

**Determination of Age of Marriage in Pakistan:  
A Comparative Study with Special Reference to Apex  
Courts' Judgments**

**(A Sharī‘ah Analysis)**



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بِسْمِ اللّٰهِ الرَّحْمٰنِ الرَّحِيْمِ

## DEDICATION

This thesis is dedicated to

My Parents

For their unwavering love, endless support, and boundless encouragement throughout my academic journey. Their sacrifices, guidance, and belief in my abilities have been the cornerstone of my perseverance. The values and wisdom they imparted have shaped not only this research but also my character and aspirations. I am grateful for the opportunities they provided and the sacrifices they made to ensure my education. This dedication stands as a token of my immense gratitude and love.

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Praise Allah, the Lord of all worlds, who has given me the knowledge, wisdom, and guidance to complete this thesis. I humbly express my deepest gratitude and unconditional praises to Allah, the Most Merciful, for His blessings and divine support throughout this academic journey.

I would also send abundant blessings and salutations upon the Prophet Muhammad ﷺ, the epitome of wisdom and enlightenment, whose teachings continue to illuminate our paths and inspire us to seek knowledge.

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Waqar Ahmad

## ABSTRACT

This research analyses the determination of the age of marriage in Pakistan, focusing on the legitimacy and illegitimacy of child marriage through the lens of the Sharī‘ah principles and the Apex Court’s judgments. The study explores whether there is a universally appropriate age for marriage or if reaching *bulūghat* (puberty) is sufficient for marriage eligibility. The research investigates the legal stance in Pakistan, Sharī‘ah perspectives, medical sciences, and the influence of societal customs.

In Islamic law, neither the Holy Qur'ān nor the Sunnah stipulates a fixed age for marriage, instead emphasising *puberty* as the key criterion. Puberty manifests through various physical signs such as menstruation, wet dreams, and the growth of body hair. However, when puberty is not physically evident, some scholars, particularly in the Hanafi, Shafi’i, and Hanbali schools of thought, suggest that maturity is assumed at the age of 15 for both males and females.

Pakistani law, particularly the Child Marriage Restraint Act of 1929, sets the legal marriage age at 18 for males and 16 for females, but remains silent on the validity of marriages conducted before this age. The Act imposes penalties on guardians who facilitate underage marriages. This research also examines medical perspectives, which indicate that puberty in boys typically occurs between 9 and 14 years, while in girls, it starts between 8 and 13 years. Furthermore, early marriage is recognised as detrimental to both physical and mental health according to medical findings.

The study highlights the cultural diversity regarding marriage age practices, noting that while rural areas often observe earlier marriages, urban areas tend to delay marriage due to concerns over its impact on the lives of the individuals involved. Despite

differing practices, this research argues that child marriage is not inherently void or contrary to Sharī‘ah law, as the primary criterion for marriage in Islam is the attainment of puberty, along with physical, mental, and financial capability.

In conclusion, the research asserts that there is no universally "appropriate" age for marriage in Islam. The Islamic legal framework emphasises puberty and personal readiness over a fixed age threshold, allowing flexibility based on individual circumstances. The study also suggests that child marriage, while culturally sensitive, is not invalid from a Sharī‘ah perspective, provided that the parties meet the necessary criteria for marriage.

## TRANSLITERATION TABLE

ا	a	ڙ	ڙ	د	د	غ	غ	ئ	ئ	بھ
ٻ	b	ڏ	ڏ	dh		ف	f	ٻ	ٻ	ph
ٻ	p	ر	ر	r		ق	q	ٻ	ٻ	th
ٻ	t	ڙ	ڙ	ڙ		ڪ	k	ٻ	ٻ	th
ٻ	ت	ڙ	ڙ	ڙ		ڦ	g	ٻ	ٻ	jh
ٻ	ث	ڙ	ڙ	ڙ		ڦ	l	ٻ	ٻ	ch
ج	th	ڙ	ڙ	ڙ		ڦ	m	ڙ	ڙ	dh
ڦ	j	س	س	s		ڦ	n	ڙ	ڙ	dh
ڦ	ch	ڦ	ڦ	sh		ڦ	ڻ	ڙ	ڙ	rh
ح	h	ص	ص	ش		ڦ	ڻ	ڙ	ڙ	kh
خ	kh	ط	ط	ظ		ڦ	ڻ	ڙ	ڙ	gh
د	d	ظ	ظ	z		ڦ	y	ڙ	ڙ	gh

<sup>1</sup> (e), when it appears at the middle or end of a word, is transliterated as elevated comma (') followed by the letter representing the vowel it carries. However, when <sup>1</sup> appears at the beginning of a word it will be represented only by the letter representing the vowel it carries.

ؑ is transliterated as elevated inverted comma (‘).

ڙ as an Arabic letter is transliterated as (d), and as a Persian/Turkish/Urdu letter as (ż).

و as an Arabic letter is transliterated as (w), and as a Persian/Turkish/Urdu letter is transliterated as (v).

ā is transliterated as (ah) in pause form and as (at) in construct form.

Article **וְ** is transliterated as (al-) whether followed by a moon or a sun letter, however, in construct form it will be transliterated as ('l).

as a Persian/Urdu conjunction is transliterated as (-o) whereas as an Arabic conjunction is transliterated as (wa).

Short vowel (‐) in Persian/Urdu possessive or adjectival form is transliterated as (-i).

## Long Vowels

## Short Vowels

## Diphthongs

9. ' (Arabic) aw  
 (Persian/Urdu) au  
 (Turkish) ev

ى	(Arabic)	ay
	(Persian/Urdu)	ai
	(Turkish)	ey

### Doubled

ج	$\begin{cases} \text{(Arabic)} & uwu \\ \text{(Persian)} & uvv \\ \text{(Urdu)} & uvv \end{cases}$
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## Table of Contents

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DEDICATION .....	ii
ACKNOWLEDGEMENT .....	iii
ABSTRACT .....	v
CHAPTER ONE .....	1
1.1    Introduction .....	1
1.2    Importance of the topic .....	4
1.3    Thesis statement .....	5
1.4    Literature review .....	5
1.5    Research questions .....	8
1.6    Objectives of research .....	9
1.7    Research Methodology .....	9
CHAPTER TWO .....	11
THE CONCEPT OF AGE LIMITATION IN ISLAMIC LAW .....	11
2.1    Introduction .....	11
2.2    Concept of Nikāh in Islamic Law and Its Objectives .....	12

2.2.1	Nikāh.....	12
2.2.2	Marriage (Nikāh ) is, in general terms: .....	13
2.3	Definitions of some contemporary scholars.....	14
2.4	Definition of Nikāh in Pakistani law.....	15
2.5	Objectives of marriage ( <i>Nikāh</i> ) .....	16
2.5.1	Spiritual objectives.....	17
2.5.2	Social Objectives .....	19
2.5.3	Personal objectives.....	21
2.6	Meaning of “puberty” and “Rushd” in Islamic Law and Pakistani Law .....	24
2.6.1	Puberty in Islamic Law .....	24
2.6.2	Rushd .....	25
2.6.3	Bulūgh (Puberty) in law .....	29
2.6.4	Puberty in Pakistani Law.....	29
2.8	Legitimacy of Child Marriage in Islamic Law.....	30
2.8.1	Definition of a <i>Tifal</i> child and <i>Tofūlah</i> Childhood in Sharī‘ah.....	30
2.8.2	Definition of a Child in Pakistani Law.....	32
2.8.3	Definition of a Child in Pakistani Law .....	32
2.8.4	Definition of Child in International Law .....	33
2.9	Legal Capacity of a Child in Sharī‘ah (Islamic Law) .....	34
2.10	Child Marriage or Early Marriage.....	37
2.11	Legitimacy and Illegitimacy of Child Marriage.....	39

2.11.1	Orphan (البييم) in Sharī‘ah .....	42
2.11.2	Orphan in Law .....	43
2.11.3	Review of these arguments .....	49
2.12	Appropriate age for marriage or just puberty.....	55
2.13	Conclusion.....	60
CHAPTER THREE .....		62
EXPERT OPINIONS ON THE STANDARD AGE OF MARRIAGE IN DIFFERENT FIELDS.....		62
3.1	Introduction .....	62
3.2	According to Sharī‘ah .....	63
•	Primary Sources: Qur’ān and Hadīth,.....	64
3.3	Historical Context .....	65
•	Traditional Interpretations .....	65
•	Practices Regarding the Age of Marriage and Early Marriage.....	66
•	Verse 9.94 of the <i>Manusmriti</i> states: .....	68
3.4	Criteria for puberty in Sharī‘ah .....	69
•	Puberty in signs, according to Fuqahā .....	70
•	Summary of signs of puberty according to jurists .....	72
•	Signs of Puberty agreed upon by Jurists for Males and Females .....	73
3.5	Puberty in age, according to Islamic Jurists .....	73

3.6	Pakistani Law about the Age of Marriage.....	75
•	Legal Framework .....	75
3.7	Medical Sciences about the Age of Marriage .....	81
•	Medical Definition of Puberty and Maturity .....	81
3.7.2	Psychological Markers.....	85
3.8	Health Implications of Early Marriage.....	86
3.8.1	Physical Health Risks .....	86
3.8.2	Mental Health Considerations.....	87
3.8.3	Reproductive Health Issues.....	88
3.9	Recommendations from Medical Professionals.....	88
3.9.1	Guidelines from Medical Organisations .....	88
3.9.2	Suggested Minimum Age .....	89
3.10	Medical science and the practices of the people regarding early marriage.....	89
3.10.1	List of the youngest mothers .....	90
	Cases by age of mother .....	90
3.10	Custom and Practice of the People about the Age of Marriage .....	94
3.10.1	Cultural Practices .....	94
3.11	Sociological Perspectives .....	96
3.11.1	Influence of Economic Conditions .....	96
3.11.2	Impact of Education Levels .....	97
3.11.3	Rural vs. Urban Differences .....	97

3.12 Case Studies .....	98
3.13 Impact on Marriage Age .....	98
3.14 Conclusion.....	99
CHAPTER 4 .....	101
STUDY OF PAKISTANI APEX COURTS' JUDGMENTS ON THE AGE OF MARRIAGE IN THE LIGHT OF ISLAMIC LAW.....	101
4.1 Introduction .....	101
4.2 Supreme Court Judgment .....	102
4.2.1 Mst. Bakhshi vs. Bashir Ahmad and another (PLD 1970 Supreme Court 323) .....	102
4.3 High Court Judgments.....	109
4.3.1 Mst. Mumtaz Bibi vs Qasim and others (Writ petition No. 4227 of 2021) .....	109
4.3.1.1 Some Jurisprudential differences between a civil Contract and a Marriage Contract according to Islamic law, in terms of the form of contract ( <i>Sigha</i> ).....	115
4.3.1.2 Judicial Interpretation about the status of the marriage contract .....	117
4.3.2 ABDUL RAZAQ VS THE STATE AND ANOTHER (2022 P Cr. L J 953 ISLAMABAD) .....	124
4.3.3 Nasreen Bibi vs. Station House Officer, etc. (Writ Petition No. 63301/2021).....	147
4.3.4 Nazar Muhammad Vs. DPO, etc (Writ Petition No.57371 of 2023)...	149
The Doctrine of <i>Taqyeed Al-Mubāh</i> and the Determination of Age of Marriage..	153

5.1 Introduction .....	153
5.2 Determining an age for the marriage of minors (Child Marriage) .....	156
5.2.1 Recommendations of the Council of Islamic Ideology .....	159
5.2.2 A Controversial Judgment of the Federal Shariat Court of Pakistan .....	161
5.3 Determining the age of marriage after puberty below 18 .....	162
5.3.1 Determine the age of marriage applying the principle of Taqyeed Al-Mubāh? 163	
5.3.2 Maslahah According to Imām Al Ghazālī,.....	165
5.3.3 There are two types of mubāh (permissible acts):.....	167
5.3.3.1 Things Allowed by Qur'ān or Sunnah (Mubāh by Text) .....	168
5.3.3.2 Examples of Restricting Mubāh with Conditions.....	171
5: Eating and Drinking .....	173
5.4 An Analysis of Sayyduna 'Umar's Restriction on Marriage with <i>Ahl al-Kitāb</i> (People of the Scripture) .....	177
5.5 Determination of age for marriage is based solely on the agenda of Western human rights, not on Islamic laws.....	179
5.6 Agenda and recommendations of the Council of Islamic Ideology (CII), Government of Pakistan, regarding the age of marriage.....	182
5.7 Possible harms of this determination .....	184

5.8 Harms of marrying before the age of 18 and its appropriate solutions .....	188
5.8.1 Logic also supports this.....	190
5.9 Contemporary Fatāwah .....	191
5.10 Logic and my stance.....	192
5.11 Conclusion.....	193
CONCLUSION AND RECOMMENDATIONS .....	194
6.1 Conclusion.....	194
6.2 Findings and Recommendations .....	197
Bibliography .....	200
List of the Qur'ānic verses.....	213
List of Hadīths.....	215

## CHAPTER ONE

### 1.1 Introduction

The family is the primary and essential unit of social organisation. A social bond brings together two or more people with kinship, marriage, or adoption ties. It begins with marriage and then involves having or adopting children, where parents are responsible for caring for their children and providing for their various needs. It is a social institution whose members are bound by the ties of blood and marriage, live an ordinary life together, and work permanently to provide the basic economic and social requirements necessary for the continuity of life. However, the family is based on the contract of marriage. The intimate relationship, approved in Sharī‘ah and law, is between a male and a female through a valid marriage, which forms the foundation of a good family institution. Therefore, marriage is recognised as an essential step towards peace, progress, and the development of Muslim and non-Muslim societies. Muslim Jurists have different definitions highlighting distinct characteristics of marriage. Thus, in light of their definitions, a marriage contract may be described as follows:

“The marriage contract is a covenant of linkage and legal cohesion between a man and a woman forever. Its purpose is chastity and decency, with the multiplication of the number of Umma (Nation) by establishing a family under the auspices of the husband on stable foundations that ensure that the contracting parties bear their burdens in tranquillity, peace, friendliness, and respect.”<sup>1</sup>

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<sup>1</sup> Dr. Muḥammad Baltāji, *Dīrsāt Fi Ahkām el Usrah, Muqāranah Bayn Al Sharī‘ah Al Islāmiyah Wa Ghaiyra* (Maktaba Al Shabab: Munira Egypt), 41.

So, Allah ﷺ created the entire creation in pairs, male and female. As Muslims, we believe that the first human on this earth was Adam, and then his wife, Hawwa. Adam was the starting point of all humanity. Allah ﷺ said in the Holy Quran:

"وَلَقَدْ أَرْسَلْنَا رُسُلًا مِّنْ قَبْلِكَ وَجَعَلْنَا لَهُمْ أَزْوَاجًا وَذُرِّيَّةً"<sup>2</sup>

And We have sent messengers before you, and gave them wives and children.

Allah created people in pairs, comprising male and female, as a result of a social agreement known as the marriage contract. This contract pairs a male and a female. This contract is considered valid when it meets its essential elements and conditions. The absence of any one of these conditions renders the contract void or voidable. Among these crucial conditions, one is the core of my research, and that is the determination of the age of marriage. Age is an essential element in a marriage contract because, with a suitable age, the contract between a man and a woman will be valid. Islamic law does not specify a determined age for marriage. Shari‘ah says that when a boy and girl reach maturity and find a suitable partner, their marriage should be arranged without delay. Now, what is the age of maturity in Islamic law? Sharī‘ah considers them mature at the onset of puberty.<sup>3</sup> According to Imām Abū Hanīfa, if no sign of puberty appears, the boy will be considered mature at 18 years and the girl at 16 years. Imām Abu Yusuf and Imām Muḥammad stated that men and women are

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<sup>2</sup> Qur’ān 13:38

<sup>3</sup>Burhānuddīn Al Marghīnānī, *Al Hidāyyah, Kitab ul Hajar, Fasl fi hadd al-Bulūgh*, Vol 6, (Karachi: Maktabul Bushra 2018), 451.

considered mature at the age of 15.<sup>4</sup> However, according to Pakistani law, the minimum age for marriage is 18 years for males and 16 years for females. According to Pakistan Law, under the Child Marriage Restraint Act (1929), the minimum age for marriage is 18 years for males and 16 years for females. The judicial precedents of Pakistani courts are hugely complex. In [PLD 1970 Supreme Court 323, (Mst. Bakhs vs Bashir Ahmad and another)], the Supreme Court of Pakistan declared that violating the Child Marriage Restraint Act, or early marriage, is an offence. However, the marriage contract is valid.<sup>5</sup> Based on this judgment, the two High Courts of Pakistan have different opinions. The Chief Justice of the Islamabad High Court, Babar Sattar, in Writ Petition 4227/2021, declared that marriage before 18 is illegal and void.<sup>6</sup> Justice Tariq Saleem Sheikh of the Lahore High Court, in Writ Petition 6330/2021, declared that under the Child Marriage Restraint Act, while early marriage is declared an offence by the Supreme Court of Pakistan, it is not declared void. Therefore, the marriage contract will not be considered void, and the couple who violates this will be punished. However, the marriage contract will remain intact.<sup>7</sup> In [2022 P Cr. LJ 953 (Abdul Razaq vs. the state and another)], Justice Aamer Farooq of the Islamabad High Court declared that under the Child Marriage Restraint Act, 1929, it is an offence for any person to give in Nikāh any girl below the age of 16 years.<sup>8</sup>

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<sup>4</sup> Ibid

<sup>5</sup> PLD 1970 Supreme Court 323

<sup>6</sup> *Mst. Mumtaz Bibi vs Qasim and others* (Writ petition No. 4227 of 2021)

<sup>7</sup> *Nasreen Bibi vs. Station House Officer, etc.* (Writ Petition No. 63301/2021)

<sup>8</sup> *Abdul Razaq vs the state and another* (2022 P Cr. L J 953 ISLAMABAD)

Recently, Justice Ali Zia Bajwa of the Lahore High Court, in Writ Petition No. 57371 of 2023 (Nazar Muhammad vs. DPO, etc.), stated, "It has long been settled that when a girl marries after attaining puberty, said marriage cannot be considered a 'void marriage' even if she has not attained the minimum legal age provided under any law currently in force. The age of puberty varies under different 'schools of thought'; however, as per the 'Hanafi Hanafi' school of thought, the minimum age for a girl to attain puberty is nine years."<sup>9</sup>

The above judgments contain complexities, and this research aims to analyze the decisions of different courts to find a suitable solution in the light of Sharī‘ah.

## 1.2 Importance of the topic

The family is the backbone and foundation of society. It is considered the most critical cell from which the body of human civilisation is composed. If it is good, society is good; if it is corrupt, society will be corrupted. Within it, humankind learns its best morals. The best family is based on the most vital relationship between husband and wife, bound by the marriage contract. A marriage will be successful and foster a strong relationship between husband and wife when it adheres to the terms and conditions of both Sharī‘ah and law. Among these conditions, the capacity for the contract of marriage is the most important in every law because, without capacity, most contracts are generally not valid and not in favour of the person lacking capacity. The same applies to the contract of marriage; early marriage and marriage without capacity

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<sup>9</sup> *Nazar Muhammad Vs. DPO, etc* (Writ Petition No.57371 of 2023)

always harm the child. However, there are some exceptions where early marriage is in the child's favour.

Therefore, there is a dire need to analyse the capacity for the contract of marriage regarding the age of the parties and to determine whether there is any specific age for marriage in Sharī‘ah and law. In this regard, the opinions of different Islamic and non-Islamic jurists are essential to discuss. The views of medical experts are also crucial.

### **1.3 Thesis statement**

The Constitution of Pakistan ensures that no law contradicts the injunctions of the Holy Qur'an and Sunnah; yet, the precedents set by the apex courts in determining the age of marriage, such as Mst. Bakhshi vs. Bashir Ahmad (PLD 1970 SC 323) and Mst. Mumtaz Bibi vs. Qasim (Writ Petition No. 4227/2021) is a debatable case, highlighting the need to assess its compatibility with these religious principles.

### **1.4 Literature review**

Many books and articles generally discuss the issue of determining the age of marriage, among other family-related matters. However, upon studying the relevant literature, I found a need for comparative studies in this field, particularly regarding the judgments of the Supreme Court of Pakistan. Therefore, there is a need to study this topic in the light of Islamic Law (Sharī‘ah). The following books, articles, and research papers will be consulted for this research.

In “*Tahdīd Sīnne Al-ziwāj*” by Dr. ’Abdul Momin Shujā‘ ud dīn”

( تحديد سن الزواج، دراسة فقهية قانونية مقارنة )

( د. عبد المؤمن شجاع الدين )

The age of marriage has been determined, and the opinions of Islamic jurists have been mentioned. This matter is governed by Yemeni law; however, no mention has been made of Pakistani law.

. In “*Sinn Sinn ul ziwāj Fi Al Shari’ah al-Islāmiyah*” by *Muhammad Qasim Abdullah Abdul Hafiz*

( سن الزواج في الشريعة الإسلامية، دراسة مقارنة تطبيقية )

( محمد قاسم عبد الله عبد الحافظ )

There is a detailed discussion about the age of marriage. The author also mentioned the age of marriage in various countries, including Italy, France, England, and others. The author discussed the determination of the age of marriage for both males and females. He said the most suitable age for marriage, according to a male, is fifteen years; for a female, it is also fifteen. However, while this research is promising in determining the age of marriage, the author did not address Pakistani law or the judgments of the apex courts.

In “*Al-Mar’ah Bayn al-Fiqh wa al-Qanūn, Ad-Duktūr al-Sheikh Mustafa As-Sibā’i*

المرأة بين الفقه و القانون، الدكتور الشيخ مصطفى السباعي

The author explained the issue of determining the age of marriage in great detail; however, he did not discuss the Pakistani law.

In her LLM thesis, “Child Marriage in Pakistani Society: An Analytical Study in Sharī‘ah and Law,” Ain ul Badar discussed the age of puberty and mentioned the opinions of Muslim Jurists regarding this age; however, the author did not discuss how the age of marriage is determined.

. Ayesha Siddique, in her LLM thesis, “Child Marriage in Pakistan & the Concept of *Khyār ul Bulūgh* in Sharī‘ah,” discusses the age of puberty regarding marriage and explores the concept of *Khyār ul Bulūgh*. There is no information available on determining the age at which marriage is permitted, and no case studies are available on this topic.

In “*Tahdīdu Sīnn Sīnn al Ziwāj Fil Fiqh al Islāmī*” by Dor. Nāiefa Khamīs ’Ashwi Al ’Anzīr

(تحديد سن الزواج في الفقه الإسلامي، د-نافعة خميس عشوی العنزي)

A chapter has been written about the determination of the age of marriage according to Muslim Jurists (Fuqahā). The author mentions that there is no specific age of marriage in the eyes of Sharī‘ah, due to the variation in the age of puberty among girls. Therefore, each case has its own independent Hukam, and the enactment of the age of marriage restriction is rejected.

However, although some research has undoubtedly been conducted in this field by various individuals, the judgments of the apex courts do not exist. Child Marriage and Its Associations with Controlling Behaviors and Spousal Violence Against

Adolescent and Young Women in Pakistan by Muhammad Zakria Zakar, Muzzam Nasrullah, and Rubeena Zakar.

Stealing Innocence: Child Marriage and Gender Inequality in Pakistan, Lane, Samuel (2021).

Marriageable Age and the Law by Nida Usman Chaudhary (International News, March 15, 2020).

In *Hamāray- 'Aailī-Masāil by Muhammad Taqi Uthmāni*

ہمارے عائلی مسائل از مفتی محمد تقی عثمانی

The author has written a detailed article on determining the age of marriage. However, he did not write anything about the judgments mentioned above.

In “*Seghar Sennī kī Shādi par Adālati Faiysalay kā Jāiyza by Dor Shizad Iqbāl Shām*”

صغر سنی کی شادی پر عدالتی فیصلے کا جائزہ ڈاکٹر شہزاد اقبال شام

The author criticized the judgment of the Islamabad High Court Justice High Court Justice Babr Sattar (Writ Petition 4227/2021) in the light of Sharī‘ah and mentioned this matter about the laws of different states in the United States of America (USA).

### 1.5 Research questions

The statement of research problems is based upon numerous questions. The questions included:

- Is there any concept of determining the age of marriage in Sharī‘ah?
- What is the marriage standard regarding age in Sharī‘ah, Pakistani law, and medical sciences?
- Are the aforementioned judgments of the apex courts compatible with Islamic Law?

### **1.6 Objectives of research**

The objective of the study is to determine an appropriate age of marriage in light of the objectives of Sharī‘ah and law, as follows:

- To determine the proper age of marriage in Sharī‘ah and law.
- To explore the standard of Sharī‘ah, Pakistani law, and Medical Sciences for marriage regarding age.
- To analyse the Pakistani apex courts' judgments about the Child Marriage Restraint Act 1929.
- To elaborate on the age of marriage in Sharī‘ah and law.

### **1.7 Research Methodology**

This study adopts a descriptive and comparative research methodology to examine the legal frameworks surrounding the age of marriage under Islamic and Pakistani law.

The following methodological steps will be undertaken:

- Primary sources of Islamic law, including the *Holy Qur’ān* and the *Sunnah* of the Prophet Muhammad (PBUH), will be critically examined to establish the foundational Islamic legal principles governing the age of marriage.

- Secondary sources of Islamic jurisprudence, including classical and contemporary works by Islamic scholars, commentaries (*tafsīr*), and recognized compilations of *fiqh*, will be consulted to support and contextualize the interpretations of the primary sources.
- Relevant Pakistani statutory provisions, judicial precedents, and case law about the legal age of marriage will be thoroughly analysed to understand the national legal position.
- A comparative analysis will be conducted, examining the corresponding provisions and interpretations under Islamic and Pakistani law.
- Data collection will be carried out using library resources, including textbooks, academic articles, legal dictionaries, law journals, research papers, and credible websites. These sources will serve to support legal arguments, provide historical context, and offer scholarly opinions relevant to the topic.

## CHAPTER TWO

### THE CONCEPT OF AGE LIMITATION IN ISLAMIC LAW

#### 2.1 Introduction

Human society is a social contract because Adam, the father of humankind, and Hawwa had a marriage contract, which established a social contract that led to the emergence of our society. Islām has taken great care of it to strengthen this structure and keep it away from problems that may lead it to collapse and deviation, to achieve the legitimate purpose of marriage of psychological comfort, affection mercy, and protection for the individual and society from any moral deviation in the absence of legal marriage, according to the Almighty's saying in Quran:

وَمِنْ آيَاتِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنفُسِكُمْ أَزْوَاجًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَكَيْسًا شَيْئًا قَوْمٌ يَتَفَكَّرُونَ<sup>10</sup>

“And it is among His signs that He has created for you wives from among yourselves, so that you may find tranquillity with them, and He has created love and kindness between you. Surely, in this, there are signs for people who reflect”.<sup>11</sup>

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<sup>10</sup> Qur'ān 30:21

<sup>11</sup> Mufti Muhammad Taqi Uthmāni, *The Meaning of The NOBLE QUR'AN With explanatory notes* (Maktaba Ma'ariful Al-Qur'ān: (Al-Qur'ān ic Studies Publishers), Karachi, July 2010), 745

This issue has recently appeared in many Islamic and non-Islamic countries. A great uproar arose around this, which led some countries to draft new legislation to set the age of marriage at a certain age. Opinions and rulings differed on this issue of child marriage. Controversy continues to rage between supporters and opponents from the jurisprudential, legal, social, and educational disciplines. It is one of society's most sensitive and vital issues due to its profound connection to reality and its multifaceted social, psychological, economic, and other impacts. Some believe that the Sharī‘ah perception of this issue cannot be neglected and that the Sharī‘ah texts dominate such an issue and society. Because of the adverse effects experienced by the young wife, she is not prepared psychologically or physically. In addition, due to her young age, she does not understand the meaning of marriage and its obligations, marital rights, and responsibilities resulting from marriage, which leads to a significant imbalance that Islām does not sanction.

Marriage is a dream cherished by every girl and young man, but what is the appropriate age for it? Is the success of marriage linked to a certain age, looking at culture, food, and other elements of society, and what is the legitimacy of child marriage in Islamic Law? This chapter contains the answers to these questions.

## **2.2 Concept of Nikāh in Islamic Law and Its Objectives**

### **2.2.1 Nikāh**

Islamic law (Sharī‘ah) is a complete code of life; it provides complete guidelines for everything for its followers. As Muslims, we are duty-bound to take good care, consult, and seek proper guidance from jurists to conform our lives according to it. Marriage is an essential institution of Islamic society; without marriage, life is complicated and incomplete.

Marriage (Nikāh) makes different persons responsible and allows them to live far from all kinds of sins. The marriage establishes a firm bond of love and compassion between the parties. Through this bond, two strangers become so close to each other that one is called a husband (zuwaj), and the other is called a wife (zuwja). As Allah ﷺ Almighty said وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً "and He created love and kindness between you.<sup>12</sup> Marriage guarantees peace, prosperity, and comprehensive development of both parties, allowing them to live and work as copartners, complementing each other.

Understanding the meaning of marriage, its objectives, and all its conditions is very necessary, so there is a dire need to define marriage in the light of Islamic law and mention the views of different jurists in detail as follows:

#### 2.2.2 Marriage (Nikāh) is, in general terms:

النِّكَاحُ: عَقْدٌ بَيْنَ ذَكْرٍ وَأَنْثِي يُبَيِّنُ اسْتِمْنَاعَ كُلِّ مِنْهُمَا بِالْآخَرِ عَلَى الْوِجْهِ الْمُشَرَّعِ.<sup>13</sup>

Nikāh is a contract between a man and a woman that permits mutual enjoyment in a lawful and dignified manner.

"الزواج هو عقد يفيد حل استمتاع الرجل بامرأة لم يمنع من نكاحها مانع شرعي."

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<sup>12</sup> Ibid.

<sup>13</sup> Muhammad Amīn Ibn ‘Abidīn, *Radd al-Muhtār ‘alā al-Durr al-Mukhtār Sharh Tanwīr al-Absār*, vol.4, (Riyadh: Dar ‘Alam al-Kutub, 2003), 59

Marriage is a contract that permits a man to enjoy a woman with whom any legal impediment does not prohibit marriage.<sup>14</sup>

Therefore, Islamic jurists have alternative definitions that share the same meaning, even if the expressions differ. This leads, in its entirety, to the subject matter of the marriage contract, which is the possession of enjoying" Mut'ah" in a legitimate manner. According to the customs of the people and the law, this contract's purpose is to make this pleasure (Mut'ah) Halal and lawful.

So, the definitions mentioned above describe the legitimate relationship between a male and a female, but do not tell about any rights and duties, so a definition that describes the rights and responsibilities of spouses is as follows;

"إنه عقد يفيد حل العشرة بين الرجل والمرأة وتعاونهما و يحدد ما لكليهما من حقوق و واجبات"<sup>15</sup>

It is a contract that permits companionship between a man and a woman, promotes their cooperation, and defines the rights and duties of both parties.

### **2.3 Definitions of some contemporary scholars**

"Marriage is a lawful and lasting bond between a man and a woman. Its purpose is to protect both partners through chastity and mutual care. It also helps grow the community by fostering a sense of family under the husband's leadership. The marriage

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<sup>14</sup> *Al Mausū'ah Al Fiqhiyah Al Kuwaitiyah*, Vol.41 (Kuwait: Kuwait Ministry of Awqāf and Islamic Affairs, 2002), P. 205

<sup>15</sup> Ibid.

is based on stable foundations that allow both spouses to share their responsibilities with peace, security, love, and respect.<sup>16</sup>

Dr Tanzil-ur-Rahman described marriage as "Marriage or Nikāh (Nupiace) is a religious legal contract that regularises the sexual relationship between man and woman, establishes the lineage of their progeny and creates civil rights and obligations between them."<sup>17</sup>

"Nikāh is a legal contract, in consequence of which, the married couple acquires the right to enjoy all benign association between themselves allowed under the Sharī'ah".<sup>18</sup>

Sayed Ameer Ali defines marriage as "an institution ordained for the protection of society, and so that human beings may guard themselves against foulness and unchastity."<sup>19</sup>

#### **2.4 Definition of Nikāh in Pakistani law**

In Pakistani law, the definition of (nikāh) is primarily derived from (Sharī'ah), as Pakistan is an Islamic republic and its laws for Muslims are based on Islamic jurisprudence. There is no single-sentence definition in the law itself, but based on legal texts and court interpretations, it is governed by the Muslim Family Law Ordinance of 1961.

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<sup>16</sup> Baltājī, *Dirāsāt fī Aḥkām al-Usrah*, 41.

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

<sup>18</sup> Ibid., 18.

<sup>19</sup> Syed Ameer Ali, *Muhammadan Law*, 7<sup>th</sup> ed, (Law Publisher: 1979), 97.

## 2.5 Objectives of marriage (*Nikāh*)

Islām always motivates Nikāh and a legitimate relationship between a male and a female and prohibits a relationship based on just friendship, as Allah ﷺ Almighty said:

"فَإِنِّي أَنْهَاكُمْ مَا طَابَ لَكُمْ مِّنَ النِّسَاءِ مَتْنَىٰ وَثُلَّةٍ وَرُبَّعٍ"<sup>20</sup>

Marry the women you like, in twos, in threes, and fours."<sup>21</sup>

"غَيْرَ مُسَلِّفَحَىٰ وَلَا مُتَّخِذَتِ أَحْدَانٍ"<sup>22</sup>

"Not going for lust, nor having paramours"<sup>23</sup>

Marriage (Nikāh) is considered a sacred and religious act in Islām. It helps establish a spiritual bond between spouses. By the marriage contract, the couple seeks Allah ﷺ's blessings and guidance for a happy and prosperous married life.

By getting married, one, either male or female, can protect himself or herself from significant sins because marriage has been called half of Iman in a Narration (Hadīth) of Prophet Muhammad, as he said:

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<sup>20</sup> Qur'ān 4:3

<sup>21</sup> Mufti Muḥammad Taqī Uthmānī, *The Meaning of The Noble Qur'ān*, 145.

<sup>22</sup> Qur'ān 4:137

<sup>23</sup> Mufti Muḥammad Taqī Uthmānī, *The Meaning of The Noble Qur'an*, 153.

"إذا تزوج العبد فقد استكمل نصف الدين فليتق الله في النصف الباقي"<sup>24</sup>

"Allah's Messenger said, "When a person marries, he (or she) has perfected half of the religion. Now, let him (or her) fear regarding the other half."

"Whoever got married has completed half of the Deen (religion), so he should fear God in the second half."

In Islām, marriage is not only a religious duty, but also a means of fulfilling this duty and seeking the blessings of Allah for a successful and happy married life.

Marriage has multiple Objectives; these objectives may be categorised into spiritual, Social, and personal objectives. The objectives of marriage are these interests set by Sharia as a goal for marriage, which means that without marriage, these goals cannot be achieved. Some of these objectives are:

#### 2.5.1 **Spiritual objectives**

In Islām, Nikāh is the term used for marriage and holds significant spiritual objectives and purposes. These spiritual objectives are based on Islamic teachings and principles, aiming to create a harmonious and God-conscious union between a man and a woman. Some of the spiritual objectives of Nikāh in Islām are as follows:

- Worship and Obedience to Allah: One of the primary spiritual objectives of Nikāh is to establish a lawful and pure relationship that enables both spouses to

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<sup>24</sup> Sheikh Waliuddīn Abū Abdullāh Al-Khatīb Al-Tabrīzī, *Mishkāt Al-Masabīh*, *Kitāb al-Nikāh*: Translated by Rafīq Abdur Rahmān, Vol 3 (Darul Ishā'at, Urdu Bazar, M. A. Jinnah Road. Karachi-1, Pakistan), 226

worship and obey Allah together. Marriage is viewed as a means of attaining closeness to Allah and gaining His pleasure by fulfilling each other's rights and responsibilities as spouses.<sup>25</sup>

- Formation of a Righteous Family: Nikāh aims to establish a righteous and pious family founded on Islamic values and principles. This includes raising children in a loving and God-fearing environment, instilling good morals, and teaching them about Islām.
- Protection from Sin: Marriage protects against immoral behaviour and sinful acts. By fulfilling each other's physical and emotional needs within the boundaries of marriage, spouses can protect themselves from indulging in prohibited relationships or actions.

Completing Half of One's Iman: Prophet Muhammad (peace be upon him) said, "Allah's Messenger said, "When a person marries, he (or she) has perfected half of the religion. Now, let him (or her) fear regarding the other half."<sup>26</sup>

Marriage is seen as a means of completing and balancing one's Iman by embracing the institution of marriage.

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<sup>25</sup> Hassān el-Sayyed Hāmid Khitāb, *Maqāsid al-Nikāh wa Ātharuha: Dirāsah Fiqhīyyah Muqāranah*. (Jami'ah Tayyebah, Madinah Al-Munawwarah: 2009), p.14.

<sup>26</sup> Al-Tabrīzi, *Mishkāt Al-Masabīh*, trans. Rafīq Abdur Rahmān, 3:226.

- Companionship and Support: Nikāh provides a platform for companionship, emotional support, and love between spouses. They are meant to support and encourage each other in their faith, struggles, and aspirations.
- Gratitude and Thankfulness to Allah: Islām encourages believers to express gratitude to Allah for His blessings, and marriage is viewed as a blessing and a source of appreciation. Being thankful for the spouse and the union itself brings spiritual rewards.
- Promotion of Modesty: Marriage promotes modesty and protects the chastity of both spouses. It provides a legitimate outlet for physical intimacy, encouraging them to lower their gaze and guard their modesty outside the marital relationship.
- Preservation of Family Values: Nikāh helps preserve family values and social stability by establishing a solid family unit. It also contributes to the continuation of lineage and kinship ties.
- Patience and Forgiveness: Marriage is an opportunity to practice patience and forgiveness, as spouses inevitably encounter challenges and differences. Working through these difficulties patiently and forgiving each other are spiritually rewarding acts.

