot have any right to contract the minor in marriage with that person.¹⁵⁵

In the event of two *walis* of same degree, for instance, two brothers or two paternal uncles, marry a minor with two different individuals, the first in time will be valid, but where it cannot be ascertained that which one is prior both will be void. Or it will be left on girl on attaining puberty she will declare which was the first marriage than that will be operative.¹⁵⁶ In the event of no availability of guardian for a minor girl and she is in a place where no *qazi* is present she can contract herself in marriage, it will be a valid marriage, but such marriage will not take effect till the time she reaches puberty and ratify it.¹⁵⁷ When a minor girl marries herself in places like *Dar-ul-Harb*¹⁵⁸, on sea, or travelling in the desert

¹⁵² Mohammad Ashraf, *The Muslim Law of Marriage*. P. 58

¹⁵³ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P. 45. Also Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P. 25

¹⁵⁴ Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P. 25-26. Also Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P. 46

¹⁵⁵ Al Haj Mahomed Ullah, *The Muslim Law of Marriage* (New Delhi: Kitab Bhavan, 1986). P. 43.

¹⁵⁶ Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P. 24. Also Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P.45

¹⁵⁷ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P.45. Also Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P. 24.

¹⁵⁸ Country of Enemy

such marriage will be void, but marriage contracted in a city or village will be subject to her option.¹⁵⁹

3.4.4 Priority Order of Guardians:

A. Hanafi View.

Imam Abu Hanifa holds that any person who enjoys guardianship over a minor can give her/him in marriage, including father, grandfather and other relative with the condition of option of puberty.¹⁶⁰ According to him, guardians use to be cautious in deciding on the best interest of their wards, so they should be considered equal to the father.¹⁶¹ A person who is *asbah-binafsi* i.e. agnate in his own right, a relative of the ward without intervening female in a relationship can act as guardian in matters of marriage of minors. In case of absence of *asbah*, the *dhawail-arham*, the uterine relations (relation through the mother) shall have the right of guardianship. When no relation of ward is available, then *Qazi* will be the guardian of the minor on the same footing of *asbah* and *dhawil-arham*, provided that the *Qazi* has been conferred with these powers by ruler. Otherwise, this right will belong to the ruler.¹⁶² Imam Abu Yusuf and Imam Muhammad, however, hold that guardianship can be given to the male relatives only. If no male relative is available the guardianship shifts to the ruler.¹⁶³

¹⁵⁹ Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P.

¹⁶⁰ Jameel Ahmed Sakarodhoi, Trans., *Ashraf ul Hadaya Vol. 4*. P. 64. Also Shamas ud Din Sarakhsi, *Al-Mabsoot Vol. 4*. (Egypt: Daar ul Marfaah, 1331H). P. 212.

¹⁶¹ Ibn Rushd, *Badayat-al-Mujtahid wa Nihayat al-Muqtasid*, Trans. Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II*. P. 6.

¹⁶² Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 192.

¹⁶³ Ala'eddin Kharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 64

of such marriages punishable by declaring it invalid, but it does not provide any remedy to the innocent girls out of the marriage, who had been married at an early age. Though the act of child marriage is penalized, but it is still valid and the girl does not get freedom from the wedlock. Those who arrange such marriages may be penalized and put behind bars, they may be fined but all this does not provide any remedy to the girl. There is only one remedy provided in the statutes for the victim girl, i.e. in Dissolution of Muslim Marriage Act, 1939. The Act provides the girl with the ground entitling her to a decree for the dissolution of her marriage. Section 2(vii) states, “that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated;”

So, if a girl has been given in marriage by her father or guardian at an early age, she has the right to raise her voice against such marriage and show her objection on that. The court may dissolve such marriage on her instance. The only condition attached to this is that the marriage should not be consummated.

The remedy recognized in the above mentioned clause is known as “option of puberty”²¹⁴ in Islamic law. On attaining the age of majority the girl is entitled to exercise her right of option of puberty, provided that the marriage is not being consummated. She can apply for a decree for dissolution of marriage on the basis of the exercise of right of option of puberty.

²¹⁴ Discussed in earlier chapter.

4.2.4.1 Relevant Case Law:

In a case titled *Muhammad Riaz vs. Mst. Robina and Another*²¹⁵ before Muhammad Akhter Shabbir, J., wherein the petitioner challenged the judgment and decree of learned appellate court before the Learned Lahore High Court. The facts of the case are that the respondent/plaintiff (Mst. Rubina) filed suit for dissolution of marriage on the basis of the exercise of her right of option of puberty (*Khair ul Baloogh*). Wherein she averred that her nikkah with the petitioner was solemnized at the age of 10/11 years without her consent and that her marriage was not consummated. Now on attaining the age of puberty, she dissolved her marriage. Petitioner contested the suit. After the trial the learned trial court dismissed the suit of the respondent. Feeling aggrieved, respondent filed appeal before the learned appellate court which was accepted and her suit was decreed. Learned court said that the three things are to be considered before granting the decree for dissolution of marriage on the basis of exercise of her right of option of puberty, i.e. marriage should have taken place before the age of sixteen i.e. in the age of minority, non-consummation of marriage and repudiation of marriage before the age of 18. In the above case from the perusal of evidence all the conditions are fulfilled i.e. marriage at the age of 10/11 years, non-consummation and exercising the *Khair ul Baloogh* before 18. The court decided that the marriage of the parties has rightly been dissolved during the exercise of right of option of puberty and dismissed the petition. In another case titled as *Mulazim Hussain vs. Mst. Amina BiBi and Another*²¹⁶ before Ch. Mushtaq Ahmed Khan, J., where in a similar issue has been decided by the learned Lahore High Court. In the said case the respondent/plaintiff filed suit for dissolution of marriage averring in the plaint that she was married to the petitioner at the

²¹⁵ 2000 MLD 1886

²¹⁶ 1994 CLC 1046

age of 5/6 years; on attaining the age of puberty she exercised her right of option of puberty and repudiated her marriage. The learned judge family court decreed the suit of the respondent/plaintiff. Feeling aggrieved petitioner filed writ petition. The Learned Lahore High court said that it is clear from the evidence adduced by the parties that the marriage was solemnized less than the age of 15 years, consummation of marriage has not taken place and the suit filed by the respondent/plaintiff is before the age of 18 and she has rightfully exercised her right of option of puberty and was well within her right in repudiation of marriage, solemnized in the age of minority. Judgment and decree of the Learned Trial was upheld being just and fair. In the case titled *Mst. Daulan vs. Dosa*²¹⁷ before *Kaukaus, J.*, appellant/plaintiff filed suit for the cancellation of her marriage alleging therein that marriage had been solemnized by her guardian under coercion and undue influence. Now, as she attained puberty twenty days before, and claimed her entitlement for dissolution of marriage. Respondent/defendant resisted the suit and denied the allegation of coercion and undue influence. He contended that the plaintiff had not attained the age of 15 years, hence suit is premature and not maintainable. The learned trial court came to the conclusion that though the plaintiff was only 12, 13 years of age attained puberty, hence suit is maintainable and decreed the suit. On appeal before the District Judge, it was observed that on a proper interpretation of Section 2(7) of DMMA, 1939, option of puberty can only be exercised after reaching the age of 15 years and accepted the appeal without considering the question of puberty. On appeal before the High Court, it was observed that though under Muslim law, there is a presumption of the attainments of puberty at the age of fifteen but this presumption is rebuttable. The law provides 15 years age requirement for puberty without any opportunity for rebuttal. The law of land does not speak of puberty, but

²¹⁷ PLD 1956 (W.P.) Lahore 712

such marriage will be void, but marriage contracted in a city or village will be subject to her option.¹⁵⁹

3.4.4 Priority Order of Guardians:

A. Hanafi View.

Imam Abu Hanifa holds that any person who enjoys guardianship over a minor can give her/him in marriage, including father, grandfather and other relative with the condition of option of puberty.¹⁶⁰ According to him, guardians use to be cautious in deciding on the best interest of their wards, so they should be considered equal to the father.¹⁶¹ A person who is *asbah-binafsi* i.e. agnate in his own right, a relative of the ward without intervening female in a relationship can act as guardian in matters of marriage of minors. In case of absence of *asbah*, the *dhawail-arham*, the uterine relations (relation through the mother) shall have the right of guardianship. When no relation of ward is available, then *Qazi* will be the guardian of the minor on the same footing of *asbah* and *dhawil-arham*, provided that the *Qazi* has been conferred with these powers by ruler. Otherwise, this right will belong to the ruler.¹⁶² Imam Abu Yusuf and Imam Muhammad, however, hold that guardianship can be given to the male relatives only. If no male relative is available the guardianship shifts to the ruler.¹⁶³

¹⁵⁹ Tauqir Mohammad Khan, *Law of Marriage and Divorce in Islam*. P.

¹⁶⁰ Jameel Ahmed Sakarodhoi, Trans., *Ashraf ul Hadaya Vol. 4*. P. 64. Also Shamas ud Din Sarakhsi, *Al-Mabsoot Vol. 4*. (Egypt: Daar ul Marfaah, 1331H). P. 212.

¹⁶¹ Ibn Rushd, *Badayat-al-Mujtahid wa Nihayat al-Muqtasid*, Trans. Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II*. P. 6.

¹⁶² Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 192.

¹⁶³ Ala'eddin Kharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 64

B. Maliki View

Maliki School holds that only a father has the right of guardianship in the matter of marriage of minor or the one to whom the father has delegated this task, unless there is apprehension of corruption and loss to the minor. According to him no one can possess the same place as the father as the law has singled him out of this, because the level of sympathy and kindness of a father is not matchable with anyone.¹⁶⁴ Where the father is not available, then Qazi will have the right of guardianship over minor.¹⁶⁵

C. Shafi View

Shafi School holds that only father and grandfather will have the right of guardianship over minor for the purposes of marriage. Nobody else has the right.¹⁶⁶

3.4.5 Arguments of Scholars:

Hanafites base their opinion on the verse, "And if ye fear that ye will not deal fairly by orphans, marry of the women, who seem good to you." (Quran 4:3). The word orphan applies to the *non-baligh* (minor) girl. While other jurists say that word orphan applies to the *baligh* (major) girl. They hold it on the base of the saying of the Prophet (P.B.U.H), "seek permission from the orphan girl." As the one whose permission is sought is one who is capable of consent and a minor girl cannot give consent. Maliki's argue on the basis of the saying that, "the orphan girl is to be asked about herself." They say a minor cannot

¹⁶⁴ Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II. P. 6*

¹⁶⁵ Tanzil-ur-Rehman, *A Code of Muslim Personal Law. P. 192*

¹⁶⁶ Wahaba Zuhaili, *Fiqh al-Islami Wa Adillatuhu Vol. 9. P. 6695*. Also Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II. P. 6*. Also Shamas ud Din Sarakhsi, *Al-Mabsoot Vol. 4. P. 213*.

grant permission so any person other than father should not be granted permission. The ruling is related to the orphan girl the rule of minor is not covered by *Shariah* expressly.¹⁶⁷

3.4.6 Requirements for a Guardian:

A guardian must fulfill the following requirements.

1. He must be an adult, sane and possess full legal capacity.¹⁶⁸
2. He must be a Muslim, or of the same religion of the ward.¹⁶⁹
3. He must be a person of probity, good moral character and honest.¹⁷⁰
4. He must be a free man; a slave cannot be a guardian.¹⁷¹

3.5 Option of Puberty:

When a minor girl or boy is contracted into marriage by his or her guardian, the minor has the right to repudiate the marriage on attainment of puberty. This right of the minor is known as "option of Puberty" "*Khayar ul Balugh*".¹⁷²

As discussed earlier, it is essential for a Muslim marriage to take effect, that the parties have given their full and free consent to it. A Muslim woman and man should conclude the contract of marriage by themselves. But where the parties are minor their marriage can be contracted by their guardian. The minor can repudiate such marriage on

¹⁶⁷ Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II*. P. 7

¹⁶⁸ Ala'eddin Kharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 66. Also Jameel Ahmed Sakarodhoi, Trans., *Ashraf ul Hadaya Vol. 4*. P. 71

¹⁶⁹ Mohammad Ashraf, *The Muslim Law of Marriage*. P 56. Also Ala'eddin Kharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 66

¹⁷⁰ Tahir Mansoori, *Family Law in Islam Theory and Application*. P. 69

¹⁷¹ Ala'eddin Kharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 66. Also Jameel Ahmed Sakarodhoi, Trans., *Ashraf ul Hadaya Vol. 4*. P. 71

¹⁷² Mohammad Ashraf, *The Muslim Law of Marriage*. P. 66

attaining puberty.¹⁷³ This is a technical right and it can be exercised under certain conditions, these are: (1) the marriage must be contracted during minority, (2) the marriage must not be consummated and (3) it must be repudiated on attaining puberty.¹⁷⁴

By exercising of option by either party marriage will cease to be a marriage anymore and will be treated as it never took place. This option given to a Muslim woman is based on the principles of Qur'an by which she is safeguarded from pre Islam inequalities by harsh institutions which were pressing them. She is required to exercise the option immediately after attaining puberty. Her right will be waived if she consents to consummation of marriage. Mere consummation is not necessary, but consummation with the free consent of the wife is necessary to waive her right. It is not necessary for a minor to repudiate a marriage orally, but if on attainment of puberty, he or she marries some other it will be enough to repudiate the marriage of minorities. The right must be exercised within a reasonable time from the knowledge of marriage or from the knowledge of the right of option of puberty.¹⁷⁵ Her silence on her knowing the fact of *Nikkah* will extinguish her option.¹⁷⁶

As discussed earlier, if a minor has been contracted into marriage by the father or grandfather no right of option of puberty will exist and the marriage will be valid and binding. The reason is that their affection for their offspring is absolute.¹⁷⁷ But where a father or grandfather acted fraudulently or the marriage is a manifest disadvantage of the minor, then the right of option of puberty will not cease on the basis that marriage was

¹⁷³ Tahir Mansoori, *Family Law in Islam Theory and Application*. P. 48

¹⁷⁴ Ibid. P. 178.

¹⁷⁵ Mohammad Ashraf, *The Muslim Law of Marriage*. Pgs. 67 68

¹⁷⁶ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P. 42

¹⁷⁷ Jameel Ahmed Sakarodhoi, Trans., *Hadaya Vol. 4*. P. 65

contracted by father or grandfather. Such marriage will be subject to the minor's repudiation.¹⁷⁸ If a guardian other than the father or grandfather marries an adult female with an equal and with a proper dower that will be a valid marriage but when such guardian marries a minor, he will have the option to repudiate the same on attaining puberty, irrespective of the fact that the match is equal and the dower is proper. The purpose of giving this option is lack of affection for minor in person other than father or grandfather.¹⁷⁹ If a girl seeks or accepts her husband's financial assistance her right of option will be dropped.¹⁸⁰

3.5.1 Opinion of Scholars Regarding Option of Puberty:

The Scholars of Islamic jurisprudence differ as to when and to what extent a minor can enjoy the option of puberty on attaining puberty. Their views are as below:

A. Hanafi Scholars

Hanafi scholars enumerate a number of cases where a minor can exercise his option. When marriage was performed by the guardian other than father and grandfather.¹⁸¹ When marriage was performed by them, but they have acted fraudulently or ignored minor's interest or with an inadequate dower. Where both of them has a notorious reputation and are known for their greed and bad character or when they are in a position of being drunk.¹⁸²