### 2.5.2 Social Objectives

In addition to the spiritual objectives, Nikāh in Islām has several critical social objectives that contribute to the well-being of individuals and society. Some of the social objectives of Nikāh in Islām include:

- Establishment of Family and Community: Marriage is the foundation of family life, and strong families form the building blocks of a healthy and stable society.

Nikāh promotes the establishment of a family unit, which provides a nurturing environment for children and supports the well-being of its members.

- Preservation of Morals and Ethics: Nikāh encourages lawful and responsible means of satisfying human needs and desires, promoting a committed and lawful relationship between spouses, and helping to preserve morals and ethics within society, while discouraging promiscuity and illicit relationships.
- Promotion of Responsibility: Marriage in Islām entails various responsibilities for both spouses, including the husband's duty to provide for the family and the wife's role in nurturing and caring for the household. This sense of responsibility contributes to the stability and welfare of the family and society.
- Population Growth and Stability: Marriage encourages procreation within the bounds of a lawful and committed relationship, thereby promoting stability. This contributes to population growth and helps maintain the stability and continuity of the community.
- Preservation of Cultural Traditions: Nikāh is often associated with cultural traditions and practices necessary for preserving cultural heritage and identity within a community.
- Legal and Social Recognition: Islamic marriage affords legal recognition to the union of two individuals, which confers essential social benefits, including inheritance rights, legal protections, and a higher social status within the community.

Nikāh in Islām is a framework for building strong families, fostering social stability, promoting ethical behavior, and creating a supportive and harmonious community. It plays a crucial role in maintaining the social fabric and ensuring the well-being of its members.

### 2.5.3 Personal objectives

In Islām, Nikāh (marriage) also holds various personal objectives for individuals who enter into this sacred contract. Some of the personal objectives of Nikāh in Islām include:

- Companionship: One of Nikāh's primary personal objectives is to find a compatible life partner for companionship and emotional support. Islām encourages the concept of spouses being each other's "garments," offering protection, comfort, and intimacy <sup>27</sup> **هُنَّ لِيَابَسٍ لَّكُمْ وَأَنْتُمْ لِيَابَسٌ لَّهُنَّ** "They are apparel for you, and you are apparel for them"<sup>28</sup>
- Fulfillment of Natural Desires: Marriage offers a lawful and socially accepted means of fulfilling natural desires and urges, thereby promoting a healthy and balanced lifestyle.
- Emotional and Psychological Stability: Having a life partner can provide emotional and psychological stability, as individuals can share their joys and sorrows with their spouses, providing comfort and security.
- Procreation and Parenting: Nikāh enables individuals to start a family and raise children within a lawful and supportive environment. Parenting is considered a noble responsibility in Islām and a means of earning rewards from Allah ﷺ.

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<sup>27</sup> Qur'ān 2:187.

<sup>28</sup> Mufti Muḥammad Taqi Uthmāni, *The Meaning of The Noble Qur'an*, 1

- Personal Development: A committed relationship can promote personal growth and maturity as individuals learn to compromise, communicate effectively, and manage conflicts.
- Preservation of Chastity and Morality: Nikāh helps individuals avoid engaging in unlawful relationships and preserves their chastity and moral values.
- Love and Affection: Nikāh is also a source of deriving pleasure and satisfaction from each other, thereby enhancing love and affection between the couple. The Holy Qur'ān has also mentioned that this relationship is a source of peace and love:

“And it is among His signs that He has created for you wives from among yourselves, so that you may find tranquillity in them, and He has created love and kindness between you. Surely, in this, there are signs for people who reflect.”<sup>29</sup>

Overall, the personal objectives of Nikāh in Islām revolve around finding love, emotional support, spiritual growth, and creating a nurturing environment for individual and family development. It is seen as a means of achieving personal happiness, contentment, and fulfillment within Islamic teachings and principles.<sup>30</sup>

**Imām Abu Muhammad Al Ghazali said:**

Imām Al Ghazali said in the chapter "Encouragement to Marry."

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<sup>29</sup> Qur'ān 30:21

<sup>30</sup> Nasīm Razi, "Importance and Objectives of Marriage in Islām: An Analysis of Pakistani Nikāh Namah in the Light of the Provisions of the Qur'ān and the Sunnah." Journal of Asian Development Studies 2, no. 3 (September 2013). ISSN 2304-375X.

There are five benefits and interests in marriage:

- The offspring
- And the breaking of lust, desire
- Housekeeping is traditionally entrusted to women, and men are generally not involved in it, as it is considered a female domain.
- And the multiplicity of the clan by affinity relationship, because man is himself alone and nothing.
- And struggling against the commanding soul and with the caretaking of them and patience for them, i.e.,<sup>31</sup> Women.

**Ibn Taymiyyah said:**

Marriage is intended for enjoyment, connection, companionship, and shared association. Still, it is the highest degree of companionship, so who does not intend to accompany, not to enjoy, not to continue and associate, but to depart, that to return to others, so he is a liar.<sup>32</sup>

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<sup>31</sup> Imām Abū Hamid Al-Ghazālī, *Ādāb An-Nikāh wa Kasr Al-Shahwatayn*, (Manshurāt Dār Al-Mārif Littiba'a wa An-Nashr, Sūsa, Tunas, 1990), 11.

<sup>32</sup> Muḥammad ibn Aḥmad al-Ṣāliḥ. *Fiqh al-Usrah 'inda al-Imām Shaykh al-Islām Ibn Taymiyyah fī al-Zawāj wa Āthārih*. PhD diss., Imām Muḥammad ibn Saūd Islamic University, Riyad, Vol. 1.

## 2.6 Meaning of “puberty” and “Rushd” in Islamic Law and Pakistani Law

### 2.6.1 Puberty in Islamic Law

#### Literal meaning (المعنى اللغوي)

In Islamic Law, Puberty (البلوغ) means "Arriving and reaching a goal or an endpoint, whether it is a place or a period, or a thing."

"وبلغ الصبي: احتلم وأدرك وقت التكليف وكذلك بلغت الفتاة"<sup>33</sup>

Reached sexual maturity and found legal capacity, as well, the girl reached puberty.

#### Terminological meaning (المعنى الإصطلاحي)

وأصطلاحاً: "انتهاء حد الصغر في الإنسان، ليكون أهلاً للتكاليف الشرعية أو "هو قوة تحدث في الصبي، يخرج بها عن حالة

الطفولة"<sup>34</sup>

Puberty (Al blugh) refers to the period in human development when individuals reach the age of maturity, becoming eligible for various responsibilities, including religious obligations. Or it is a power that occurs in a young boy, causing him to transition out of Childhood.

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<sup>33</sup> *Al Mausū 'ah Al Fiqhiyah Al Kuwaitiyah*, 8:186.

<sup>34</sup> Ibid.

## 2.6.2 Rushd

**Literal Meaning:** Rushud refers to discretion, maturity of intellect, and the capacity to manage one's affairs.<sup>35</sup> As Allah ﷺ Almighty said:

“فَإِنْ عَانَكُمْ مِنْهُمْ رُشْدًا”<sup>36</sup>

“Then if you perceive in them a discretion”<sup>37</sup>

### Terminological meaning

الرُّشْدُ مُلْكَةٌ نُفْسَانِيَّةٌ تَمْنَعُ مِنْ إِفْسَادِ الْمَالِ وَتَصْرِفُهُ فِي غَيْرِ الْوِجْهِ الْلَاِنْقَةِ بِأَفْعَالِ الْعُقَلَاءِ”<sup>38</sup>

Rushd (maturity) is a psychological faculty that prevents the misuse of wealth and its expenditure in ways that are inconsistent with the conduct of rational individuals.

*Rushd* is the opposite of ‘*Safah*’ (deficiency of intellect), which implies waste and prodigality, which is “that weakness of intellect which urges a person to act concerning his property contrary to the dictates of reason. At the same time, *Rushd* signifies the handling of financial matters by the dictates of reason. *Rashid* is a person who can identify avenues of profit as well as loss and act accordingly to preserve his

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<sup>35</sup> Dr. Abdullah Abbās Al Nadwai, *Qamūs Alfāz Al Qur’ān Al Karīm*, Arabic-English (Chicago, Mussasatu Iqra Althaqafati Alalamiah, 1984), p.223

<sup>36</sup> Qur’ān 6:4.

<sup>37</sup> Mufti Muhammad Taqi Uthmāni, *The Meaning of The Noble Qur'an*, 146.

<sup>38</sup> Shaykh ‘Abd Allāh ‘Isā Ibrāhīm al-Ghadeerī, *Al-Qamūs al-Jāmi‘ lil-Muṣṭalahāt al-Fiqhiyyah* (Beirut: Dar al-Mahajja al-Baydā‘, 1998), 210.

wealth.<sup>39</sup> Imām Malik said: (يطلق على حفظ المال المصاحب للبلوغ) ‘Rushd refers to the preservation of money that accompanies puberty.’<sup>40</sup> According to the *Majallah al-Ahkāam' Adliyyah*,

"هو الذي يتقيى بمحافظة ماله، و يتوقى من السفه و التبذير." <sup>41</sup>

It means that *Rashīd* is the one who is careful to protect his wealth and avoids foolishness and extravagance.

Imām Nawawī stated that *Rushd* is to be presented in a person in the following circumstances:

- (i) When he behaves reasonably in his personal affairs;
- (ii) When he abstains from everything that brings him reproach, and
- (iii) When he is not a spendthrift, he does not waste his wealth by allowing himself to be deceived in commercial transactions by blatant fraud.<sup>42</sup>

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<sup>39</sup> Dr. Muhammad Tahir Mansoori, *Islamic Law of Contract: Applications in Islamic Finance*, (Islamabad: IPS, 2020), 58.

<sup>40</sup> Muhammad Qasim Abdullah Abdul Hafiz, *Sīnn Sīnn ul Ziwāj Fi Al-Sharī'at ul Islamiyah*, (An-Najāh National University Nablus: Palestine, 2012), 47.

<sup>41</sup> Commission of Ottoman Jurists (1867-77) *Majallah al-Ahkāam' Adliyyah*, (Istanbul, 19305), Article 947.

<sup>42</sup> Muhiyuddīn Abū Zakariyyah Nawawī, *Minhāj al-Talibīn*, translated into English by: E.C. Howard, (London:1977), 167.

## How to recognise *Rushd* or Signs of *Rushd*

*Rushd* is the final stage of legal competency. When an individual reaches maturity (*Rushd*), their legal capacity is complete, guardianship is lifted, and their assets are entrusted to them. *Rushd* and puberty may occur simultaneously, but sometimes *Rushd* can be delayed relative to puberty, depending on the individual's upbringing and readiness. There is no specific sign for knowing *Rushd*. However, Fuqhā (jurists) said that *Rushd* will be known by testing and Examination as Allah ﷺ described in the Holy *Qurān*, “Test the orphans until they reach the marriageable age. Then, if you perceive them to have a proper understanding, hand their property over to them.”<sup>43</sup> A minor's degree of intelligence (*Rushd*) should be estimated differently according to the various categories of persons. Thus, the son of a merchant should be examined about purchase and sale or his aptitude at a bargain; the son of a farmer should undergo inquiry as to his knowledge of cultivation and the proper employment of labor for that purpose; and the son of an artisan should give proof that he understands his trade; while a girl should show herself apt in all that has to do with managing the home, keeping clothes, preserving food and other household chores. This examination should be undergone at least twice so that it is likely that the minor is of sound mind (*Rashīd*). According to Hanafīs, this examination will be before the minor reaches the marriageable age.<sup>44</sup>

It is known from the verse mentioned above that mostly *Rushd* may occur either before puberty because Allah ﷺ instructed that examine the minor before reaching

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<sup>43</sup> Qur'ān 4:6

<sup>44</sup> *Al Mausū'ah Al Fiqhiyah Al Kuwaitiyah*, 8:186.

puberty or at the same time with puberty. *Bulūghat* (puberty) and *Rushd* are two distinct and independent concepts; it is also possible that *Rushd* may be delayed relative to puberty, depending on the individual's mental development, because *Rushd* has a hidden aspect as a person. There are no specific signs that show that *Rushd* has occurred.

### **Age for *Rushd***

According to Imām Abū Hanīfah, Rushad's age is 25. He says that if the Safīh individual reaches the age of twenty-five and shows no signs of maturity (*Rushd*), the property will be handed over to him.<sup>45</sup>

It is known from Imām Abū Hanīfah's saying that *Bulūghat* and *Rushd* occurred simultaneously, as he set the example of Safīh, who possesses a lake of intellect. He did not say that if a sound-minded person reaches puberty and no signs of *Rushd* occur, it will be presumed that he is *Rashīd* at 25 years old.

According to other Jurists, there is no determined age for the occurrence of *Rushd*. However, *Rushd* will be known by testing and examination, and males and females are equal. As for *Malikīs*, the age for *Rushd* is 18 years, which is what custom required.<sup>46</sup>

According to the Dictionary of Modern Written Arabic by Hans Wehr, the word 'Rushd' is defined as "integrity of (one's) actions, proper, sensible conduct, reason, good

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<sup>45</sup> Al-Marghīnānī, *Al-Hidāyah*, vol. 6, 451, 452.

<sup>46</sup> Shihāb al-Dīn Aḥmad ibn Idrīs Al-Qarāfī, *Al-Dhakhīrah*. Vol. 8, Edited by Muḥammad Ḥajji. (Tunis: Dār al-Gharb al-Islāmī, 1994), 230, 237, 238, 239.

sense, sense, consciousness; maturity (of the mind)".<sup>47</sup> This means that a person who has attained puberty and can form good decisions and have a maturity of mind can contract Nikāh."

### 2.6.3 Bulūgh (Puberty) in law

“Puberty. 1. The stage of physical development when a person takes on secondary sexual characteristics, and it usually becomes possible to reproduce. • In females, the beginning of this stage is marked by the menarche. 2. Hist. The earliest age at which one could presumptively consent and legally enter into a binding marriage. • Under English common law, children become marriageable at the onset of legal puberty (age 12 for girls and 14 for boys). In French civil law, a marriage was invalid if contracted before the end of legal puberty (age 15 for girls and 18 for boys). An underage spouse had the power to void the marriage. Also termed (in English common law) age of discretion.”<sup>48</sup>

### 2.6.4 Puberty in Pakistani Law

Puberty is not explicitly defined in Pakistani law, and differing age thresholds govern various legal matters. For example, in the context of marriage, the legally prescribed age is set at eighteen years for males and sixteen years for females. Accordingly, under

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<sup>47</sup> Hans Wehr, *A Dictionary of Modern Written Arabic* (New York, Spoken Language Services, Inc., 1976), 341

<sup>48</sup> Black's Law Dictionary, 8th ed. (St. Paul, MN: Thomson West, 2004), 3875

this framework, a male is considered an adult after the age of eighteen, while a female attains legal majority for marriage purposes upon reaching the age of sixteen.<sup>49</sup>

## 2.8 Legitimacy of Child Marriage in Islamic Law

Before examining the legitimacy of child marriage, it is essential first to define the concept of 'child' and understand how child marriage is addressed within both Islamic law and Pakistani legal frameworks.

### 2.8.1 Definition of a *Tifal* child and *Tofūlah* Childhood in Sharī‘ah

Laterally, Altifal (Child) means “الملود ما دام ناعماً و رخصاً” “the infant (newly born child) as long as soft and too little”<sup>50</sup> and “الملود حتى البلوغ” “the newly born child till puberty”<sup>51</sup>.

According to

”الطفل: الصبي من حين يسقط من البطن إلى أن يختتم“<sup>52</sup>

“The child: a boy from the time he is born until he reaches puberty.”

Its plural is (الأطفال) Alatfāl. This word is used in the Holy Qur’ān in this meaning.

Allah ﷺ Almighty said:

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<sup>49</sup> Child Marriage Restraint Act 1929 Section 2.

<sup>50</sup> Husain Bin Muḥammad, Al Rāghib Al Asfahānī, *Mu’jam Mufradāt e Alfāz Al Qur’ān*, (Beirut, Dar al-Fikr, 2006), 229

<sup>51</sup> Majamma Al Lughatul Arabiah, *Al Mu’ajam Ul Wasīt*, (Jahuria Misar Alarbiah, 2004), 580

<sup>52</sup> Mohammad ‘amīm Al-Iḥsān Al-Mujaddadī Al-Barkatī, *Al-Ta’rifāt Al-Fiqhiyya*: ( Beirut-Lebnon, Dār Al-Kutub Al-‘Ilmiya: 2003), 136

”وَإِذَا بَلَغَ الْأَطْفَالُ مِنْكُمُ الْحُلُمَ فَلَيْسْتُمْ نُواكَّهَا أَسْتَعْذَنَ الَّذِينَ مِنْ قَبْلِهِمْ“<sup>53</sup>

“When the children from among you reach puberty, they must seek permission, as those before them seek permission.”<sup>54</sup>

According to Islamic law, a child is generally considered a person who has not yet attained puberty or reached the age of puberty.

### **Childhood (*tufūla*)**

According to Islamic law, Childhood is a period in the life of a human being in which they are not obliged to follow any laws or rules. Even in the case of violating any law, they are not liable to punishment. This period starts from birth, as the Holy Qur'ān mentions, <sup>55</sup>(وَبَرْجَمَ طَفَلًا), and remains until the age of puberty, as the Qur'ān stated: <sup>56</sup>(وَإِذَا بَلَغَ الْأَطْفَالُ مِنْكُمُ الْحُلُمَ). So, this is a phase of a human being which starts from birth and remains up to puberty.”<sup>57</sup> According to Islamic concepts, a human being

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<sup>53</sup> Qur'ān 24:59

<sup>54</sup> Mufti Muḥammad Taqī Uthmānī, *The Meaning of The Noble Qur'an*, 657.

<sup>55</sup> Qur'ān 40:67

<sup>56</sup> Qur'ān 24:59

<sup>57</sup> Aḥmad ibn Maḥmūd al-Dīb, *Dalīl Marāhil al- 'Umr: Min al-Bulūgh ilā Ardhāl al- 'Umr* (Saudi Arabia: Dār al-Dhikr Schools, 2019), 96, this book is available, <https://www.noor-book.com/%D9%83%D8%AA%D8%A7%D8%A8-%D8%AF%D9%84%D9%8A%D9%84-%D9%85%D8%B1%D8%A7%D9%86-%D8%A7%D9%84%D8%A8%D9%84%D9%88%D8%BA-%D8%A7%D9%84%D9%8A-%D8%A7%D8%B1%D8%B0%D9%84-%D8%A7%D9%84%D8%95%D8%B1-%D8%A7%D9%84%D8%95%D8%B1-%D8%A7%D9%84%D8%AC%D8%B2%D8%A1-%D8%A7%D9%84%D8%A7%D9%88%D9%84--pdf>.

is a result of intercourse between a male and a female, starting life as a fetus in the womb of their mother. They begin the period of suckling, and after that, they become a child.<sup>58</sup>

### *Al Sabī*

According to Ibn e Manzūr:

<sup>59</sup> "الصبي منذ ولادته إلى أن يفطم"

The boy from his birth until he is weaned.

#### **2.8.2 Definition of a Child in Pakistani Law**

Generally, according to black Law Dictionary, a child is "Child means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age."

<sup>60</sup>"Child means a person, male or female, who is under eighteen years of age."<sup>61</sup>

#### **2.8.3 Definition of a Child in Pakistani Law**

"Minor means a person of either sex who is under eighteen years of age."<sup>62</sup>

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<sup>58</sup> Qur'ān 4:1, 22:5, 31:13, 46:15

<sup>59</sup> Abū Alfadhal, Muḥammad bin Mukarram, Ibne Manzūr, *Lisān al-‘Arab*, (Berout: Dar Sadar, 1414H),

<sup>60</sup> *Child Marriage Restraint Act 1929*, section 2

<sup>61</sup> *The Sindh Child Marriage Restraint Act 2013*, section 2

<sup>62</sup> *Child Marriage Restraint Act 1929*, section 2

## 2.8.4 Definition of Child in International Law

According to international law, the definition of a "child" refers to an individual who has not yet reached the age of puberty. Concerning statute and in the ordinary use of the English language, a person of fourteen years is a child. But laying down any definite boundary separating "children" from young men and women is impossible. It is supposed that their maximum age is somewhere between sixteen and twenty.

The Convention on the Rights of the Child 1989 (CRC1989) defines that "A child means every human being below the age of 18 years unless under the law applicable to the child, the majority is attained earlier."<sup>63</sup>

Article 1 of the CRC 1989 specifies that the highest age limit for Childhood should be as early as possible under the laws applicable to the child. This article, therefore, explores the concept of the advancement of the majority at an early age.<sup>64</sup>

According to the aforesaid UN convention, states are allowed to fix an age of puberty other than eighteen years. Still, it emphasizes that states substituting an earlier age for specific purposes must do so in the context of the Convention's guiding principles. Thus, it must be based on non-discrimination and in the child's best interest. Article 1 of this Convention was intentionally left deliberately vague to allow the contracting parties flexibility in interpreting the term "child". This article remains silent on the issue of when a child attains puberty, leaving states free to determine when childhood and adolescence end. So, in light of the above discussion, eighteen years of

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<sup>63</sup> *United Nations Convention on the Rights of the Children, 1989*, Article No. 1

<sup>64</sup> Ibid.

age can be considered the standard age for the end of Childhood and the attainment of manhood. It is also known that if any state decides to take less than eighteen years of age as an age of puberty, it will not be against the spirit of this Convention, provided that this decision is based on the principle of non-discrimination and must be in the favor of the child.<sup>65</sup>

So I say that International law is very close to Islamic law in this regard because the majority of Muslim jurists have an opinion that a person will be considered an adult when they attain the age of puberty.

## 2.9 Legal Capacity of a Child in Shari‘ah (Islamic Law)

The term Al Ahliyya (الأهلية) refers to legal capacity in Shari‘ah. The literal meaning of the word *Ahliyya* is the ability (الصلاحية) and entitlement As (الاستحقاق)<sup>66</sup> Allah ﷺ Almighty said:

وَكَانُوا أَحَقُّ بِهَا وَأَهْلَهَا<sup>67</sup>

“And they were much entitled to it and competent for it”.

Ahliyya is "the ability to acquire and exercise rights and to accept duties and perform them. This indicates two types of capacity: the first is based on the acceptance

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<sup>65</sup> United Nations, "OHCHR Homepage, [https://www.ohchr.org/en/ohchr\\_homepage](https://www.ohchr.org/en/ohchr_homepage).

<sup>66</sup> Dr. Muhammad Mustafā Al-Zuhaylī, *Al-Wajīz fī Ūsūl al-Fiqh Al-Islāmi* (Beriut:Dārul Khair, 2006), 492.

<sup>67</sup> Qurān 48:26

or acquisition of rights, and the other on the performance of duties, which are named *Ahliyyat al-wujūb* (أهلية الوجوب), the capacity for the acquisition of rights, and *Ahliyya tul Adā* (أهلية الأداء), the capacity for execution or performance of duties.

Ali Bin Muḥammad As Sayyed As Sharīf Al Jurjāni defines “*Ahliyya*”

“عبارة عن صلاحية الإنسان لوجوب الحقوق المشروعة له أو عليه”<sup>68</sup>

“It is a human being's ability to have legitimate rights and duties.”

Dr. Husain Hamid Hassān defines “*Ahliyya*” as

الصلاحية لثبت الحقوق و استعمالها، و وجوب الإلتزامات و وفائها”<sup>69</sup>

“Capacity for the vindication of rights and their use, and the obligation of responsibilities and their performance”.

Al Zarqa describes “*Ahliyya*” as “a description presumed in a person, rendering such a person a possible candidate to receive a legislative injunction”.<sup>70</sup>

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<sup>68</sup>Ali Bin Muḥammad Al Sayyed Al Sharīf Al Jurjāni, *Mu'jam al-Ta'arifaat*, edited by Muḥammad Siddiq Al-Minshawi, (Dar ul Fadīla, Cairo, Egypt), 36

<sup>69</sup> Dr. Husain Hamid Hassān, *Usūl lul fiqh*, (Maktaba tul Jami'a, International Islamic University, Islamabad, 2003), 137-149

<sup>70</sup> Mustafā Aḥmad al-Zarqā', *Al-Madkhāl al-Fiqhi al-Āmm* (Damascus:Dār al-Qalam, 2004), 791.

Al-Sabūni describes *Ahlīyya* as “the ability of a person to oblige, be obliged, and conduct one’s affairs by oneself”.<sup>71</sup>

El-Alami refers to it as "the fitness of a person to enter into an ignition that is to bind and to be bound."<sup>72</sup>

So, “*Al ahlīyya*” refers to the power that qualifies individuals to secure and exercise rights and privileges while being culpable of depravity. Under the Sharī‘a, legal capacity involves privileges, duties, and responsibilities inherently enjoyed and exercised by an individual. Legal capacity covers not only the potential of an individual to acquire rights and obligations as called (*Ahlīyyat al-wujūb*) but also the capacity to exercise, execute, and perform such rights and duties as called in Arabic (*Ahlīyya tul Adā*).

Thus, a child (*Al tifal*) and a minor (*Al sabī*) are generally assumed to possess the full capability (*Ahlīyyat al-wujūb*) for the acquisition. However, a child does not have the (*Ahlīyya tul Adā*) for performance until they reach the age of actual or legal puberty. This is when a child is assumed to have fully developed their intellect ('aql) and discretion (rushd).

An individual is said to have the capacity to act when fully developed intellectually and has the discretion (reason) to do so. Thus, an unborn child (*Janīn*) acquires some rights, like inheritance, legacy, and parentage, but cannot perform certain

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<sup>71</sup> Mahdi Zahraa, *The Legal Capacity of Women in Islamic Law*, Arab Law Quarterly, Vol . 11, 1996, p 245.

<sup>72</sup> Ibid

obligations. This is because the (*Janīn*) is still attached to the mother, and her personality is deficient.<sup>73</sup>

## 2.10 Child Marriage or Early Marriage

Marriage, according to Islamic law, is a firm contract (*Mīsāq e ghalīzān*)<sup>74</sup> To obey Allah’s orders and carry out His worship.

In Sharī‘h, it is not found that the determination of the age limit for marriage in depth determines the age limit for maturity. This is a very important factor because child marriage always occurs in girls. Even if Islām does not clearly define the boundaries, it does not mean that Islām allows underage marriage.

Regarding the age of marriage, Islām provides very flexible limits, allowing it to apply to all places and times.

Child marriage is also known as early marriage. It is a marriage where both parties to the marriage contract are minors. In Sharī‘h (Islamic Law), a person who has not attained puberty is a minor. To bind a person in any obligation, whether social, economic, civil, or criminal, the person must understand the nature of the responsibility he is subject to. Similarly, marriage is a great responsibility for girls or boys, so the parties need to be able to understand it.<sup>75</sup>

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<sup>73</sup> Hassān, *Usūl ul Fiqh*, 137–149.

<sup>74</sup> Qurān 4:21

<sup>75</sup> Ayn ul Badar, *Child Marriage In Pakistani Society: An Analytical Study In Sharī‘ah and International Law*, (LLM Thesis, International Islamic University Islamabad), 35.

Husain Ahmad stated that classical fiqh books refer to a young marriage with *Nikāh Al Saghir* (نكاح الصغير) or *Al Saghirah*, while the opposite is *Al Kabir* or *Kabirah*. In the new fiqh, the term is *al-ziwāj al-mubakkir* (الزواج المبكر), which refers to child marriage or early marriage. Marriage at a young age is a marriage between a man and a woman who is not yet mature if *bulūgh* is determined by age or a count of years. According to the majority of jurisprudence experts, a young marriage is defined as one in which the spouses are under the age of 15 or 18, as per the view of Abu Hanīfah.<sup>76</sup>

According to Mawardī, underage marriage is the marriage between a man and a woman who has not reached the age of 19 for men and 16 for women.<sup>77</sup>

Sharī'ah has categorized several conditions that the parties must fulfill before entering into a marriage contract. 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, when contracting marriage, parties must understand the consequences of their actions. Real consent to marriage can be given by the parties when they are fully aware of the consequences of their actions.<sup>78</sup>

According to the majority of scholars, the limitation for a person to get married, for men, is marked by a wet dream (*ihtilām*), and for women, it is menstruation.

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<sup>76</sup> Delti Hidayati, Nūr Halīmah Al Sadiah, *Early Marriage According To Islamic Law*, (Sekolah Tinggi Agama Islām Assunah, Medan, Indonesia), 29

<sup>77</sup> Ibid., 29

<sup>78</sup> Ibid., 35.

However, there are other signs that, whether male or female, indicate that they are suitable for marriage.<sup>79</sup>

It is a well-known thing that a minor cannot enter into any contract before he attains the capacity to enter into a contract. Islamic law imposes numerous conditions for entering into any contract. Marriage is also a social contract, so there are multiple conditions that the contracting parties must fulfill. They must satisfy all the conditions before a marriage contract can be signed. An infant person, in the eyes of the law, cannot enter into any legal transaction; consequently, they are disqualified from entering into a marriage contract. There is a distinction between a contract made by a minor possessing some discretion (الصبي المميز) and one made by a minor who does not possess discretion (الصبي غير المميز) . A minor not having reached the age of discretion and does not understand and comprehend the consequences of the contract of marriage, will be a mere nullity. The marriage will be null and void, whether the minor is a girl or a boy.<sup>80</sup> However, this research examines whether a child gets married by their Wali (guardian) or by themselves after bulugh and before the age of 18, and whether the marriage will be considered legitimate or illegitimate in the eyes of Sharī'ah and Law. There is a debate, and it is as follows:

## **2.11 Legitimacy and Illegitimacy of Child Marriage**

There are two types of opinions given by Islamic jurists;

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<sup>79</sup> Ibid.,30.

<sup>80</sup> Ayn ul Badar, *Child Marriage in Pakistani Society*, 36.

## First Opinion

Az-Zuhaylī said that the majority of jurists allowed the marriage of minors by argument.<sup>81</sup>

## Al Qur'ān:

Allah ﷺ almighty says about the 'iddah of a little girl,

وَالَّتِي بَيْسَنَ مِنَ الْمَحِيطِينَ مِنْ يَسِّيرِكُمْ إِنْ أَرَتُمُوهُنَّ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ وَالَّتِي لَمْ يَحْضُنْ<sup>82</sup>"

And those women from among you who have despaired of (further) menstruation, if you are in doubt, their iddah is three months, as well as of those who have not yet menstruated."<sup>83</sup>

This verse says that the iddah for those who have not menstruated is three months, and since the iddah is only prescribed in the case of divorce, this proves that:

- She can get married and get divorced.
- Marrying her off before puberty is allowed.
- Her consent is neglected.

Allah ﷺ Almighty says:

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<sup>81</sup> Dr. Wahbah al-Zuhayli, *Al-Fiqh Al-Islāmi wa Adillahtuhū*, Vol.7, (Beirut, Dar al-Fikr, 1984), 179

<sup>82</sup> Qur'ān 65:4

<sup>83</sup> Mufti Muḥammad Taqī Uthmānī, *The Meaning of The Noble Qur'ān*, 1063.

وَإِنْ خَفْتُمْ أَلَا تَقْسِطُوا فِي الْيَتَامَةِ فَإِنَّكُمْ مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَنْهُ مَنْ لَكُمْ وَرُبَّمَا  
84

“If you fear that you will not do justice to the orphans, then, marry the women you like, in twos, in threes, and in fours.”<sup>85</sup>

“Zuhri narrated from ŪrwaŪrwa that he asked ĀishahĀishahĀishahĀishah about the Statement of Allah ﷺ, "If you fear that you shall not be able to deal justly with the orphan girls, then marry (other) women of your choice, two or three or four..... She said, "O, my nephew! (This Verse has been revealed in connection with) An orphan girl under the guardianship of her guardian, who is attracted by her wealth and beauty, and intends to marry her with a Mahr less than what other women of her standard deserve. So they (such guardians) have been forbidden to marry them unless they do justice to them and give them their full Mahr, and they are ordered to marry other women instead of them.”<sup>86</sup>

- In the explanation of this verse, Mufti Muhammad Taqi Uthmāni says;<sup>87</sup>

“This is to eliminate an unjust custom that was prevalent in Arabia. If a cousin became the guardian of a beautiful or rich orphan girl, he would marry her without giving her the due rights of dower and maintenance and without treating her as his wife on an equal basis. The verse says, ‘If you apprehend that you will not fulfil the obligations

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<sup>84</sup> Qur’ān 4:6

<sup>85</sup> Mufti Muhammad Taqi Uthmāni, *The Meaning of The Noble Qur’ān*, 145.

<sup>86</sup> Muhammad Bin Ismā‘īl Al-Bukhārī, *Shahīh Al-Bukhārī*, Hadīth no. 5140, Vol 7 (Riyadh: Dār al-Salām, 1997), P.60.

<sup>87</sup> Mufti Muhammad Taqi Uthmāni, *The Meaning of The Noble Qur’ān*, 145.

towards orphan girls, then avoid marrying them, and marry other women who are lawful for you. This explanation of the verse is given by Sayyidha Āisha.ĀishaĀisha.<sup>88</sup>

### **Hadīth:**

- “Az-Zuhri narrated from ‘ŪrwaŪrwa, who said; I said to the Ūmm ul Muminīn, ‘Āyesha Seddiqa about the saying of Allah ﷺ Almighty: “If you fear that you will not do justice to the orphans, then, marry the women you like, in twos, in threes, and in fours,” she said: O my sister’s son, she is an orphan girl, she is in the custody of her guardian, so he desires her money and her beauty and wants to marry her for less than her dowry, so they forbade them to marry her unless they paid them in fairness, and they ordered that they marry women other than them”.<sup>89</sup>
- It is known from the above verse that marrying an orphan is valid and lawful, so let’s know who is an orphan girl,

#### **2.11.1 Orphan (اليتيم) in Sharī‘ah**

يقول الراغب الأصفهاني:

"اليتيم: انقطاع الصبي عن أبيه قبل بلوغه و في سائر الحيوانات من قبل أمه"<sup>90</sup>

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<sup>88</sup> Dr. Muhammad Muhsin Khan, The Translation of the Meanings of Sahīh Al-Bukhāri, Vol. 7, Darussalām, Riyadh, Saudi Arabia, 145.

<sup>89</sup> Muhammad ibn Ismail, *Al-Sahih Al-Bukhari*, Hadīth Number, 4574.

<sup>90</sup> Husain Bin Muhammad, Al Raghib Al Asfahāni, *Mujam Mufradāt e Alfāz e Al Qur’ān*, (Beirut, Dar al-Fikr,2006), 417

“An Orphan-hood is the separation of a child from his father before he reaches puberty and from other animals by his mother”.

”عرفه ابن قدامة“

”هو الذي مات عنه أبوه ولم يبلغ الحلم و سواء ماتت أمه أم لم مقت“<sup>91</sup>

Ibn e Qudamah defined:

“An orphan is the one whose father died and did not attain puberty, whether his mother died or not.”

و قال القفهاء:

”اليتيم من مات أبوه وهو دون البلوغ حديث: ”لا يتم بعد احتلام“<sup>92</sup>

The jurists said:

“An orphan is someone whose father died while he was in puberty. According to the Hadīth: 'Orphanhood ends with puberty'<sup>93</sup>

### 2.11.2 Orphan in Law

“Orphan means any child under the age of eighteen years-

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<sup>91</sup> Dr.Farīdha Muḥammad Ahmad Al-Ghāmidi, *Al-‘Inyatū Bil-Yatīm Fi Dhaw el Qur’ān Al Karīm*, P. 128

<sup>92</sup> Ibid. p. 254

<sup>93</sup> Mūlāna Mufti Muḥammad Shafī’, *Ma’ariful Al-Qur’ān* translated by Muahmmad Shamim Volume 2,(Maktaba-e-Darul-Uloom, Karachi, Pakistan) 291

- (i) Who has lost one or both parents and has no adequate source of income;
- or
- (ii) Whose parents are destitute; or
- (iii) Who has been abandoned by his parents: or
- (iv) Whose parents are not known; or
- (v) The whereabouts of whose parents are not known.<sup>94</sup>

“Unattended orphan means a child, below the age of fifteen years, with unknown parentage, abandoned or not in the legal custody of anyone.”<sup>95</sup>

So, from the hadīth mentioned above, it's very clear that the marriage of an orphan can be held, and the orphan is a child who does not reach puberty because orphanhood ends with puberty, and the verse of the Holy Al-Qur’ān indicates this very clearly as Allah ﷺ Almighty said,

وَابْتَلُوهُ أَلْيَتَمَى حَتَّىٰ إِذَا بَلَغُوا أَلْيَكَاحَ<sup>96</sup>

And “Test the orphans until they reach the marriageable age (puberty)”<sup>97</sup>. This means that an orphan is a minor who has not yet reached puberty. Therefore, when the Nikāh

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<sup>94</sup> *The Sindh Orphanages (Supervision and Control) Act, 1976*

<sup>95</sup> *Ibid.*

<sup>96</sup> Qur’ān 6:4

<sup>97</sup> Mufti Muḥammad Taqī Uthmānī, *The Meaning of The Noble Qur’ān*, 146.

of an orphan can be held, the Nikāh of a normal child is also possible, even if they do not reach puberty.<sup>98</sup>

Hafiz Ibn Hajar commented on the above hadith saying:

"وفي جواز تزويج اليتامي قبل البلوغ لأنهن بعد البلوغ لا يقال لهن يتيمات"<sup>99</sup>

In this hadīth, the permissibility of marrying orphans before puberty is mentioned because after puberty, they are not called orphans.

And this is said by Imām Abū Hanīfah as follows:

"وقد استدل بذلك أبو حنيفة على جواز نكاح اليتيمة قبل البلوغ، وقال : أما بعد البلوغ فليس يتيمه ، بدليل أنها لو أرادت أن

تُحْكَمْ عن صداق مثلها جاز له"<sup>100</sup>

However, the definition of law is repugnant to Islamic law according to the Hadīth, "Orphanhood ends with puberty", because there is no doubt that a child, whether male or female, reaches puberty before the age of eighteen years.

Marriage of the prophet Muhammad with ‘Ā’yesha when she was 6. This is reported by ‘Ā’yesha Ūmm ul mūminīn:

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<sup>98</sup> Khalīl Ibrāhīm Mullah Khatir, *Ziwāj Al-Sayyida ‘Ā’yesha wa Mashrū’iyyat Al-Ziwāj Al-Mubakkir wa Al-Radd ‘alā Munkirī Dhalik*, (Dār ul Qiblah: 1405H) 13

<sup>99</sup> Ibid., 15.

<sup>100</sup> Abū Hayyān Muḥammad ibn Yūsuf ibn Ali al-Andalūsi, *Al-Bahr al-Muhīt fi Tafsīr al-Qur'an al-Azīm*, Vol 9, (Beirut: Dār al Kutub al-‘ilmīyyah, 1993), 4:6.

"عن عائشة رضي الله عنها قالت: تزوجها رسول الله صلي الله عليه وسلم وهي ست سنين وأدخلت عليه وهي بنت تسعة ومكثت

عنه تسعا" 101

did the that the Holy Prophet رضي الله عنها Narrated Āishah Āishah Āishah Āishah  
marriage contract with her when she was six years old and he consummated his  
marriage when she was nine years old, and then she remained with him for nine  
years."<sup>102</sup>

Abū Bakr Jassās mentioned in Ahkām ul Qurān from Muhammad Bin Ishāq the Nikāh  
of Salmah with the daughter of Hamza, which was done by the Prophet Muhammad:

"فروجه رسول الله - صلي الله عليه وسلم - بنت حمزة: و هما صبيان صغيران: فلم يجتمعوا حتى ماتا اخ"

So, the Messenger of Allah ﷺ married him to the daughter of Hamza, and the two  
young children did not meet until they died.<sup>103</sup>

Marriage of the daughter of Az Zubayr:

"تزوج قدامة بن مظعون - رضي الله عنه - إبنة الزبير حين نفست فقيل له فقال: إبنة الزبير إن مت ورثني وإن عشت كانت امرأني"<sup>104</sup>

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<sup>101</sup> Muḥammad Bin Ismā‘īl Al-Bukhārī, *Shahīh Al-Bukhārī*, Hadīth no. 5133, Vol 7 (Riyadh: Dār al-Salām, 1997), Grade: Sahīh

<sup>102</sup> Muhsin Khan, *The Translation of the Meaning of Sahīh Al-Bukhārī*, 7:57.ḥ

<sup>103</sup> Mufti Muḥammad Taqi Uthmani, *Hamārāy-Aaili Masāil*, (Darul Ishāt, Karachi.1) Pg. 210

<sup>104</sup> Dr.Zāfir Bin Husain Al-‘umri, Dr. Osama bin Sa’īd Al-Qahtāni, Dr. Ali bin Abdul’azīz bin Ahmed Al-Khuḍārī, Dr. Faisal bin Muhammed Al-W’lān, Dr. Fahd bin Saleh bin Mohammed Al-Lahādān, Dr. Saleh bin ‘Obeid Al-harbi, Dr. Saleh bin Nā’im Al-‘Omari, Dr. ‘Azīz bin Farhan bin Mohammed Al-ḥiblāni Al-‘Enezi, Dr.Mohammed bin Mu’id Al-Dawwās Al-Shahrānī, Dr. Abdullah bin S’ad bin Abdul’azīz Al-Muḥārib, Dr. ‘Ādil bin Mohammed Al-‘Abīsī, *Mawsu’at Al-Ijmā’ Fil-Fiqh Al-Islāmi*, Volume 3 (Dar ul Fadha, Riyadh KSA, 2012) p.147

"Qudamah Bin Mathun married the daughter of Zubayr when she was born, so he was told about this. He said: If I die the the daughter of Zubayr will inherit me, and if I live, then she will be my wife."

Marriage of Um Kulthūm:

"زوج علي -رضي الله عنه- أم كلثوم إبنته و هي صغيرة عمر بن الخطاب -رضي الله عنه"105 -

Ali married off his minor daughter, Um Kulthūm, to Umar, the second caliph.

These Hadeeths show that ĀishaĀishaĀisha, Daughter of Zubār and Ali's daughter, was a minor, which means their consent was invalid.

### **Consensus of Jurists (*Ijmā'*)**

The majority of Muslim jurists are of the view that the Nikāh of a minor girl is permissible and lawful, therefore Allāmah Abūbaker Jassās says that:

"و في هذه الآية دلالة أيضا على أن للأب تزويج إبنته الصغيرة من حيث دلت على جواز تزويج سائر الولياء إذا كان هو أقرب

الولياء و لا نعلم في جواز ذلك خلافا بين السلف و الخلف من فقهاء الامصار"106

"In this verse, there is also a denotation that the father has to marry off his minor daughter, which indicates the permissibility of marrying off other guardians if he is the

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<sup>105</sup> Ibid.

<sup>106</sup> Mufti Muḥammad Taqi Uthmani, *Hamārāy- 'Aailī Masā'il* (Darul Ishā'at, Karachi) Pg. 210

closest guardian, and we do not know if the permissibility of this is in any conflict between the old and new jurists of the regions."

Dr.Zafir Bin Husain Al-Almri discussed this matter in his book, and he mentioned that Jurists have Ijmā that a father can marry off his minor daughter. <sup>107</sup>

### **Second Opinion**

Some jurists hold opposing opinions, such as Imām Ibn-e-Shubroma, a contemporary Muslim jurist of Imām Abū Hanīfa in Iraq. Additionally, Qazi Abū Bakr al-Asam also had an opposing opinion. They are of the view that the Nikāh of a minor girl is not permissible in Islām. They argue that it contradicts the clear injunctions of the Al-Qur'ān, which require puberty, discretion, and sound judgment (الرشد) in the parties to a marriage contract. The Al-Qur'ān says:

"وَأَبْنَلُوا الْيَتَامَى حَتَّىٰ إِذَا بَلَغُوا النِّكَاحَ فَإِنْ عَانَسْتُمْ مِنْهُمْ رُشْدًا" <sup>108</sup>

"Test the orphans until they reach the marriageable age. Then, if you perceive in them proper understanding, hand their property over to them".

In this verse, the Al-Qur'ān determines puberty as the age of marriage. Now, if we allow child marriage, it will make the verse redundant, and they do not need to Nikāh, because

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<sup>107</sup> Al-'Umri et al., *Mawsuat Al-Ijmā' Fil-Fiqh Al-Islāmi*, 3:147.

<sup>108</sup> Qur'ān 6:4

the intent of the marriage, naturally (طبعاً), is the elimination of lust and no desire for them, and, legally (شرعًا), is generation and Childhood is contradicting both of them.<sup>109</sup>

### 2.11.3 Review of these arguments

The moot point here is the Qur'anic verse "حَتَّىٰ إِذَا بَلَغُوا الْتِكَاحَ" until they reach the marriageable age. They said that here Al-Qur'ān defined puberty with "حَتَّىٰ إِذَا بَلَغُوا الْتِكَاحَ" that means that in the eye of Al-Qur'ān, there is a determined age for marriage and that is puberty, but this is a weak point which they have pointed out because the word *Nikāh*, which is used in the above verse, has two meanings in linguistics and the daily practice of Arab people.<sup>110</sup>

#### 2.11.3.1 The literal meaning of *Nikāh*

*Nikāh* is derived from the Arabic word (نكاح); its root letters are ح-ك-ن. In linguistics, it means (الضم و الجمع) Combination, pairing and gathering. So, when the branches of trees meet with each other, it is said that (ساقت الأشجار) means the trees are together or they are mixed up with each other. Its original meaning is sexual intercourse

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<sup>109</sup> Muhammad Bin Ahmad Bin Abi Sahl Abū Bakr Shams al-Dīn Al-Sarakhsī, *Al-Mabsūt*, Vol: 6, (Dār al-Kutub al-Ma'rfah, Beirut), 192

<sup>110</sup> Mufti Muhammad Taqi Uthmāni, *Hamārāy-Aailī Masaīl* (Darul Ishā'at, Karachi) Pg. 219

(الوطء); however, as Majāz e mursal, it means (العقد) agreement of Nikāh that is based on the sexual relationship between husband and wife.<sup>111</sup>

**The famous linguistic 'Al lāma Azharī says:**

قال الأزهري: "أصل النكاح في كلام العرب الوطئ و قبل للتزوج نكاح لأنه سبب للوطاء المباح"

The Original meaning of Nikāh in the practice of Arabs is intercourse, and marriage is called Nikāh because it is a reason, "Sabab," for permissible intercourse.<sup>112</sup>

**The Second famous linguist, Johari, says:**

"النكاح الوطاء وقد يكون العقد"

Nikāh is intercourse, and it may be a contract of Nikāh.<sup>113</sup>

**Imām Al-Sarakhsī has defined literal meaning of Nikāh as:**

"النكاح في اللغة عبارة عن الوطء....."

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<sup>111</sup> Abdur-Rahmān Al Jazarī, *Kitab ul Fiqh 'Alā Madhahib aI Fiqh* Vol.4 (Dār al-kutub al-'Ilmiyyah, Beirut Lebanon), 7

<sup>112</sup> Taqi Uthmanī, *Hamaray- 'Aaili Masāill*, 220.

<sup>113</sup> Ibid. 220

So, from the above extract, it is clear that the literal meaning of Nikāh is sexual intercourse.<sup>114</sup>

**Allah ﷺ Almighty says in the Holy Qur'ān :**

"وَلَا تَنكِحُوا مَا نَكَحَ إِبْرَاهِيمَ" 115

"Do not marry those women whom your fathers had married."<sup>116</sup>

In this verse, Nikāh means sexual intercourse because (العقد) contract is not something that is forbidden; that's why Hanafīs take the Nikāh's meaning as sexual intercourse from the verse.

"أَلَزَانِي لَا يَنْكِحُ إِلَّا زَانِيَةً" 117

"A man who is a fornicator does not (like to) marry, but a woman who is a fornicator."<sup>118</sup>

**In the saying of the Prophet Muhammad, peace be upon him:**

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<sup>114</sup> Muhammad Bin Ahmad Bin Abi Sahl Abū Bakr Shams al-Dīn Al-Sarakhsī, *Al-Mabsūt*, Vol: 6, (Dār al-Kutub al-Ma'rifah, Beirut), 192

<sup>115</sup> Qurān 4:22

<sup>116</sup> Mufti Muhammad Taqi Uthmāni, *The Meaning of The Noble Qur'ān*, 151.

<sup>117</sup> Ibid., 645.

<sup>118</sup> Taqi Uthmānī, *Hamaray- 'Aaili Masāill*, 219.

I was born from Nikāh, i.e., from permissible intercourse.

Everything is permissible for you with your menstruating wife<sup>120</sup> "إصنعوا كل شيء إلا النكاح"

except sexual intercourse.

So, regarding the above verses and Hadiths, if this meaning (sexual intercourse) is inferred from the word Nikāh in verse (إِذَا بَلَغُوا الْتِنَاجِ), then the meaning will be "when they reach the age of maturity and are capable of intercourse and develop sound judgment, then you deliver them their property." In this context, this verse also does not indicate that puberty is the age of Nikāh. This analogy is much closer to the real meaning of the verse and is supported by the following arguments:

The first thing that is quite evident here in this verse (إِذَا بَلَغُوا الْتِنَاجِ) The Holy Qur'ān refers to the age of Nikāh, and the verse states that when orphans reach puberty and develop sound judgment, then their property should be delivered to them. Now look here, for describing puberty, two expressions are possible: one is to say that "when the orphans reach a marriageable age, and the second is, when they can engage in intimate relations. The second expression is clearer when describing puberty because every person has a different opinion about marriageability. Every person has their standard

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<sup>119</sup> Al-Hāfiẓ Abū al-Qāsim Sulaymān ibn Aḥmad al-Ṭabarānī, *Al-Mu'jam al-Awsat* (Vol. 5, Hadīth, 4728, (Qahirah, Maktabah: Dār al-Haramayn, 1415H), 80.

<sup>120</sup> Imām Abū al-Ḥusayn Muslim ibn al-Ḥajjāj, *Sahīh Muslim*, Kitāb al-ḥaydh, vol. 1, trans. Nasiruddin al-Khattab, (Riyadh: Darussalam, 2007), 421.

for marriage; someone may say that a minor has reached adulthood but is not yet fit for marriage, which means they are not yet capable of taking responsibility for marriage or have financial or educational obligations that do not allow them to marry. Therefore when someone is told, "When your son becomes marriageable, hand over his property to him," the rightful meaning that person will interpret from this is that when his son becomes eighteen or twenty years old, starts earning and spending, and becomes independent, he should hand over his property, On the contrary, when said "hand over the property when he is capable of doing sex" then no other meaning can be understood from this except that he has to hand over the property to his son when he becomes an adult. Therefore, the origin of the Al-Qur'an is explained in this case, as Nikāh means 'intercourse', so the meaning should be understood as intercourse.

We mentioned above that according to Imām Azhari and Jawhrī, the original meaning of Nikāh is sexual intercourse. Therefore, it cannot be ignored as long as there is no compulsion to take another meaning, such as "contract of marriage." Not only is there no compulsion to take another meaning, but there is a fear that taking another meaning may lead to misunderstandings that are against the purpose of the Al-Qur'an and Hadīth. Therefore, in this verse, Nikāh means sexual intercourse.<sup>121</sup>

The other linguists say that the original meaning of Nikāh is (المقد) "the marriage contract," and as a majāz e mursal, Nikāh means Sexual intercourse.

Allama Al Raghib says:

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<sup>121</sup> Taqi Uthmanī, *Hamaray- 'Aaili Masāill*, 219.

"أصل النكاح للعقد ثم استعير للجماع و محال أن يكون في الأصل للجماع ثم استعير للعقد"<sup>122</sup>

The origin of Nikāh is for ('Aqad) the marriage contract; then, it is borrowed as a majāz e mursal for intercourse, and it is impossible to be initially for intercourse and then borrowed for the marriage contract.

If Nikāh means "contract of marriage," as the jurists above said, even then, our stance is unaffected, and this verse does not tell us that the Qur'ān has declared marriage before puberty illegal. The meaning of the verse will be "When the orphans reach Nikāh, it means that when they get the ability to have Nikāh, but 'marriage before puberty is not permissible', that is not known from any word of this verse.

If the purpose of the Holy Qurān is that marriage before puberty is not permissible, then it should have been mentioned somewhere in the Holy Qurān and Hadīths. Here, the Holy Qurān mentions (إِذَا بَلَغُوا أَلْتِغَاجَ) in such a way that it is a well-known age that everyone recognizes if the Al-Qur'ān meant an age of marriage before which marriage is not permissible. It would not be correct to refer to it here because the reference is always given to something mentioned before in any verse of the Holy Qurān or even in the weakest hadīth. In this situation, if we assume that the Holy Qurān aims to prohibit marriage before a certain age, then it would mean that the Holy Qurān refers to an age not previously mentioned. It is something that cannot be imagined, at least by God.

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<sup>122</sup> Husain Bin Muhammad, Al Rāghib Al Asfahāni, *Mu'jam Mufradāt e Alfaz e Al Qur'ān*, (Beirut, Dār al-Fikr, 2006), P. 382

This makes it clear that the purpose of the Holy Qurān (إذَا بَلَغُوا أُكْلَاحَ) It is only that “when they reach the age at which the full ability for marriage is generally developed or the age at which marriage is usually solemnized,” and this is a reference that everyone knows.

All that we have stated above is fully supported by all the Ahādith that prove the marriage of minors, or which is proven by the Prophet Muhammad (peace be upon him) that he arranged marriages of minors. It is obvious that if marriage before puberty were not permissible in the eyes of the Qurān, then the Holy Prophet himself would not have married Hazrat Ā'isha at an early age. He would not have married Hazrat Salama to Hazrat Hamza. Similarly, other companions of the Prophet Muhammad who strongly believed in Al-Qur'ān's teachings would not have approved marriages with minors. From the above discussion, it is known that the marriage of a child is legitimate and permissible in Sharī'ah (Islamic Law). It is not an offense, as declared in Pakistani law. A father or grandfather may marry off a child before puberty. Even other guardians may marry off minors before puberty. However, minors have a right to abrogate this contract of marriage. This right is called *Khiyarul bulūgh*.<sup>123</sup>

## **2.12      Appropriate age for marriage or just puberty**

It should be clear that, according to Sharī'ah (Islamic law), there is no specific age of marriage for a boy or a girl. As soon as a young man is fit, capable of providing for his wife, and fulfilling her marital desires, he will be considered fit for marriage. However, it is best and preferable that one get married as soon as possible, as delaying

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<sup>123</sup> Taqi Uthmanī, *Hamaray- 'Aaili Masāill*, 219.

it could lead to boys and girls getting involved in unlawful things. However, a boy or girl cannot marry himself before puberty, but their guardian has the right to marry them off. Islām says that there is no specific age for marriage, but whenever a boy or girl becomes an adult and fit, they are allowed to get married.<sup>124</sup> The two authoritative sources of Islamic Law are the Al-Qur'an and the Sunnah. The Qurān is relatively silent on the issue of marriageable age, albeit for one verse that states, "And test the orphans until they reach marriageable age. Then if you perceive in them sound judgment, hand over their property to them."<sup>125</sup> Along with the injunction of maturity (bulūgh) in this verse, the Holy Qur'an has also answered the question regarding the age when a child would be taken as mature (Baligh) by saying: (إِذَا بَلَغُوا الْتِنَعَّجَ) translated as "until they reach marriageability."<sup>126</sup> Here, it has been

indicated that real maturity is not tied up with any particular count of years. Instead, it depends on specific indicators and signs experienced by adults as they enter the threshold of adulthood. Regarding these indicators and signs, they would be regarded as fit to marry and considered mature, even if their age does not exceed thirteen or fourteen years. However, if such signs of maturity do not appear in some children, they will still be considered mature in terms of age. In this situation, Muslim jurists fixed different ages for maturity. Some fixed eighteen years for boys and seventeen for girls; others have fixed fifteen years for both. With the Hanafīyyah, the fatwās on this position are that the boy and the girl shall be considered mature under Islamic law after

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<sup>124</sup> Ālā Uddīn Al Kāsānī, *Badā'ī al-Sanā'ī*, Volume 3 (Cairo: Daryl Hadith 2005) P 362

<sup>125</sup> Qur'ān 4:6

<sup>126</sup> Ibid.

completing their fifteenth year. Irrespective of whether or not signs of maturity are found.<sup>127</sup> However, this fixation will not last forever, as we know that Islamic law evolves over time and in different places.

The puberty in a girl is assumed to be the period of menstruation, and in a boy, the indication of physical development is the emission of semen. According to Imām Abu Hanīfa, if these signs are absent, puberty in females will be seventeen years and in males not later than eighteen. At these ages, males and females will not be considered minors. In civil law, the age for marriage is not the same as the age of legal majority; however, the two age limits may nonetheless be parallel. Only puberty is not enough for marriage. Adulthood is also an essential feature for the consummation of marriage: physical maturity. The Fuqahā agree about the “Nikāh” of a minor done by his WaliWalī (guardian); however, Rukhsati (sexual intercourse) is a matter that depends on several things. For instance, living areas, food, water, air, happiness or sadness, and some other things that affect the health of minors. No doubt, if a minor is in a condition in which sexual intercourse is not recommended, then no one will be allowed to have sexual intercourse with them. So, the agreement of Nikāh and sexual intercourse are two different things. Just Nikāh of a minor by his walīwalī is possible, and it's permissible by the Jamhūr jurists even though they say that if a minor is not fit for sex, then Intercourse is forbidden.<sup>128</sup>

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<sup>127</sup> Muhammad Qāsim Abdullah Abdul Hāfiẓ, *Sinn Al-Ziwāj Fi Al-Sharī'ul Islamiah, Dirasah Muqārnah Tadbiqīyyah*, (Jamia'tu Al-Najāh Al Watniyyah: Nablas, Falastīn 2012) P.39

<sup>128</sup> Nazia Zaman and Mohyuddīn Hashmi, *Woman's Marriage Age in Sharī'ah: Traditional and Modern Approaches*, (Ma'arif-e-Islami (AIOU), Department of Islamic Studies, AIOU, Islamabad,

### Al Muhallab said:

قال المهلب: "أجمعوا على أنه يجوز لأب تزويج ابنته الصغيرة البكر، ولو كانت لا يوطأ مثلها، إلا أن الطحاوي حكى عن ابن شرمة

منعه فيمن لا توطأ،"<sup>129</sup>

Fuqhā (Jurists) have *Ijmā'* on that it is permissible for the father to marry off his virgin daughter, even if such a girl does not have intercourse. However, At-tahawī narrated from Ibn e Shubrama's prohibition in the case where such a girl has not had intercourse.<sup>130</sup>

The reason is the difference in the definition of "Rushd." Regarding the legal capability of males and females, the Shafī School and the Hanbalī School set the age of marriage at fifteen years, whereas the Malikī School differs in this regard, setting the line at seventeen years. According to the Hanafi School, girls reach puberty at the age of nine, and boys reach puberty at the age of twelve. In Pakistan, the Hanafi Hanafi law is followed. That's why traditional Muslims presumed that the age of marriage for a girl is nine, as this is the age of puberty, and the boy becomes an adult at the age of twelve at least. "Hanafis" and some others hold this point of view that since Islām gave women the right to contract in financial matters without interference or guardianship from anyone, women should be equally able to contract their marriage without the need for a *walī*.

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<sup>129</sup> Ibn Hajar al-‘Asqalānī, *Fath al-Bārī Sharḥ Ṣahīḥ al-Bukhārī*, vol. 9, (Cairo: Dār al-Ma‘rifah, n.d.), 19.

All schools agreed that walīwalī could arrange the marriage of his daughter before reaching the age of puberty. The consummation of marriage cannot take place before puberty. That's why the guardian must wait till that time. The female has a right (خيار البلوغ) “option of puberty.” She can exercise it during puberty and maturity. The classical jurists agreed that a female can exercise this “option of puberty” when a father or grandfather does not conclude the marriage of a minor. But Justice Tanzil ur Rehman defined that this option can be exercised by a female on attaining puberty, whether the nikāh is concluded by any of the guardians, including father and grandfather, three years after reaching the age of marriage or till the 18 years age of the time of exercising the right of “*Khāyar al Bulūgh*.”<sup>131</sup> The muftīs issued a fatwa regarding the annulment of marriage when a girl becomes mature after the guardian concludes her marriage. According to Radd ul Muhtār' Alā al-Addurul Mukhtār, a verdict that allows her to exercise her right of "Khīyār al Bulūgh," but through a Qadhi or court decision, she can annul her marriage.<sup>132</sup>

In Islamic law, the consent of both males and females is required for concluding the marriage contract. However, in our society, it is often arranged by the guardian, and the consent of both males and females is rarely sought. Sometimes, minors do not have the mental maturity to give consent. The guardians provide the argument in support of child marriage that the Prophet ﷺ married Hazrat Ā'isha (RA) when she was seven years old. Today, the verdict of Muftīs is also based on the Marriage of Hazrat Ā'isha (RA) for the proof of early marriages in Islām. Fuqahā are in view and agreed

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<sup>131</sup> Tanzil ur Rehman, *Majmooa Qawaneen e Islam*, Vol 1, (Islamabad: Idara Tehqiqat e Islami), 43

<sup>132</sup> Ibid., 43.

upon that the Nikāh of a minor can be arranged by their walīwalī. And Nikāh of a minor is considered "permissible." The National Institute of Child Health and Human Development notes that in medical science, the age of puberty is regarded as the age of marriage. Puberty in girls typically begins between 10 and 14 years old, and in boys, it usually starts between 12 and 16 years of age, as indicated by physical changes.<sup>133</sup>

## 2.13 Conclusion

In this chapter, we explored various aspects of the family, the basic unit of society founded on marriage (*Nikāh*). "Marriage or *Nikāh* is a legal relationship established by an agreement between a man and a woman, entitling them to sexual enjoyment." While different jurists define marriage in varying terms, the core concept remains the same. *Nikāh* is considered a sacred and essential act, as well as a religious duty in Islām, serving multiple purposes. The majority of jurists (*Jamhūr*) hold that *Nikāh* before puberty (*Bulūgh*) is valid and that (*Rushd*) maturity is not necessary for a valid Nikāh. Conversely, some jurists argue that *Nikāh* before puberty is void and insist on puberty for validity. This contradiction arises when minors are married off by their guardians. There is no disagreement among jurists that if minors marry in person, the *Nikāh* is voidable. In Islamic law, a child is generally defined as someone who has not attained puberty or the age of maturity. According to the law, a minor is a person of either sex under eighteen years of age. Child marriage, or early marriage, is a union between a boy and girl who have not reached puberty, where either party is a minor. While Islamic law permits child marriage with several arguments in support, some

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<sup>133</sup> Nazia Zaman and Mohyuddin Hashmi, *Women's Marriage Age in Sharī'ah: Traditional and Modern Approaches*, (Ma'arif-e-Islami (AIOU), Department of Islamic Studies, AIOU, Islamabad,

jurists oppose this view. Under the law, child marriage is void and considered an offense.

According to *Shari'ah* (Islamic law), there is no specific age for marriage (*Nikāh*) for boys or girls. Marriage is permissible once a young person is physically and mentally mature, capable of providing for a spouse, and able to fulfill marital duties. Although guardians can marry off minors, consummation is only allowed when the child reaches puberty. Different Islamic schools of thought hold varying views on the age of maturity, with some ranging from 9 to 18 years. Ultimately, the physical signs of puberty and the individual's environmental context determine their readiness for marriage. Islamic law emphasizes the consent of both parties for a valid marriage contract, although, in practice, guardians often arrange marriages without this consent. There is a pressing need to understand the opinions of experts regarding the standard age of marriage across various disciplines, so my next chapter will address this topic.

## CHAPTER THREE

### **EXPERT OPINIONS ON THE STANDARD AGE OF MARRIAGE IN DIFFERENT FIELDS**

#### **3.1 Introduction**

Determining the right age to get married is a multi-disciplinary quest, given that it is a product of social, religious, legal, medical, and cultural norms. Thus, to accomplish the above purpose, this chapter will present the following research question:

What are the cross-sectional and cross-cultural views in defining the standard age for marriage? Analysing this topic from various perspectives is important because it shows that the sectors of society are interconnected, and dysfunctional norms in one sphere reflect and affect all the others, particularly those of marriage. Given Pakistan's Islamic nature and its complicated relationship with legal, religious, and cultural practices, it is relevant to compare these sets of standards. By comparing and contrasting the concept of the age of marriage from these multiple views, one can better understand the reasoning behind setting these standards and their results on the people and society. Such an approach assists in defining the areas that may require reforms and contributes to adopting culturally, legally, and medically adequate policies.

This chapter is important because it provides a multi-disciplinary perspective on an essential subject of life: the standard age of marriage. Secondly, it takes a modest approach, stating that nothing is entirely right or wholly wrong when considering the matter. Legal scans may be focused on minors and their provisions and policies

concerning the same, and religious scans may be inclined towards providing moral and ethical angles. From a medical point of view, one has to consider physical and mental well-being, while cultural aspects and practices can be comprehended according to cultural standards.

Thus, awareness of these different standards proves helpful in assessing contradictions and issues where discussion between disciplines is required. Promoting solutions that acknowledge religious standards, legal age, medical recommendations, and customs in society contributes to a proper and sophisticated debate on how one can get married.

This chapter also contributes to the overall research objectives of the study by giving background information on the various forms of standards for the age of marriage as contained in Sharī'ah, Pakistani law, medical science, and the local tradition. Through these views, it is the author's intention for the chapter to shed light on multidimensionality and the differences between what can be considered a suitable age for getting married. This analysis makes way for the subsequent chapter, detailing some instances and their harmonisation through Islamic law principles. Therefore, it effectively sets the background and ground for the development of a complete understanding of the issues in the Pakistani legal system.

### **3.2 According to Sharī'ah**

- Explanation of Sharī'ah**

Shari`ah refers to the entire religion (Islam), which Allah has chosen for His slaves to bring them forth, thereby from the depths of darkness into the light. It is what He has prescribed for them and what He has explained to them of commands and

prohibitions, halal and haram, as well as covering virtually all spheres of life, such as religious practices, relations between individuals, expenditures, and laws on criminal activity. The principles of Sharī'ah, therefore, originate from the Quran, which is the Islamic scriptures, and the Hadiths, which are records of the life of the Prophet Muhammad ﷺ. Sharī'ah has set goals of getting closure to justice, acting as the moral guide for the community, and getting closure to the welfare of the community members. Regarding marriage, Sharī'ah has described consent, age suitability for marriage, and the capability of performing marital duties. The age of marriage is deemed necessary because people must be physically and psychologically ready to handle the responsibilities that come with marital life.<sup>134</sup>

- **Primary Sources: Qur'ān and Hadīth,**

Sharī'ah is based mainly on Qurān and hadīth and constitutes one of the primary sources for resolving all of the issues faced by Muslims daily. One such problem is ascertaining the marriageable age of males and females. It should be clear that, according to Sharī'ah (Islamic law), there is no specific age of marriage for a boy or a girl. As soon as a young man is fit, capable of providing for his wife, and fulfilling her marital desires, he will be considered fit for marriage.

However, it is best and preferable that one get married as soon as possible, as delaying it could lead to boys and girls getting involved in unlawful things. However, a boy or girl cannot marry themselves before puberty, but their guardian has the right to marry them off. Islam says that there is no specific age for marriage, but whenever a

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<sup>134</sup> Nesrine Badawi, *Introduction to Islamic Law*, (Cambridge, MA 02138 USA: Program on Humanitarian Policy and Conflict Research, Harvard University, February 2009) P. 2

boy or girl becomes an adult and fit, he or she is allowed to get married.<sup>135</sup> However, this matter is mentioned already in the last part of the first chapter.

### **3.3 Historical Context**

- Traditional Interpretations**

Through the years, Islamic scholars have stated different opinions on the age of marriage, considering the societies in which they lived. The Hanafi school of thought considers puberty as the proper age of marriage for a man or woman, which is about fifteen years old. The Shafi' and Maliki schools also rely on the onset of puberty, but they are particular with age, in that puberty can mature as young as 15 or 17 years. These interpretations have arisen from reasons of justice, rationality, and comprehensiveness of the Holy Qurān; in addition, these are considered for moderation, explaining the literal and going by the context and utility for the individuals and society.

Previously, individuals were likely to marry early since they did not live long, or the existing culture and traditions differed. Imām Abu Hanifah and Imām Shafī'ī developed their concept of thinking based on the interpretation of the Holy Qurān, Hadith, along with the traditions of contemporary Society.<sup>136</sup> Such explanations are conventional and have prevailed in determining the modern Islamic Jurisprudence on the marriage age.

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<sup>135</sup> Ālā Uddīn Al Kāsānī, *Badā'ī al-Sanā'ī*, Volume 3 (Cairo, Daryl Hadith 2005) P 362

<sup>136</sup> Al-Marghīnānī, *Al-Hidāyah*, Vol. 6, Kitāb al-Ḥajar, p. 451.

- **Practices Regarding the Age of Marriage and Early Marriage**

Historically, the practice of early marriage in the Islamic world has been seen in religious and cultural teachings. Islam neither encourages this nor discourages this. It has some advantages and some disadvantages. It is worth admitting that, at some point, people of different societies used to get married early for socio-economic reasons like the establishment of advantageous alliances and lineage continuation. These practices were thus in conformity with the religious perception of maturity and puberty. For example, in Europe as early as the fourteenth century and in the Islamic world, especially before the Age of Enlightenment, girls were often married at puberty because society believed that a girl was ready for marriage duties when she attained puberty. So, these practices are still mentioned in today's explanation and application of Shari'ah teachings, regarding the age of marriage. Indeed, applying the texts mentioned above has shifted over the years, while the constitutive texts remain the same. The historical approach to the provisions of early marriage is persistent. Examples of religious practices have been mentioned in the first chapter; here are some other non-religious examples which are following: There have been many leaders in various religions who have married young girls, which shows that, from an ahistorical point of view, marrying a girl of that age was expected, and no one considered it illegal or harmful to the health of a young girl.

### **3.3.1 Christianity**

- According to the famous book Bible:

- “But save for yourselves every girl who has never slept with a man.”<sup>137</sup>
- The *Catholic Encyclopedia* (1913 edition), in its article on Saint Joseph, references certain apocryphal sources, such as the *Protoevangelium of James*, which claim that Mary (Maryam) was about twelve years old and Joseph was ninety at the time of their betrothal. However, the article explicitly notes that these sources are legendary and historically unreliable. The Catholic Church does not affirm these ages as doctrinal fact. These stories reflect pious traditions or symbolic storytelling rather than verified historical events.

Most modern scholars consider such age differences implausible and suggest that Mary was likely a young teenager (around 12–14), in keeping with Jewish customs of the time, while Joseph was probably a younger man, possibly in his **30s or 40s**, rather than an elderly widower.<sup>138</sup>

- King Richard II of England married a seven-year-old girl.<sup>139</sup>
- In 1880, the minimum age for marriage in the state of Delaware, USA, was eight years; in California, it was ten years.<sup>140</sup>

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<sup>137</sup> *The Holy Bible*, New International Version (Grand Rapids: Zondervan, 2011), Numbers 31:18.

<sup>138</sup> *The Catholic Encyclopedia*. Vol. 8. New York: Robert Appleton Company, 1910. s.v. "St. Joseph." [https://en.wikisource.org/wiki/Catholic\\_Encyclopedia\\_\(1913\)/St.\\_Joseph](https://en.wikisource.org/wiki/Catholic_Encyclopedia_(1913)/St._Joseph)

<sup>139</sup> Isabelle of France (1389–1409). *British History Online*, also, <https://archives.history.ac.uk/richardII/isabelle.html>.

<sup>140</sup> Gillian Frank, “When Did Girls Become Women? The Historical Age of Consent in the United States,” *Notches: (re)marks on the history of sexuality*, April 20, 2016, also, <https://notchesblog.com/2016/04/20/when-did-girls-become-women-the-historical-age-of-consent-in-the-united-states/>.

- In England, before 1929, the ministers were allowed to marry a girl of twelve years old.<sup>141</sup>

### 3.3.2 Hinduism

- Verse 9.94 of the *Manusmriti* states:

"A man, aged thirty years, shall marry a maiden of twelve who pleases

him; or a man of twenty-four, a girl of eight years of age; if his duties

would otherwise be impeded, he must marry sooner."<sup>142</sup>

"Let the father marry his daughter while she still goes about naked, out of

fear that she may attain puberty in his house, for if she stays after puberty,

the sin falls on the father".<sup>143</sup>

- It is written in the book "The Oriental, the Ancient and Primitive."

"In Oriental lands generally, the marriageable age of girls is about

twelve years ... in India, even infant girls are married by their parents

to other infants, or older boys, or men."

And:

"It is not an uncommon thing in India for four generations of family

life to be crowded into one house ... The day of her wedding may be

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<sup>141</sup>Age of Marriage Act 1929, 19 & 20 Geo. 5 c. 36 (UK), also, <https://hansard.parliament.uk/Lords/1929-02-19/debates/8a669e9d-cd60-4e2e-8dd9-bc7a4fc08592/LordsChamber>.

<sup>142</sup> *Manusmriti*, 9.94, trans. Ganganath Jha, in *Manusmriti with the Commentary of Medhatithi* (1920; repr., Delhi: Motilal Banarsiidas, 2001), also, <https://www.wisdomlib.org/hinduism/book/manusmriti-with-the-commentary-of-medhatithi/d/doc201455.html>.

<sup>143</sup> <https://www.wisdomlib.org/hinduism/book/the-sacred-laws-of-the-aryas>.

as early as between the ages of five and six ... At twelve years of age, the young wife is in all probability a mother.”<sup>144</sup>

- According to Hindu law and custom, a father needed to marry off his daughter before she reached puberty. However, *the Rukhsati* was often delayed, which was for about three years.<sup>145</sup>
- According to the “Encyclopedia of Religions and Ethics”

“A Hindu father whose daughter reached puberty unmarried was considered a sinner.”<sup>146</sup>

### 3.4 Criteria for puberty in Shari’ah

The first chapter mentions the definition of puberty; here, the aim is to discuss the standard of Islamic law for puberty. According to jurists, puberty may be in years or signs.

Shari’ah does not focus on the age for puberty, but Islam relies on the signs of puberty. As soon as any sign of puberty arises, the boy or girl will be considered mature. Signs of puberty are different for both males and females; some of these are the following:

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<sup>144</sup> Edward Bagby Pollard, *The Oriental, the Ancient and Primitive* (New York: Thomas Whittaker, 1891), 58–59. Also, <https://www.gutenberg.org/files/32418/32418-h/32418-h.htm>

<sup>145</sup> *Manusmṛti* 9:90–94; trans. Ganganatha Jha, in *The Laws of Manu*, Chapter 9, verses 90–94

<sup>146</sup> James Hastings, ed., *Encyclopaedia of Religion and Ethics*, vol. 5 (Edinburgh: T. & T. Clark, 1912), 522–523. Also, <https://archive.org/details/encyclopaedia-of-religion-and-ethics-vol-5/page/522/mode/2up>.