¹⁷⁸ Mohammad Ashraf, *The Muslim Law of Marriage*. P. 70

¹⁷⁹ Muhammad Ala-ud-Din Haskafani, *The Durr-ul-Mukhtar*. P.39

¹⁸⁰ Ala'eddinKharofa, *Islamic Family Law A Comparative Study With Other Religion*. P. 67-68

¹⁸¹ Jameel Ahmed Sakarodhoi, Trans., *Ashraf ul Hadaya Vol. 4*. P. 66

¹⁸² Muhammad Tahir Mansoori, *Family Law in Islam Theory and Application*. P. 178-179

Imam Abu Yusuf and Imam Muhammad two students of Imam Abu Hanifah however, hold that marriage of a minor by guardian whether father, grandfather or any other remote guardian will be binding and the minor will not have the option to repudiate it on attainment of puberty. They have given some exception where marriage has been contracted with an unequal person or with an improper dower.¹⁸³

B. *Shafi Scholars*

They hold the opinion that a minor can only be married by his father or grandfather. They say that only a father or grandfather can be the guardian of marriage. If they are not available, the minor cannot be married by other guardians.¹⁸⁴ They further added that marriage of a minor under the guardianship of the father or grandfather will be binding and minor will not be entitled to the right of option of puberty.¹⁸⁵

C. *Maliki Scholars*

Maliki scholars on the contrary, hold that only the father has the authority to contract the marriage of a minor or someone who has been authorized by father in this regard.¹⁸⁶ No other guardian can give the minor in marriage. They also hold that such marriage will be binding on minor and no option will exist.¹⁸⁷

A marriage contracted by guardians other than father and grandfather is invalid according to Shafi and Maliki scholars.¹⁸⁸

¹⁸³ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 467

¹⁸⁴ Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II*. P.

¹⁸⁵ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 468.

¹⁸⁶ Imran Ahsan Khan Nayazee, *The Distinguished Jurist's Primer Vol. II*. P. 6

¹⁸⁷ Muhammad Tahir Mansoori, *Family Law in Islam Theory and Application*. P. 179

¹⁸⁸ Tanzil-ur-Rehman, *A Code of Muslim Personal Law*. P. 468.

3.6 Conclusion:

After the detailed discussion of Islamic law of child marriage, it is very clear that child marriage in Islam is permissible altogether, though not compulsory. The scholars of Islamic jurisprudence under the light of the *Quran* and the *Sunnah* permit child marriage with the condition of guardian. Obviously, for a minor, who cannot even decide what to eat and how to act in a certain situation, cannot make such a major and significant decision of his life alone. So the supervision of a guardian is necessary for him/her and of vital importance. After the supervision of a guardian, he/she has been granted the right of option of puberty. Irrespective of the conflict of opinions among scholars, all these rules regarding guardian and option of puberty safeguard the rights of the child. There could be a number of situations for a minor or for his parents were living in a certain period of time or living in a specific society, it is vital for the minor to be wedded as soon as possible (as the reasons discussed in chapter 1). For such situations, Islam has provided a legal way, requirement of guardian is basically a safeguard of the rights of minor as it is an admitted fact that father, grandfather or other relatives by blood use to have affection and emotional attachment with minor. So they will decide whatever is in the best interest of minor. In case of their negligence or in the apprehension of any harm that may cause minor in the result of such marriage, Islam provides him/her with a legal mechanism to exercise his/her right of option of puberty. So the rights of minor have been safeguarded at every step.

CHAPTER FOUR

CHILD MARRIAGE IN LAW- NATIONAL AND INTERNATIONAL

4.1 Introduction:

Child marriage is a very serious problem of our society, particularly in rural areas, it has been shaped as an evil due to which life and health of a female is at stake. Those young girls who do not have much physical strength, their life is open to a danger of early death because of undesired and early pregnancy. Due to the reasons discussed in earlier chapters, parents marry their daughters in early age not even taking their consent, without even bothering to know their inclination and deprive them of many fundamental rights. Their only concern is to lighten their own burden, thinking it better for her economic and social status.

This section will elaborate the legislative efforts to combat the child marriage issues at the domestic level (Pakistan) and international level. This aspect can easily be witnessed that provisions related to child marriage are very much focusing the female child, the reason behind this is the greatest number of victims being female due to this child marriage and early marriage practices.

4.2 National (Pakistani) Laws:

4.2.1 Child Marriage Restraint Act, 1929:

The Child Marriage Restraint Act, 1929 is a penal statute making the act of solemnizing child marriage punishable. It prescribes punishment for those who solemnize

such child marriage and also for the parents and guardians concerned with child marriage. It also prescribes punishments for male adult who is above 18 years of age marrying a child.

The Child Marriage Restraint Act, 1929 at no stage invalidate a child marriage, it only made it punishable offence and prescribe punishment for those who are involved in this offence. The Act has nothing to do with the validity of marriage. If the marriage is valid according to Islamic rites and rituals, then it will be valid under the Child Marriage Restraint Act, 1929.

By introducing the Child Marriage Restraint Act, 1929 government aimed to discourage the practice of child marriage. The Act penalizes the supporters of such marriages of underage girls and boys. The spouse is not liable for any punishment owing to their age, and the marriage is considered to be valid. The reason for such provisions is that the customs and traditions of the land are of such a nature that a married girl is not considered to be the part of her parent's family, but a member of her husband's family so; it is in the best interest of the girl. The other reason for not invalidating such marriages is that this would lead the offspring of such marriages as illegitimate. So considering such marriages as valid is important.¹⁸⁹

4.2.1.1 Background of the Child Marriages Restraint Act, 1929.

In the Sub-Continent Muslims and Hindus were living together, they had developed same culture and practices. The custom of child marriage existed in undivided India historically. Some Indian scholars are of the view that child marriage existed in ancient

¹⁸⁹ Deep Ray, "Child Marriages and the Law."

India. For Hindus, it was a religious duty of father to marry their daughters before they reach the age of puberty. At the age of puberty if a girl is still unmarried it is considered a failure towards his duties. It was believed that if a daughter is married before the age of puberty, it would be equal to the donation of 7,800 cows and if the daughter is unmarried at that age it would be equal to the killing of 7,800 cows. A reason of early marriage in ancient India was that in 400 BC the average life span was between thirty five to forty years but this is no longer an issue. Another reason was that in the medieval times predatory feudal lords and princes were a constant threat all over India. So in order to save the virginity of young girls parents marry them at an early age. Even during the British period this practice was prevalent. In 19th century, two significant cases grabbed the attention towards the issue of child marriage, the *Rukhmabai* case in Maharashtra and the *Phulmonee* case in Bengal. After these cases the issue was first addressed in 1860's in Indian Penal Code. In which laws were made to punish those who had sexual intercourse with their wives below a particular age. The intention behind this law was to protect girls from sexual abuse within the institution of marriage. According to the Section 375 of Indian Penal Code sexual intercourse of a man with his wife who is under 15 years of age was considered as rape. This was the first attempt in the direction of making child marriage an illegal act, though it was not successful due to the lack of implementing powers. In 1929 Child Marriage Restraint Act came into force aiming to eliminate the practice of child marriage. It rose the age of marriage to 14 years.¹⁹⁰ Child Marriage Restraint Act, 1929 was one of those laws which were adopted by Pakistan after its independence.

¹⁹⁰ Shakti Deb," A Critical Analysis of Child Marriage Law in India with Special Reference to Hindu Law", *KIIT Law School*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998189 P. 19 last accessed 10 November, 2013.