- **Puberty in signs, according to Fuqahā**

### **Hanafi School**

Puberty in males arises with four signs:

1. Wet dream احتلام
2. Ejaculation during a wet dream or by other means إنزال المنى باحتلام أو بغيره
3. Impregnation إجبار المرأة

This is not known until he has intercourse with her.

4. Hair growth إنبات الشعر

According to some jurists, pubic hair, moustache growth, and voice deepening are signs of puberty.

As for the females, puberty awakens them with two signs:

1. Menstruation الحيض
2. Pregnancy الحبل

And it is known that if she had intercourse or semen entered her vagina and pregnancy occurred, then she has reached puberty.<sup>147</sup>

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<sup>147</sup> Al Marghīnānī, *Al Hidāyyah*, 6:451.

## Shaf'ī' School

They said that puberty in males arises with insemination إِمَانَةٍ, and minors have already completed nine years. If this is done before nine years, it will be because of a disease, which will not be a sign of puberty. This school of thought did not mention Impregnation because it is impossible before the semen comes. For females, the sign is menstruation at any stage of age, but it is essential to ensure that the blood coming down is menstrual blood and not bleeding due to illness.<sup>148</sup>

## Hanbali Schools

The common signs of puberty between males and females are:

1. Ejaculation while awake or asleep, through wet dreams or sexual intercourse.
2. Hair growth إِبَاتُ الشَّعْرِ The growth of coarse hair on the pubic that needs to be removed with a razor. As for اللَّغْبِ (soft and smooth hair) It is not a sign of puberty because it may happen to children.

As for females, some other signs that are specific to her and not found in boys:

1. Menstruation الْمَيْضُ
2. Pregnancy الْحَبْلُ<sup>149</sup>

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<sup>148</sup> Shams al-Dīn Muḥammad ibn Aḥmad al-Khaṭīb ash-Shirbīnī, *Mughni al-Muḥtāj ilā Ma 'rifat Ma 'ānī Al-fāz al-Minhāj* vol.2,(Cairo: Dār al-Kutub al-'Ilmīyah, 1994), p. 167.

<sup>149</sup> Ibn Qudāmah al-Maqdīsī, *Al-Mughnī*, vol. 7, (Beirut: Dar al-Fikr, 1997), 614.

## Maliki School

According to these jurists, the Signs of puberty are the following:

1. Ejaculation while awake or asleep, and this is common between boys and girls.
2. The growth of coarse hair on the pubic area *إنبات شعر العانة الخشن*

These jurists pointed out that if a minor boy or girl grows a beard or moustache, this is not a sign of puberty because a person may reach puberty before it grows.

3. Armpit plucking *نَفْ الإِبْطِ*
4. Changing the tip of the nose *فرق أرنبة الأنف*
5. Voice Deepening *غَلَظَ الصَّوْتِ*
6. Periods
7. Pregnancy

The last two are for girls.<sup>150</sup>

- **Summary of signs of puberty according to jurists**

- **Common signs of puberty between males and females**

1. Ejaculation (Agreed upon by jurists)
2. The growth of coarse hair on the pubic and armpit (Agreed upon by jurists and some of the Hanafī)
3. Armpit plucking (According to Maliki jurists)

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<sup>150</sup> Badr al-Dīn Muḥammad ibn Musa al-Dusūqi, *Hashiyat al-Dusūqi 'ala Sharh al-Kabīr*, vol. 3, (Cairo: Dar al-Kutub al-‘Ilmiyya, 2004), 293.

4. Changing the tip of the nose (According to Maliki jurists)
5. Voice Deepening (According to Maliki jurists)

- **Signs of Puberty agreed upon by Jurists for Males and Females**

➤ **The signs for males:**

1. Impregnation

➤ **The signs for Females:**

1. Periods

2. Pregnancy<sup>151</sup>

### 3.5 Puberty in age, according to Islamic Jurists

When none of the signs of puberty we mentioned appear, puberty for males and girls must be determined by age. According to Islamic jurists, puberty may occur at different stages of age. The famous jurist's opinions are the following:

#### **Hanafi School**

Hence, products of the Hanafi school of Islamic jurisprudence, which has the most extended history and is currently the most influential, as per the Hanafi law, the jurists have two opinions on determining the age of puberty:

1. The age of puberty for both boys and girls is 15 years, and this is the Mufta Bihī opinion among them, الرأي المتفق به.

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<sup>151</sup> Abdulrahman Al-Saadi, *Puberty and Its Signs According to A Contemporary Islamic Jurisprudential-Legal View*. (Journal of AlMaarif University College, no. 32 (October 2021), 8.

2. Imam Abu Hanifa's opinion is that the age of puberty for boys is 18, and for girls is 17.

According to the Hanafi school, there is a presumption that girls do not reach puberty until the age of 9, and boys do not until the age of 12.<sup>152</sup>

### **Shaf'i School**

The Shaf'i school assumes that maturity is attained at the age of fifteen years for both males and females.<sup>153</sup>.

### **Hanbali Schools**

Hanbali scholars hold the view that at 15 years old, both males and females are regarded as mature. This is also the opinion of Imām Awdhāī, Shaf'i, Abu Yosuf, and Imām Muhammad. However, Dawood Zahrī said that there is no age limit for puberty,

البلوغ بالسن لا حد له<sup>154</sup>

### **Maliki and Hanbali Schools**

According to Maliki scholars, puberty determines the possibility of marriage, and the age of puberty is assumed to be 15 for boys and 9 for girls.<sup>155</sup>

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<sup>152</sup> Abdulrahman Al-Saadi, *Puberty and Its Signs According to A Contemporary Islamic Jurisprudential-Legal View*. (Journal of AlMaarif University College, no. 32 (October 2021) P.11

<sup>153</sup> Muhammad Bin Idrīs Al Shāfi'i, *Kitāb ul Umm*, 28-30.

<sup>154</sup> Al-Saadi, *Puberty and Its Signs*, 32:11.

<sup>155</sup> Ibn 'Abd Al-Barr, *Al-Kāfi Fi Fiqh Ahl al-Madina* (Beirut: Dār al-Kutub al- 'Ilmiyyah, n.d.), 231.

## **Abu Dawood Az Zahri,**

According to Abu Dawood Zahrī, there is no puberty without a sign of puberty, even though a male or female reaches 40 years old.<sup>156</sup>

### **3.6 Pakistani Law about the Age of Marriage**

- Legal Framework**

#### **3.6.1 Pakistani Marriage Laws**

Marriage laws in Pakistan are pluralistic, containing both civil as well as religious laws due to the extensive legal history of Pakistan. Some significant legal instruments relevant to marriage legislation include legislation that addresses the age of marriage, the protection of minors, and compliance with international human rights instruments. These regulations include the Child Marriage Restraint Act of 1929, which, up to now, has been legislation that is used to fight child marriages.<sup>157</sup> .

Furthermore, one of the significant legal instruments concerning marriage in Pakistan is the Muslim Family Laws Ordinance of 1961<sup>158</sup>. This ordinance describes the registration of marriage, the dissolution of marriage, and all other related family affairs. It enriches the Child Marriage Restraint Act by presenting the general concepts of family law in the context of Islamic law. Some of these laws have been changed from time to time to meet new social problems and global trends.

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<sup>156</sup> Ibid., 11.

<sup>157</sup> *The Child Marriage Restraint Act 1929*

<sup>158</sup> *The Muslim Family Laws Ordinance 1961*, Section, 5, 8. Etc.

Recently, people have pushed for additional changes to increase the age of marriage to 18 for males and females, as suggested by the United Nations and similar organisations. The prospective amendments underlying the omission of early marriage intend to protect the youth from early conjugacy, which may negatively influence their health and interfere with their academic achievement. The legal regulation remains in development, combining traditional morality with new principles needed for minors' social presentation and protection.

### **3.6.2 *Child Marriage Restraint Act 1929***

The Child Marriage Restraint Act of 1929 is a key Act in the legal framework of Pakistan, aiming to stop the practice of child marriage.<sup>159</sup> The Act provides for the legal age of marriage, where the male is supposed to be 18 and the female 16. It makes certain marriages unlawful by contracting them where the parties are below these ages. It provides penalties for the parties to the marriage and the parents or guardians of the parties to the marriage, respectively. The penalties include fines to those involved and imprisonment to put an end to the practice and shield the youngsters from being forced to enter early marriages.

The above Act has several implications; one of them is the protection of the girl who is forced into early marriage with compensation as her legal right. This bestows the courts with the prerogative to act against such marriages; it protects the vulnerable minors. Nevertheless, the Act has brought up controversies due to its inefficiency in the fight against child marriage, mainly caused by cultural beliefs that support child

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<sup>159</sup> *The Child Marriage Restraint Act 1929*

marriage and inadequate implementation. Child marriages remain hidden and do not come to the knowledge of the law; penalties are not enforced most of the time, thus removing the deterrent factor that should have come with the Act.

Still, the Child Marriage Restraint Act of 1929 remains an important legal tool to be used by Pakistan in the fight against child marriage. Contemporary discussions about an amendment in the Act to increase the age at which a girl can marry to 18, as well as attain international measures, and the age of majority. Changes of such nature are viewed as crucial because they would improve the functionality of the Act, along with the need to protect all children from the adverse outcomes of early marriage.

### **3.6.3 Judicial Precedents**

Pakistani judicial precedents differed regarding the validation and invalidation of child marriage or early marriage. There are three types of these judgments. Some judges believe that early marriage is void because it's totally against Pakistani law. Some others say even if a girl has not reached the statutory minimum age under the Child Marriage Restraint Act of 1929 (16 years), marriage is valid under Islamic law, and it's not void, relying on the interpretation of Islamic law. Some others opine that Pakistani law does not permit the marriage of a girl under the age of 16 years; it's a violation of the Child Marriage Restraint Act 1929, and the persons who have solemnised the marriage may be held criminally liable. However, the marriage is valid and not void. Some of these judicial precedents are the following:

### **3.6.4 Judicial Precedents Against Child Marriage**

**Mst. Mumtaz Bibi vs Qasim and others (Writ petition No. 4227 of 2021)**

### **Facts of the Case:**

In the case of Mst. Mumtaz Bibi vs. Qasim and others (Writ Petition No. 4227/2021).<sup>160</sup> The question of marriage age in Pakistan was placed in the context of the CMA. Mst. Mumtaz Bibi: Before she got married to Qasim, she was forced to wed below the age described by law, the statutory age. She had to sue the man legally because she wanted her marriage to be annulled following its violation of the Act. The case challenged the judicial system, as it was about balancing the statutory law that disapproved of early marriages and the social and legal norms that supported such marriages.

### **Decision**

The argued case of the Islamabad High Court was as follows: all marriages with persons under a fixed age were not just unlawful but also null and void. The court also focused on the issue of early marriages as illegal and stressed the proper implementation of the laws of the Child Marriage Restraint Act.

#### **3.6.5 Judicial Precedents in favour of Child Marriage**

##### **Nazar Muhammad vs. DPO, etc. (Writ Petition No. 57371 of 2023)**

### **Case Background**

In this case, Nazar Muhammad vs. DPO, etc., the validity of a marriage between a girl below 16 years, Mst. Yasmeen, and respondent No.5, her husband, according to

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<sup>160</sup> *Mumtaz Bibi vs. Qasim and others* (Writ Petition No. 4227/2021)

Pakistani law, the Child Marriage Restraint Act 1929. The petitioner claimed that the marriage was void because the girl, Yasmeen, is below 16, the statutory minimum age for marriage under the Child Marriage Restraint Act of 1929. He also alleged that the consummation of such a marriage was considered rape as per section 375 of the Pakistan Penal Code OF 1860 (PPC).

### **Decision**

The court determined that Islamic law permits a girl who has reached puberty to marry even if she is younger than the minimum age required by the Child Marriage Restriction Act of 1929 (16 years old). The judge stressed that the girl's legal underage status would not render the marriage null and unlawful; additionally, it would shield the couple from accusations of rape under Section 375 of the Pakistan Penal Code. This decision is in line with the Islamic belief that a girl who reaches puberty is eligible to marry, even though the Child Marriage Restriction Act still makes it illegal to marry a young girl.

#### **3.6.6 Judicial Precedents allow Child Marriage, considering it a Violation of Pakistani law**

- **Mst. Bakhshi vs. Bashir Ahmad and another (PLD 1970 Supreme Court 323)**

**Facts of the Case:** In Bakshi vs. Bashir Ahmad (PLD 1970 SC 323),<sup>161</sup> the issue regarding the age of marriage under the Child Marriage Restraint Act 1929 was quite

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<sup>161</sup> *Bakshi vs. Bashir Ahmad* (PLD 1970 SC 323)

disputed. The case involved Ms. Shamim Alias Nasreen was married off early, below the legal age provided by the Act. The first question was whether the marriage, despite offending the provisions of the Act, could be held to be valid under Pakistani law. The plaintiff, Mst. Bakshi, while actively seeking annulment of the marriage based on the fact that it was entered when she was still a minor, thus seeking protection under the Act for herself.

**Decision:**

The Supreme Court pointed out that although the marriage violates the Child Marriage Restraint Act 1929, a marriage of this nature was invalid only in the technical legal sense or voidable. This meant the marriage could still be considered legal unless an annulling order was obtained from the proper court. The court pointed out that the Act passed by the Parliament aimed to deter child marriages through penalties rather than the nullification of the marriages. This decision was very crucial because it pointed out that the Act covered little on how the issue of child marriages could be effectively handled. The uplifting of the provision further raised the question of the need for enhanced legal provisions and implementation regimes against early marriages for young persons without necessarily negating valid and executory marital contracts violating the provision of this law.

**Nasreen Bibi vs. Station House Officer, etc. (Writ Petition No. 63301/2021)**

**Facts of the Case:**

The case under discussion is the Nasreen Bibi vs. Station House Officer Writ Petition No. 63301/2021, where Nasreen Bibi, a wife who has been confined forcibly

in marriage below the legal minimum age.<sup>162</sup>. The critical subject was a young girl, Nasreen Bibi, who attempted to get legal remedy concerning the annulment of her marriage under the Child Marriage Restraint Act 1929. The case is unique in terms of recalling the emphasis on implementing the Act and the roles of the police in combating such marriages. This case also exhibits how child marriage affected Nasreen Bibi's personal and social life. In addition, it highlights social issues and barriers in the fight against child marriage despite the existing laws against it. The case also exposed the inefficiency in handling such marriages by the local police and other structures of the government, as well as the judiciary, in ensuring child protection legal frameworks.

## **Decision**

In this case, the Lahore High Court opined that the marriage was not void, although Aliza did not obtain the statutory age mentioned in The Child Marriage Restraint Act 1929.

### **3.7 Medical Sciences about the Age of Marriage**

- Medical Definition of Puberty and Maturity**

#### **3.7.1 Physical Growth**

Puberty is the phase of physical maturation when adolescents reach sexual maturity and become capable of reproduction. It is a developmental process that a child goes through

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<sup>162</sup> Nasreen Bibi vs. Station House Officer etc. (writ petition No 63301/2021 Lahore High court).

to attain an adult body capable of procreation. Hormonal changes that result in several physiological transformations initiate this procedure. Along with emotional and hormonal changes, puberty brings significant physical developments, including breast growth in females (thelarche), the appearance of pubic hair (pubarche), genital changes in males, voice deepening, height growth, and the onset of menstruation (menarche) in females.

Puberty in boys and girls occurs either by age or by signs, and there is a specific age at which a boy or girl reaches puberty.

### **3.7.2 Puberty with age in boys**

Development begins slightly earlier in boys than in girls, but at any rate, not earlier than the age of 9 and not later than 14.<sup>163</sup>

### **3.7.3 Puberty with age in girls:**

In girls, the process of puberty starts at the age ranging between 8 and 13 years.<sup>164</sup>

### **3.7.4 Puberty with signs in males**

#### **1. Testicular Size**

This is typically the first sign of puberty in boys—the testes increase in size during puberty due to the development of the seminiferous tubules. An increase in testicular size causes the scrotal skin to become thinner and darker. Boys

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<sup>163</sup> Peter T. Ellison, Meredith W. Reiches, *Human Growth and Development, Puberty*, (Harvard University, Cambridge, MA 02138, USA: 2022), P. 125-153

<sup>164</sup> Ibid.

typically experience their first ejaculation approximately one year after the testicles begin to grow. The first ejaculation, however, does not automatically signal an ability to procreate. On average, fertility is achieved one year after the first ejaculation.

## **2. Pubarche**

The pubic hair growth at the penile base typically occurs alongside testicular development. Pubic hairs initially appear light, straight, and thin, then become darker, curlier, and thicker as puberty progresses. Approximately two years after the onset of pubarche, axillary, chest, and facial hair begin to grow.

## **3. Penis Size**

The growth of the penis occurs in testicular enlargement. The penis grows in length, then width, and the glans penis and corpus cavernosum also enlarge.<sup>165</sup>

### **3.7.1.5 Signs of puberty in females**

#### **1. Thelarche**

Thelarche refers to breast growth and is usually one of the earliest signs of puberty in girls, often starting around the age of 9 or 10. This process is driven by a rise in estrogen, which stimulates the growth of the milk ducts, while an

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<sup>165</sup> Maqsood, Hadia, and Riyaz Baba, *Puberty*, (*StatPearls*. Treasure Island, FL: StatPearls Publishing, 2023). <https://www.ncbi.nlm.nih.gov/books/NBK534827/>.

increase in progesterone promotes the development of the lobular alveoli at the ends of these ducts.

## **2. Pubarche**

Approximately six months after breasts start to develop (thelarche), girls usually begin to grow pubic hair (pubarche). At first, this hair is light, thin, and straight, but it becomes thicker, darker, and curlier as puberty continues. Around two years after pubic hair starts growing, underarm hair will also appear. This happens due to the hormone testosterone, another sign of physical changes during puberty.

## **3. Menarche**

Menarche is a girl's first period, usually happening 1.5 to 3 years after breast development begins, around age 12.8 in white girls and a few months later in African-American girls. During puberty, the lining of the uterus grows and sheds due to changing estrogen levels, leading to the first period. Progesterone levels stay low until after menarche, when ovulation starts, usually about 6 to 9 months later.

## **4. Ovarian Development**

During puberty, increased hormones cause the ovaries to produce estradiol, which leads to changes like breast development, growth of the reproductive organs, fat moving to the hips and breasts, and bone growth. The ovaries also grow in size, from about  $0.5 \text{ cm}^3$  before puberty to about  $4.0 \text{ cm}^3$  afterwards.

## 5. Uterus Size

Before puberty, a girl's uterus is shaped like a teardrop, with the neck and narrow part making up about two-thirds of its size. When estrogen levels rise during puberty, the uterus changes to a pear shape, becoming longer and thicker.

## 6. Vaginal Changes

During puberty, the labia (the outer and inner parts of the vulva) get more extensive. You might also notice a clear to white vaginal discharge before the first period starts.<sup>166</sup>

### 3.7.2 Psychological Markers

Even though height growth and the development of features like body hair and breasts are significant signs of puberty, psychological and emotional maturity are also key fundamentals in determining or ascertaining eligibility for marriage. These milestones involve psychological elements such as abstract thinking, decision-making, emotional control, and social self-reliance. During puberty, adolescents achieve individuality different from their parents and are in a better position to understand issues of life and morality.<sup>167</sup> The emotional intelligence created by the personality to manage and regulate emotions properly is a key element for the construction of successful human relationships in couples and marital relations. Minnesota's adolescents need to learn how to manage their stress levels, appreciate the emotional

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<sup>166</sup> Ibid.

<sup>167</sup> Marvin B. Sussman, Suzanne K. Steinmetz, and Gary W. Peterson, *Handbook of Marriage and the Family* (New York: Plenum Press, 2013).

state of others, and deal with adverse situations. This is quite important in handling the tasks and issues associated with marriage.

Another criterion is social development, which implies having healthy interpersonal relationships, making decisions, and meeting social expectations. Friendship is a vital aspect during adolescence, and people start to develop social skills to enable them to interact in adulthood. It is essential to understand that these psychological markers generally develop with some differences among individuals and depend on childhood, education, and cultural background. Hence, there is a need to understand this maturity in a way that goes beyond mere observation of the person's physical growth.

### **3.8 Health Implications of Early Marriage**

#### **3.8.1 Physical Health Risks**

Child marriage, especially of young girls who have not completed the development of puberty, is at high risk of several diseases. Perhaps the biggest issue is the complications that pregnant and birthing women experience. Obstetric complications are more frequent in adolescent girls. Their bodies may not have reached an optimal size to support pregnancy, and complications, maternal mortality, and morbidity may occur. Also, young mothers are more likely to have premature or low birth weight babies, which are at high risk of developing complications and or developmental issues.<sup>168</sup> Early marriage also exposes the victims to several physical health risks; for example, they are at a higher risk of getting STIS (Sexually Transmitted

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<sup>168</sup> Yvette Efevbera et al., “*Girl Child Marriage as a Risk Factor for Early Childhood Development and Stunting*,” Social Science & Medicine 185 (2017): 91–101.

Infections). Including HIV (Human Immunodeficiency Virus). Additionally, such pregnancies can have adverse effects in the long run in that growth could be interrupted, and hence, lead to situations such as malnutrition and anaemia, among others, due to conflict between the need for nutrition for the growing teenager and that of the fetus.<sup>169</sup>

### 3.8.2 Mental Health Considerations

Self-esteem and adolescents' psychological health are also negatively affected by early marriage. Youths are at a vulnerable age of psychological development, and the demands of marriage and childbirth are likely to bring about a lot of stress. Stressors like isolation, low decision-making power, and lack of social support were significantly related to young brides' anxiety, depressive symptoms, and other similar outcomes. Such difficulties are intensified by the fact that young people are transferred from adolescence to adulthood without the required psychological and emotional maturity.<sup>170</sup>

Pre-marital sex is another problem that is worsened by early marriage, as well as the lack of educational and career opportunities due to early marriage. As for the young brides, most drop out of school, thus resulting in limited personal development and economic inability. These extreme women lack power and end up depending on their husbands; such issues give them feelings of uselessness, and thus, they continue developing mental illnesses.<sup>171</sup>

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<sup>169</sup> Ibid.

<sup>170</sup> Sarah W Whitton et al., "Depressive Symptoms in Early Marriage: Predictions from Relationship Confidence and Negative Marital Interaction," *Journal of Family Psychology* 21, no. 2 (2007): 297.

<sup>171</sup> Fan, Suiqiong, and Alissa Koski. "The Health Consequences of Child Marriage: A Systematic Review of the Evidence, (BMC Public Health 22 (2022): 309. <https://doi.org/10.1186/s12889-022-12707-x>.

### 3.8.3 Reproductive Health Issues

Young brides are also affected by reproductive health matters, which is another primary concern. Early marriage makes women get pregnant as teenagers, and this makes them have multiple pregnancies in a short time, hence developing health problems both for the mother and the baby. Limited reproductive health services and Information worsen this. Adolescent girls are at high risk of adverse outcomes due to low access to early ANC (antenatal care), pre-ANC, and PNC (postnatal care), hence the poor health status of both the mother and the newborn child.<sup>172</sup>.

In addition, early marriage and childbearing reduce the chances for female youth to access information on family planning services as well as employers. This reduces their chances of access to other methods of contraception, hence exposing them to the risks of unintended pregnancies and unsafe abortions, therefore, their health. Fewer risks will thus be characteristic of young people when they are educated on proper reproductive health and provided access to the right services.<sup>173</sup>

## 3.9 Recommendations from Medical Professionals

### 3.9.1 Guidelines from Medical Organisations

Child and adolescent health is protected by guidelines offered by medical bodies like the World Health Organisation, WHO, and the American Academy of Paediatrics, AAP. The WHO called for postponing the age at which girls can legally marry until

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<sup>172</sup> Sanyukta Mathur, Margaret Greene, and Anju Malhotra, “Too Young to Wed,” *The Lives, Rights, and Health of Young Married Girls*, (Washington, DC: International Center for Research on Women, 2003),

<sup>173</sup> Ibid.

they are 18 years of age, for them to be physically, psychologically, and socially ready for procreation. These guidelines also focus on Education, enlightening the youth and young adults with information regarding their health and well-being.<sup>174</sup>.

### 3.9.2 Suggested Minimum Age

The views of healthcare practitioners are that the minimum marriage age should be 18 years for both males and females. This age limit corresponds with the biological, psychological, and social development required to come up with appropriate input in handling the responsibilities of marriage. Forcing young people to get married at a younger age omits the purpose of young people to gain education, emotional and social maturity, and decide the rest of their future on their own. It also cuts down the mortality rates of mother and child during early pregnancy and childbirth. If placed worldwide, this minimum age would go a long way in improving young people's health standards to better face the world's challenges in the future.<sup>175</sup>

## 3.10 Medical science and the practices of the people regarding early marriage

Although Medical science sees early marriage as harmful to both the mother and child, and says that pregnancy is an early age is harmful to the health of girls and may lead to several diseases for the youngest mother, as mentioned above, but at the same time, there are a lot of examples of the youngest birth mothers. The customs and the practice of the people prove that pregnancy is possible at an early age without any harm caused

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<sup>174</sup> World Health Organization, “*WHO Recommendations on Adolescent Sexual and Reproductive Health and Rights*,” 2018.

<sup>175</sup> Ibid.

to the youngest mothers. This is not the practice of a specific nation or a specific place, but there are a lot of examples all over the world. Below are some examples:

### **3.10.1 List of the youngest mothers**

#### **Cases by age of mother**

##### **Age 8**

- In **2006**, A girl from Huánuco, Peru, gave birth to a baby weighing 2 kg (4 lb) by caesarean section at a hospital in Lima in December 2006. Her ninth birthday occurred a couple of days later. She became pregnant after being raped by two of her cousins.<sup>176</sup>
- **Age 9**

**1957:** Hilda Trujillo gave birth to a girl weighing over 6 lb (2.7 kg) at a hospital in Lima, Peru, in December 1957. Her 22-year-old cousin, who was staying in her family's one-room house at the time, was arrested for rape.<sup>177</sup>

- **2004:** A Singaporean girl gave birth to a boy in 2004 after being impregnated by a fellow student at her school. Her mother initially thought she had a urinary tract infection, but, upon taking her to the doctor, she learned she was already six months pregnant. The baby was given up for adoption.<sup>178</sup>

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<sup>176</sup> *List of Youngest Birth Mothers*,” bionity.com,  
[https://www.bionity.com/en/encyclopedia>List\\_of\\_youngest\\_birth\\_mothers.html](https://www.bionity.com/en/encyclopedia>List_of_youngest_birth_mothers.html)

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

- **2005:** A girl gave birth to a baby boy by caesarean section at a hospital in Butare, Rwanda, in December 2005. The child, who underwent breast development at age six and menarche at age eight, became pregnant after being raped by her family's domestic servant.<sup>179</sup>
- **2006:** A girl of the Apurinã, an indigenous people from the Amazon Rainforest in Brazil, gave birth to a baby girl weighing 2.2 kg (4.8 lb) by caesarean section at a hospital in Manaus in July 2006. Police are investigating the case.<sup>180</sup>
- **2007:** A girl from La Esperanza, Intibucá, Honduras, gave birth to a baby girl by caesarean section in May 2007 after being raped by her father.<sup>181</sup>

## Age 10

- **1834:** Sally Deweese of Butler County, Kentucky, was reported by Dr. D. Rowlett to have delivered a baby girl weighing 7.75 lb (3.5 kg) on April 20, 1834. Deweese allegedly developed breasts within weeks of birth and began menstruating at 12 months.<sup>182</sup>
- **2000:** A girl from Bolivia gave birth to a baby girl weighing 2.5 kg (5.5 lb) by caesarean section at a hospital in Parque Patricios, Buenos Aires, Argentina on September 25, 2007. A 28-year-old was arrested on a charge of rape.<sup>183</sup>

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Ibid.

- **2005:** A girl from Calama, Chile, gave birth to a baby boy by caesarean section at a hospital in Antofagasta on April 13, 2005. The child became pregnant after having been raped by her father at age nine. Her parents, who both came from Bolivia, were jailed.<sup>184</sup>
- **2005:** A girl gave birth to a baby girl at a hospital in Sion, Switzerland, in August 2005. She had immigrated to Switzerland from Cameroon with her siblings when her mother married a Swiss citizen. A 68-year-old man who was in a relationship with the mother admitted to having molested the girl, but a DNA test found that he was not the father of the girl's child.<sup>185</sup>
- **2006:** A girl in Abbeville, South Carolina, gave birth by caesarean section in 2006 after having been raped by then-26-year-old William Edward Ronca. Ronca admitted to having molested the girl for over two years and was sentenced to 25 years in prison as a result. The baby was given up for adoption.<sup>186</sup>
- **2006:** A girl from Charleroi, Belgium, was born in 2006. After the child began gaining weight, her mother put her on a diet, but when the girl visited a doctor, it was discovered that she was nine months pregnant. The father was a 13-year-old boy who attended the same school as the girl. News of the birth did not become publicly known until 2007.<sup>187</sup>
- **2006:** A girl from Jaral del Progreso, Guanajuato, Mexico, gave birth naturally to a baby girl weighing 2.3 kg (5 lb) on April 3, 2006. She became pregnant after being

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<sup>184</sup> [https://www.bionity.com/en/encyclopedia/List\\_ofyoungest\\_birth\\_mothers.html](https://www.bionity.com/en/encyclopedia/List_ofyoungest_birth_mothers.html)

<sup>185</sup> Ibid.

<sup>186</sup> Ibid.

<sup>187</sup> Ibid.

raped by a 47-year-old neighbour, who was sentenced to 11 years, 6 months in prison for the crime.<sup>188</sup>

- **2007:** A girl from San Lorenzo Cacaotepec, Oaxaca, Mexico, gave birth to a baby boy on July 2, 2007. Her pregnancy was the result of a rape committed by the 65-year-old landlord of the house that her parents rented. The man was jailed.<sup>189</sup>

## **Age 11**

- **1972:** A girl gave birth at the age of 11 years, 10 months at Royal Buckinghamshire Hospital in Aylesbury, England. The father was the young girl's stepbrother.<sup>190</sup>
- **2002:** A girl from Bridgeport, Connecticut, gave birth after being raped by a 75-year-old man, who was arrested on April 17, 2002.<sup>191</sup>
- **2004:** A girl gave birth to a baby boy weighing 8.4 lb (3.8 kg) at a hospital in Kharkiv, Ukraine, in January 2004. The girl, who is currently the youngest mother in Ukraine, is suspected to have been impregnated by a 26-year-old neighbour, who fled in fear of facing prosecution.<sup>192</sup>
- **2005:** A girl gave birth to a boy in Moscow, Russia, after she was impregnated by her 14-year-old boyfriend.<sup>193</sup>

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<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

- **2006:** An African girl gave birth to a baby boy at a hospital in West London, United Kingdom, on May 5, 2006. A 37-year-old man was arrested.<sup>194</sup>
- **2007:** A girl from Valhalla Park, Cape Town, South Africa, gave birth to a baby boy on July 12, 2007. An elderly security guard was arrested in connection with rape. The mother will be allowed to visit her child once a month at the hospital.<sup>195</sup>

These cases show that pregnancy at an early age is possible, and an eight- or 9-years girl can be pregnant and she is capable of giving birth, because according to medical science, in girls, the process of puberty starts at the age ranging between 8 and 13 years.<sup>196</sup>

### **3.10 Custom and Practice of the People about the Age of Marriage**

#### **3.10.1 Cultural Practices**

##### **3.10.1.1 Regional Differences**

The cultural patterns regarding marriage age. Pakistan also differs from one region to another and depends on traditions, ethnicity, and religious beliefs. Socio-cultural factors, namely early marriage, are prevalent in the rural parts of the provinces of Sindh and Punjab. These regions are likely to be culturally conservative regarding girls' marriage rights after puberty, that is, between 12 and 16 years. On the other hand, the ages of marriage more or less vary significantly in cities like Karachi, Lahore, and

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<sup>194</sup> Ibid.

<sup>195</sup> Ibid.

<sup>196</sup> Peter T. Ellison, Meredith W. Reiches, *Human Growth and Development, Puberty*, (Harvard University, Cambridge, MA 02138, USA: 2022), P. 125-153

Islamabad, as people there give importance to education and may have some level of job employment before stepping into wedlock. These urban centres depict progressive attitudes due to education, awareness campaigns, and better economic status.<sup>197</sup>.

Among tribal communities and certain ethnic groups, including the KPK and Baluchistan's Pashtun people, early marriage is customary to formalise family ties and adhere to tribal practices. Here, one can get married at 12, thus demonstrating a completely different culture from the developed and relatively liberal urban areas. These regional differences explain the multiple cultural regions in Pakistan and point to the fact that culture plays a part in the marriage practices of the people.

### **3.10.1.2 Evolution Over Time**

Over the years, Pakistan's culture around the age of marriage has changed. Early marriage was a common practice among the people of the subcontinent during pre-colonial and colonial rule because of social-cultural practices, economic hardships, and the strengthening of alliances. The colonial British paved the way for these legal measures to come into existence; for instance, the Child Marriage Restraint Act of 1929, to discourage child marriage, decreed that it was unlawful to marry off a girl under the age of twelve.

After gaining their independence, the people of these countries also changed their marriage practices and trends, depending on the sociopolitical situations and new economic development. More reliance on urbanisation and the spread of education

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<sup>197</sup> Rais Nouman Ahmad, Faiz Bakhsh, Rao Imran Habib, Muhammad Danyal Khan, “*Social, Cultural and Religious Factors of Forced Marriages in Pakistan and Its Legal Concerns*,” *Pakistan Journal of Social Sciences* 40, no. 2 (2020): 1119–28.

changed people's attitudes towards marriage age. In the last few decades, there have been campaigns by various governmental and non-governmental organisations to minimize cases of marriage between girls and boys, thereby educating people on the effects of child marriage. Some campaigns related to girl-child education and women's rights have been initiated and are prevalent in urban society. Nonetheless, even with such attempts, early marriage is legitimised by cultural practices in rural areas. This situation points towards the fact that while change may be gradual, it is also discontinuous.

### 3.11 Sociological Perspectives

#### 3.11.1 Influence of Economic Conditions

The economic setup of a particular country influences the age at which people get married. This practice includes early marriages where, in economically disadvantaged regions, the girls are encouraged to get married so that they can help with an absent or minimal family income.<sup>198</sup> Early marriage, especially sending daughters to their husbands' homes, can help ease the financial burden by transferring the burden of feeding them to their husbands. On the other hand, in developed countries, families have more time and resources to invest in their offspring; thus, they can support their children longer, complete their education, and delay marriage.<sup>199</sup> Development within the economic aspect helps families change attitudes toward early marriage, stating that education is more critical for the future.

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<sup>198</sup> Aneel Shahzad, “*Differentials in Female Age at Marriage in Pakistan: Have They Changed or Not?*” *Nust Journal of Social Sciences and Humanities* 3, no. 1 (2017): 71–94.

<sup>199</sup> Aāmad Nawaz, “*UnderAge and Forced Marriages: An Anathema of the Pakistani Society,*” *Journal of Public Policy Practitioners* 1, no. 1 (2022): 67–98.

### **3.11.2 Impact of Education Levels**

Education standards are known to affect the age at which people get married to a large extent. Education composition by age shows that the higher the level of education, the later the marriage age, because people focus on education and work. The level of education means more awareness will be created for women's awareness early on of their rights and the implications of early marriages, health-wise. Institutions have been used to create awareness of the advantages of early marriage among the public. On the other hand, early education in rural areas may not be much enhanced; hence, the parents do not have enough knowledge to keep their daughters away from early marriages.

### **3.11.3 Rural vs. Urban Differences**

Consequently, the provincial divide dominating Pakistani lifestyles becomes highly significant. Nonetheless, as mentioned above, rural-born girls marry early because it is traditional, and since there are few employment opportunities, education and healthcare are poor. Marriage ages are generally higher in urban areas because they enjoy better education, health care, and employment standards. People in urban areas are more exposed to media and awareness campaigns, such as delays in marriage and the need to pursue education, than their counterparts in rural areas; hence, they are more likely to develop liberal attitudes towards marriage age. It will also show differences in marriage practices across urban and rural areas regarding resource and information accessibility.

### 3.12 Case Studies

#### Specific Examples

In the rural area of Tharparkar, Sindh, early marriage still exists because people follow cultural norms and get rid of financial problems, which is emerging as a big issue. Girls are frequently married at a very young age, between twelve and nineteen, to minimise the cost of dowry and other household expenses.<sup>200</sup> On the other hand, networks organising for change or development in large cities such as Lahore and NGOS like the Aurat Foundation have played a crucial role in creating community awareness regarding Marriage Laws and the reproductive health of early marriage. Such strategies have helped to record the prominent success of delayed marriage ages. Parents are now focusing on education and skills acquisition before marriage for their daughters.