Marriage of a male or female less than eighteen or sixteen year of age respectively is forbidden by the Act.¹⁹¹ A marriage in which either party to it is below the prescribed age fell under the scope of the Act. The purpose of the Act was to abolish the special evil which endangers the life and health of a female child and to avoid early deaths of such minor mothers who could not withstand the stress and strains of married life.¹⁹²

4.2.1.2 The Main Provisions of the Act:

The Act was aimed to restraint the solemnization of child marriages.¹⁹³

- **Definitions:**

The definition of Child has been mentioned earlier in chapter one. It is important to mention here that in May 2014, certain amendments are proposed in the Child Marriage Restraint Act, 1929 before the National Assembly through “The Child Protection System Bill” (hereinafter called Proposed Amendment), along others it proposed the change in the definition of child, which defined Child as a person under the age of eighteen years, hence it is raising the minimum limit of the girl child from 16 to 18 years.¹⁹⁴ The Act defines child marriage as, “a marriage to which either of the contracting parties is a child;”¹⁹⁵ and minor as, “person of either sex who is under eighteen years of age”¹⁹⁶

¹⁹¹ 16 years substituted 14 years by the Muslim Family Laws Ordinance 1961 (No VIII), section 12(1)(a)

¹⁹² Shakti Deb,” A Critical Analysis of Child Marriage Law in India with Special Reference to Hindu Law.”

¹⁹³ Preamble, Child Marriage Restraint Act, 1929.

¹⁹⁴ Section 2, The Child Protection System Bill 2014,

http://na.gov.pk/uploads/documents/1397730973_450.pdf accessed on 10 August 2014

¹⁹⁵ Section 2(b), Child Marriage Restraint Act, 1929.

¹⁹⁶ Section 2(d), Child Marriage Restraint Act, 1929.

▪ **Punishment for Male Adult Above 18 Years of Age Marrying a Child:**

Child Marriage Restraint Act, 1929 prescribes a punishment of simple imprisonment of one month or a fine of rupees one thousand or both for a male adult above 18 years of age marrying a child.¹⁹⁷ In the Proposed amendment, punishment is enhanced from one month to two years and from a fine of rupees one thousand to one hundred thousand rupees.¹⁹⁸

▪ **Punishment for Solemnizing a Child Marriage:**

On the other hand the punishment for solemnizing a child marriage is simple imprisonment for one month or a fine of one thousand rupees, or both.¹⁹⁹ In the Proposed amendment, punishment is enhanced from one month to two years and from a fine of rupees one thousand to one hundred thousand rupees.²⁰⁰

▪ **Punishment for Parents or Guardian Concerned In Child Marriage:**

Parents and guardians who supervise any child marriage will be punished with simple imprisonment of one month or one thousand rupees or with both.²⁰¹ In the Proposed amendment, punishment is enhanced from one month to two years and from fine of rupees one thousand to one hundred thousand rupees.²⁰²

¹⁹⁷ Section 4, Child Marriage Restraint Act, 1929.

¹⁹⁸ Section 3, The Child Protection System Bill 2014.

¹⁹⁹ Section 5, Child Marriage Restraint Act, 1929.

²⁰⁰ Section 4, The Child Protection System Bill 2014,

²⁰¹ Section 6, Child Marriage Restraint Act, 1929.

²⁰² Section 5, The Child Protection System Bill 2014,

▪ **Power to issue injunction prohibiting marriage in contravention of this Act**

The Act empowers the court to issue an injunction prohibiting a child marriage. If a court receives any information through a complaint or otherwise that a child marriage has been arranged or is about to be solemnized, it may issue an injunction against any person mentioned below.

1. Male adult above 18 years of age marrying a child,
2. Any person solemnizing child marriage and
3. Parents and guardians concerned in a child marriage.

Before issuing such injunction court shall give a previous notice to such person and affords him an opportunity to show cause against the issue of same. The court has the power to alter or rescind any order of injunction on application of any aggrieved person.

After receiving such an application, court shall afford the applicant an early opportunity of appearing before it either in person or by pleader. In case court rejects the application, it shall give its reasons in writing.

Whoever after issuance of injunction and having knowledge of the same disobey such injunction shall be punishable for a term which may extend to three months or with fine of one thousand rupees or with both. Provided that, no woman shall be punishable with imprisonment.

It is worth mentioning that check is made more strict upon any activity related to child marriage by the Proposed amendment, wherein the requirement of service of notice before issuing injunction is now removed and court can directly issue the injunction

prohibiting any marriage which is in contravention of the Child Marriage Restraint Act 1929 . This amendment could be taken in the interest of speedy and fair justice to the affected child.²⁰³

4.2.1.3 Weaknesses in the Act:

The Child Marriage Restraint Act 1929 if analyzed critically will show some of the weaknesses and shortcomings within it. The Act requires a court to take action only if any complaint is made by the Union Council or by any Provincial authority. This section stops the police to take action against the violators of the law.

Secondly the offender violating the provisions of the Act will be punished for one month imprisonment or with fine of Rs.1000 (US \$ 10), but the marriage does not stand dissolved. As usual, the implementation of this law is non-existent.

Therefore, it is very important for the state to take corrective measures by making the laws strict. The legislators need to bring amendments to the law making the punishment stricter. The monitoring and implementation of the law should be mandatory, while the law should be publicized properly so that everyone in the country knows about it. One of the efforts is the recently presented proposed bill in the National Assembly referred above, which demanded the change in the definition of child, minimum imprisonment to two years and fine amount to one hundred thousand rupees. Along with these it proposed to give cognizance of the offences under this law to the Police, which is an appreciating thing.

Apart from the federal level efforts, in Pakistan Provincial level efforts are also done and Sindh Assembly is the first to pass some amendments unanimously in the Child

²⁰³ Section8, The Child Protection System 2014,

Marriage Restraint Act 1929. Sindh Assembly passed a law in its sitting held on 28th April, 2014 defining child as a person, male or female under eighteen years of age.²⁰⁴

4.2.1.4 Reported Cases Under the Child Marriage Restraint Act, 1929:

In a case *Mushtaq Ahmed Vs. Muhammad Amin*²⁰⁵ before A.S Faruqui and Wahiduddin Ahmed, JJ., Sindh High Court opined that the Child Marriage Restraint Act, 1929 merely punishes the male for contracting a marriage with a “child” but it does not render the marriage invalid. It makes performance of child marriage an offence not the marriage itself. In another case, *Mst. Bakhshi vs. Bashir Ahmed*²⁰⁶ before M.R Khan and Wahiduddin Ahmed, JJ., where a girl Mst. Shamim of age 15 years married Bashir Ahmed of her own will. It was contended by appellant that the girl being under the age of 16 years was incompetent to contract a marriage under the Child Marriage Restraint Act, 1929. It was held by Supreme Court that, “it is true that the said Act does not permit the marriage of a girl below the age of 16 years, but if a girl below the age of 16 years marries in violation of that law the marriage itself does not become invalid on that score, although an adult husband contracting the marriage to the person who have solemnised the marriage may be held criminally liable.” In *Mauj Ali vs. Safdar Hussain*²⁰⁷ before Sajjad Ahmed and Wahiduddin Ahmed, JJ., Supreme Court of Pakistan held that it is not disputed that the girl has attained the age of puberty and she had married with Syed Safdar Hussain Shah of her own free will. Such a marriage is valid under Muhammadan Law, so husband is the guardian of the girl and it is justified to allow her to go with her husband. In *Shamsu Mia*

²⁰⁴ Section 1(a) Sindh Child Marriage Restraint Act, 2013.

²⁰⁵ PLD 1962 Kar 442

²⁰⁶ PLD 1970 SC 323

²⁰⁷ 1970 SCMR 437

*and others vs. The State*²⁰⁸ before *Sikandar Ali, J.*, a 9/10 years old girl, Roushana was living with her uncle after her father's death and mother's second marriage. Her mother brought the child on a visit to her husband's house. Where mother and stepfather gave her in marriage to a man elder in age to her. Her mother, step father, bridegroom and Father of the bridegroom were sentenced to pay a fine under section 4 and 5 of The Child Marriage Restraint Act, 1929 by the Dacca High Court.

In *Ghulam Qadir vs. The Judge Family Court, Murree*²⁰⁹ before *Gul Zaman Kiani and Rashid Aziz Khan, JJ.*, Mst. Parveen Akhter claimed that at the time of her Nikkah she was minor and her age was 14 years she further claimed that the marriage was not ratified and that she in exercise of her right of option of puberty had repudiated it. Her husband resisted the suit and it was pleaded that at the time of marriage Mst Parveen Akhter had attained puberty and was about 18 years of age. On consideration of the evidence and hearing of the parties learned judge of family court adjudged her minor and gave her a decree of annulment of marriage.

As no appeal lay, the husband filed an application under Article 199 of the Constitution of Pakistan before the Lahore High Court and challenged the decision; petition did not succeed and was dismissed. He further went to appeal to double bench where again appeal was dismissed and Parveen Akhter stood entitled to exercise her right to option of puberty.

The above discussion clearly shows that courts while deciding cases under Child Marriage Restraint Act, 1929 did not negate the status and validity of a marriage but where

²⁰⁸ PLD 1964 Dacca 630

²⁰⁹ 1988 CLC 113

such marriage took place in violation of the Act the persons who violate the law and solemnized marriage has been punished accordingly. Courts allow a girl to exercise her right of option of puberty.

4.2.2 Pakistan Penal Code 1860 (PPC) Giving Females in Marriage as Badl-i-Sulh (Mutually Agreed Consideration of Compromise):

A prominent and widely practiced form of child marriage with respect to female child is “*vanni*” which is penalized under Pakistan Penal Code, 1860 with the name of “giving females in marriage as *Badl-i-Sulh*”. Though this provision is not specific to *vani* only, giving female as *badl-e-sulh* in any form other than *vani* also falls under the ambit of this provision. Where while compounding the *qisas* in *qatl-e-amad* it has been made illegal to give a female in marriage as *Badl-i-Sulh*. “*Badl-i-Sulh* means the mutually agreed compensation according to *Shariah* 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”²¹⁰.

Section 310(1) of PPC 1860 provides that while compounding of *Qisas* in *qatl-e-amd*²¹¹ an adult sane *wali* may compound the right of *qisas*²¹² by accepting *badl-i-sulh* at any time. The proviso of the said section made it clear that a female given in marriage as *badl-i-sulh* will not be a valid consideration for compounding of *qisas*. Section 310A further provides punishment for those who violates the provisions of section 310(1).

²¹⁰ Explanation section 310 PPC 1860.

²¹¹ Section 300, Pakistan Penal Code 1860 defines it as “Whoever with the intention of causing death or with the intention of causing bodily injury to a person by doing an act which in ordinary course of nature is likely to cause death, or with the knowledge that his act is so imminently dangerous that it must in all probability cause death, causes death of such person is said to commit Qatlamd”

²¹² Section 299 PPC says “qisas” means punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed qatl-i-amd in exercise Of the right of the victim or a Wali;

It says “*Whoever gives a female in marriage or otherwise in badal-i-sulh shall be punished with rigorous imprisonment which may extend to ten years but shall not be less than three years.*”

The violators of the provisions of section 310(1) will be subject to the rigorous imprisonment for a term of three to ten years.

4.2.3 Muslim Family Law Ordinance, 1961 (MFLO):

Registration of marriage is being made mandatory by law, to avoid certain irregularities and illegalities including child marriage. The Muslim Family Law Ordinance, 1961 lays down the rule of registration of marriage in Section 5. The said section provides the procedure of registration of marriage and the penalty in case of non-compliance with the provisions of the section. According to it, every marriage solemnized under Muslim law shall be reported to the *Nikkah* Registrar, licensed for the purpose by the Union Council. Contravention of these provisions of law will be punishable with simple imprisonment which may extend to three months or with fine of one thousand rupees or with both. The maintenance of *nikkahnama* and the register will be the responsibility of *Nikkah* Registrar. The Union Council will be responsible for the preservation of records. The mode of registration of marriage and supply of copies of *nikkahnama* to the parties, and the fee to be charged thereof shall be such as prescribed.²¹³ This is one of the important legal provisions which can lessen the chances of child marriage occurrences.

4.2.4 Dissolution of Muslim Marriage Act, 1939 (DMMA):

These small numbers of statutes on the issue of child marriage, though make the act

²¹³ Section 5, MFLO

of such marriages punishable by declaring it invalid, but it does not provide any remedy to the innocent girls out of the marriage, who had been married at an early age. Though the act of child marriage is penalized, but it is still valid and the girl does not get freedom from the wedlock. Those who arrange such marriages may be penalized and put behind bars, they may be fined but all this does not provide any remedy to the girl. There is only one remedy provided in the statutes for the victim girl, i.e. in Dissolution of Muslim Marriage Act, 1939. The Act provides the girl with the ground entitling her to a decree for the dissolution of her marriage. Section 2(vii) states, “that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years: Provided that the marriage has not been consummated;”

So, if a girl has been given in marriage by her father or guardian at an early age, she has the right to raise her voice against such marriage and show her objection on that. The court may dissolve such marriage on her instance. The only condition attached to this is that the marriage should not be consummated.

The remedy recognized in the above mentioned clause is known as “option of puberty”²¹⁴ in Islamic law. On attaining the age of majority the girl is entitled to exercise her right of option of puberty, provided that the marriage is not being consummated. She can apply for a decree for dissolution of marriage on the basis of the exercise of right of option of puberty.

²¹⁴ Discussed in earlier chapter.

4.2.4.1 Relevant Case Law:

In a case titled *Muhammad Riaz vs. Mst. Robina and Another*²¹⁵ before Muhammad Akhter Shabbir, J., wherein the petitioner challenged the judgment and decree of learned appellate court before the Learned Lahore High Court. The facts of the case are that the respondent/plaintiff (Mst. Rubina) filed suit for dissolution of marriage on the basis of the exercise of her right of option of puberty (*Khair ul Baloogh*). Wherein she averred that her nikkah with the petitioner was solemnized at the age of 10/11 years without her consent and that her marriage was not consummated. Now on attaining the age of puberty, she dissolved her marriage. Petitioner contested the suit. After the trial the learned trial court dismissed the suit of the respondent. Feeling aggrieved, respondent filed appeal before the learned appellate court which was accepted and her suit was decreed. Learned court said that the three things are to be considered before granting the decree for dissolution of marriage on the basis of exercise of her right of option of puberty, i.e. marriage should have taken place before the age of sixteen i.e. in the age of minority, non-consummation of marriage and repudiation of marriage before the age of 18. In the above case from the perusal of evidence all the conditions are fulfilled i.e. marriage at the age of 10/11 years, non-consummation and exercising the *Khair ul Baloogh* before 18. The court decided that the marriage of the parties has rightly been dissolved during the exercise of right of option of puberty and dismissed the petition. In another case titled as *Mulazim Hussain vs. Mst. Amina BiBi and Another*²¹⁶ before Ch. Mushtaq Ahmed Khan, J., where in a similar issue has been decided by the learned Lahore High Court. In the said case the respondent/plaintiff filed suit for dissolution of marriage averring in the plaint that she was married to the petitioner at the