### 3.13 Impact on Marriage Age

Culture is fundamental when establishing marriage practices in many societies around the globe. In areas where early marriage is traditional, such practices are thus defended on the grounds of preserving family honour, economic reasons, religion, or tribal culture. Such traditions restricted the possibilities of the future, especially for girls. However, in societies where the culture of the liberal mindset has gained ground, people have started to acknowledge the advantages of postponing marriage. Legal measures have slowly modified perceptions, which have seen the marriage age rise and

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<sup>200</sup> Kiren Khan, Mumraiz Khan, Tahira Parveen, Sabahat Hussain, “*Impacts of Climate Change in Vulnerable Communities in Sindh, Pakistan: Voices from the Community*,” 2021.

better health and education statuses for youths. These examples also show that cultural factors play a primary role in marriage age and that efforts to change socially appropriate behaviours in this sphere are essential.<sup>201</sup>

### 3.14 Conclusion

This chapter has thus aimed at understanding the Shari'ah law, Pakistani laws, medical science, and culture on the proper age of marriage. When comparing the Standard of Shari'ah with some of the essential aspects questioned in the study, it was paradigmatic to learn that Islamic jurisprudence is informed significantly by the onset of puberty and signs of maturity. However, different schools of thought have different standards of age. All juristic schools of thought, namely the Hanafi, Shafi'i, Maliki, and the Hanbali, think that the bride should be physically and psychologically prepared for marriage; however, the age and each school has set slightly varying recommendations.

Pakistani Law involves a legal framework, like the Child Marriage Restraint Act of 1929 and later case laws. Notable cases include Bakshi vs. Bashir Ahmad, Mumtaz Bibi vs. Qasim, and others, as well as Nasreen Bibi vs. Station House Officer. These cases illustrate the legal complexities and consequences of enforcing the marriage age laws.

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<sup>201</sup> Rais Nouman Ahmad, Faiz Bakhsh, Rao Imran Habib, Muhammad Danyal Khan, "Social, Cultural and Religious Factors of Forced Marriages in Pakistan and Its Legal Concerns," *Pakistan Journal of Social Sciences* 40, no. 2 (2020): 1119–28.

From the Medical Sciences, we learned the effects of early marriage on health. Specific physical health hazards are complications during pregnancy and childbirth, and psychological strain and emotional incompleteness are other issues. Reproductive health issues were reported to be highly prevalent cases of early pregnancy and limited access to health facilities.

Finally, the Custom and Practice of the People demonstrated the variance of the marriage age customs in Pakistan due to the economic situation, education level, and the distinction between urban and rural areas. Examples of cultures concerning marriage age revealed the reality of people's adherence to the traditional ways and improvements made by education and legal systems.

Compliance with cultural practices is high in various areas since people prefer adherence to customs, the economy, and social norms rather than legal and medical advice. However, there continues to be a shift and significance to higher marriage ages due to the awareness and improved legal acts.

The similarities relate to acknowledging the necessity of maturity and the preparedness for marriage, which are the same in both branches of science. However, the differences point to all the divergences in the perception and practice of this concept by members of different disciplines.

## CHAPTER 4

### STUDY OF PAKISTANI APEX COURTS' JUDGMENTS ON THE AGE OF MARRIAGE IN THE LIGHT OF ISLAMIC LAW

#### 4.1 Introduction

There is no doubt that the determination of the age of marriage is a controversial issue among all Islamic countries, especially in Pakistan. Islamic law does not consider a specific age for marriage, but it's based on puberty and maturity, physically and mentally. In Islamic law, whenever a male or female obtains puberty, and there is no restriction on marriage, he or she must get married. They do not need to wait for a specific age to get married. However, Pakistan and most Islamic countries have a particular age for marriage, and getting married below that age is considered an offence, which is totally against the injunctions of Islām. In Islamic law, this issue is crystal clear and says that the age of marriage for a girl and a boy is puberty. In Sharī‘ah, no specific age is determined for puberty. In Islām, the age at which a person is considered an adult can vary depending on the context and the specific responsibilities or actions involved. Generally, reaching the age of puberty is an essential milestone in determining adulthood. Puberty is the stage at which a person becomes capable of reproduction and experiences physical and hormonal changes. It is a natural biological process that varies from person to person. Once a person reaches puberty, he is considered mature (الغٰل) and are accountable for their actions in the light of Islamic law.

This topic, "Study of Pakistani apex courts' judgments on the age of marriage in the light of Islamic law," deals with a complex relationship between legal interpretations and religious principles in Pakistan. The apex courts, including the

Supreme Court and High Courts, have played a significant role in the Islamization of several laws. Still, some precedents regarding the age of marriage are subject to debate, in a country where the majority of the people have a strong belief in Islām. However, the interpretation and application of Sharī'ah in matters such as the determination of the age of marriage will indeed be acceptable, and deviation from Islamic law will not be tolerated. In Pakistan, the determination of the age of marriage is a matter of both legal and religious significance. The legal system, influenced by colonial laws and international human rights standards, often intersects with Sharī'ah, which holds a prominent place in Pakistani society. My research will analyse some judgments by the apex courts, examining whether they are compatible with the Islamic framework or not.

This chapter will cover various standards and disciplines related to the age of marriage. Additionally, the chapter aims to illuminate the intersection of law and Sharī'ah in determining the age of marriage in Pakistan, highlighting the role of the judiciary and legislation in shaping the Islamic framework for all laws, particularly in selecting and setting the age of marriage.

#### **4.2 Supreme Court Judgment**

##### **4.2.1 Mst. Bakhshi vs. Bashir Ahmad and another (PLD 1970 Supreme Court 323)**

Notably, this judgment was later cited as a precedent by the Islamabad High Court and the Lahore High Court. The Judges of both high courts gave different opinions regarding the determination of the age of marriage; these judgments will be discussed in this chapter later on.

## **Facts of the Case**

In this case, Ms. Shamim Alias Nasreen, a minor girl under 16, leaves the house of her mother and step-father, eloping with Bashir Ahmad and contracting marriage with him. Her mother complained of the kidnapping of Mst. Shamim Alias Nasreen. Police recovered the girl and handed her over to her parents, Bashir Ahmad. Thereupon, a habeas corpus petition was filed, and the matter was before the Court.<sup>202</sup>

## **Decision**

The Supreme Court pointed out that although the marriage violates the Child Marriage Restraint Act 1929, it does not become invalid on that score; however, an adult husband contracting the marriage or the person who solemnised the marriage may be held criminally liable.

## **Analysis**

Regarding child marriage, this is the essential judgment, and this judgment does not declare a marriage below 18 invalid. However, it makes the guardian who solemnizes the marriage criminally liable; the second part is contrary to the injunctions of Islām. Islamic law provides that the guardian may marry off a minor. The Holy Qurān and the Hadiths are the primary sources of Islamic Law (Sharī'ah). It is discussed that guardians can marry off their minor if there is an interest (Maslaha) in early marriage

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<sup>202</sup> *Mst. Bakhshi vs. Bashir Ahmad and another* (PLD 1970 Supreme Court 323)

for minors, as seen by the guardians, and they are not criminally liable. However, the minors cannot get married themselves.<sup>203</sup>

One thing is essential to note: Islamic law does not encourage Child marriage or early marriage at all; in the early stage, Islamic law allows just the contract of Marriage, not the *Rukhsatī* and sexual intercourse, as I have discussed in the first chapter. Sharī'ah says that if the marriage of a minor is done by any one of the guardians, then the *Rukhsatī* and sexual intercourse shall be after attaining puberty and when she gets fit for intercourse. As discussed earlier, the marriage of the Prophet Muhammad is the best example and witness of this. (Sharī'ah) came to preserve man's religion, life, intellect, property, and progeny. Regarding these *Maqāsid* (Objectives of Sharī'ah), Islamic law grants full authority to the guardians of minors to manage their social and commercial affairs. The Holy Qur says in this regard: "If the one who owes is feeble-minded or weak or cannot dictate himself, then his guardian should dictate with fairness".<sup>204</sup>

It is pertinent to note that Islamic Law has granted authority to all guardians, especially to the father and grandfather of the minors, that they may marry off minors if they see any interest (*Maslaḥa*) in marrying them off.<sup>205</sup> Islamic Law gave them this authority, aiming at the interest of minors, and this is based on great wisdom (*Al-Hikmah*) because there is a principle means, Allāh (lawgiver) is all-wise, the action of

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<sup>203</sup> Al Marghīnānī, *Al hidāyyah*, 3:32.

<sup>204</sup> Qur'ān 2:282

<sup>205</sup> Al Marghīnānī, *Al hidāyyah*, 3:28

the All-wise is not devoid of wisdom.<sup>206</sup> We see that sometimes guardians must marry off even their minors because of some extrinsic or intrinsic situations. There are some examples where the guardians have to marry off their minors:

1. In some situations, marrying a young girl to a suitable person may be in her best interest. If a guardian believes that a prospective suitor is an ideal match for his minor daughter, he may decide to arrange the marriage before she reaches puberty. This decision is often motivated by the guardian's desire to secure a favourable match, as the suitor may not be available later.<sup>207</sup>

Let's forget for a while the marriage of minors by guardians and discuss the marriage of those boys and girls who did not reach 16 years but attained puberty. According to the Hanafī School of thought, they are mature and may get married even without a guardian.<sup>208</sup> However, according to Pakistani law, they are still minors because they are under eighteen. Now, they cannot get married themselves. If they get married themselves, the Court does not consider their marriage a valid marriage, and this marriage would fall within the definition of sexual abuse in terms of section 277a of the Pakistan Penal Code.<sup>209</sup> If they get married off by their guardians, they will be criminally liable.<sup>210</sup> Meanwhile, due to sex education and

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<sup>206</sup> Abū ‘Abdillah Muḥammad Ibn Abī Bakr Ibn Ayyūb Ibn Qayyim al-Jawziyyah, *Shifa’ al-‘Alīl Fi Masa’il al-‘Qaḍā’ wa al-Qadr wa al-Hikmah wa al-Ta’līl*, (Beirut: Dār Ibn Hazm, 2019). Abū ‘Abdillah Muḥammad Ibn Abī Bakr Ibn Ayyūb Ibn Qayyim al-Jawziyyah, *Miftah Dār al-Sa‘adah*, vol. 2 (Saudi Arabia: Dar Ibn ‘Affan 1996) P. 314

<sup>207</sup> Al Marghīnānī, *Al hidāyyah*, 3:33.

<sup>208</sup> Wahbah, Al-Zuhaylī, *Al-Fiqh Al-Islāmi Wa Adillahtuhū*, Vol.7, (Damascus:Dār al-Fikr,1984), P.48

<sup>209</sup> Mst. Mumtaz Bibi Vs Qasim and Others P54

<sup>210</sup> *Child Marriage Restraint Act 1929*

the influence of social media, the likelihood of open relationships between boys and girls has significantly increased during the teenage years. This is not compatible with Islamic law. Shari‘ah permits them to get married even without their guardians' consent, according to the Hanafī School of thought, and their guardians may also arrange their marriage, with no liability on their part.

It is very strange that under eighteen persons are considered children according to Pakistani Law, and they cannot get married either themselves or by their guardians. This is a significant problem for our society, particularly among young males and females. I can say that it is affecting the spirit of our society because a delay in marriage increases the involvement of males and females in illegal relationships; if child (Under Eighteen) marriages are declared prohibited, millions of people in our society will face such challenges for which no solutions will be found. To understand the true nature of these challenges, we present a few examples:

Let's suppose there is a person who observes that his son or daughter is deteriorating morally to a significant extent. If their marriage is not arranged promptly, guiding them back to the right path will become impossible. At present, there is a suitable match available for his child. Under these circumstances, wisdom demands that he arrange the marriage of his son or daughter as soon as possible. However, due to our law restrictions, he is compelled to wait until his son turns eighteen before he can proceed with the marriage. Meanwhile, he has nothing to do except bite his finger in regret, watching his child on the brink of ruin with no remedy in his control.

(2) In another situation, an individual who, due to illness, does not expect to live much longer. He has a fifteen-year-old daughter, and either she has no heirs or cannot rely on the existing heirs to treat his daughter well. In such a situation, he wishes to entrust his

daughter's hand to an honourable man, so that he can leave this world in peace. Yet, because of the law, he is forced to leave his daughter unprotected and vulnerable, with no one to care for her. After his death, the girl may be left to wander, facing hardship and exploitation by selfish individuals driven by greed and lust.

(3) Another example is of a widowed woman with no guardian or supporter. She has a daughter, who may be a minor or of age but under eighteen. The widow will struggle to support herself and protect her dignity and honour. It will become a challenge for her to bear the additional burden of her daughter. Keeping the girl under her care creates financial hardship for her and brings the constant fear that, if her daughter's marriage is not arranged soon, she might fall into the clutches of a criminal. So, she has no alternative except to entrust her daughter to a respectable individual. However, due to the legal restrictions, the girl is deemed ineligible for marriage under the law because she is too young for marriage.

(4) Take the case of a rural farmer with a young daughter. He observes, day and night, how his landlord and their workers, driven by their malicious tendencies, exploit young girls for their selfish desires. The farmer fears that if he keeps his daughter with him for too long, he may be unable to protect her. This compels him to arrange her marriage as soon as possible. However, when he examines the legal restrictions, he feels helpless and cannot do anything except shed tears of frustration.<sup>211</sup>

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<sup>211</sup> Taqi Uthmani, *Hamaray-‘Aaili Masāill*, 219.

The most significant reason behind early marriages in rural areas was the farmers' need to protect their honour and dignity. It is no secret that the oppressive behaviour of landlords has long endangered the modesty of tenant families. In the presence of this law, such farmers will find themselves entirely powerless to safeguard their families. These scenarios are not merely hypothetical assumptions, but rather reflect real-world situations. If one surveys society, countless individuals can be found for whom this law, CMA, would become a source of immense hardship. Such individuals would perceive themselves as deeply helpless and wronged.

(5) The inevitable consequence of these difficulties would be an accelerated moral decline in our society. Juvenile crimes would increase at an alarming rate, posing severe harm to the nation. Incidents of adultery and abduction would rise steadily, and everyone would witness firsthand the outcomes of imposing restrictions on marriage while leaving immorality unchecked.

(6) Furthermore, under this law, the CMA, every individual would be obligated to register births. This requirement would impose a particularly harsh burden on rural inhabitants, forcing them to either resort to false testimony or endure additional hardships to prove their age eligibility for marriage.

(7) Additionally, this law would create opportunities for malicious individuals to exploit the system, leading to the public humiliation of many honourable people. For instance, imagine a person's marriage is taking place, and the local marriage registrar bears animosity towards him. The registrar could exploit the situation by objecting at the very moment of the marriage, claiming that the bride or groom has not yet reached the legal age for marriage. As a consequence of such an objection, the individual would be forced to return to the wedding procession with great disappointment and regret,

suffering financial losses from the expenses incurred in organising the event. Furthermore, the marriage would remain on hold until the individual could produce medical reports or other official evidence to prove that either he or his fiancée is of legal marriageable age.

This is not merely a hypothetical concern; similar incidents have already been reported from various parts of the country. In conclusion, prohibiting early marriages will undoubtedly lead to such challenges, which will be exceedingly difficult to address effectively.<sup>212</sup>

So, let me clear again that Islām does not actively encourage marriage at an early age, as such marriages can sometimes lead to various problems. Instead, Islām provides the guideline that if someone feels the need to marry or arrange a marriage at an early age due to specific circumstances, they are permitted to do so.

#### **4.3 High Court Judgments**

##### **4.3.1 Mst. Mumtaz Bibi vs Qasim and others (Writ petition No. 4227 of 2021)**

###### **Facts of the Case:**

In the case of Mst. Mumtaz Bibi vs Qasim and others (Writ Petition No. 4227/2021). The question of marriage age in Pakistan was placed in the context of the CMA. Mst. Mumtaz Bibi, before she got married to Qasim, was forced to wed below the age described by law, the statutory age. She had to sue the man legally because she wanted her marriage to be annulled following its violation of the Act. The case

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<sup>212</sup> Taqi Uthmani, *Hamaray- 'Aaili Masāill*, 219.

challenged the judicial system, as it involved balancing statutory law that disapproved of early marriages with social and legal norms that supported such marriages.

## **Decision**

The argued case of the Islamabad High Court was as follows: all marriages with persons under a fixed age were not just unlawful but also null and void. The Court further stated that this marriage would fall within the definition of sexual abuse in terms of section 377A of the Pakistan Penal Code. The Court also focused on the issue of early marriages as illegal and stressed the proper implementation of the laws of the Child Marriage Restraint Act.

**Analyses and Comparison:** This judgment is not compatible with Islamic law. Some points are against Sharī‘ah. Here is a gradual analysis of these points and their comparison with Islamic law as follows:

- a) In This judgment (***Mst. Mumtaz Bibi vs Qasim and others***), the honourable Judge deviated from the judgment of the Supreme Court (***Mst. Bakhshi vs Bashir Ahmad and another***) on some grounds, among these grounds on which he deviated from the judgment of Supreme court one is following:  
*“the said law was laid down before the promulgation of the Constitution of 1973....”*

This means that the Honorable Court does not deem such judgments or laws fit that were laid down before the 1973 Constitution. Surprisingly, in the same judgment, the Honorable Court, in Paragraph 22, has relied on the Supreme Court's judgment, ***The***

***Hanover Fire Insurance Company vs Muralidhar Banechand***,<sup>213</sup> This was decided before the promulgation of the 1973 Constitution. This seems inconsistent with the Court's reasoning.<sup>214</sup>

b) The second ground is

*"Principles of Islamic law are to be employed as tools where statutory provisions create room for more than one interpretation."*

The Honourable Judge has mentioned this and taken the path of deviation by stating that 'its application is only valid when two interpretations of the law are possible. However, in the current issue, only one interpretation of the law is likely to be presented. Legal experts have clarified that stating only one interpretation of a law is possible is an exercise of legal interpretation, which is based on certain fundamental assumptions. Moreover, even if we assume for a moment that adherence to this legal principle is necessary only in cases where two interpretations of the law are possible, it is still evident from the facts that there are two or even several possible interpretations in the current issue. This is demonstrated by the fact that, at present, we have three distinct judgments on this matter, each of which has adopted a different interpretation. Honorable Justice adopted the approach of interpreting marriage as a contract and applying the principles of English contract law to it. For instance, he referred to the legal age of the parties involved and the status of a marriage contracted by a minor. He relied on the English legal concepts of contracts and the associated principles to answer these questions. However, while contract law was indeed established in 1872, after

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<sup>213</sup> PLD 1958 SC 138),

<sup>214</sup> *Mst. Mumtaz Bibi vs Qasim and others* (Writ petition No. 4227 of 2021), pp. 23, 26

independence, when we declared that Allāh Almighty is recognized as the Sovereign in our constitutional and legal framework and that all powers must be exercised within the limits prescribed by Him, the meaning of this law inevitably changed. Moreover, when the Constitution specifically declared Islām as the state religion of this Islamic Republic and stipulated that all prevailing laws must be aligned with Islamic principles, it became mandatory for the courts to interpret the laws in light of Islamic teachings.<sup>215</sup> This constitutional responsibility was also explicitly mentioned in the Law and Sharī‘ah Implementation. Thus, in the present case, the alternative interpretation that was possible is that, according to Islamic law, marriage is both an act of worship (*İbādah*) and a special type of contract, as well as a religious duty. Islamic law has established specific principles for such agreements, which differ from those applicable to ordinary contracts. The Court should have examined these unique principles and how their application would affect the current issue. Unfortunately, the Court did not take this approach.

- c) The third ground is the United Nations Convention on the Rights of the Child.

*“.....Pakistan is a party to the UNCRC and is obliged to comply with its provisions.....”*

There is no doubt that Pakistan is a part of UNCRC, but there is a dualistic system and a mechanism to adopt specific laws of foreign jurisdiction. Additionally, it is an established principle that in the event of a clash between municipal and

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<sup>215</sup> *The Constitution of the Islamic Republic of Pakistan*, Article 2.

international law, municipal law prevails. Pakistan, being an Islamic Republic, recognizes Sharia law as a form of municipal law. It is essential to note that even if a covenant is ratified and subsequently legislated by it, such legislation, under our constitutional framework, must conform to Islamic injunctions (as per Article 227 of the Constitution).<sup>216</sup> Furthermore, its interpretation must also be under Islamic principles (as stipulated in Section 4 of the Enforcement of Sharī‘ah Act).<sup>217</sup> Therefore, applying Islamic injunctions and principles remains obligatory in all circumstances. Our entire legal system, particularly our Constitution, is based entirely on Islamic Concepts. Even in the absence of the Enforcement of the Sharī‘ah Act, our courts are still duty-bound to follow the injunctions of Islām. If we suppose for a while that the judgment of the Supreme Court should not be observed as the High Court stated, still, the said marriage cannot be considered a 'void marriage' because the Child Marriage Restraint Act 1929 only provides punishment for marrying a girl under 16 years of age, but does not declare such marriage void. Unfortunately, the Honourable Court still opted to take advantage of UNCRC and declared the marriage null and void.<sup>218</sup> However, as stated earlier, Nikāh cannot be declared void solely based on minor age, as was done in the case at hand. At most, the alleged offender can be punished for their Act of a criminal nature, but Nikāh shall be maintained as Valid.

- d) The Honourable Court considered marriage a contract and applied the principles of English contract law to it. For instance, he referred to the legal age of the parties involved and the status of a marriage contract made by a

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<sup>216</sup> *The Constitution of the Islamic Republic of Pakistan*, Article 227.

<sup>217</sup> *The Enforcement of Sharī‘ah Act, 1991*, Section 4 (Pakistan).

<sup>218</sup> *Nazar Muhammad Vs. DPO, etc.* (writ petition No. 57371 of 2023)

minor. He relied on the English legal concepts of contracts and the associated principles. He treated the Contract of Marriage as a civil contract under the Contract Act.

However, marriage cannot be treated as an ordinary contract under any law.

Let us consider the position of marriage in Islamic law. The Holy Qurān describes marriage as a sacred covenant (*mithaq-i-ghaīdha*). Allāh says:

"وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَى بَعْضُكُمْ إِلَى بَعْضٍ وَأَخْذَنَ مِنْكُمْ مِيقَاتًا عَلَيْهَا"<sup>219</sup>

"How can you take it when you have had access to each other, and they have taken a firm covenant from you?" Regarding this verse, marriage is not a civil contract but a covenant, which means a contract considered to be sacred by the contracting parties and more sanctified than an ordinary contract.<sup>220</sup> Many verses emphasize the sanctity of the marriage contract. The Holy Prophet ﷺ has declared marriage his Sunnah and said that "whoever did not follow my Sunnah, he is not my follower."<sup>221</sup> As Muslims, the Sunnah of the Holy Prophet ﷺ is something different from a clause of the Contract Act, because whenever the Holy Qur'ān asks Muslims to obey Allāh, it also asks them to obey His Messenger ﷺ. The Holy Prophet ﷺ also mentioned in a hadith, "You must then follow my sunnah and that of the rightly-guided caliphs."<sup>222</sup> So, marriage for Muslims is a religious duty rather

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<sup>219</sup> Qur'ān 4:21

<sup>220</sup> Mansori, *Islamic Law of Contract*, 19.

<sup>221</sup> Al-Bukhāri, *Sahīh Al-Bukhāri*, hadith no. 4743.

<sup>222</sup> Al-Tirmidhī, *Jāmi' al-Tirmidhī*, 2676.

than a contract for material gains. Furthermore, the Holy Prophet (ﷺ) has given a stern warning to those Muslim youth who have the capabilities to marry but do not marry by telling one unmarried person to “get married because now you belong to the brotherhood of devils (Shītan).”<sup>223</sup> If marriage were only ‘a civil contract’, the Prophet (ﷺ) would not have emphasized it to this extent.

#### **4.3.1.1 Some Jurisprudential differences between a civil Contract and a Marriage Contract according to Islamic law, in terms of the form of contract (*Sīgha*)**

According to all jurists, a civil contract is concluded by conduct (Mū‘ātāt) other than words, while a marriage contract is not concluded by conduct. Shaikh Wahba Al Zuhaili said: The jurists are unanimous on the point that marriage cannot be established through mere physical conduct out of respect for the sanctity of intimacy, for its seriousness, and its dignity. Therefore, the contract is only valid with a clear verbal expression or an indirect reference (*kināya*).<sup>224</sup>

##### **i. In terms of contracting parties (‘Aqidān)**

At least two parties conclude a civil contract; a commutative contract cannot be concluded through a unilateral declaration, while a marriage contract may be concluded by even one party, according to the Hanafī School of thought.<sup>225</sup>

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<sup>223</sup> Abu Nu‘aym al-Asbahānī, *Ma‘Rifat al-Sahabah*, 5021, *Dha ‘if*

<sup>224</sup> Dr. Amīn Mahfūz al-Shanqītī, *al-Furūq al-Fiqhiyah bayna ‘Aqd al-Nikāh wa ‘Aqd al-Bay*, (University of Tabuk KSA) p.518

<sup>225</sup> Al Marghīnānī, *Al hidāyyah*, 3:3.

## ii. In terms of Option (*Khīyār*)

Civil and marriage contracts differ in the permissibility of options (*khīyār*). In a civil contract, options such as the option of session (*majlis*) and the option of condition (*al-Shart*) are permissible. However, in a marriage contract, the option of session and the option of condition are not acceptable.<sup>226</sup>

## iii. In terms of religious efficiency (*Al-kafā’*)

There is a difference between the two because the transactions of Muslims with non-Muslims, such as buying and selling, are valid and permissible. However, in the case of a marriage contract, compatibility in religion between the spouses is required. A Muslim woman is not lawfully married to a non-Muslim, and such a marriage contract is invalid and void.<sup>227</sup>

## iv. In terms of testimony (*Īshhād*)

Both differ because the civil contract is valid and can be concluded without witnessing, although witnessing is recommended (*Mustahb*). However, the marriage contract is invalid and cannot be concluded unless witnessed or publicly announced. Witnessing or announcing is obligatory.<sup>228</sup>

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<sup>226</sup> Dr. Amīn Mahfūz al-Shanqītī, *al-Furūq al-Fiqhiyah bayna Aqd al-Nīkah wa ‘Aqd al-Bay* (University of Tabūk: KSA) p.520

<sup>227</sup> Ibid., 528.

<sup>228</sup> Ibid., 524.

#### **4.3.1.2 Judicial Interpretation about the status of the marriage contract**

Some judges in the past declared the contract of marriage a civil contract, which is not compatible with Islamic law. In contrast, some other judges defined *Nikāh* according to Sharī‘ah and condemned the earlier-mentioned judges. “In Shahida Parveen v. Samiullah Malik, Justice Mian Saqib Nisar dispelled the idea that marriage is only a civil contract. He stated:

Although the marriage bond between the two Muslims is akin to a civil contract, it would be a grave misconception to equate it with ordinary agreements, such as those for sale, purchase, property transactions, or those providing personal services, entered into between parties under the Contract Laws. Instead, such a contract has its genesis in the social norms of Muslim society and is structured based on the commands of Allāh Almighty and the Sunnah of the Holy Prophet. This contract is blended with human emotions and sentiments, such as love, affection, likes, dislikes, tolerance, aversions, and the equation/ compatibility of two personalities and minds.”<sup>229</sup>

Unfortunately, the Judges of a non-Islamic state (India) also opined that a contract of marriage is not a civil contract. In Anis Begam And Ors Vs. Malik Muhammad Istafa observed by the Judge that "Marriage in Islām is not regarded as a mere civil contract, but a religious sacrament."<sup>230</sup> Justice Murtaza Fazal Ali of the Indian Supreme Court has also described marriage as a 'sacrosanct contract'.<sup>231</sup> While

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<sup>229</sup> PLD 2006 Lahore 401

<sup>230</sup> AIR1933ALLAHABAD 634

<sup>231</sup> *Sirajmohammad Khan Vs. Jan Muhammad*, AIR 1981 SC 1972

still in India, the Madhya Pradesh High Court has emphasised the religious sanctity of marriage among the Muslims of India.<sup>232</sup>

From the above explanation, it is clear that a marriage contract is not a civil contract, but rather a strong bond between the spouses, which holds more sanctity than an ordinary contract.

e) In the case at hand, the Honorable Court applied specific laws on marriage, stating,

*“We do not allow such child who has not reached the age of 18 to be issued a CNIC or be granted travel documents which would enable them to travel without the consent of his parents or guardians. We do not allow a citizen to exercise his right to vote, guaranteed under the Constitution, till the time that he/she reaches the age of 18. We do not allow children to drive motor vehicles till such time that they reach the age of 18. We do not trust children, till they have reached the age of 18, to be able to take care of their own day-to-day needs without being placed under the supervision of a parent, guardian or other caregiver.”*

As explained above, the nature of Nikāh is different from the ordinary contract, and these things are mentioned. Nikāh is a religious duty and worship. Allāh ﷺ has elevated the status of marriage to that of worship and declared it permissible in all religions. As Allāh Almighty said:

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<sup>232</sup> *Noor Muhammad Vs. Muhammad Ziauddin* AIR 1992 MP

"وَلَقَدْ أَرْسَلْنَا رُسُلًا مِّنْ قَبْلِكَ وَجَعَلْنَا لَهُمْ أَزْوَاجًا وَذُرِّيَّةً" <sup>233</sup>

"And We have sent messengers before you, and gave them wives and children,"

Prophet Muhammad ﷺ has encouraged His followers to get married from time to time. He ﷺ said: "Marriage is part of my Sunnah, and whoever does not follow my sunnah has nothing to do with me; get married, for I will boast of your great numbers before the nations....." <sup>234</sup> It is narrated from ḥaḍhrat Abu Ayyūb رضي الله عنه that the Messenger of Allah ﷺ said:

"أربعة من سنن المسلمين: الحباء والمعطر والسواك و النكاح" <sup>235</sup>

Four things are from the Sunnah of the Messengers عليهم السلام : modesty, wearing perfume, using a toothpick (*Sīwāk*), and marriage." A corpus of *Hadith* suggests that Nikāh is Sunnah and Nikāh is worship.

Nikāh, being is a worship, religious duty, and sanctified contract. How will it be compared with the general laws of NADRA <sup>236</sup> Election, and getting a vehicle license <sup>237</sup>? while these are administrative things and belong to permitted things (*Mubahāt*) in Islamic law? Nikāh is a universal and strict issue for all humans and all the world; its

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<sup>233</sup> Qur'ān 13:38

<sup>234</sup> Abū 'Abdillāh Muḥammad ibn Yazīd Ibn Mājah, *Sunan Ibn Mājah*, Vol. 3, book 9, Hadith 1846 (Darussalam), Hasan

<sup>235</sup> Abū 'Iisā Muḥammad Ibn 'Iisā At-Tirmidhī, *Jāmi' At-Tirmidhī*, vol. 2, Hadith No.1081, trans. Abu Khaliyl, ed. and ref. by Hāfiẓ Abu Tāhir Zubair 'Ali Za'i, rev. by Islamic Research Section Darussalam (Riyadh: Darussalam,207), 451

<sup>236</sup> *The National Database and Registration Authority Ordinance, 2000*, Section 9

<sup>237</sup> *The Provincial Motor Vehicles Ordinance 1965*, Section 4

terms and conditions are not changeable. For instance, Sharī‘ah states that every person has the capability of marriage; he may get married, regardless of who he is or where he is. It does not matter; however, the legislation for the capability to cost votes and obtain CNIC and vehicle licenses is not universal and rigid. Every country has the choice to legislate on these matters and establish an age limit. Some countries allow voting rights before 18, for example, "Argentina, Austria, Brazil, Cuba, Ecuador, Guernsey, Greece, Indonesia, Isle of Man, Jersey, Nicaragua, North Korea, and Timor-Leste".<sup>238</sup> Looking at both of these comparatively, a question comes to mind: Is there any scope in law for marriage before 18 years?

The answer is no, especially as stated by this honorable Court. And is there any way to obtain an identity before the age of 18? The answer is yes because it may be possible for an individual under eighteen to obtain Form B and prove that they are an original citizen of a specific country. Still, in such a case, the marriage is null and void according to this judgment, and the guardians are also criminally liable. So, how will it be treated that both are the same issue, and the same laws will be applied?

Additionally, how is it possible to compare Nikāh with the laws as mentioned above, when Nikāh requires both physical and mental capability? In contrast, casting a vote or obtaining a CNIC does not require physical capability. Therefore, a lame person can get a CNIC, affirming that he or she is a citizen of a particular country. Similarly, both men and women may cast their votes even if they are not physically fit.

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<sup>238</sup> John K. Borchardt, *"Voting Age Around the World,"* BatchGeo Blog, November 3, 2020, <https://blog.batchgeo.com/voting-age-around-the-world/>

Let us accept this for a while, since a minor cannot exercise the rights mentioned above before 18 years; therefore, he cannot exercise the right of marriage before 18 years. Still, my stance will be to stand, because the nature of Marriage is entirely different from the rights mentioned above. Regarding *Nikāh*, in typical cases, it is the Sunnah of the Holy Prophet ﷺ and recommended. However, suppose someone has the complete physical and financial capability to get married and believes that delaying marriage would result in a sin (*Zinah*), in this situation. In that case, there is a consensus among jurists that getting married is obligatory (*faradh*). Each of them has to get married and protect themselves from illegal intercourse. Sexual intercourse is a basic need of a human being, like food and drink. This is a universally acknowledged fact that cannot be denied. However, the things mentioned above in judgment are not like in *nikāh*. In addition to this, there is a big difference between *Nikāh* and these things.

For instance, if a boy attains puberty at the age of 15 or 16 or before this and he is physically and financially fit and needs to get married, Islamic law allows for him to get married and encourages him to get married. In contrast, according to the law, he is not allowed to get married either by himself or by his guardians. He has to wait until he is 18 years old, even though he is involved in an illegal relationship.

*f) The honorable Court stated, "We do not find a child under 18 to possess the agency, legal capacity, and qualification to look after himself/herself...."*

As mentioned above, the principle of interpretation of laws shall be interpreted according to the injunctions of Islām. We do not accept that a child below 18 has no legal capacity. All Islamic jurists agree that when a minor attains puberty, they get complete capacity (*Ahliyyah kamilah*), and they are allowed to get married without any restriction. No doubt that puberty occurs before 18 years in both males and females. So,

if a minor receives puberty at 13 or 14 or before this or after this before 18 years, Islamic law allows the marriage. And why should Islām not allow him, while he is now an adult? All Allāh's Rulings (*Ahkām*), like prayer, fasting, etc., have been made obligatory for him, so when he is qualified for all these commands, why is he not allowed to marry? Meanwhile, Nikāh is also worship. The Hanafīs, on the other hand, acknowledged a deficient capacity of execution (*Ahliyyah al-adā Naqisah*) for a person who has attained some degree of discretion. However, his mental faculties are not fully developed. Thus, a minor who possesses discretion can be assigned such a capacity. However, there is no sure way of determining whether the minor has attained this capacity. The Hanafī jurists, however, fixed the age of seven years for the assignment of such a capacity. Anyone over seven who has not attained puberty may be assigned such a capacity. A minor after 7 years till puberty is called *Sabī mumayyaz* (minor possessed with discretion).<sup>239</sup> The Hanafīs divide the transaction of a *Sabī mumayyaz* into three kinds:

- a) Purely beneficial transactions, like the acceptance of a gift or *sadaqah*, are allowed for him.
- b) Purely harmful transactions like granting *qard*, *hibah*, *waqaf*, and *wasiyyah* are not to be entered into by the *Sabī mumayyaz*. صبي ممكّن
- c) Transactions are equally likely to result in a profit or a loss, such as sales, hires, and partnerships. These transactions are valid and suspended till the ratification of the concerned guardian.<sup>240</sup>

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<sup>239</sup> Mansori, *Islamic Law of Contract*, 54.

<sup>240</sup> Ahmad Ibrāhīm Bik, *Al-altezāmāt fī al-Shar'a al-Islāmī*, (Cairo: Dār al al-Anṣār, 1944), p.120-121.

After Hanafies established this principle that a *Sabī* *mumayyaz* has a deficient capacity, let's come back to the decision above, and let's accept that *Nikāh* is a civil contract, when a *Sabī* *mumayyaz* has a deficient capacity and may enter into a contract, being he is not mature, this also allows him to enter into a contract of *Nikāh*, being mature but under eighteen. This is an intellect that demands that if a minor has deficient capacity and enters into a contract, even though it is suspended, when he attains puberty and becomes mature, he should also enter into a contract of *Nikāh*. What if he is under eighteen? In both situations, considering *Nikāh* either as a contract or as a religious duty and worship should be valid if done after attaining puberty before the age of eighteen, or considering it a merely civil contract, it should also be valid.

According to the CMA of 1929 and this honorable Court, if a marriage below 18 years old (even though the minor has attained puberty already, for instance, at 15, 16, 17, or before this age) is solemnized by guardians or others, they are criminally liable. However, in light of the above principle, a guardian may ratify the contract of a minor who is not yet mature. So, this is a significant deviation from the injections of *Islām*. Our Court should give priority to the Islamic interpretation. If we make the guardians criminally liable in such a situation, it means that the guardians have no authority. What will be the physical example of the Prophet's Quranic verses and Hadiths in which Allāh addressed the guardians? It will be understood from this that these verses are (*Al-Khās*) with guardians' authority after 18 years of minors. This will be an argument without any *Dalīl* and not acceptable at all. Islamic law granted full authority to the guardians of minors, as mentioned earlier.

- g) The Honorable Court Relied on International Law, especially on UNCRC, and declared the marriage null and void.

It is important to note that the International treaties/conventions discussed above disapprove of child marriage but do not declare it null and void. Further, the former would prevail if there is a conflict between municipal law and the treaty provisions.

#### **4.3.2 ABDUL RAZAQ VS THE STATE AND ANOTHER (2022 P Cr. L J 953 ISLAMABAD)**

##### **Facts of the case**

In this case, a girl, Mst. Laiba Noor, aged 16 years and 5 months, was married to Abdul Razaq; an FIR was lodged under section 365B of PPC against Abdul Razaq, wherein it was alleged that Mst. Labia Noor was abducted by the petitioner (Abdul Razaq) for sexual desires. He filed a bail application seeking bail after being arrested in connection with the FIR.

##### **Decision of the Court**

This case was decided in favor of Mst. Labia Noor stated by the honorable Court that she was 16 years and 05 months at the time of the solemnization of Nikāh; hence, the CMA,1929, is not attracted. However, according to the Hanafī School of thought, she does not qualify to enter into a contract, which would apply to her in light of Article 227 of the Constitution of the Islamic Republic of Pakistan. Thus, the case against the petitioner is one that warrants further inquiry, and the petition is allowed. The petitioner is therefore enlarged on bail after arrest. The honorable Court opted not to discuss the validation or invalidation of Nikāh between the spouses.

## **Analysis and Comparison with Sharī‘ah**

This case, along with the previously discussed case (Mst. Mumtaz Bibi vs. Qasim and others), is fascinating. In the previous case (Mst. Mumtaz Bibi vs. Qasim and others), Islamic Law was disregarded, and English laws were applied to a marriage that is not civil. In the latter case (ABDUL Razak vs. the STATE AND ANOTHER), Islamic law is adopted, and Pakistani law is ignored. The significant points are the following:

1. In this case, Barrister Zafarullah Khan, ASC, was appointed as an Amicus Curia to assist the Court. Learnt Amicus Curia contended that puberty is not a mere criterion for granting consent for marriage, but that *Rushd* (a person being able to decide for himself and exercise good judgment) is also required. In para number 14, the same is adopted by the honorable Court as well.

*Rushd* has been discussed earlier. Furthermore, *Rushd* is the opposite of 'Safah' (deficiency of intellect), which implies waste and prodigality, which is "that weakness of intellect which urges a person to act concerning his property contrary to the dictates of reason. At the same time, *Rushd* signifies the handling of financial matters by the dictates of reason. *Rashīd* is a person who can identify avenues of profit as well as loss and act accordingly to preserve his wealth.<sup>241</sup>

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<sup>241</sup> Mansori, *Islamic Law of Contract*, 58.

Imām Malik said: ‘(يطلق على حفظ المال المصاحب للبلوغ) Rushd refers to the preservation of money that accompanies puberty.’<sup>242</sup> According to the *Majallah al-Ahkām al-‘Adliyyah*, section (947), ‘هو الذي يتقيد بمحافظة ماله، و يتوقى من السفه و التبذير’, it means that Rashīd is the one who adheres to safeguarding his wealth and avoids foolishness and extravagance.<sup>243</sup>

### How to recognize *Rushd* or Signs of *Rushd*

*Rushd* is the final stage of legal competence. When an individual reaches maturity (*Rushd*), their legal capacity is complete, guardianship is lifted, and their assets are entrusted to them. *Rushd* and puberty may occur simultaneously, but sometimes *Rushd* can be delayed relative to puberty, depending on the individual's upbringing and readiness. Muslim Jurists are unanimous in the point that there is no specific sign for recognizing *Rushd*. However, Fuqhā said that *Rushd* will be known by testing and Examination as Allah described in the Holy *Qurān*, “Test the orphans until they reach the marriageable age. Then, if you perceive them to have a proper understanding, hand their property over to them.”<sup>244</sup> A minor's degree of intelligence (*Rushd*) should be estimated differently according to the various categories of persons. Thus, the son of a merchant should be examined about purchase and sale or his aptitude at a bargain; the son of a farmer should undergo inquiry as to his knowledge of cultivation and the proper employment of labor for that purpose; and the son of an artisan should give proof that

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<sup>242</sup> Abdul Hafiz, *Sinn ul Ziwāj Fi Al-Sharī‘at ul Islamiyah*, 47.

<sup>243</sup> Ibid., 48.

<sup>244</sup> *Qurān* 4:6

he understands his trade; while a girl should show herself apt in all that has to do with managing the home, keeping clothes, preserving food and other household chores. This examination should be undergone at least twice so that it is likely that the minor is of sound mind (*Rashīd*). According to Hanafis, this examination will be before the minor reaches the marriageable age.<sup>245</sup>

It is known from the verse mentioned above that mostly *Rushd* may occur either before puberty because Allah ﷺ instructed that examine the minor before reaching puberty or at the same time with puberty. *Bulūghat* (puberty) and *Rushd* are two distinct and independent concepts; it is also possible that *Rushd* may be delayed relative to puberty, depending on the individual's mental development, because *Rushd* has a hidden aspect as a person. There are no specific signs that show that *Rushd* has occurred.

### **Age of *Rushd***

According to Imām Abū Hanīfah, Rushad's age is 25. He says that if the Safīh individual reaches the age of twenty-five and shows no signs of maturity (*Rushd*), the money is handed over to him.<sup>246</sup>

It is known from Imām Abū Hanīfah's saying that *Bulūghat* and *Rushd* occurred at the same time, as he set the example of Safīh, who possesses a lake of intellect. He

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<sup>245</sup> *Al Mausū 'ah Al Fiqhiyah Al Kuwaitiyah*, 22. 213, 214

<sup>246</sup> Abdul Hafiz, *Sinn ul Ziwāj Fi Al-Sharī'at ul Islamiyah*, 49.

did not say that if a sound-minded person reaches puberty and no signs of *Rushd* occur, it will be presumed that he is *Rashīd* at 25 years old.

According to other Jurists, there is no determined age for the occurrence of *Rushd*. However, *Rushd* will be known by testing and examination, and males and females are equal. As for *Malikīs*, the age for *Rushd* is 18 years, which is what custom required.<sup>247</sup>

After the above explanation of the word *Rushd*, I would like to answer the following questions:

**Q. Is mere puberty sufficient for marriage, or is puberty qualified with sound judgment? *Rushd* will be required? And is marriage declared null and void in the absence of *Rushd*?**

Puberty with signs or with the number of years (as long as there is no evidence of mental impairment or lack of discernment) is sufficient for the capacity to get married. Looking at the above-mentioned meaning and explanation of *Rushd*, which Allah ﷺ mentions in Surah An Nisā' 6, every interpreter of the Qurān and all jurists said that *Rushd* here means 'capacity to run financial matters.' It is pertinent to note that *Rushd* is not a capacity that must occur after puberty or when it happens; the person will never make any mistake because of *Rushd*. In short, *Rushd* means *Aqal* (intellect), *Tamyīz* (discretion), or proper judgment. The aim of Sharī‘ah here is a little bit of discretion and 'aqal, not the highest level of 'aqal, because the Holy Qurān, when mentioning the word *Rushd*, mentioned it *Nakirah* (indefinite). This *Nakirah* is for

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<sup>247</sup> Ibid., 51.

*Taqlīl* (reducing)<sup>248</sup>, which means that a little bit of ‘*aqal*’ is sufficient. Jurists mentioned that an examination to determine someone’s *Rushd* will be conducted at least twice; this means that a normal person, upon attaining puberty, is considered *balīg* and *Rashīd* unless there is evidence of mental impairment or lack of discernment.

Let's admit that Complete legal capacity is attained when a person has reached puberty, and also after a few years. Nevertheless, *Rushd* with puberty will still be required for some financial transactions, not for all. Don't you see a *Sabī Mumyyaz* who can handle some economic matters? According to Hanfīs, as mentioned earlier. So, an orphan can accept<sup>249</sup> A gift despite being a minor now. There is a distinction between the age of majority for managing property and the age of majority for other purposes. As said earlier, puberty is the age of majority for all purposes except property management. For property management, the age of majority is the age of discretion or sound judgment.<sup>250</sup> The Holy *Qurān* also mentions the word *Rushd* about financial matters, not *Nikāh*.<sup>251</sup> As for *Khitāb ul ‘ibādat* and *Khitāb ul Jināt*, of course, mere (*bulūght*) puberty is sufficient. It was explained earlier that *Nikāh* is a form of worship, a religious duty, and a contract. *Nikāh* has two or three statuses. If someone says that puberty and *Rushd* are required for contract, the other will say that *Nikāh* is a worship and that just puberty is sufficient for worship. Here, we have to find out the aim and intention of (*Shari‘*) the lawgiver. *Shari‘ah* encourages those who are eligible to get

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<sup>248</sup> Abū al-Qasim Maḥmūd bin 'Umar Al-Zamakhshari, *Al-Kashshāf 'an Haqa'iq Ghawamidh al-Tanzil wa 'Uyun al-Aqāwīl fī Wujūh al-Ta'wil*, vol.1. (Bayrūt: Dār Al-Kitāb Al-‘arabī, 1987), p.573

<sup>249</sup> Hamid Hassan, *Usūl lul Fiqh*, 148.

<sup>250</sup> Dr.Mudasra Sabreen, *The Age of Criminal Responsibility and its Effect on Dispensation of Justice*, Pakistan LAW Review, Vol. VIII, P.108

<sup>251</sup> Qurān 4:6

married. Several Qur'anic verses and Hadiths encourage getting married. Some of these are already mentioned. For instance, the Holy Prophet said:

"يَا مَعْشَرَ الشَّبَابِ مَنْ أَسْتَطَعَ الْبَاءَةَ فَلْيَتَرْوَجْ، فَإِنَّهُ أَغَصُّ لِلْبَصَرِ، وَأَحْصَنُ لِلْفُرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وِجَاءٌ" <sup>252</sup>.

Allāh's Messenger said, "O young people! Whoever among you can marry should marry because it helps him lower his gaze and guard his modesty (i.e., his private parts from committing illegal sexual intercourse, etc.), and whoever is not able to marry should fast, as fasting will diminish his sexual power."

This Hadith appeals to young people who can get married, but it does not imply a limitation on the age of marriage. Age at marriage is closely related to the ability to act, as marriage is a legal act that requires responsibility and is burdened with certain obligations. It indicates that a marriage can take place if a person already has a bā'ah; what is meant by a bā'ah is being able to have sex and being able to finance a marriage. Muslim jurists unanimously declared that every Muslim who has the physical, mental, and financial ability must get married, and, in some situations, marriage is mandatory for such a Muslim. He must marry as soon as possible.

Furthermore, let's examine this issue in the context of *Maqāsid al-Shari'ah* (Objectives of the *Shari'ah*). The *Shari'ah* aims at the preservation of *the Nasl* (progeny). The conservation of progeny may be possible if people get married at the right time, but a delay in marriage may harm and affect the purpose of *Shari'ah*. It is

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<sup>252</sup> Al-Bukhārī, *Shahīh Al-Bukhārī*, hadith no. 5066.

crystal clear that, nowadays, due to social media, the chances of getting involved in illicit relationships and other nefarious activities are increasing daily. Our Children are at high risk. Many ways have been adopted for approaching our children and involving them in sexual activities. Many porn websites have been created, and they are being advertised in different ways. Muslim society is also caught in this trap. If marriages continue to be delayed, our youth will increasingly deteriorate. Now, the easy solution to get out of it is to get married at the right time and make the Nikāh easy. The right time for Nikāh is after attending puberty, and the discretion that occurs with puberty is sufficient as long as there is no evidence of mental impairment.

In addition to this, as mentioned above, *Rushd can handle financial matters*, as demonstrated by examination. This ability of a minor will be estimated in different ways according to the various categories of persons. Thus, the son of a merchant should be examined about purchase and sale, and the son of a farmer should inquire about his knowledge of cultivation, etc. The question arises here: How will the Rushd of a minor be estimated for marriage? Will there be the same examination for all people or different ones for different people? Rushing into marriage means that a person should be aware of the responsibilities and consequences of marital life, including how to coexist with their partner and how to resolve issues. If the latter is the case, learning these things in a few days is easy, especially if parents dedicate a few days to this focus.

So, Rushd, which is required for financial matters, is not necessary for marital issues. So, if someone attains puberty and they have intellect (*‘Aqil*), they may enter into a contract of Nikāh. This is a non-definable fact that our children are generally more intelligent nowadays than in the past.

A famous Islamic scholar, Wahbah Al-Zuhaylī stated:

"اشترط الرشد مخصوص في التصرفات المالية، وأما غير ذلك كالزواج والطلاق فإنها نافذة منه بمجرد البلوغ عاقلاً"<sup>253</sup>

"Rushd is only a condition for financial transactions, not in other matters, such as marriage and divorce, which become valid once the individual reaches adulthood and is of sound mind ('Aqil)."

2. The honorable Court mentioned the book *Tafhīmul Qurān* by Abul A'la Maudūdi. Then it stated: "*As per above explanation, it is not only balūghat/puberty but also rushd, which is the second important criterion for a person to enter into Nikāh .*"

It is essential to note that Abul A'la Maudūdi mentioned that balūghat and Rushd both make a person's capacity for a financial transaction. He never mentioned that Rushd is the second criteria for a person to enter into Nikāh . The words of the book *Tafhīmul Qurān* are the following:

"مال ان کے حوالے کرنے کے لیے دو شرطیں عائد کی گئی ہیں: ایک بلوغ، دوسرے رشد، یعنی مال کے صحیح استعمال کی امکیت"<sup>254</sup>

This is the creation mentioned by Abul A'la Maudūdi. He discussed only financial transactions and never even mentioned the possibility of marriage.

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<sup>253</sup> Al-Zuhaylī, *Al-Fiqh Al-Islāmi Wa Adillahtuhū*, 4:126.

<sup>254</sup> Syed Abul A'la Al-Mawdūdī, *Tafsīr Tafhīm-ul-Qur'ān*, (Lahore: Idāra Tarjumān ul Qur'ān, 2023), 4:6.

Apart from the above-mentioned *Tafsīr* of the Holy *Qurān*, I checked about 80 *Tafsīr* of the Holy *Qurān*, but no one mentioned that *Rushd* is the second important criterion for a person to enter into *Nikāh*. Some of these *Tafsīr* are as follows:

- i. *Madārik al-Tanzīl wa Haqa'iq al-Ta'wīl* by [Abu al-Barakāt al-Nasafi](#),<sup>255</sup>
- ii. *Aḥkām al-Qur'ān* by Abū Bakr Muḥammad Ibn al-‘Arabī,<sup>256</sup>
- iii. *Aḥkām al-Qurān* by [Al-Jassās](#),<sup>257</sup>
- iv. [Al-Jāmi' li-Aḥkām al-Qurān](#) by [Al-Qurtubi](#),<sup>258</sup>
- v. *Rūh al-Ma'ānī* by Maḥmūd A'lūsi al-Hanafi,<sup>259</sup>
- vi. [Tafsīr al-Tabārī](#) by at-Tabārī,<sup>260</sup>
- vii. [Mafatīh al-Ghayb](#) (*Tafsīr al-Kabīr*) by [Fakhr al-Dīn al-Rāzī](#),<sup>261</sup>
- viii. *Tafsīr ibn Kathīr* (*Tafsīr al-Qurān al-Azīm*) by [Ibn Kathīr](#),<sup>262</sup>
- ix. [Bayān Ul Qurān](#) by [Ashraf Ali al-Thanwi](#),<sup>263</sup>

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<sup>255</sup> Abū al-Barakāt Abdullāh ibn Aḥmad ibn Maḥmūd, *Madārik al-Tanzīl wa Haqa'iq al-Ta'wīl*, Vol. 3. (Istanbul: Dar Tahqīq al-Kitāb) 4:6.

<sup>256</sup> Abū Bakr Muḥammad Ibn al-‘Arabī, *Aḥkām al-Qur'ān* ('Emād Zakī al-Baroudī ed, Al-Tawfikia n.d.) 4:6.

<sup>257</sup> Abū Bakr Aḥmad al-Jassās, *Aḥkām al-Qur'ān*, (Dār al-fikr, 2001) 4:6.

<sup>258</sup> Abū Abdillāh Muḥammad bin Aḥmad Al-Ansārī, *Al-Qurṭubī*, *Al-Jāmi' li-Aḥkām al-Qur'ān* (Bayrūt: Dār Al-Kitāb Al-‘arabī, 2007) 4:6.

<sup>259</sup> Sayyid Maḥmūd ibn 'Abd Allāh Ālūsī, *Rūh Al-Ma'ānī Fī Tafsīr Al-Qur'ān Al-‘Aẓīm Wa-Al-Sab' Al-Mathānī* vol.3 (Cairo, Dārul ḥadīth, 2005) 4:6.

<sup>260</sup> Abū Ja'far Muḥammad bin Jarīr al-Tabārī, *Jāmi' Al-Bayan 'an Ta'wīl Āye al-Qur'ān*, vol.6 (Dār ibn Jawzī, Damam, 2022) 2:6.

<sup>261</sup> Fakhr al-Dīn al-Rāzī, *al-Tafsīr al-Kabīr aw Mafatīh al-Ghayb*, vol. 5 (Cairo: Dar al-Hadīth) 4:6.

<sup>262</sup> Ismā'īl Ibn 'Umar Ibn Kathīr, *Tafsīr Al-Qur'ān Al-‘Aẓīm : Tafsīr Ibn Kathīr*. ( Bayrūt: Dār Al-Kitāb Al-‘arabī, 2011) 4:6.

<sup>263</sup> Hakīmul Ummah Maulāna Ashraf 'Ali Thanvi, *Bayān ul Qurān* Vol 1, (Karachi: Maktaba Ghaznawi, 2019) 4:6

- x. *Ma'ariful Qurān* by Muhammad Shafī<sup>264</sup>
- xi. *Tafsīr-e-Mājidi* by Abdul Majid Daryabadi<sup>265</sup>
- xii. *Tafhīm al-Qurān* by Abul A'la Maudūdī<sup>266</sup>
- xiii. *The Noble Qurān: Meaning With Explanatory Notes* by Taqi Uthmānī<sup>267</sup>

### Some essential and relevant Quotations of the *Mufassirīn*

Among these *Mufassirīn* (interpreters of the Holy Qurān), some mentioned clearly that this verse refers to financial capacity; no one suggested that it pertains to the contract of marriage. Following are some of the sayings of these honorable *Mufassirīn*:

#### I. Zamakhshari

In this issue, it is sufficient what is said by Zamakhshari; he extracted an essential point by saying that in this verse, the word Rushd is indefinite (Nakirah). Of course, this is for a great purpose, and this indefiniteness (Tankīr) is for one of two purposes, he stated:

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<sup>264</sup> Maulānā Mufti Muhammad Shafī, *MA'ARIFUL-QUR'AN*, trans. Muhammad Shamim, rev. Mufti Muhammad Taqi Uthmānī, vol. 2 (Karachi: Maktaba-e-Darul-'Uloom, ), 4:6.

<sup>265</sup> Mulānā 'Abdul Mājid Daryabādi, *Tafsīr Mājedi*, (Karachi: Majlis e Nashriyat Qurān, 2014) 4:6

<sup>266</sup> Syed Abul A'lā Al-Mawdūdī, *Tafsīr Tafhīm-ul-Qur'ān*, (Lahore: Idāra Tarjumān ul Qur'ān, 2023), 4:6.

<sup>267</sup> Mufti Muhammad Taqi Uthmānī, *The Meaning of The Noble Qur'ān*, 4:6

"فإن قلت: ما معنى تكير الرشد؟ قلت: معناه نوعاً من الرشد وهو الرشد في التصرف والتجارة، أو طرفاً من الرشد ومخيلة من مخاليه

268 "حق لا ينتظر به قام الرشد"

If you ask, why is Rushd indefinite? I would say that either of the two reasons is a form of sound judgment (Rushd), specifically in the disposition of financial matters, or an indication of any sign of Rushd, so that complete sound judgment is not expected."

## II. Qadi Muhammād Thana' Allāh al-Uthmani al-Hanafi al-Mazhari al-Naqshbandi

He also mentioned that the indefiniteness (*Tankīr*) of word Rushd indicates that full Rushd is not required but some of Rushd, has words are following:

269 "قال أبو حنيفة تكير رُشداً في الآية يفيد التقليل يعني نوعاً من الرشد حق لا ينتظر به قام الرشد"

Imām Abū Hanīfah stated that the indefiniteness (*Tankīr*) of the word Rushd in the verse indicates that a little bit of Rushd is sufficient, which means a type of sound judgment, not the complete Rushd is expected.

## III. Abu al-Barakāt Abdullāh ibn Aḥmad ibn Maḥmūd,

He stated:

270 "وتنكير الرشد يفيد أن المراد رشد مخصوص وهو الرشد في التصرف والتجارة"

<sup>268</sup> Abū al-Qasim Maḥmūd bin 'Umar Al-Zamakhshari, *Al-Kashshāf 'an Haqa'iq Ghawamidh al-Tanzil wa 'Uyun al-Aqāwīl fī Wujūh al-Ta'wil*, vol.1. (Bayrūt: Dār Al-Kitāb Al-‘arabī, 1987), p.573

<sup>269</sup> Qadi Muhammād Thana' Allāh al-Uthmani al-Hanafi al-Mazhari al-Naqshbandi, *Tafsīr al-Mazhari*, vol. 2 (Beirut, Lebanon: Dār Ehia' al-Turath al-Arabi, 2004) p. 223.

<sup>270</sup> Abu al-Barakāt Abdullāh ibn Aḥmad ibn Maḥmūd, *Madārik al-Tanzīl wa Haqa'iq al-Ta'wil*, Vol. 3. (Istanbul: Dar Tahqiq al-Kitab) 4:6.

The indefiniteness of the word "الرشد" indicates that a specific type of Rushd is intended, and that is a Rushd in the disposition of financial matters.

#### IV. Hakīmul Ummah Maulāna Ashraf ‘Ali Thanvi

He stated that:

"کاح کی پوری قابلیت بلوغ سے ہوتی ہے" 271

"The full capability for marriage is attained with maturity."

From these opinions, it is known that no one mentioned amongst *Mufassirīn* that Rushd is the second criterion for the capacity of marriage.

#### V. Abū Bakr Aḥmad al-Jaṣṣāṣ

I am so glad to write here the opinion of the honorable Abū Bakr Aḥmad al-Jaṣṣāṣ, he stated as following:

وَمَعْلُومٌ أَنَّ اللَّهَ شَرَطَ رَشْدًا مَنْكُورًا وَلَمْ يُشْتَرِطْ سَائِرَ ضَرُوبِ الرَّشْدِ..... 272

And it is well-known that Allāh has stipulated the word Rushd indefinite, and has not stipulated all forms of Rushd and complete Rushd."

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<sup>271</sup> Hakīmul Ummah Maulāna Ashraf ‘Ali Thanvi, *Bayān ul Qurān* Vol.1, (Karachi, Maktaba Ghaznawi, 2019) 4:6

<sup>272</sup> Abū Bakr Aḥmad al-Jaṣṣāṣ, *Aḥkām al-Qur’ān*, (Dār al-fikr, 2001) 4:6.

## Does logic support this stance?

After the research, I say that logic also supports what I said because to consider maturity (Rushd) as a condition for marriage is both irrational and illogical, because, according to this verse,

"وَابْتَلُو الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا الْتِنَاجَحَ فَإِنْ عَانَسْتُمْ مِّنْهُمْ رُشْدًا" <sup>273</sup>

"Test the orphans until they reach the marriageable age. Then, if you perceive in them proper understanding, hand their property over to them".

The test (ابلاء) will occur before puberty, and a minor may obtain Rushd before reaching puberty; in this case, he would be allowed to engage in business and financial matters. Now, the question arises: if this child wishes to marry, will he be permitted to do so or not? If so, how is it possible that a minor can enter into a marriage contract, yet he is not allowed to do so according to both Sharī‘ah and law? And if you say, No, he cannot do a marriage contract, it means that you allow him to engage in financial interactions but not in marriage, so this will be against the injunctions of the Sharī‘ah because this verse says that for a financial transaction, puberty and Rushd are required.

It is now crystal clear that *Bulūgh alone* is sufficient for marriage, and Rushd is not required.

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<sup>273</sup> Qurān 4:6

3. In this judgment, the Honourable Court sought help from and placed reliance on the Honorable Federal Shariat Court in the judgment titled *Farooq Omar Bhoja Vs Federation of Pakistan (Shariat Petition No.10/I OF 2020)*<sup>274</sup>, Federal Shariat Court in its judgment relied on The concept of سُدُّ الذرائع (‘Sadd al-dharā’i‘) and then on the commands of Hadhrat Umar (R.A), the second caliph of Islām' and stated "In Islamic law, there is a well-developed concept of Sad-uz-Zaraey ( based on Qurān and Sunnah, according to this principle it is also a duty of the State to control, curtail or curb any act in a society, which may lead to harmful consequences to society at large or to any of its segments, no matter how minor it is..... a marriage should not be consummated before the attainment of the age of medical maturity by the girl. Setting an age of 16 years reduces the possibility of breach of this principle of Sharī‘ah to the maximum. There are many other examples available from the life of Hazrat Umar (R.A)."<sup>275</sup>

It is essential to know whether the concept of *Sadd al-dharā’i‘* (سُدُّ الذرائع) is applied here or not. For this, we must understand what the concept of سُدُّ الذرائع (‘Sadd al-dharā’i‘) is and what the conditions for this are.

### ***Sadd al-dharā’i‘***

It is composed of two words, (سُدُّ) and (الذرائع)

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<sup>274</sup> (Shariat Petition No.10/I OF 2020),

<sup>275</sup> *Abdul Razaq vs the State and another* (2022 P Cr. L J 953 ISLAMABAD)

(سد) literally means <sup>276</sup> إغلاق الخلل blocking the gap and <sup>277</sup> المتع preventing

(الذرائع) *al-dharā'i'* is the plural of <sup>278</sup> الذرعة synonymous with <sup>279</sup> الوسيلة

Technically, *al-dharī'i'* means

"هي ما كان وسيلة و طریقا إلى الشیء ،" 279

It is the means and way that leads to an end, whether legitimate or illegitimate, permissible or impermissible.

### ***Sadd al-dharā'i'* Technically**

Jurists have defined *Sadd al-dharā'i'* in different words; some of these definitions are the following:

- **According to Al-Qarāfi:**

"Closing down the means of evil to prevent it" <sup>280</sup> حسم مادة وسائل الفساد دفعا لها

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<sup>276</sup> Abū Alfadhal, Muhammad bin Mukarram, Ibne Manzūr, *Lisān al-'Arab*, (Berout: Dar Sadar, 1414H), 3:206.

<sup>277</sup> Ahmad Ibn Muhammād Al Fayyūmī, Al-Misbāh Al-Munīr fi Gharīb al-sharh Al-kabīr lil-Rafī'i, (Berout: Darul Kutub Al-'lmiyya, 1994), p.270

<sup>278</sup> Abū Alfadhal, Muhammad bin Mukarram, Ibne Manzūr, *Lisān al-'Arab*, (Berout: Dar Sadar, 1414H),

<sup>279</sup> Fatih S'adi, "Sadd al-dharā'i' Wa A'srhū Fi Al-Fatāwa Al-Mu'āsrah", *Al-Shihāb* 04, (Jami'ah tul Wadī, 2016): 178

<sup>280</sup> Ibid., 179.

- According to Ibn Taymiyyah:

"الفعل الذي ظاهره أنه مباح، و هو وسيلة إلى فعل محروم"<sup>281</sup>

"The action that appears to be permissible, but it is a means to a prohibited act".

- According to Al-Shatibī:

"التوسل بما هو مصلحة إلى مفسدة"<sup>282</sup>

Using an interest (Maslah) is a way towards evil.

In simple words, *sadd al-dhara'i* means blocking or closing the door against the possibility of committing a sin or illegal things. Sometimes, a permissible act may be forbidden by the Sharī'ah, because it leads or may lead to a sin or unlawful actions.

#### Essential elements (*Arkān*) of *Sadd al-dharā'i*

*Sadd al-dharā'i* has three elements

1. Wasīlah, Dharī'a (meaning or way)
2. Al-Ifdā (Leading)
3. Al-Mutawassal *ilaihi* (Expected result)

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<sup>281</sup> Ibid., 179.

<sup>282</sup> Ibid., 179.

## Conditions

- The permissible means will be the leader to *Mafāsid*, whether this result occurs intentionally or unintentionally. The motive for using this means might be a good intention, but in reality, it could lead to *Mafāsid*. In such a case, the means should be prohibited.<sup>283</sup>

For example, *buy-back agreement* (بيع العينة). For instance, "A buys sugar worth one lac rupees on credit of one year from B, and then sells it immediately to B, for Rs. 80,000 on cash. Here, A has obtained a loan of Rs. 80,000 with interest of Rs. 20,000."

Here, this agreement leads to Ribā.

- The principle of *Sadd al-dharā'i* ('blocking the means) is based on the consideration of *Maslaha* and *Mafsadah*. When the *Mafsadah* outweighs the *Maslaha*, *Sadd al-dharā'i* is applied. Conversely, when the *Maslaha* outweighs the *Mafsadah*, *Sadd al-dharā'i* is not applied.

For example, illicit intimacy (khalwat) between a boy and girl is prohibited because it constitutes a means to *zinā*, whether or not it leads to it.

All sexual overtures that are expected to lead to *Zinā* are similarly unlawful by certainty or likelihood that the conduct would lead to *Zinā*.

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<sup>283</sup> Mu'ādh Uthmān Rashīd Uthmān, *Qā'idah Ṣadd al-Dharā'i 'wa-Taṭbīqātuhā fī al-Ahwāl al-Shakhṣiyah wa-Hifz al-Usrah*, (Jāmi' al-Najāh Al Wataniyyah, Nablus, Palestine, 2022), 24

Here, *Mafsadah* outweighs the *Maslaha*, so *Sadd al-dharā'i* is applied.<sup>284</sup>

The *Wasīlah* must inevitably or most likely lead to *Mafsadah*, such that it is strongly suspected to result in it. However, if the result leads to *Mafsadah* only in rare or unlikely cases, or based on mere conjecture, the means should not be prohibited on that basis.

For example, digging a deep well next to the entrance door to a public place that is not lit at night. The one who enters the door is most likely to fall into it.

Selling grapes to a wine maker, or renting out premises for gambling or prostitution.<sup>285</sup>

- If that *wasīlah* (means) inevitably or most likely leads to *Mafsadah*, it should be prohibited to the extent that it ensures the realisation of the *Maslaha*.
- *Sadd al-dharā'i* shall not be used against Al-Nass (Al Qurān, Sunnah, and Ijmā')
- *Sadd al-dharā'i* shall not be used against Maqāsid al Sharī'ah.<sup>286</sup>

After discussing and knowing the principle of *Sadd al-dharā'i*, it is necessary to see how the honorable Court applied this principle in this regard. As mentioned above in the case in hand, the honorable Court of Islamabad relied on the Federal Shariat Court in the judgment titled *Farooq Omar Bhoja Vs Federation of Pakistan (Shariat Petition No.10/I OF 2020)*. So, this principle and the Commands of the second Caliph are expounded in the (*Shariat Petition No.10/I OF 2020*).

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<sup>284</sup> Ibid

<sup>285</sup> Ibid

<sup>286</sup> Ibid

It is regrettable to say that, in both judgments, applying this principle is quite ambiguous. At least I cannot understand how the principle of *Sadd al-dharā'i* applied here. According to the Essential elements of this principle, there shall be *Wasīlah* (*means*), *Al-Ifdā* (*Leading*), and *Al-Mutawassal ilaihi* (*Expected result*). Now, as far as I understood from these court decisions, here *Wasīlah* is, getting married before 18 years or marrying the minors off by guardians, and *Al-Mutawassal ilaihi* is, wasting the chance for education, early pregnancy, lack of confidence, and sexual abuse, etc. Are the latter-mentioned things considered *Mafāsid* or not by *Shari‘ah*? This principle applies where something is considered *Mafāsid* by *Shari‘ah*.

As to my approach to *Shari‘ah*, the principle of *Sadd al-dharā'i* cannot be applied here in this way, because:

- i. The things that are considered here as *Al-Mutawassal ilaihi* are not treated as *Mafāsid* according to *Shari‘ah*. Education is not obligatory for all people; it is just one of the *Mubahāt* (*permissible*) matters. We cannot force someone to get an education. So, lack of knowledge or education is not a *Mafsadha*. As well as achieving confidence, it is also not obligatory, and lack of confidence is not a *mafsada*. Then how can this principle be applied?
- ii. It is said that early pregnancy is harmful to a girl before 18 years. This is not a universally proven fact, but it varies from person to person and place to place, etc. There are a lot of examples of girls under 18 who get pregnant

and give birth, usually without any harm.<sup>287</sup> So this Mafsada is not inevitable and likely to happen; of course, this principle will not apply.

iii. Applying here the principle of *Sadd al-dharā'i'* will go against the text (Al-Nass) Qurān Sunnah and Ijmā', because according to the Sharī'ah, marriage has more than one status. In such a case, when a male or female is inevitably sure that if he or she does not get married, he or she would be involved in Sin (Zinā). Marriage is obligated to them. Now, applying this principle by prohibiting marriage before 18 years would be against the injunctions of IslāmIslam. Because there is no clash amongst the jurists about the contract of marriage after puberty, although it may be before 18 years, the majority of jurists also agreed that marrying off a minor is valid by the guardians.

iv. **Al Muhallab said:**

قال المهلب: "أجمعوا على أنه يجوز لأب تزويج ابنته الصغيرة البكر، ولو كانت لا يوطأ مثلها، إلا أن الطحاوي حكى عن ابن شرمة منعه فيمن لا توطأ".<sup>288</sup>

Fuqhā (Jurists) have Ijmā' on that it is permissible for the father to marry off his virgin daughter, even if such a girl does not have intercourse. However, At-tahāwī narrated from Ibn e Shubrama the prohibition in the case where such a girl has not had intercourse.

v. Applying here the principle of *Sadd al-dharā'i'* will go against the maqāsid al Sharī'ah as well, because imposing restrictions on marriage before 18

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<sup>287</sup> [https://www.bionity.com/en/encyclopedia>List\\_of\\_youngest\\_birth\\_mothers.html](https://www.bionity.com/en/encyclopedia>List_of_youngest_birth_mothers.html)

<sup>288</sup> *Fath al-Bārī*, vol. 9, p. 19

years and declaring it an offense will increase the ratio of illegal relationships among young people, will affect the spirit of our society, for instance, there is a boy who is fit to get married. Still, he cannot get married because of the law. If he is involved in sin (*Zinā*) and commits *zinā* with someone, the following Mafasaid will be created:

- By doing illegal sexual intercourse with one, both persons will commit a major sin (*Kabīrah*).
- The chastity ('ffat) of both will be finished.
- Wasting of wealth, if *Zinā* is done with a consideration.
- Involving both fatal diseases.
- There is a great possibility that they will repeat this again and again until a proper marriage.

Apart from the Mafāsid mentioned above, there is also a possibility of other Mafāsid, and a significant violation of the principle of *Maqāsid al-Sharī'ah*.

So the principle of *Sadd al-dhara'i* does not apply here in such a manner because the conditions of this principle do not support its application.

### **Possible Application of *Sadd al-dhara'i* in the case at hand**

In light of the *Arkān* of this principle, there shall be a *Wasīlah* (means), *Ifdā* (leading), and *Al-Mutawassal ilaihi* (*Expected result*). Here *Wasīlah* is, imposing restrictions on marriage, and delaying marriage till 18 years despite the full capability of a person for marriage, *Al-Mutawassal ilaihi*, is (*put in mind our today society which is entirely influenced by the European society, electronic media which embraced even our children, Education which is being changed, natural*

Islamic Cutler, is being replaced with a culture where there are no religious limitations, everyone is free of his will, the family system is so weak, the concept of girlfriend and boyfriend is a standard of a reasonable confidence, etc) involving Zinā and others major sins. Of course, this is *mafsada*, which has to be closed and blocked. Now, the leading means to this is delaying marriage.

The principle of *Sadd al-dharā'i* will be applied here, and it will be declared that delaying marriage leads to the above *Mafsada*, so delaying marriage is the *wasīla* (means) to it, and this means will be blocked.

### **My opinion pertains to the determination of the age of marriage and the development of solutions to specific problems.**

In conclusion, I would like to suggest that, according to the *Qur'ān* and *Sunnah*, there is no specific age of marriage. Sharī'ah says that when a person has the capability of marriage and finds a suitable match (partner of life), they should marry without any delay. The Sharī'ah sets no age for marriage. In this regard, Sharī'ah considers *Bulūght* (puberty) as a criterion for marriage. Setting 18 years as the age of marriage is against the literal text of the *Qurān* and *Sunnah*; however, the State may sometimes legislate in permissible matters, *Mubahāt*. Therefore, setting a minimum age for marriage by the State, in case some problems arise, is acceptable. However, setting 18 years of age as the minimum marriage age is creating difficulties for some people, as this is also against the Hadiths of the Prophet ﷺ, in which the Prophet ﷺ emphasized the importance of marriage.

Therefore, if early marriage harms society in real then the State may fix an age for marriage provided that this fixing should rely on the age at which a minor typically

obtains puberty, for example, 15 years, as this is the age at which a minor reaches the puberty according to the preferred saying (Muftā bihi Qawal) of the Hanafi School of thoughts. In Addition to this, the determination of age should not be a stringent law. Still, there should be some exceptions for exceptional cases, because an unavoidable circumstance or situations may appear where a person or a family wants to solemnize a marriage before the age as set by the law, in this case the State should allow for such family to solemnize their marriage without making them criminally liable, the Federal Shariat Court in Para No. 13 stated in case cited (*Shariat Petition No.10/I of 2020*) as:

“There are many Islamic countries where such a type of law is present, wherein a minimum age for marriage for males and females is fixed, like in Jordan, Malaysia, Egypt, and Tunisia, etc. However, in such countries, according to their laws, if in a specific or special case there is an unavoidable circumstance or situation to solemnize a marriage before the age as set by the law, then the family of that girl and boy must approach a specific authority made by the government, allowing or disallowing such permission.”<sup>289</sup>

#### **4.3.3 Nasreen Bibi vs. Station House Officer, etc. (Writ Petition No. 63301/2021)**

##### **Facts of the Case**

In this case, the parties were Christian; Nasreen Bibi (The petitioner) was the mother of a girl, namely Aleeza alias Liza, who lodged FIR No. 474/2021 at Police Station Saddar Narowal against Respondent No.3 and alleged that Respondent No.3

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<sup>289</sup> *Farooq Omar Bhoja Vs Federation of Pakistan* (Shariat Petition No.10/I of 2020)

abducted her 13-year-old daughter and then forcibly married her. She seeks her recovery through this petition. Respondent 3 maintained that she contracted marriage with him of her own free will. He also denied the allegation of abduction and stated that the girl had given her statement under section 164 Cr.P.C., recorded with the Area Magistrate. The Court appointed Mr. Saad Rasool, Advocate, *as amicus curiae*.