²¹⁵ 2000 MLD 1886

²¹⁶ 1994 CLC 1046

age of 5/6 years; on attaining the age of puberty she exercised her right of option of puberty and repudiated her marriage. The learned judge family court decreed the suit of the respondent/plaintiff. Feeling aggrieved petitioner filed writ petition. The Learned Lahore High court said that it is clear from the evidence adduced by the parties that the marriage was solemnized less than the age of 15 years, consummation of marriage has not taken place and the suit filed by the respondent/plaintiff is before the age of 18 and she has rightfully exercised her right of option of puberty and was well within her right in repudiation of marriage, solemnized in the age of minority. Judgment and decree of the Learned Trial was upheld being just and fair. In the case titled *Mst. Daulan vs. Dosa*²¹⁷ before *Kaukaus, J.*, appellant/plaintiff filed suit for the cancellation of her marriage alleging therein that marriage had been solemnized by her guardian under coercion and undue influence. Now, as she attained puberty twenty days before, and claimed her entitlement for dissolution of marriage. Respondent/defendant resisted the suit and denied the allegation of coercion and undue influence. He contended that the plaintiff had not attained the age of 15 years, hence suit is premature and not maintainable. The learned trial court came to the conclusion that though the plaintiff was only 12, 13 years of age attained puberty, hence suit is maintainable and decreed the suit. On appeal before the District Judge, it was observed that on a proper interpretation of Section 2(7) of DMMA, 1939, option of puberty can only be exercised after reaching the age of 15 years and accepted the appeal without considering the question of puberty. On appeal before the High Court, it was observed that though under Muslim law, there is a presumption of the attainments of puberty at the age of fifteen but this presumption is rebuttable. The law provides 15 years age requirement for puberty without any opportunity for rebuttal. The law of land does not speak of puberty, but

²¹⁷ PLD 1956 (W.P.) Lahore 712

of age. Hence, a woman can exercise her right after fifteen years, which is not subject to the disproof of puberty. This fact also entails that where girl's marriage is performed before the age of fifteen, irrespective of the fact of being puberty or not, she can exercise her option of puberty for dissolution after the age of 15 and before turning 18. The court further held that Dissolution of Muslim Marriages Act, 1939 is to clarify and consolidate the Muhammadan Law. Section 2 (vii) of the DMMA, 1939 does not exhaust the whole of right, which a Muslim woman has with respect to a marriage performed by a guardian before attaining puberty. This Act also provides Section 2(ix) which says that any other ground which is recognized is valid for the dissolution of marriages under Muslim law. Due to this fact, the court returned the matter to the trial court for a fresh decision.

The question here arises is whether the operation of the option in itself is enough to bring the marriage to an end or it is the court whose decree will end the marriage? After going through the section 2(vii) of DMMA, 1939, it appears that the decree of the court is necessary, but a number of precedents are present, which have decided that a decree of the court is not compulsory to end the marriage.²¹⁸

In *Munni vs. Habib Khan*²¹⁹ before *B.Z. Kaukaus, J.*, Lahore High Court held that, a marriage repudiated by the exercise of option of puberty will end it, without the aid of any court. When the matter comes to court it does not dissolve the marriage, but merely recognizes the termination of the contract of marriage. In another case, namely, *Noor Muhammad vs. The State*²²⁰ before *M.S.H. Qureshi, J.*, a private complaint was brought by husband under Section 406 of Pakistan Penal Code, alleging that his father in law has

²¹⁸ David Pearl, *A Text book on Muslim Personal Law* (London: Croom Helm, 1987), P. 45.

²¹⁹ 1956 PLD (WP) Lah. 403

²²⁰ 1976 PLD Lah. 516

committed a criminal breach of trust. He alleged that his father in law Noor Muhammad arranged a second and bigamous marriage of his wife with another man. The husband alleged that he has married the girl in 1958 and had an agreement that the couple would commence living together in 1974. 10 days before the agreed date Noor Muhammad told him that he arranged the girl's marriage with that other person. The marriage was duly performed. The Lahore High Court decided that there was no bigamy or criminal breach of trust. The girl married the other person in the exercise of her option of puberty. The court said that mere fact of her entering into subsequent marriage on attaining the puberty amounts to repudiation of her earlier marriage. Communication to the court of exercising the option or decree from the court in this regard was not necessary. Decree of the court in such cases is only to confirm an established fact.

The analysis of these cases shows that courts are so lenient in granting the females the right to exercise the option of puberty. The courts laid down three important points to be considered before granting the decree of dissolution of marriage on the basis of the exercise of right of option of puberty i.e. age of minority, consummation of marriage and repudiation of marriage before the age of 18 years. Furthermore a female exercised the right of option of puberty will be enough to dissolve the marriage, she is not required to obtain a decree for dissolution but courts only recognize the dissolution. Even in the case *Noor Muhammad vs. The State*, court recognized the marriage which was solemnised in exercise of right of option of puberty.

4.2.5 Anti-Women Practice Law:

In 2011, Prevention of Anti-Women Practices (Criminal Law Amendment) Act was passed by the Parliament of Pakistan, this penalized anti-social practices like forced

marriages, vanni, swara or Budla-i-Sulh, in which women (girls) are traded to settle personal, family or tribal disputes. The offences covered by the Act are non-bailable and non-compoundable.²²¹

4.2.6 Protection of Women Act, 2006:

Section 375 and 376 of Pakistan Penal Code, 1860 discussing rape and its punishment was repealed by section 5 of Protection of Women Act, 2006. Section defines rape as, “A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

- (i) against her will.
- (ii) without her consent
- (iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt,
- (iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or
- (v) With or without her consent when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”²²²

²²¹ <http://www.isj.org.pk/child-marriages-in-pakistan/#sthash.YEbq1cy2.dpuf> accessed on 10 August 2014

²²² Section 5 of Protection of Women Bill, 2006.Repealed Section 375 of PPC. 1860.

Clause (v) is relevant to the topic. It says that if a man has sexual intercourse with a woman less than 16 years of age, with or without her consent, the man is said to commit rape with her. The important point here is that under this section it is immaterial that the woman is his wife or some other woman. Cases where a man has a wife under the age of 16 years, he has sexual intercourse with her with or without her free consent, even than the husband will be guilty of rape with her and will be punished accordingly. This clause safeguards child bride to an extent.

The section further describes the punishment for the offence of rape as, “Whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine.”²²³

A person so guilty of the offence of rape will be punished with either death or imprisonment for a term of 10 to 25 years, of either description and shall also be liable to fine.

There is a lot of discussion and criticism on the said clause by the modern Islamic scholars. Scholars have a lot of reservations regarding this clause as to whether it is according to Islamic teachings or not. This is another debate and not made part of this study as it will take the discussion to another side. But a further research could be made on this topic separately.

²²³ Section 5 Protection of Women Bill, 2006.Repealed Section 376(1) of PPC. 1860.

4.3 Role Of Council Of Islamic Ideology, Pakistan And Child

Marriage:

Advisory Council of Islamic Ideology (CII) established on August 1, 1962 under Article 199 of the Constitution of the Islamic Republic of Pakistan 1962, was re-designated as Council of Islamic Ideology in Article 228 of the 1973 Constitution with provisions for its composition (Article 228), Procedure for reference to the Council (Article 229), its functions (Article 230), and Rules of Procedure (Article 231).²²⁴ This Council was established with a vision to have a constitutional body that advises the legislature whether or not a certain law is repugnant to Islam, namely to the *Qur'an* and the *Sunnah*.

At the concluding ceremony of its 191st meeting, the chairman CII Maullana Muhammad Khan Sheerani said that the existing laws related to the minimum age of marriage are not Islamic and children of any age can marry provided they have attained puberty. There are two segments of marriage, *nikkah* and *rukhsati*, *nikkah* could be performed at any age. He added that *nikkah* of minor can be performed by guardian deferring the *rukhsati* on attainment of puberty. Limiting the age for both the segments of marriage is not Islamic and should be rectified.²²⁵ He said that such marriages solemnized in the minority are binding on the parties if arranged by father or grandfather otherwise parties will have the option of puberty.²²⁶

This opinion by CII brought a lot of criticism from civil society and human rights

²²⁴ <http://cii.gov.pk/aboutcii/History.aspx> accessed on 08 August 2014.

²²⁵ Kalbe Ali, "Pakistani Laws Prohibited Under Age Marriage Un-Islamic: CII", the Dawn. March 11, 2014, News. Available at <http://www.dawn.com/news/1092468> accessed November 13, 2014.