## **Decision**

The Honorable Lahore High Court opined that although both spouses are Christians, the Child Marriage Restraint Act 1929 applies to everyone indiscriminately, regardless of anyone's religion or beliefs. According to the birth certificate, the girl was 13 years and 4 months old at the time of marriage. Therefore, there was a contravention and violation of the Act on the part of the husband, for which he could be punished for this offense. The Honorable Court held that the marriage was not void, although Aliza did not obtain the statutory age mentioned in the CMA OF 1929.

## **Analysis and Comparison with *Shari‘ah***

In this case, the invalidation of marriage was directly discussed. The Honorable Court held that, in this judgment, this marriage is intact and cannot be declared null and void. This Honorable Court also resorted to the judgment of the August Supreme Court (*PLD 1970 SC 323*), which was made distinguishable by the Honorable Justice Babar Sattar. Based on this judgment, the Honorable Court dismissed the petition.

The Honorable Justice also discussed International laws, such as the UNCRC, ICCPR, ICESCR, and CRC (1989), but did not invalidate the Nikāh between the spouses.

The Honorable Court stated that “*on October 11, 2012, the first International Day of the Girl Child was observed with the theme of ending child marriage.*” He also mentioned the efforts of the UN and its organizations to raise global awareness about the disadvantages of child marriages.

Once again, I want to make it clear that Islām does not actively encourage marriage at an early age, as such marriages can sometimes lead to various problems. Islām provides guidelines that permit someone who feels the need to marry or arrange a marriage at an early age due to specific circumstances to do so. So, despite all these problems, Sharī‘ah opened this door for those who want to get married or solemnise early marriage in the interest of their minors.

#### **4.3.4 Nazar Muhammad Vs. DPO, etc (Writ Petition No.57371 of 2023)**

##### **The facts of this case are as follows:**

The girl's mother filed a petition in the High Court, stating that her daughter, namely Mst. Her husband has kidnapped Yasmin. Therefore, she requests that the Court recover her daughter from her husband. Along with this, she also asked the Court to charge her husband with the offense of rape since the marriage took place at a young age, and to annul this marriage.

##### **Court decision**

The Honorable Court decided that child marriage cannot be considered rape. This is because, according to Hanafī Fiqh, marriage is linked to the onset of puberty, rather than a specific age. This means that when a boy and a girl reach puberty, they

are both eligible for marriage. However, it is another thing if the State sets a specific age for marriage.

In our country, the Child Marriage Restraint Act of 1929 restricts marriage to individuals under the age of eighteen. However, this law does not declare child marriage invalid in any way; it only prescribes imprisonment for a specific duration.

If the legislature had intended to declare child marriage as invalid, it would have explicitly stated so in the law. However, this is not the case. Therefore, it is clear that the maximum punishment for child marriage is imprisonment, but the marriage itself cannot be annulled.

### **Analysis of the judgment**

Among the judgments of all High Courts of Pakistan, this is a good judgment in this regard. The honorable Court declared explicitly that although the girl in the case in hand does not qualify for the minimum legal age provided by law, she attained puberty, the Court stated in this regard in para 4:

*“It has been settled for a long time that when a girl marries after attaining puberty, said marriage cannot be considered a ‘void marriage’ even if she has not attained the minimum legal age provided under any law for the time being in force.”<sup>290</sup>*

- The Honorable Court also discussed the age of puberty and said that, according to the Hanafī School of thought, the minimum age for a girl to attain puberty is 9 years old. In this regard, help was sought from and reliance was placed on the

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<sup>290</sup> *Nazar Muhammad Vs. DPO, etc* (Writ Petition No.57371 of 2023)

authority of the Honorable Supreme Court in the decision, namely **Yousuf Masih alias Bagga Masih**. In this case, it was held by the Supreme Court as follows:

*"...All the original texts of Hanafi jurisprudence are unanimous on the point that 9 years is the minimum age at which the declaration of a girl about her puberty can be accepted. For example, Allama Shami, the well-known Hanafi jurist, writes in his Radd-ul-Muhtar, volume 5, page 107.... And the minimum age of puberty for a boy is 12 years, and for a girl is 9 years."*<sup>291</sup>

- The honorable Judge answered the question of how it will be determined whether a girl has attained puberty or not. The honorable Judge said, *"When a girl, after reaching the minimum age of puberty, declares that she has attained puberty, her declaration would be accepted as correct unless and until rebutted by cogent and convincing legal evidence."* Again, the honorable Court relied on that same judgment of the Supreme Court; the relevant extract of the judgment is:

*"....And the minimum age of puberty for a boy is 12 years, and for a girl is 9 years. Therefore, if they reach this age and declare that they have attained puberty, their statement can be relied upon if there is nothing apparent to falsify them..."*<sup>292</sup>

- The Honorable Court also answered an ambiguous question in Para No. 5, and that is, if a person marries an underage girl, will he commit the offence of rape punishable under section 376 of the Pakistan Penal Code, 1860? Because section

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<sup>291</sup> *Yousuf Masih alias Bagga Masih and another vs. The State-* 1994 SCMR 2102

<sup>292</sup> 1994 SCMR 2102

375 PPC provides that a sexual act with a girl under sixteen years of age will amount to rape irrespective of her consent. The Honorable stated:

*“In this regard, suffice it to say that the sexual offense mentioned in Section 375 PPC cannot be equated with the consensual consummation of marriage with a legally wedded girl, who has attained puberty, though she has not attained the minimum age provided under the Act of 1929. To do so would amount to declaring such a marriage null and void. Regarding the validity of such marriage, it is worth noting that marriage is a significant institution in Islām, and its validity or illegality can only be adjudged in the light of the injunctions of Islām. The Act of 1929 only provides punishment for marrying a girl under 16 years of age, but does not declare such marriage void.”<sup>293</sup>*

- The Honorable Judge stated in Para No.6 that consummation of such a marriage would amount to rape.<sup>294</sup>

Strangely, two judges of two High Courts decide the same issue in an Islamic country, where a fundamental principle for interpreting the laws is that the interpretation of the law will be based on the injunctions of Islām. One of the declared Nikāh below 18 years is null and void.<sup>295</sup>, and the other declares it valid<sup>296</sup>It means that there is a lack of Islamic fundamental knowledge. A Judge of the courts of a country like the Islamic Republic of Pakistan must have sound Islamic knowledge.

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<sup>293</sup> *Nazar Muhammad Vs. DPO, etc* (Writ Petition No.57371 of 2023)

<sup>294</sup> Ibid.

<sup>295</sup> *Mst. Mumtaz Bibi vs Qasim and others* (Writ petition No. 4227 of 2021) Islamabad High Court

<sup>296</sup> *Nazar Muhammad Vs. DPO, etc* (Writ Petition No.57371 of 2023) Lahore High Court

## The Doctrine of *Tagyeed Al-Mubāh* and the Determination of Age of Marriage

### 5.1 Introduction

It should be made clear that in Shari'ah, no age limit has been prescribed for marriage. The religion is complete, and there is no room for any addition or subtraction in it. Differences of opinion are inevitable in matters suggested by human intellect. Therefore, to alter a divine command with human reasoning is not only rebellion against the religion, but also constitutes distortion and innovation in the religion, and a means of spreading corruption and discord within it.

Therefore, marriage can be conducted at any age when the conditions are found; however, before reaching puberty, a boy or girl cannot marry on their own; rather, it is the guardian (wali) who has the right to arrange their marriage. Determining an age for marriage will be considered a change in the Sharī'ah, as well as in human nature, by making an adult person a minor.<sup>297</sup>

It is crystal clear from my previous chapters that Islam is a religion of moderation and justice, far from excess and deficiency. Fundamentally, Sharī'ah does not promote child marriage. However, in certain circumstances, Sharī'ah considers that if marriage takes place under those conditions, it may be beneficial for the child. Whenever Islam supports child marriage, it is solely for the protection of the child and to preserve the stability of the relationship. Sharī'ah intends that when a suitable and compatible match is found, and there is a risk that this opportunity might be lost forever, Islam

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<sup>297</sup> Muhammad Bin Aḥmad Bin Abi Sahl Abū Bakr Shams al-Dīn Al-Sarakhsī, *Al-Mabsūt*, Vol: 4, (Dār al-Kutub al-Ma'rifah, Beirut), 212, 213

permits especially to the father and grandfather, the authority to proceed with the marriage, even if the child is young. SubhanAllah, it is particularly noteworthy that Sharī‘ah places the primary responsibility for decision-making on the father and grandfather. This indicates how sensitively Islam treats the matter of marriage and how carefully it safeguards it. That is why Islam instructs that when a suitable and compatible match is found, then marriage may indeed take place even at a young age.

Furthermore, observe the excellence of this system: Islam did not grant this authority to just anyone; instead, it was explicitly given to the male relatives ('aṣabāt'). Even among the male relatives, Islam considers which one of them shows the most compassion and care towards a young girl or boy. It has thus been declared that if the father or grandfather arranges the marriage of a minor boy or girl, then the child does not have the right to annul the marriage, because the father and grandfather are the most compassionate and possess sound judgment.<sup>298</sup>

This discussion makes it clear that the objective of Islam is to consider the best interest (*maṣlahah*) of the minors and to ensure the stability and sustainability of the marital relationship.

Islam aims to establish a prosperous and harmonious life for both the husband and the wife. Hence, it becomes evident that a father or grandfather may arrange the marriage of a minor only when it serves a genuine benefit.

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<sup>298</sup> Abd Allāh ibn Maḥmūd al-Mawṣilī, *Al-Ikhtiyār li-Ta 'līl al-Mukhtār*, vol. 3 (Beirut: al-Risālah al-Ālamiyah, 2009), 72,73

If, however, there is no clear benefit, or if negligence or abuse of authority is observed on the part of the father or grandfather, then Islam does not permit such a marriage under any circumstances. Imām Sarakhsī stated in this regard,

Marrying off minors is conditional upon achieving a *Maslaḥa*, and it is in the minor's best interest, whether male or female, to be married to someone suitable.<sup>299</sup>

Imām Shafī'i<sup>300</sup> Set some conditions for a father to marry off his young virgin daughter without her permission. These conditions are:

1. There should be no apparent enmity between the father and the daughter.
2. He must marry her to someone suitable and compatible (*kuf'*).
3. The dowry (*mahr*) must be similar to what other girls like her would receive.
4. The groom should not be too poor to pay the dowry.
5. He should not marry her to someone who would harm her, like a blind man or a significantly older man.

Therefore, the guardian has the responsibility to choose a suitable husband — someone close to her in age — because this helps the couple live in harmony and increases the likelihood that the marriage will last.

Therefore, if these conditions are not met, Islam will not permit this *Nikāh*.

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<sup>299</sup> Al-Sarakhsī, *Al-Mabsūt*, vol. 4, Dār al-Kutub al-Ma'rifah, Beirut. P. 212

<sup>300</sup> Muḥammad ibn Muḥammad al-Khaṭīb al-Shirbīnī, *Mughni al-Muḥtāj ilā Ma 'rifat Ma 'ānī Alfāz al-Minhāj*, Vol 4 (Beirut: Dār al-Kutub al-'Ilmiyyah, 2000) 246

## 5.2 Determining an age for the marriage of minors (Child Marriage)

From the above discussion, it becomes evident that the primary objective of Islamic law is to ensure the best interests of minor children. Therefore, in situations where there is no clear benefit (*maṣlahah*), the marriage will not be considered valid or appropriate. The jurists stated that marriage, even at a young age, is valid if the guardians conduct it. However, regarding intercourse, Islam has placed a condition: if the girl is not physically capable of tolerating intercourse, the husband is not permitted to have relations with her. But if she is capable of tolerating it and there is no fear of harm or illness, then in such a case, the husband is permitted to have relations with her.<sup>301</sup>

In marriages arranged by the father or grandfather, minor children do not have the option (*khayār al-bulūgh*) to annul the marriage themselves. This ruling assumes that the guardian (*walī*) acts in the best interest of the child and protects her rights. However, this assumption is not absolute (Mutlaq).

Therefore, in cases where it is known that the guardian did not consider the child's welfare and instead arranged the marriage for his benefit, the jurists have recognized the authority of the judge (*qādī*) to annul such a marriage to safeguard the rights of the child.<sup>302</sup> Because Child marriage is allowed, especially for the preservation of a suitable match, and it is not found in all time, so Sharī‘ah gave full authority to the guardians

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<sup>301</sup> Nizām al-Dīn, *al-Fatāwā al-Hindiyah al-ma‘rūfa bi’l-Fatāwā al-‘Ālamgīriyyah fī Madhhab al-Imām al-‘Ażam Abī Ḥanīfah al-Nu‘mān*, vol. 1, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2000), p. 286.

<sup>302</sup> Al-Sarakhsī, *Al-Mabsūt*, vol. 4, Dār al-Kutub al-Ma‘rifah, Beirut. P. 224

and allowed for them that if they feel that a suitable match is available and if we delay the Nikāh it will be lost so that they may conduct Nikāh of a minor.<sup>303</sup> No doubt that Nikāh at a young age might contain problems. For example, when the boy and girl grow up, they may not accept each other; sometimes, they simply do not like one another. In other cases, one of them may develop an illness that makes the other unwilling or unable to accept. Most importantly, in today's era, the tendency of guardians to prioritize their interests has become more prominent. So, in such situations, what alternative method can be adopted to protect a minor girl from a lifetime of suffering?

One possible solution is that the law should clearly state that marriage before puberty is only allowed if it is in the best interest of the child. The girl must also be given the right of “khiyār al-bulūgh” (the option to annul the marriage upon reaching puberty), especially if the Nikāh is done by someone other than the father or grandfather, and she should be provided with every possible support to exercise this right. But would it not be a more appropriate solution to completely prohibit marriage before puberty, to block the path that allows some guardians to ruin the lives of young girls?

Can a Muslim ruler who holds general authority (wilāyah ‘āmmah) over the people, not place restrictions or conditions on the actions of guardians for the protection of such girls' rights and welfare? A ruler has the authority to legislate and regulate matters that are originally permissible (mubāh) to protect public interest. Considering the conditions and circumstances of society, he may impose reasonable restrictions on

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<sup>303</sup> Ibid., 212

actions that are otherwise permissible under Sharī‘ah, primarily to safeguard the welfare of the weak and vulnerable members of society.

He may even temporarily ban such actions when needed. This principle is discussed in detail by the jurists under the topic of *maṣāliḥ mursalah* (unrestricted public interests). However, Imām Muḥammad cited a precedent from Sayyidunā ‘Umar ibn al-Khattāb, رضي الله عنه, who stated: “*If a girl marries someone who is not her equal (kuf’), I will prevent it.*”<sup>304</sup>

Explaining the legal principle behind this statement, Imām al-Sarakhsī clarifies that safeguarding the interests of society is among the duties of the ruler. Due to this responsibility, the ruler has the authority to regulate matters related to marriage. Here, Imām al-Sarakhsī mentions a fundamental legal maxim of Islamic law in the following words:

”إِنَّ لِلإِمَامِ يَدًا فِي الْإِنْكَحَةِ“<sup>305</sup>

The ruler has the authority to govern matters of marriage.

Therefore, a state can restrict the marriage of a minor before puberty, as stated by Shaykh Ibn ‘Uthaymīn as well.<sup>306</sup> At this stage, the opinion of those jurists can be accepted as evidence who oppose child marriage and do not consider the marriage of minors permissible at all. This matter has already been discussed in the first chapter.

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<sup>304</sup> Muḥammad ibn al-Ḥasan al-Shaybānī, *al-Asl*, vol. 10, (Doha: Ministry of Awqāf and Islamic Affairs, Islamic Affairs Department, 2014). 199

<sup>305</sup> Al-Sarakhsī, *Al-Mabsūt*, vol. 4, Dār al-Kutub al-Ma‘rifah, Beirut.

<sup>306</sup> فتاوى ابن عثيمين والقرضاوى فى منع زواج الصغيرات واضحة، ولا مجال للتاليis <https://marebpress.net/articles.php?id=6943>

Ibn Shubruma, Uthman al-Batti, and Abu Bakr al-Asamm stated that neither the boy nor the girl should be married off until they reach puberty.<sup>307</sup>

Therefore, considering the current moral condition of society and the negligence of guardians regarding the rights of young girls, if the law restricts marriage before puberty, this is lawful and a state has the authority to do so by Sharī‘ah. This is not declaring something lawful (Halāl) as unlawful (Harām); rather, it is to regulate what is lawful to prevent its misuse.

In conclusion, Sharī‘ah grants the guardian (wali) the authority to arrange the marriage of a minor girl before puberty, keeping her best interests in mind. However, at the same time, Sharī‘ah also places the responsibility on the ruler to protect the rights of such a girl. Therefore, if the ruler deems it appropriate to restrict or temporarily suspend the guardian’s authority, he may do so through proper legislation by exercising the powers of *Siyasah Shar‘iyyah* (Islamic governance).<sup>308</sup>

### **5.2.1 Recommendations of the Council of Islamic Ideology**

Granting boys and girls unrestricted freedom to follow their desires and choices in matters of marriage is clearly against the explicit texts of Sharī‘ah. At the same time, it is also not permissible for guardians (awliyā’) to arrange the marriage of their children solely based on their own will without consulting them. Therefore, for children who have not yet reached the age of giving consent or meaningful consultation, the option

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<sup>307</sup> Al-Sarakhsī, *Al-Mabsūt*, vol. 4, Dār al-Kutub al-Ma‘rifah, Beirut. 212

<sup>308</sup> Dr. Muhammad Mushtaq Ahmad, <https://www.facebook.com/share/p/1Afk2D7Ctt/>

of *khiyār al-bulūgh* (the right to revoke the marriage upon reaching puberty) should be granted after they attain puberty.

According to some jurists, this *khiyār* (option) may be granted unconditionally. In contrast, others permit it only in cases where misuse of guardianship (su' al-ikhtiyar) or potential harm (mafsadah) is involved.

Therefore, two recommendations are proposed:

1. Guardians should be restricted from performing marriages for children during their early years. Instead, they may proceed with engagements (wa'd al-nikāh) only, as engagement is distinct from an actual marriage.
2. Alternatively, guardians may be permitted to conduct the marriage of children in their early years; however, if there is evidence of misuse of authority or harmful consequences, the child should be granted the right of *khiyār al-bulūgh* after reaching puberty.<sup>309</sup>

It should be noted that this entire discussion pertains to the contract of marriage before puberty. Regarding the contract of marriage after puberty, I will discuss it shortly; however, before doing so, I wish to draw attention to an important point.

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<sup>309</sup> Council of Islamic Ideology, Annual Report 2013-2014, Government of Pakistan, p. 161. <https://cii.gov.pk/>

## 5.2.2 A Controversial Judgment of the Federal Shariat Court of Pakistan

### Farooq Omar Bhoja, son of Omar Bhoja, Vs Federation of Pakistan (Shariat Petition No.10/1 of 2020)

In this judgment, it is stated that “*it is settled principle of Sharī‘ah if any mobāh (جائز) act appears to be harmful to the society collectively or to a particular segment of a society, the state has the power to make that Act prohibited so the society can be protected from a larger damage..... the setting of the minimum age limit of 16 for girl is one of such examples.*<sup>310</sup>

The Honorable Court relied on different arguments, among them one is that, although most Muslim jurists are of the view that the Nikāh of a minor girl is permissible, some other jurists hold an opposing opinion, also, like Imām ibn Shubruma and Qadi Abu Bakr al-Asam, both contemporaries of Imām Abu Hanīfah in Iraq. They had such a Nikāh is not permissible in Islam. This suggests that both viewpoints are represented among Muslim jurists. So setting 18 is Islamic.

At this point, I would like to draw attention to an important distinction: fundamentally, there are two separate matters, first, marriage before puberty, and second, marriage after puberty but before the age of 18. The first has already been discussed above, where it was explained that the majority of jurists consider marriage during minority (before

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<sup>310</sup> Farooq Omar Bhoja, son of Omar Bhoja, Vs Federation of Pakistan (Shariat Petition No.10/1 of 2020)

puberty) to be permissible, supported by various evidence. However, it is essential to note that Islam never permits intercourse before puberty. Intercourse is only allowed when the girl is physically capable of consummation.<sup>311</sup> The disagreement among jurists extends only up to this point: scholars like Abū Bakr al-Asam and others maintain that marriage before puberty is not permissible. However, all jurists agree that marriage after puberty is valid; there is no difference of opinion on that. Now, the court has combined both issues, applying the differences in jurists' opinions concerning pre-pubescent marriage to the post-pubescent context. In doing so, the Honorable Court has effectively legitimized the Child Marriage Restraint Act of 1929. For example, by declaring that the age of 16 for girls set in the law is entirely Islamic, they indirectly suggest that the age of 18 set for boys is also Islamic, which is un-Islamic and against the injunctions of Sharī‘ah.

### **5.3 Determining the age of marriage after puberty below 18**

Now, let me discuss that according to Sharī‘ah, marriage after puberty is valid when it meets all conditions, and there is no opposing opinion among the jurists. All jurists agree that when a boy or girl reaches puberty, they may enter into the contract of marriage; even according to the Hanafi school of thought, they may get married without the permission of guardians.<sup>312</sup> There is no determined age of marriage. Several Hadith encourage the young to get married as soon as they are physically and financially capable.<sup>313</sup> Now, does Sharī‘ah allow for a state to determine a specific age for

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<sup>311</sup>Nizām al-Dīn, *Al-Fatāwā al-Hindiyah*, vol. 1, 286.

<sup>312</sup> Al-Sarakhsī, *Al-Mabsūt*, vol. 5, Dār al-Kutub al-Ma‘rifah, Beirut. P. 10

<sup>313</sup> Al-Bukhārī, *Shahīh Al-Bukhārī*, hadith no. 5066. Also, Al-Tabrīzī, *Mishkāt al-Maṣābīh*, vol. 3, 226.

marriage, and below such age, marriage will be considered an offense? To find the answer to this, answering some questions is very important:

- 1) Can a state determine the age of marriage applying the principle of *Taqyeed Al-Mubāh*?
- 2) Is this determination based on Islamic law or solely on Western human rights?
- 3) What are the recommendations of the Council of Islamic Ideology, Government of Pakistan?
- 4) What are the possible harms of this determination?
- 5) What are the harms of marrying before the age of 18, and what are the appropriate solutions?

One thing is so important to note, Sharī‘ah does not force people to get married after puberty, it just encourages people, now if someone thinks that marriage below 18 is harmful, then they may get married after 18. They are allowed to do so, and if marriage is unhealthy for someone below 18, then Sharī‘ah will obligate them to get married after 18 years, because the objective of Sharī‘ah is to preserve life. Here I am just analyzing this determination and comparing it with Sharī‘ah. Let's come to the first question:

### **5.3.1 Determine the age of marriage applying the principle of *Taqyeed Al-Mubāh*?**

Everyone knows that marriage is permissible after puberty; there is no other opinion on this matter. However, some people opine that marriage is *Mubāh* (acceptable). Suppose any *Mubāh* act appears to be harmful to society collectively or to a particular segment

of society. In that case, the state has the power to make that prohibited, so setting an age for marriage and prohibiting it before that age is permissible in Sharī‘ah, because Nikāh is among Mubāhāt.<sup>314</sup>

Islamic law has granted the ruler (Wali ul-Amr) a high status; it commands obedience to him and prohibits disobedience, so that the affairs of the people may remain in order and he may fulfill the great objective for which he has been appointed.

This objective consists of two key elements:

1. Protecting the religion and preserving it based on its principles and foundations.
2. Governing worldly affairs and managing the matters of the state and its citizens by the religion.

Islamic law has allowed the ruler (Wali al-Amr) to take all necessary actions, words, or decisions to fulfill his essential duty. This flexibility means that a ruler who follows Islamic law has the authority to make decisions on many matters that require judgment, based on careful thinking, research, and consultation with trustworthy scholars and experienced experts. These decisions might involve prohibiting something, enforcing something, placing limits, or making something obligatory. The only condition is that these actions must remain within the boundaries of Islamic law and not contradict its clear teachings. Among the legal Maxims established by jurists in this regard is:

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<sup>314</sup> Farooq Omar Bhoja, son of Omar Bhoja, Vs Federation of Pakistan, Shariat Petition No.10/1 of 2020

<sup>315</sup> "تصريف الإمام على الرعية منوط بالصلحة." Rulers' decisions must be in the best interest of the people.

### 5.3.2 **Maslahah According to Imām Al Ghazāli,**

The word *maslahah* (interest) means gaining something good or avoiding something harmful. But that's not what we mean here. Gaining interest and avoiding harm are the primary goals of individuals, and their well-being lies in achieving these objectives. In Islam, what we mean by *maslahah* is protecting what the Sharī‘ah (Islamic law) aims to protect. And the Sharī‘ah seeks to protect five main things:

1. Preservation of *Dīn* (Religion)
2. Preservation of *Nafs* (Life)
3. Preservation of *‘Aqal* (Intellect)
4. Preservation of *Nasl* (progeny)
5. Preservation of *Māl* (property)

Anything that helps protect these five things is a real *maslahah* (interest), and anything that harms or destroys them is a *mafsadah* (harm), and stopping that harm is also a *maslahah*.<sup>316</sup>

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<sup>315</sup> Ibn Nujaym *al-Ashbāh wa al-Naṣā’ir ‘alā Madhhab Abī Hanīfah al-Nu‘mān*, (Beirut: Dār al-Kutub al-‘Ilmiyyah,199) 104

<sup>316</sup> Abū Hāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Mustasfā min ‘Ilm al-Uṣūl*, (Beirut: Dār al-Kutub al-‘Ilmiyyah,1413H).174

Therefore, the maxim mentioned above implies that anyone who takes responsibility for public affairs, whether it is the ruler or any other official, such as a judge, will only have their decisions considered valid and binding if they are based on genuine benefit and public interest. This benefit may be related to either religious or worldly matters.

Therefore, if a ruler's decision brings a worldly benefit to the people, it must be carried out. But if it is not based on any real benefit, then the ruler's decision should be rejected.<sup>317</sup>

If something in Islam is not strictly forbidden or required, but merely allowed (mubah), then the ruler can make it mandatory or restrict it for the public interest. But this doesn't mean that the ruler can do this for all *Mubāhāt* (all permissible things). This rule isn't as general as people often think.

Making a *Mubāh*, forbidden, is like creating a religious ruling, which is the right of Allah alone. No man can create religious laws. However, in some cases, the ruler is given temporary authority to act, but we'll explain the limits of this authority in more detail below.

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<sup>317</sup>

<https://saaid.org/Doat/alsharef/50.htm#:~:text=%D9%88%D8%A7%D9%86%D8%B7%D9%84%D8%A7%D9%82%D8%A7%20%D9%85%D9%86%20%D9%87%D8%B0%D9%87%20%D8%A7%D9%84%D9%85%D9%87%D9%85%D8%A9%20%D8%A7%D9%84%D9%85%D9%88%D9%83%D9%88%D9%84%D8%A9%20%D9%84%D9%87%20%D9%88%D9%85%D8%A7,%D8%A5%D9%86%D9%81%D8%A7%D8%B0%D9%87%20%D9%88%D8%A7%D9%84%D8%B9%D9%85%D9%84%20%D8%A8%D9%87%D8%8C%20%D9%88%D9%84%D8%A7%20%D9%8A%D8%B5%D9%84%D8%AD%20%D8%A7%D9%84%D8%AA%D8%AE%D9%84%D8%B5%20%D9%85%D9%86%D9%87>

### 5.3.3 There are two types of **mubāḥ** (permissible acts):

1. The first type is what is declared permissible in the Islamic texts, such as Allah's statement about the permissibility of trade, "*Allah has permitted Al-Bay' and forbidden Riba (interest)*" <sup>318</sup> And His statement about the permissibility of Nikāḥ and polygamy, "*Marry the women you like, in twos, in threes and fours.*" <sup>319</sup>
2. The second type includes those permissible things that are not mentioned as allowed in the Shari'ah. However, they are considered acceptable under the general rule:

"الأصل في الأشياء الإباحة" <sup>320</sup>

"*The original rule for things is permissibility.*"

Allah mentioned this principle in the verse:

"*It is He who created for you all that the earth contains,*" <sup>321</sup>

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<sup>318</sup> Qur'ān 2:275

<sup>319</sup> Qur'ān 4:3

<sup>320</sup> Ibn Nujaym *al-Ashbāh wa al-Naẓā'ir 'alā Madḥhab Abī Ḥanīfah al-Nu'mān*, (Beirut: Dār al-Kutub al-'Ilmiyyah, 199) 56

<sup>321</sup> 2:29

Therefore, it is permitted for a person to live in a rented house, own a home, build one or more floors, walk, or travel by vehicle; all of these are allowed not by specific texts, but by the general rule that things are originally permissible.

Now, let's determine whether the Taqyeed (restriction) of Mubāh is allowed for a ruler or someone else. In this second type of Mubah, it is permitted for a ruler or a judge to retract it or ban it, etc.<sup>322</sup>

### 5.3.3.1 Things Allowed by Qur'ān or Sunnah (Mubāh by Text)

It's mentioned above that if something is Mubāh in the Qur'ān or Sunnah (like trade, marriage, food, etc.), then no one has the right to:

- Restrict it (put conditions on it),
- Or force it on people (make it obligatory),
- Or stop it completely.

Because this would be changing the religion, and only Allah has the right to make laws. Both the Qur'ān and Sunnah are from Allah. In Sharī'ah, the lawmaker is just Almighty Allah and the Messenger, the Prophet ﷺ said:

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<sup>322</sup>

<https://saaid.org/Doat/alsharef/50.htm#:~:text=%D9%88%D8%A7%D9%86%D8%B7%D9%84%D8%A7%D9%82%D8%A7%20%D9%85%D9%86%20%D9%87%D8%B0%D9%87%20%D8%A7%D9%84%D9%85%D9%87%D9%85%D8%A9%20%D8%A7%D9%84%D9%85%D9%88%D9%83%D9%88%D9%84%D8%A9%20%D9%84%D9%87%20%D9%88%D9%85%D8%A7,%D8%A5%D9%86%D9%81%D8%A7%D8%B0%D9%87%20%D9%88%D8%A7%D9%84%D8%B9%D9%85%D9%84%20%D8%A8%D9%87%D8%8C%20%D9%88%D9%84%D8%A7%20%D9%8A%D8%B5%D9%84%D8%AD%20%D8%A7%D9%84%D8%AA%D8%AE%D9%84%D8%B5%20%D9%85%D9%86%D9%87>

ألا إني أوتتني القرآن ومثله (”I was given the Qur'an and something like it along with it.”)<sup>323</sup>

(معه)

So, the general rule is that no one can restrict or suspend the laws of Allah Almighty, but Allah did not impose any hardship on us in our religion<sup>324</sup>. However, Exceptions to this general rule exist within limits. So, if something is allowed (Mubāh) even by text, it can be restricted temporarily in exceptional circumstances. However, this restriction should not be applied permanently or universally. When those exceptional circumstances end, the ruling goes back to its original status of general permission. Islamic scholars have laid out specific conditions and guidelines for such temporary restrictions. These are the following:

### 1. Compliance with Shari‘ah

If there is an urgent necessity or a general public need that leaves no other solution except restricting or requiring that action, then it can be allowed, just like

<sup>325</sup> (الضرورات تبيح المحظورات) “Necessity makes the forbidden permissible.” In such cases, even permitted (mubāh) things can be temporarily restricted or suspended. And <sup>326</sup> (الحاجة تنزل منزلة الضرورة، عامة كانت أو خاصة) “Need takes the same position as necessity whether it is general or specific.”

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<sup>323</sup> Muhammad ibn ‘Abd Allāh al-Khaṭīb al-Tabrīzī, *Mishkāt al-Maṣābīh*, vol. 1 (Karachi, Maktabah al-Bushrah, 2010). Hadith no.163, p. 187

<sup>324</sup> Qur'an 22:78

<sup>325</sup> Ibn Nujaym, *al-Ashbāh wa al-Naṣā'ir*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 199). 73

<sup>326</sup> Ibid., 78

But this restriction or obligation must remain temporary, limited to the time of necessity, and should not be seen as a violation of Sharī‘ah.

## **2. Compliance with the *Maqāsid al-Shari‘ah* (Objectives of Sharī‘ah)**

Every action taken regarding (Mubāh) should work toward achieving one of the general objectives of Islamic law. These objectives are the beneficial goals for people's well-being that Sharī‘ah has established to achieve. As Imām Al-Shātibī said: “We have concluded from the Sharia that it is set up for the interest of the people.<sup>327</sup>

### **3. Considering Al *Maslaha al- ‘āmmah* (Public Interest):**

4. If something is permitted (mubāh) even with a specific text (Nass), then it can also be restricted if there is a clear public interest, with the consultation of Islamic jurists. A ruler can do so because تصرف الإمام على الرعية منوط<sup>328</sup> (بالمصلحة) Rulers' decisions must be in the best interest of the people. But if there is no public benefit, then it is not allowed to restrict or make it compulsory.

### **5. Restriction is only allowed in cases of necessity.**

This means it should apply to a specific situation and for a limited period. If a ruler issues an order during an emergency, it should not be considered a permanent law contrary to Islamic teachings. It is a temporary rule applicable only to that specific situation, and it will end when the problem is resolved.

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<sup>327</sup> Ibrāhīm ibn Mūsā al-Shātibī, *Al-Muwāfaqāt*, kitab al-Maqāsid, vol 2. (Dār Ibn ‘Affān) 12

<sup>328</sup> Ibn Nujaym, *al-Ashbāh wa al-Naṣā’ir*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 199).

For example, in *Šahīh al-Bukhārī*, the Prophet ﷺ prohibited Muslims from storing the meat of their sacrificial animals for more than three days.<sup>329</sup> Although it usually is permissible for a Muslim to store food or share it with others, in that year, people were in need, so the Prophet ﷺ gave a temporary order to help the poor.

Later, when the condition improved, the Prophet ﷺ allowed people to eat, give, and save the meat again. This indicates that temporary restrictions are allowed only under special conditions, not permanently. The well-known legal maxim:

<sup>330</sup> (الضرورات تبيح المحظورات) “Necessities permit prohibitions”

This issue can also be referred to as another principle:

(الحاجة تنزل منزلة الضرورة، عامة كانت أو خاصة)<sup>331</sup>

Public interest takes the status of necessity.

(ما أبیح للضرورة تقدر بقدرها)<sup>332</sup>

What is permitted due to necessity is limited to the extent of that necessity.

### 5.3.3.2 Examples of Restricting **Mubāh** with Conditions

#### 1: **Al-Bay‘ (trade )**

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<sup>329</sup> Al-Bukhārī, *Šahīh Al-Bukhārī*, 7:208, hadith no. 5423.

<sup>330</sup> Ibn Nujaym, *al-Ashbāh wa al-Naṣā’ir*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 199). 73

<sup>331</sup> Ibid., 78

<sup>332</sup> Ibid., 73

Allah clearly allowed trade:

"Allah has permitted Al-Bay‘ and forbidden Riba (interest)"<sup>333</sup>

So, no one can say:

- Trade is only permitted for specific items.
- Trade can only occur on particular days or times.
- Trade must be in certain places.
- Or, traders must sell their goods (forced selling).

These types of restrictions contradict what Allah has allowed openly.

## **2: Polygamy (Marrying More Than One Wife)**

Polygamy is allowed in the Qur'ān and Sunnah.<sup>334</sup> No one, not even the Government, can:

- Ban it completely,
- Or make laws that stop people from practicing it.

However, if there is a genuine emergency, such as a shortage of available women, then a temporary restriction could be implemented. Still, it must end when the situation ends.

## **3: Marriage Restrictions**

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<sup>333</sup> Qur'ān 2:275

<sup>334</sup> Qur'ān 4:6

No one can make rules like:

- A woman with a university degree can't marry someone without one,
- People from villages can't marry people from cities, etc.

These are human-made restrictions and go against what Allah has allowed.

Also, no one can force every man or woman to get married. Marriage is permitted, not compulsory.

#### **4: Divorce**

Even though divorce has many harmful effects, Allah allowed it. So:

- No one can ban divorce completely,
- Or put general restrictions on it.

Allah knows best what is good and evil. His laws are full of wisdom.

#### **5: Eating and Drinking**

Allah allowed Muslims to eat good and clean food:

“O you who believe, eat of good things we have provided to you,”<sup>335</sup>

So, no one can say:

- Don't eat a particular food,
- Eat only a certain amount per day or week,

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<sup>335</sup> Qur'ān 2:172

- Or force people to eat certain foods.

However, suppose there's a food shortage (such as not enough for everyone). In that case, a ruler can implement temporary measures, like limiting the amount of food per person, to ensure that everyone receives something. When food becomes enough again, these rules must end.