²²⁶ Kalbe Ali, "CII Endorses Underage Marriages", The Dawn. May 22, 2014, News. Available at <http://dawn.com/news/1107849> accessed at November 13, 2014.

activists. Chairperson of Human Rights Commission of Pakistan, Zohra Yousuf said that if a minimum age for marriage is removed from the law it will result in an increase of exploitation of women and children as they are the most vulnerable group of society. Khawar Mumtaz, head of the National Commission on the Status of Women viewed that these laws are effective and should not be changed but should be implemented in the true sense.²²⁷

The opinion of the CII at this point makes the matter complex, now it is up to the lawmakers to amend the existing laws and make new laws in conformity with Islam for the protection of the children.

4.4 International Treaties And Conventions:

The issue of child marriage is also discussed at international levels under the ambit of human rights and women's rights and made part of different treaties and conventions. These treaties and conventions are being ratified by a large number of states. States are required to make their laws in accordance with those treaties and conventions. In this research only those international conventions are discussed which are being ratified by Pakistan. The features of the provisions of these conventions are discussed in the following part.

4.4.1 United Nations Convention on the Rights of The Child (UNCRC):

On 20th November, 1989 General Assembly of United Nations adopted the Convention on the Rights of the Child (UNCRC) which entered into force on 20 September 1990. This convention had been ratified by 191 nations, and reached almost universal

²²⁷ Ibid.

ratification.²²⁸ Its universal ratification reflects “a global commitment to the principle of children’s rights.”²²⁹ The purpose of the convention was “to set out the rights that must be realized for children to develop their full potential.”²³⁰

4.4.1.1 Summary of Related Provisions of UNCRC:

UNCRC defines child as “any human being below the age of 18years” this definition is subject to the applicable law to the child if the age of majority is attained earlier under the law than that would be the age for the purposes of the convention.²³¹ Convention applies to every child without any discrimination of race, colour, sex, language, religion, opinion; origin etc.²³²It provides full protection to the best interest of child in all matters whether by public or private social welfare institutions, court of law, administrative and legislative bodies.²³³ Every child has the inherent right of life and it is the responsibility of state to ensure the survival and development of child to the maximum extent.²³⁴ Convention provides respect to the views of child who is capable of forming the same. In all matters affecting child, his views should be given weight.²³⁵

²²⁸ Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Kluwer Law International Publishers 1999), 1. Available at http://books.google.com.pk/books/about/A_Commentary_on_the_United_Nations_Conve.html?id=QB6UB1SCxbsC&redir_esc=y

²²⁹ Lynne Marie Kohm, “Suffers the Little Children: How the United Nations Convention on the Rights of the Child has not Supported Children,” *New York International Review*, Summer, 2009:57 available at <http://ssrn.com/abstract=1962681>

²³⁰ “Convention on the Rights of the Child,” UNICEF, available at http://www.unicef.org/crc/index_protecting.html

²³¹ Article 1 of UNCRC.

²³² Article 2 Ibid

²³³ Article 3 Ibid

²³⁴ Article 6 Ibid

²³⁵ Article 12 Ibid

4.4.2 Convention of Elimination of all forms of Discrimination Against Women (CEDAW):

In 1946 the Commission on the Status of Women (CSW) was established as a commission to protect women's rights with the goal to promote the equality of men and women and to ensure development of women by creating proposals. CEDAW was produced by CSW during 1976, UN adopted it in 1979.²³⁶ In 1981 after ratification of twenty countries, it took legal effect. The convention has been adopted by more than 180 countries and took legal effect in 1981.²³⁷

“CEDAW is an effort to eliminate discrimination against women by holding countries responsible for discrimination takes place in their territories.”²³⁸

4.4.2.1 Summary of Related Provisions of CEDAW:

The summary of the provisions of CEDAW, which safeguard women's right to marriage is given below.

State parties to the convention take measures to eliminate discrimination against women in matters of marriage and ensure an equality of women and men (a) the right to enter into marriage, (b) same right of choice and full and free consent.²³⁹ Convention declares child marriage as an act having no legal effects so, a minimum age of marriage should be specified and it should be made compulsory for every marriage to be registered in

²³⁶ Meghan, “A Brief History of CEDAW”, <http://studentsforcedaw.blogspot.com/2011/04/brief-history-of-cedaw.html> visited 3rd dec 2013.

²³⁷ Linda Napikoski. “A Brief History of CEDAW”
<http://womenshistory.about.com/od/laws/a/cedaw.html>.

²³⁸ Ibid.

²³⁹ Article 16(1) of CEDAW.

an official registry.²⁴⁰ Discrimination against women in all its forms is condemned and to eliminate it states parties under took ... “to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;”²⁴¹

4.4.3 Universal Declaration of Human Rights (UDHR)

The Universal Declaration on Human Rights was adopted by the United Nations General Assembly on 10th Dec. 1948 in its 3rd resolution 217(A), in Paris. Eight nations abstained from vote none dissenting. The text of the document was prepared in less than two years.²⁴² The Declaration is translated into nearly 350 languages. It is the world’s most cited and best known document. It is considered as a model for a number of international treaties and declarations and is incorporated in the constitutions and laws of many countries.²⁴³

“The General Assembly recognizes that the inherent dignity and the absolute rights of all members of the human family is the base of freedom, justice and peace in the world. That rule of law should protect the human rights. There should be friendly relations between nations. Faith in human rights, worth and dignity of human person equal rights of men and women have been acknowledged by the people of the United Nations and they are determined to promote social progress, better standards of life and freedom and have

²⁴⁰ Article 16(2) Ibid.

²⁴¹ Article 2(f) Ibid.

²⁴² <http://www.un.org/en/documents/udhr/history.shtml>

²⁴³ <http://www.humanrightseducation.info/hr-materials/the-universal-declaration-of-human-rights/220.html>

guaranteed to promote human rights and their common understanding”²⁴⁴

4.4.3.1 Summary of Related Provisions of UDHR:

Brief summary of provisions of the UDHR which safeguard women right to marriage is given below.

Everyone is equal in dignity and rights, and everyone should be treated in the same way.²⁴⁵ No one should be subjected to torture or to cruel, inhumane or degrading treatment or punishment.²⁴⁶ Everyone has a right to be treated equal before law.²⁴⁷ Everyone is equal before law and the same law should be applied to everyone without any discrimination.²⁴⁸ In case of violation of any fundamental right granted by constitution or law everyone has a right to an effective remedy by law.²⁴⁹ Every man and woman of full age has the right to marry and to have a family without any limitation regarding race, nationality or religion. Everyone is entitled to equal rights as to marriage, during and after marriage. Everyone has a right to enter into marriage with his free and full consent.²⁵⁰

International conventions conferred certain rights on a child without any discrimination of sex. These conventions provide a child with the right of life, survival, development and full and free consent. Right of protection from torture, cruel, inhumane and degrading treatment. Every child is entitled to the right of protection of his views and his best interest. Child marriage effects these rights of a child at every step. The girl’s right

²⁴⁴ Preamble UDHR.

²⁴⁵ Article 1 UDHR.

²⁴⁶ Article 5 Ibid.

²⁴⁷ Article 6 Ibid.

²⁴⁸ Article 7 Ibid.

²⁴⁹ Article 8 Ibid.

²⁵⁰ Article 16 Ibid.

of full and free consent is infringed, the life of a child bride is also in danger due to the following pregnancy. In many cases she faces torture and inhumane treatment. In short child marriage results in violation of all the rights she is conferred by international law.

4.5 Conclusion:

After going through all the statutory provisions discussed above, it is obvious that the laws on the issue of child marriage are not inadequate. At national as well as international level, there are a lot of improvements required with reference to the laws of child marriage, protection of children and women's rights. There are provisions related to the minimum age of marriage, exploitation of rights of women and children, unjust customary practices and birth registration, etc. There are penal provisions in terms of fine and imprisonment for those who break the law.

Along with the inadequate laws, major issue is the implementation of the existing laws. This results in violation of all the rights conferred on children by the UNCRC in addition to it, it results in violation of fundamental rights of women who are the victim of child marriage. The strict implementation of these existing laws can help protect these rights of children.

The state's responsibilities have been categorized into four chunks by UNCRC i.e. survival, protection, development and participation of a child.²⁵¹ A government fails to fulfill its responsibilities conferred to it by UNCRC by not controlling the evil of child marriage. Child marriage in any of its form whether *vani/sawara*, *wattasatta* or any other prevalent form is a complete threat to the girls fundamental rights conferred to her by

²⁵¹ Dr. Sania Nishtar, "Child Protection Legislation" The NEWS International. Tuesday, August 17, 2010.

nature or any statute in force e.g. right to good health, right of survival, right of protection from violence and exploitation, right of development and participation of child as discussed comprehensively in effects of child marriage.

In Pakistan, efforts are initiated for the protection of children which also include to restricting child marriage, which can cause a dilemma for the society in the shape of unsettled minds and bodies. Along with the amendment in the laws it is equally necessary to make their enforcement more effective. So, that child experiencing this injustice in the shape of early marriage without their consent, can seek justice through the courts. Amendments and the making of laws should be made by the legislators while keeping in mind the requirements of Islamic law as well as the justice and fair play.

CHAPTER FIVE

CONCLUSION

All the above discussion related to child marriage makes it very clear that it is not that much huge social evil as it has been converted due to the un-Islamic provisions in the customs and laws of the land. In Pakistan the forms in which child marriage is practiced are really threatening. These forms of child marriage are clear violation of fundamental human rights of children. Though the laws of the land and international conventions and treaties declare these practices illegal and provide penal sanctions, but the issue is about the implementation of those laws. Non-registration of birth is the main tool for violators of the law. They take benefit of non-registration of birth and later on show fake ages of the minor. In some cases where birth has been registered, marriage registration is avoided or marriage registrars help those parents illegally by accepting a handsome bribe. Here laws are present, but their strict implementation is missing. That is a major loophole in the legal system. National and international legislators are very much concerned to save children from earlier marriages, which is an abuse of their rights.

Child marriage is a social issue, so; it should not be dealt as a purely religious matter. Islam, though permit child marriage, it does not at any stage made child marriage compulsory. A permissible act can be restricted, limited or provided with conditions in the larger interest of the individual and society. So it is a matter of choice in Islam. The state has the authority to restrict or suspend child marriage in the larger interest of the public. But it is not the authority of the state to declare the act as illegal. Allah has defined laws, rules and regulations for humanity through His book the *Quran* and the *Sunnah* of His Prophet

(P.B.U.H) is the commentary to the *Quran*. Allah has left some issues to be decided by the head of the state in the larger interest of the public and in accordance with the norms of the society he is heading. But in such cases the head of the state is required to keep within the limits defined by Allah.

As far as child marriage is concerned, the state has the authority to make laws in the larger public interest, and it may restrict child marriage to avoid exploitation of minor girls. But here could be an issue for those parents who are under the compulsion to marry off their daughters in order to save her future. For example a man is on his death bed and he is the only guardian of her daughter, no other relatives of girl are present to look after her in case of his death. Here it is necessary for the minor girl to have a guardian or someone elder to look after her. Or in another situation, a family is residing in a village or town where there is a strong apprehension that the girls of the community are not safe from the victimization of rape. In such cases, parents usually think it better to safeguard the honor of their daughters by marrying them at an early age. In such exceptional cases, child marriage should be allowed to be conducted by guardians as per Islamic law. The Child Marriage Restraint Act, 1929 does not allow marriage of a child below the age of 16 and 18 for girls and boys respectively. There should be a legal way present for the parents who do not have any other option except to marry their daughters. Islamic law does not punish guardian who solemnize the marriage of his minor ward. But as per Pakistani law, such guardians are subject to the monetary as well as physical punishment. The point here is that this law has been made in order to stop the evil practices of *vani* and selling off daughters which are not at all Islamic practices. As mentioned above state can make laws in the public interest to restrict or suspend certain practices. Child Marriage Restraint Act, 1929 though penalize

the child marriage, but once a marriage is solemnized it does not render that illegal. The marriage then depends on the repudiation of minors on attaining puberty, whether to continue or not. The Dissolution of Muslim Marriage Act, 1939 grants this right to the female so married.²⁵² The right of option of puberty has been granted to the minor who has been married off by his or her guardian, other than father and grandfather.

The child marriage has adverse medical effects on child bride which in certain cases may even result in her death.²⁵³ Protection of one's life is among the five objectives of Islamic law (*Maqasad e Shariah*), that means protecting a life is among the highest goals of Islamic law. Protection of life is the second objective of the *Shariah* so an Islamic state is under obligation to protect the lives of its citizens, and devise such laws which protect their lives. Looking from this point of view laws prohibiting child marriage are not un-Islamic but are actually safe guarding the children from becoming the victims of such practices which may result in any harm to their body or life.

A very important point to be discussed here is age of marriage. Islamic law defines attainment of puberty as the criteria for the age of marriage. A person who is not pubert is a minor under Islamic law. It varies from person to person in what age he attains the puberty. However, in Pakistani law age of marriage has been made specific as 16 years for girls and 18 years for boys, which is not Islamic. As per Islam in the absence of evidence of puberty, it is assumed at the age of 15 years both for male and female according to majority of scholars. So, even then the ages defined in Pakistani law are different.

²⁵² Section 2(vii)

²⁵³ "Child Marriages: 39,000 Everyday."

Being a part of international community and signatory to a number of conventions and treaties, Pakistan is required to make laws of land in accordance with international law or amend the existing laws accordingly. On the other hand, being an Islamic state Pakistan is also bound to make laws according to parameters defined by Shariah. The Constitution of Pakistan makes it compulsory that the laws of the land must be in conformity with Islamic injunctions.²⁵⁴ As it comes to the child marriage or defining the minimum age of the marriage it is not an obligation under Islam to marry the minors but it is only a recommendation under the guardianship of father or grandfather. Islam is not defining a particular age for marriage, it sets attainment of puberty as a defined criterion to enter into marriage. The study of CEDAW shows that it clearly prohibits child marriage and requires the state parties to it to define a minimum age of marriage.²⁵⁵ However UNCRC while discussing child as a human being under 18 years of age provides that this limit is subject to the applicable law to the child if the age of majority is attained earlier under the law than that would be the age.²⁵⁶ So international law also provides the space to the states who do not want to set 18 years as the age of majority. Hence following international law will not be un-Islamic if Pakistan sets puberty as the age of majority. It can be concluded that international law does not stop Pakistan from following Islamic injunctions in this regard.

The purpose of the Pakistani laws is not erroneous nor is it prohibited to make such laws for the betterment of the public. The issues with the laws are firstly of the lack of implementation and then the age of marriage. Recommendations are made in this regard.

²⁵⁴ Article 227 of The Constitution of Pakistan, 1973.

²⁵⁵ Article 16(2) of CEDAW

²⁵⁶ Article 1 of UNCRC

5.1 Recommendations

1. Make the existing laws stricter by making punishments severer and their implementation must be assured.
2. As suggested by the Child Protection System Bill, 2014 child marriage should be made a cognizable offence and police should be given the power to interfere in the matter to stop the marriage on receiving any such complaint.
3. Rules regarding the age of marriage should be made in accordance with Islamic injunctions i.e puberty and majority should be checked in this order instead of fixing a specific age
4. Exceptional clauses should be introduced in Child Marriage Restraint Act, 1929 for those parents who are under the dire need of marrying off their daughters due to the situations discussed above or alike situation. In such cases the parents may take permission from court or the statutes themselves allow such marriage.
5. A proper check and balance of birth and marriage registration should be introduced in order to avoid the corruption in his regard.
6. Education should be made compulsory and parents who show negligence in sending their children to the school must be punished. Not only this but general awareness for public should be spread so that, parents may know the problems their children may face in such marriages.

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