What Allah made allowed, no one can restrict or force. Only in emergencies can temporary limits be made to protect people. When the emergency ends, the limit must also end. Making permanent rules on what Allah made free is not allowed for anyone.<sup>336</sup>

After this explanation, when we reflect on the issue of setting a minimum age for marriage, it becomes clear that marriage is among those matters permitted in Sharī‘ah by textual evidence. This is considered a form of general legislation that no one has the right to make. In Islam, there is no fixed age for marriage; whenever a person can take on the responsibilities of marriage and is fit physically and financially, it is allowed, even if they are young (bāligh, below 18). So, setting a general age limit for marriage without a strong need or urgent reason falls under making legislation, which is not allowed for anyone.<sup>337</sup>

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<sup>336</sup>

<https://saaid.org/Doat/alsharef/50.htm#:~:text=%D9%88%D8%A7%D9%86%D8%B7%D9%84%D8%A7%D9%82%D8%A7%20%D9%85%D9%86%20%D9%87%D8%B0%D9%87%20%D8%A7%D9%84%D9%85%D9%87%D9%85%D8%A9%20%D8%A7%D9%84%D9%85%D9%88%D9%83%D9%88%D9%84%D8%A9%20%D9%84%D9%87%20%D9%88%D9%85%D8%A7%D9%84%D8%99%D9%85%D9%84%D8%AD%20%D8%A7%D9%84%D8%AA%D8%AD%D9%8A%D9%84%20%D9%84%D9%84%D8%AD%D9%84%D9%84%D9%84%D8%AA%D8%AE%D9%84%D8%B5%20%D9%85%D9%86%D9%87>

<sup>337</sup> Ibid

The opinion that the ruler does not have the right to set a minimum age for marriage is also supported by another well-known legal maxim in Islamic jurisprudence:

(الولاية الخاصة أقوى من ولاية عامة)<sup>338</sup>

Private guardianship is stronger than public guardianship.

This means that the authority of a close guardian (like a father or grandfather) over a specific person is stronger than the authority of public officials (like judges or rulers) over the general public. In matters of marriage, Islamic law grants the right to arrange the marriage of a minor to close relatives, especially the father or grandfather, thereby conferring this special authority, not on the state. Because no one cares more for their children than a father or grandfather, Islamic law grants them special authority (*wilāyah khāṣṣah*) in matters such as marriage. This is stronger than the general authority (*wilāyah ‘āmmah*) that a judge or ruler has over public issues.

Therefore, if in a specific situation the father or grandfather believes it is appropriate to arrange a marriage for a boy or girl at a young age, then the ruler's decision does not override theirs, because private guardianship is stronger than public guardianship.<sup>339</sup>

As Muḥammad Mustafa al-Zuhayli says:

“When both private and public guardianship exist together, the private one is given priority. The public guardian’s decision has no effect when a private guardian is present.

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<sup>338</sup> Ibn Nujaym, *al-Ashbāh wa al-Naẓā’ir*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 199). 134

<sup>339</sup> ‘Abd Allāh ibn Maḥmūd al-Mawṣilī, *Al-Ikhtiyār li-Ta’līl al-Mukhtār*, vol. 3 (Beirut: al-Risālah al-‘Ālamiyah, 2009), 72,73

If a public guardian acts despite the presence of a private guardian, then his action is not valid.”<sup>340</sup>

Aḥmad Ibn Muḥammad al-Zarqā’ stated after the explanation of the above maxim:

(وكذا لا يملك القاضي تزويج الصغار مع وجود الوالي إلا بعد عضله)<sup>341</sup>

The judge does not have the authority to marry off minors while the real guardian is present, except when the judge obstructs the guardian.

“From the above explanation, it is clear:

The authority of the ruler (*ḥākim*) to act in matters that are *mubāh* (permissible) is not absolute or general; somewhat, it is restricted to several conditions and specific cases of *mubāhāt*.

The ruler or judge possesses *wilāyah ‘āmmah* (general guardianship), whereas the father, grandfather, and other close relatives possess *wilāyah khāṣṣah* (specific guardianship). When *wilāyah khāṣṣah* is present, the authority of *wilāyah ‘āmmah* does not become effective. Allah Almighty has given the authority of marriage to fathers and close relatives because no one can show as much love, kindness, and compassion to a child as a parent can. Based on this wisdom, Islamic law has left marriage decisions to individuals, allowing them to marry at whatever age they find suitable.

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<sup>340</sup> Muḥammad Mustafa al-Zuḥayli, *al-Qawā’id al-Fiqhiyyah wa Taṭbīqātuhā fī al-Madhāhib al-Arba’ah* (Damascus: Dār al-Fikr, 2009), 488

<sup>341</sup> Aḥmad ibn Muḥammad al-Zarqā’, *Sharḥ al-Qawā’id al-Fiqhiyyah*, Muṣṭafā Aḥmad al-Zarqā’ (Beirut: Dār al-‘Ālam, 1989), 313

If a judge or ruler interferes in such matters, it would affect people's personal lives. In many cases, even when someone urgently needs to get married, they may not be able to do so due to legal restrictions. This would cause unnecessary hardship, and Islamic law commands the removal of hardship and difficulty from people's lives.<sup>342</sup>

In light of the above principles, it can be concluded that the ruler does not have the right to fix a specific minimum age for marriage or legislate laws to that effect. However, if it is done at a particular time or by some people due to necessity or any other valid reason, it may be allowed; otherwise, the door cannot be opened entirely.

#### **5.4 An Analysis of Sayyduna ‘Umar’s Restriction on Marriage with *Ahl al-Kitāb* (People of the Scripture)**

The people who are in favour of determining the age of marriage take support from the retraction of Sayyduna ‘Umar رضي الله عنه . They argue that ‘Umar retracted Nikāh with the people of scripture, so it allows for us to retract the marriage before a specific age, like 18, as set by the Pakistani Parliament.<sup>343</sup>

We say, no doubt that ‘Umar رضي الله عنه did that, but the case in hand (setting 18 years for marriage in Pakistan) is different from the restriction of ‘Umar رضي الله عنه . He restricted the general permissibility of marrying women from the People of the Book. He prohibited this for the senior Companions and those considered role models so that

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<sup>342</sup> Qur’ān 22:78

<sup>343</sup> Farooq Omar Bhoja, son of Omar Bhoja, Vs Federation of Pakistan, Shariat Petition No.10/1 of 2020

ordinary Muslims would not follow their example in this matter, which could lead to the promotion of marriages with non-Muslim women and the decline of marriages with Muslim women. Furthermore, He رضي الله عنه took care of one other thing, by noticing that many of these women were not chaste, and marrying them might lead to marriage with immoral women. This was a serious issue and was a challenge for Muslim women. So 'Umar رضي الله عنه realized this critical problem and the seriousness of this issue, whose consequences would later be borne by Muslim women. Therefore, he issued this ruling specifically for the rights of women. However, there was no prohibition on marrying chaste women from among the People of the Book for those who were not considered role models among the Muslims. It means that this was not a general restriction, but rather a specific limitation applied to a particular group.

Additionally, 'Umar رضي الله عنه did not declare marriage with the woman of scripture an offence and never prescribed a specific punishment for this, but rather a preference for what is better and more appropriate for those Companions who were role models. If one of the senior Companions had disagreed with him in this regard, he would not have been punished for it.

The proof of this is.

(تَرَوَّجَ حَذِيقَةُ يَهُودَيَّةً، فَكَتَبَ إِلَيْهِ عُمَرُ: خَلَّ سَيِّلَاهَا، فَكَتَبَ إِلَيْهِ: أَتَرْعُمُ أَنَّهَا حَرَامٌ فَأَخْلَقَ سَيِّلَاهَا؟ فَقَالَ: لَا أَرْعُمُ

344 أَنَّهَا حَرَامٌ، وَلَكِنِي أَخَافُ أَنْ تَعَاطُوا الْمُؤْمِنَاتِ مِنْهُنَّ)

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<sup>344</sup> Abū Ja'far Muḥammad bin Jarīr al-Tabari, *Jami' Al-Bayān 'an Ta'wīl Āye al-Qur'ān*, vol.4 (Dār ibn Jawzī, Damam,2022) 2:221

Hudhayfah رضي الله عنه married a Jewish woman. So ‘Umar رضي الله عنه wrote to him: "Leave her." Hudhayfah رضي الله عنه replied: "Do you think she is unlawful (*harām*), so I should leave her? 'Umar رضي الله عنه said: No, I don't say she is *harām*, but I fear that people may start marrying unchaste women among them (the People of the Book). So He رضي الله عنه did not impose any penalty for conducting marriage with them. However, according to Pakistani law, it is an offence to conduct marriage before 18.<sup>345</sup>

## 5.5 Determination of age for marriage is based solely on the agenda of Western human rights, not on Islamic laws

Sharī‘ah considers the matter of Nikāh a personal matter of an individual or a family. Sharī‘ah does not involve itself in these issues; it gives the authority to the guardians when children are below puberty, and after that to the boy and girl to enter into a marriage contract according to its conditions. According to Hanfi's approach, when a boy or girl reaches puberty and they have mental, physical, and financial capacity, both of them may conduct their marriage contract themselves without the permission of guardians, and the contract of Nikāh is *Sahīh* (valid). However, if they married an unsuitable person, then it is allowed for the guardian to claim it before the *Qādhī* (judge) and file a suit for the dissolution of the marriage; the matter will then be decided at the judge's discretion.<sup>346</sup> So, Sharī‘ah mostly leaves this matter on guardians of the minors and after puberty on the contracting parties, because guardians are the best caretakers of the minors and have more love and mercy for their children than the people sitting in parliament and making laws in this regard and after puberty every boy and girl can

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<sup>345</sup> The Child Marriage Restraint Act 1929, Section. 4, 5, 6

<sup>346</sup> ‘Abd Allāh ibn Maḥmūd al-Mawṣilī, *Al-Ikhtiyār li-Ta‘līl al-Mukhtār*, vol. 3 (Beirut: al-Risālah al-‘Ālamiyah, 2009), 72,73

decide best for their best life and bright future than these people. Sharī‘ah states that now they are adults and know right from wrong; each of them is free and has given their consent. Let the matter be left on them; they may do anything they wish and want as long as they are within the boundaries of Sharī‘ah. These are the fundamental human rights given by Sharī‘ah.

On the other hand, nowadays, a great deal is happening in the name of human rights. Various laws are being enacted, and numerous organizations are at work. From the UDHR 1949<sup>347</sup> Till today, a lot of conventions and treaties have been made, like CEDAW<sup>348</sup> and CRC 1989<sup>349</sup>. No doubt, all of these aim at the protection of children and women and emphasize a proper domestic legislation for the protection of children and women<sup>350</sup>. It also requires member states to set a formal age limit for marriage as well as a minimum age for children to work.<sup>351</sup>

Setting an age limit for marriage has already been discussed in light of Sharī‘ah. Here, I aim to investigate the state of the family system and the divorce rate in countries where human rights organizations are highly active. I mean, is the Western family system an ideal system for us?

According to their beliefs, the aim of the aforementioned human rights conventions and treaties is to protect women and children from abuse and to develop the family system.

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<sup>347</sup> Universal Declaration of Human Rights 1948

<sup>348</sup> Convention on the Elimination of All Forms of Discrimination Against Women 1979

<sup>349</sup> Convention on the Rights of the Child 1989

<sup>350</sup> CEC Article 19

<sup>351</sup> CRC Article 1. 24, CEDAW Article 11.

Unfortunately, all in vain, the family system is on the brink of destruction and annihilation. The divorce ratio is higher than in countries where there are no such strict laws for marriage, the relationship between parents and children is so weak, they often leave their parents and choose a boyfriend or girlfriend even at a very young age. The countries where human rights laws are made and implemented are also suffering the biggest problem of family, and that is divorce. The rate of divorce is higher than in the Muslim countries where these organizations are trying to work.<sup>352</sup>

Therefore, Western's family system cannot serve as a role model for us. We must adhere to our Islamic principles and cultural values. The rights that Islam has given to men and women are far better than those granted by the West and are sufficient for the well-being of both.

The current Chairman of the Council of Islamic Ideology in Pakistan, Dr. Raghib Hussain Naeemi, stated that the proposed legislation introduced by MNA Sharmila Faruqui does not align with Islamic injunctions. While acknowledging issues associated with underage marriages, he said such trends should be discouraged through other means, but he deemed the Bill itself unacceptable under Islamic law. He further noted that this Act is based on the propaganda of Human rights and not according to the injunctions of Islam.<sup>353</sup>

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<sup>352</sup> <https://ourworldindata.org/marriages-and-divorces>

<sup>353</sup> <https://raahedaleel.blogspot.com/2025/05/blog-post.html?m=1> also can be found, <https://youtu.be/TBfOt6Tr0vg>

## **5.6 Agenda and recommendations of the Council of Islamic Ideology (CII),**

### **Government of Pakistan, regarding the age of marriage**

The Council of Islamic Ideology has been given a lot of recommendations to the Government on this sensitive issue and declared that this law is.<sup>354</sup> It is purely un-Islamic and against the injunctions of Sharī‘ah. Here are some reports of the Council:

1. It is evident from the Qur’ān, Sunnah, the consensus of the Ummah (ijmā‘), and the clear statements of Islamic jurists that the marriage of a minor boy or girl is valid according to Sharī‘ah. Therefore, any legislation that contradicts this ruling is invalid and unacceptable. Moreover, enacting a law that prohibits the marriage of underage individuals and declares it a punishable offense is a grave transgression, as it carries a serious risk of blasphemy. This is because the Prophet ﷺ entered into the marriage contract with Umm al-Mu’minīn Sayyidah ‘Āishah رضي الله عنها when she was only six years old. Under the provisions of this law, such a noble and blessed act- God forbid-would be deemed a criminal offense. This not only contradicts the unanimously accepted Islamic belief in the infallibility (العصمة) of the Prophets but also entails direct disrespect toward the Messenger ﷺ, which amounts to blasphemy.

Additionally, Section 2-A of the Bill<sup>355</sup> defines all individuals under the age of 18 (both boys and girls) as "children." This definition is not by Sharī‘ah. According to Islamic

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<sup>354</sup> The Child Marriage Restraint Act 1929, and now, Islamabad Capital Territory Child Marriage Restraint Act 2025

<sup>355</sup> Child Marriage Restraint Bill 2009, section 2.

law, if a boy, after reaching the age of 12, exhibits signs of puberty (such as nocturnal emission, ejaculation, or the ability to impregnate), or if a girl, after reaching the age of 9, exhibits signs of puberty (such as menstruation, wet dreams, or physical development), they are considered to have attained puberty and are thus classified as adults. If there are no signs of puberty, then both the boy and girl are deemed legally mature upon reaching the age of 15.

Therefore, in all existing or future laws that involve the concept of age or legal capacity (*bulūgh*), this *Shari‘ah*-based definition of puberty must be incorporated and duly observed. The Council also disagrees with the stated objectives at the end of the Bill, as they reflect a Western ideological framework. Such legislation constitutes an assault on our Islamic family structure and traditional moral values.<sup>356</sup> A detailed note on child marriage is also available.<sup>357</sup>

2. According to *Shari‘ah*, there is no objection to the marriage of minor children.

However, consummation (*Rukhsatī*) before puberty is not free from potential harms. Therefore, it is necessary to impose a legal restriction on *Rukhsatī* before puberty, and it is also essential to prescribe penalties for violating this restriction.<sup>358</sup>

3. The Government should be urged to launch an awareness campaign through religious scholars to discourage child marriage and to promote awareness about this issue in educational institutions. In this regard, the writings of the

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<sup>356</sup> Council of Islamic Ideology, *Annual Report 2012-2013*, Government of Pakistan, p. 94, <https://cii.gov.pk/>

<sup>357</sup> Ibid., 184.

<sup>358</sup> Ibid., *Report 2013-2014*, p. 183.

late Maulana Mufti Muhammad Shafi should be considered, as he stated that child marriage is not free from harmful consequences.<sup>359</sup>

Above all, the recommendations support my stance, and Allah Almighty knows best.

### **5.7 Possible harms of this determination**

Determination of age as 18 years and prohibition of marriage before this age contains a lot of harm, which is as follows:

Firstly, let's clarify that this prohibition and age determination do not fully address the needs of society and fail to protect girls from misuse adequately. The Child Marriage Restraint Act of 1929 states that every girl is considered an adult at the age of 16, and every boy at the age of 18. After this, they are legally allowed to marry, and everything becomes permissible for them.

On the other hand, Sharī‘ah holds that marriage (Nikāh) is possible at any stage. Still, the Act of rukhsatī (consummation) and sexual intercourse must only occur when the girl is physically capable of engaging in such a relationship. If she is not physically capable, then rukhsatī and intercourse are not permissible, regardless of her age.

The implications of both stances can be illustrated in a hypothetical case.

Consider the example of a 19-year-old girl who is physically weak and unable to engage in sexual intercourse. If she were to do so, it could result in serious health complications. Under Pakistani law, since she is above 18, the legal age for marriage,

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<sup>359</sup> Ibid., *Report 2018-1019*, p. 191.

her marriage would be considered valid. Even if sexual intercourse occurred with her consent and it resulted in harm, the husband would not be legally liable.

In contrast, Sharī‘ah takes the well-being of both parties into account. In this case, Sharī‘ah would allow the contract of marriage but would prohibit rukhsatī, as it requires physical readiness, which she does not possess. Therefore, rukhsatī and sexual intercourse would not be permitted until she is physically capable. Ibn Battāl said:

"أجمع العلماء أنه يجوز للآباء تزويج الصغار من بناتهم، وإن كن في المهد ، إلا أنه لا يجوز لأزواجهن البناء  
بهن إلا إذا صلحن للوطء ، واحتملن الرجال".<sup>360</sup>

There is consensus among jurists that a father may lawfully contract the marriage of his minor daughter, even if she is still in the cradle. However, consummation of the marriage is not permitted until she is physically capable of intercourse and able to endure marital relations.

According to Fatāwa ḥindiyyah:

"و اختلفوا في وقت الدخول بالصغرى فقيل: لا يدخل بها ما لم تبلغ، و قيل: يدخل بها إذا بلغت تسع سنين، كذا " في البحر الرائق. وأكثر المشايخ على أنه لا عبرة للسن في هذا الباب وإنما العبرة للطاقة إن كانت ضخمة سمينة تطيق الرجال ولا يخاف عليها المرض من ذلك؛ كان للزوج أن يدخل بها، وإن لم تبلغ تسع سنين، وإن كانت نحيفةً مهزولةً لا تطيق الجماع ويخاف عليها المرض لا يحل للزوج أن يدخل بها، وإن كبر سنها وهو

الصحيح"<sup>361</sup>

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<sup>360</sup> Badr al-Dīn al-‘Aynī, ‘Umdat al-Qārī Sharh Ṣahīh al-Bukhārī, vol. 20 (Beirut: Dār al-Fikr, 2011), 78

<sup>361</sup> Nizām al-Dīn, al-Fatāwā al-Hindiyyah al-ma‘rūfa bi ‘l-Fatāwā al-‘Ālamgīriyyah fī Madhhab al-Imām al-A‘zam Abī Ḥanīfah al-Nu‘mān, vol. 1, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2000), p. 286.

Islamic Jurists have differed regarding the time of consummation with a young girl. Some said: it is not permissible until she reaches puberty, while others said: it may be permitted once she reaches nine years of age, as stated in *Al-Bahr al-Rā'iq*. The majority of scholars, however, hold that age is not the determining factor in this matter, but rather physical capability. Suppose she is physically developed, healthy, and capable of tolerating intercourse without fear of illness. In that case, the husband may consummate the marriage even if the wife has not yet reached the age of nine. However, if she is thin, weak, and unable to endure intercourse, and there is fear of harm, then it is not permissible even if she is older. This is the prevailing opinion."

In this situation, the wife was weak and unable to endure sexual intercourse. Despite this, intercourse took place, and as a result, she died. According to Pakistani law, this may not be classified as a criminal offence, and the husband may not be held criminally liable. However, under Sharī'ah, the husband is considered liable. Sharī'ah does not permit sexual intercourse when the wife is physically weak and unable to bear it. In this case, the husband proceeded with intercourse until it led to her death, demonstrating that he had transgressed the bounds of his rights. This constitutes an abuse of rights under Islamic principles.

The harms are as follows:

1. Unconditionally determining a fixed age for marriage as 18 in Pakistan will be regarded as an alteration of the laws set by Allah Almighty.
2. There is a likely danger with this restriction and determination that tomorrow another law may be passed declaring polygamy a crime as well, just like in

Western countries, because the same verse proves both issues (child marriage and polygamy) are demonstrated by the same verse.<sup>362</sup>

3. This determination involves a violation of both men's and women's rights.

Sharī'ah has revoked even the authority of the father and grandfather after the child reaches puberty, and it grants both men and women complete freedom to marry a suitable spouse of their own choice and with their consent. Now, with such legal restrictions in place, this fundamental right would be taken away from them.
4. Setting the age limit at 18 contradicts nature, as it suggests that males and females typically reach puberty by the age of 15, whereas the law claims it occurs at 18.
5. If natural and legal paths are obstructed, the youth may potentially choose alternative, often harmful, routes. This could lead to a rise in immorality, secret relationships, and unlawful marriages in society, which would affect not just the individual but also families and the broader community.
6. Nature dictates that sexual desires arise in men and women upon reaching puberty. Now, if puberty occurs at the age of 15, then making them wait until 18 poses the risk that they may seek sexual gratification through unlawful means.
7. This restriction is likely to increase cases of elopement, as marriage is being restricted on one hand while co-education is being promoted on the other.
8. This will lead to an increase in unregistered marriages.

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<sup>362</sup> Qur'ān 4:6

9. It is our observation that, at times, a girl may initially reject marriage because she has many ambitions and plans for her future. She postpones marriage, hoping to achieve specific goals first. However, as time passes and she begins to lose her youthful beauty and physical fitness, she becomes eager to marry as soon as possible. At this stage, she often faces one of two problems:

- She may not find a suitable and compatible partner. Sometimes, a wealthy man proposes to her, and she feels she has no choice but to accept him at an older age purely for financial reasons.
- In other cases, she is unable to find any suitable partner at all because, over time, she has lost much of her beauty and appeal. As a result, she falls into depression and anxiety.

### **5.8 Harms of marrying before the age of 18 and its appropriate solutions**

Let me clear one thing again: Sharī‘ah preserves our religion, property, intellect, life, and progeny. It never commands an action that is harmful to an individual or society. Sharī‘ah sets a rule that Nikāh is allowed after puberty, even before. Now this ruling is not obligatory in typical cases; rather, it is merely optional. If someone needs and wishes to get married, it is allowed for them to do so. If someone feels that marriage is harmful to them, then it is not only allowed to avoid marriage, but Sharī‘ah also obliges them to avoid Nikāh. Islam is a complete religion; it contains the solution to every problem. A notable point is that Sharī‘ah does not specify an age for marriage. Why? Of course, from our perspective, since Sharī‘ah always prioritizes the interests of individuals and society, in this case, the aim of Sharī‘ah is that the matter of Nikāh is a personal matter for individuals, and they, or their guardians, are well aware of their situations. So Sharī‘ah says that you should get married when you need and

wish, at any stage of your age. However, in some situations, Sharī‘ah obliges some people to get married, especially in the case of one who is capable of getting married and is afraid that if he does not get married, he will be committing a major sin. In this case, marriage is obligatory for them.<sup>363</sup> Some solutions are as follows:

**Some people object that early marriage is harmful for girls, and early pregnancy is more dangerous.**

We believe that this is not a universal issue, but rather one that varies from person to person and place to place. Many girls, particularly in rural areas, marry after reaching puberty and lead happy and fulfilling lives. Why should this not be the case? This aligns with nature itself, as nature suggests that when a girl reaches puberty, she is capable of marriage and motherhood. However, if early pregnancy poses risks to a girl's health, then she should avoid pregnancy or even marriage altogether. But this is an individual decision, not a general issue for everyone. Therefore, why should the age of marriage be fixed for all, and why should marriage be treated as a punishable act? This goes beyond reason.

**Some people say that if there is no restriction on marriage below 18, then it is likely to increase cases of eloping.**

This objection is based on a misunderstanding of Sharī‘ah. In cases where a girl marries after reaching puberty and is capable of marriage, the Nikāh (marriage) is valid. However, according to the Hanafi school of thought, if the guardians are

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<sup>363</sup> al-Mawṣilī, *Al-Ikhtiyār*, 3:92.

opposed to the marriage and can prove that the groom is not *kuf'* (suitable) for her, they have the option to seek *faskh al-nikāh* (dissolution of the marriage).<sup>364</sup> This is a well-known concept, and our courts often make decisions based on this principle.<sup>365</sup>

**One common objection is that, due to his young age, a boy is not capable of earning a living on his own; how will he bear the responsibility of another person (the bride)? As a result, after marriage, he may be unable to fulfill all the rights of his wife, which can lead to various problems.**

This objection typically arises from those who are unfamiliar with the teachings of Sharī'ah. Sharī'ah provides reassurance regarding financial provision after marriage. The Holy Qur'ān clearly states: “*Arrange the marriage of the spouseless among you, and the capable from among your bondmen and bondwomen. If they are poor, Allah will enrich them out of His grace.*”<sup>366</sup> This verse means that if someone is capable of taking on the responsibilities of marriage but he is poor, and he seeks to protect himself from sin and live a chaste life, then he should get married, and Allah will provide for him from His bounty.<sup>367</sup>

**5.8.1 Logic also supports this:** when a boy is unmarried, he often does not feel a strong sense of responsibility. He may rely on pocket money from his father or brothers and live without much concern for earning a living. However, once he is married, he becomes more conscious of his responsibilities. He starts thinking seriously about

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<sup>364</sup> Al-Sarakhsī, *Al-Mabsūt*, vol. 5, Dār al-Kutub al-Ma'rifah, Beirut. P. 25, 26

<sup>365</sup> Hafiz Abdul Waheed vs Asma Jehangir (PLD 2004 SC 219)

<sup>366</sup> Qur'ān 24:32

<sup>367</sup> Muftī Muḥammad Shafī', *Ma 'āriful al-Qur'ān*, 24:32

earning a living, finding a job, or doing any work to support his family. In this way, marriage becomes a motivation for him to take responsibility and become financially independent.

So, Sharī‘ah has opened the door to marriage after puberty, and in some cases, even before it. Everyone is free to decide what is best for themselves. If a male or female believes that getting married is beneficial for them due to their capabilities, the option should remain open. On the other hand, if someone feels that marriage is not suitable for me at the moment, they are free to wait and marry when they are ready.

## 5.9 Contemporary Fatāwah

Jāmi‘ah ‘Ulūm-e-Islāmiyyah, Binoori Town, Karachi, has stated in various *fatāwās* that the Child Marriage Restraint Act of 1929 is repugnant to the Sharī‘ah. According to their view, the state has no authority to fix a minimum age for marriage, and any marriage conducted below the age of 18 is still considered a valid and binding contract under Islamic law.<sup>368</sup>

In another fatwa, it is stated that marriage below the age of 18 is valid. However, regarding intercourse, Islam has placed a condition: if the girl is not physically capable of tolerating intercourse, the husband is not permitted to have relations with her. But if

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<sup>368</sup> کیا ریاست نکاح کے لیے عمر کی حد مقرر کرنے کی مجاز ہے؟ | جامعہ علوم اسلامیہ علامہ محمد یوسف بنوری ٹاؤن Published in Bayyanāt, <https://www.banuri.edu.pk/bayyinat-detail/%DA%A9%DB%8C%D8%A7-%D8%B1%DB%8C%D8%A7%D8%B3%D8%AA-%D9%86%DA%A9%D8%A7%D8%AD-%DA%A9%DB%92-%D9%84%DB%8C%DB%92-%D8%B9%D9%85%D8%B1-%DA%A9%DB%8C-%D8%AD%D8%AF-%D9%85%D9%82%D8%B1%D8%B1-%DA%A9%D8%B1%D9%86%DB%92-%DA%A9%DB%8C-%D9%85%D8%AC%D8%A7%D8%B2-%DB%81%DB%92>,

she is capable of tolerating it and there is no fear of harm or illness, then in such a case, the husband is permitted to have relations with her.<sup>369</sup>

### **5.10 Logic and my stance**

Determining a specific age for marriage is extremely difficult because every individual is different. The mental and physical development of each person varies, and these differences are influenced by factors such as climate, geographical location, and diet. In some regions, minors may mature—both physically and mentally—more rapidly than in others.

Therefore, applying a fixed age of marriage uniformly across an entire country can lead to significant challenges. It is far more reasonable to approach the issue on a case-by-case basis. When a person attains the physical and mental capacity for marriage, they should be allowed to marry.

One boy or girl may be fully prepared for marriage at the age of 15, while another may not be ready even at 20. Hence, setting a universal marriage age goes against logic and practical wisdom.

Nikāh (marriage) is permitted by Sharī‘ah even before puberty; however, *rukhsatī* (consummation or cohabitation) is only allowed when the girl is physically and mentally capable of it. Due to the negligence of guardians and the potential misuse of

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<sup>369</sup> Fatwāh No. 144307102504, issue date: 27 July 2025, <https://www.banuri.edu.pk/readquestion/athara-sal-say-kam-umar-ki-larki-shadi-ka-hukum-144307102504/04-03-2022>

authority, it is within the jurisdiction of the state to impose a prohibition on child marriages (before puberty) arranged by guardians.

The state should take this matter seriously and may, in consultation with qualified Islamic scholars, prohibit marriage after puberty as well, but not so easily, if there are valid reasons such as necessity, emergency, or public welfare. However, such a prohibition should not be considered permanent or universal; it should apply only in specific circumstances and not to all individuals indiscriminately.

However, such a prohibition should not be considered permanent or universal; it should apply only in specific circumstances and not be imposed indiscriminately on all individuals. In Pakistan, however, the legal age of marriage is fixed at 16 for girls and 18 for boys. This blanket restriction is permanent and applies to everyone, regardless of individual circumstances. As such, it goes against the spirit of Sharī‘ah, which allows flexibility based on maturity and context, and is not necessarily in the genuine interest of the people.

## **5.11 Conclusion**

In this chapter, the judgments of some apex courts are discussed in **Mst. Bakhshi vs. Bashir Ahmad and another (PLD 1970 Supreme Court 323)**, it is declared that Islamic law does not encourage Child marriage or early marriage at all. Islamic law allows only the contract of Marriage if the guardians feel any interest in the minors, not the *Rukhsatī* and sexual intercourse. Lowering the 18-year age of marriage will create numerous problems for many people.

In **Mst. Mumtaz Bibi vs Qasim and others (Writ Petition No. 4227 of 2021)**, it was held that Nikāh is not a civil contract, but rather a contract of worship and a religious

duty. Marriages under 18 years of age are not declared void marriages either by the Child Marriage Restraint Act, 1929, or by International treaties/conventions; however, they disapprove of them but do not declare them null and void.

In **ABDUL RAZAQ VS THE STATE AND ANOTHER (2022 P Cr. L J 953 ISLAMABAD)**, it is stated that *Rushd* is not required for the validity of marriage; it is only needed for financial transactions. No one among the interpreters of the *Holy Qurān* said that *Rushd* is a requirement of a valid marriage contract. The Principle of *Sadd al-dharā'i* is applied here in the wrong way.

In **Nasreen Bibi vs. Station House Officer, etc. (Writ Petition No. 63301/2021)**, it is discussed that a marriage under 18 is valid.

In **Nazar Muhammad Vs. DPO, etc (Writ Petition No.57371 of 2023)**, predominantly Islamic law, is discussed and declared that marriage after puberty is a valid marriage even if it is before 18 years. It is also addressed that marriage in such cases is not considered rape.

## **CONCLUSION AND RECOMMENDATIONS**

### **6.1 Conclusion**

Conclusively, my research presents an analysis of the determination of the age of marriage in Pakistan in the light of the Apex courts' judgments, the Sharī'ah perspective, specifically focusing on the legitimacy and illegitimacy of child marriage. In addition to this, the study has discussed whether there is an appropriate age for marriage or whether *Bulūghat* (Puberty) is sufficient. To answer this question, the stance of

Pakistani Law regarding the age of marriage, the stance of Sharī'ah, the medical sciences, and the stance of the people's practices and customs are discussed.

According to the Holy Qurān and Sunnah, there is no specific age for marriage; the criteria of Sharī'ah regarding marriage are simply puberty. Puberty appears in males and females with different signs, for example, wet dreams, Ejaculation, the growth of coarse hair on the pubic and armpit, Menstruation, pregnancy, etc. When none of the signs of puberty appear, then puberty for males and females must be determined by the number of years. Jurists hold differing opinions on this matter. According to the preferred saying in the Hanfani school of thought, it is 15 years for both males and females. The Shafī'ī school assumes that maturity is attained at the age of fifteen years for both males and females. Hanbali scholars hold the view that at 15 years old, both males and females are regarded as mature. According to Maliki scholars, the age of puberty is assumed to be 15 for boys and 9 for girls. According to Abu Dawood Zahrī, there is no puberty without a sign of puberty, even though a male or female reaches 40 years old. According to Pakistani law (the Child Marriage Restraint Act of 1929), the age is 18 for males and 16 for females. Such an Act is silent about the validity of marriage if done before 18 years; however, it imposes a penalty on the guardians by whom such marriage is solemnized. In the context of medical science, the perspective on the age of marriage is discussed, and it states that Development begins slightly earlier in boys than in girls, but at any rate, not earlier than the age of 9 and not later than 14. In girls, the process of puberty typically begins between the ages of 8 and 13. It also discusses the various signs of puberty in males and females. Medical science states that early marriage is harmful for both males and females. This research also covers the customs and practices of the people concerning the age of marriage. The customs of people vary; those in urban areas have their customs, while those in rural

areas have their own. The practice of early marriage is most commonly observed in rural areas; however, in urban areas, people tend to delay marriage. They believe that early marriage has numerous adverse effects on the lives of the bride and groom. This research also aims to declare that child marriage or early marriage **الزواج المبكر** is not void and not against the Sharī'ah. Child marriage means where either party to the marriage contract is a minor. It is also held by the author that there is no appropriate age for marriage in Islām. Islamic criteria for marriage include puberty as well as physical, mental, and financial capability.

There is also a comprehensive analysis of the Pakistani apex court's judgments and their comparison to the Sharī'ah, in **Mst. Bakhshi vs. Bashir Ahmad and another (PLD 1970 Supreme Court 323)**, it is declared that Islamic law does not encourage Child marriage or early marriage at all. Islamic law allows only the contract of Marriage if the guardians feel any interest in minors, not the *Rukhsatī* and sexual intercourse. Lowering the 18-year age of marriage will create numerous problems for society.

In **Mst. Mumtaz Bibi vs Qasim and others (Writ Petition No. 4227 of 2021)**, it was held that Nikāh is not a civil contract, but rather a worship and a religious duty. Marriages under 18 years of age are not declared void marriages either by the Child Marriage Restraint Act, 1929, or by International treaties/conventions; however, they disapprove of them but do not declare them null and void.

In **ABDUL RAZAQ VS THE STATE AND ANOTHER (2022 P Cr. L J 953 ISLAMABAD)**, it is stated that *Rushd* is not required for the validity of marriage; it is only needed for financial transactions. No one among the interpreters of the *Holy Qurān* said that *Rushd* is a requirement of a valid marriage contract. The Principle of *Sadd al-dharā'i* is applied here in the wrong way.

In **Nasreen Bibi vs. Station House Officer, etc. (Writ Petition No. 63301/2021)**, it is discussed that a marriage under 18 is valid.

In **Nazar Muhammad Vs. DPO, etc (Writ Petition No.57371 of 2023)**, predominantly Islamic law, is discussed, and it is declared that marriage after puberty is a valid marriage even if it is before 18 years. It is also addressed that marriage in such cases is not considered rap.

Nikāh (marriage) is allowed in Sharī‘ah before puberty, but rukhsatī (cohabitation) is only permitted when the girl is physically and mentally ready. Due to the risks of misuse by guardians, the state can restrict child marriages to protect minors. The state may also limit the age of marriage after puberty in special cases (e.g., emergencies or public welfare), but such restrictions should be temporary and case-specific, not universal.

In Pakistan, the law sets a fixed marriage age: 16 for girls, 18 for boys. It goes against the spirit of Sharī‘ah, which allows flexibility based on maturity and context, and is not necessarily in the genuine interest of the people

## **6.2 Findings and Recommendations**

Pakistan is an Islamic Country. The intention behind the foundation of this country was to establish a nation where sovereignty would belong solely to Allāh, Islām would be the dominant religion, Islamic law would be the law of the land, and all disputes would be decided according to Islamic Law. Therefore, these purposes were declared by the Constitution of the Islamic Republic of Pakistan as well as by the legislative body, for example, the Enforcement of Sharī‘ah Act, 1991. According to section 4 of the said Act,

"If more than one interpretation is possible, the one consistent with Islamic principles and jurisprudence shall be adopted by the Court.

In this regard, I found some things that I recommend to our legislative bodies and our courts, these are:

- It is a need of the time to amend our oldest laws, which were legislated for a colonial system. The Child Marriage Restraint Act (CMA) 1929 should be revised to align with Sharī‘ah, recognizing puberty as the age of marriage.
- Instead of an absolute ban on marriage below 18, it should be allowed with the guardian's consent and under judicial oversight in exceptional cases.
- Courts must interpret all the laws within an Islamic framework, especially marriage laws, recognizing that Nikāh (marriage) is more than a civil contract. It is an act of worship and a religious duty.
- The Judgment of the August Supreme Court (PLD 1970 SC 323) should be followed, as it does not invalidate marriages contracted below the statutory age.
- Fifteen years should be the legal marriage age, in line with Hanafi jurisprudence, which considers puberty at 15 in the absence of physical signs.
- There is a pressing need for exceptions to early marriage with judicial approval, based on the Islamic principle of *Maslaḥa* (public interest).
- Father and grandfather (guardians) of the minor must be allowed to solemnize the mere contract of marriage, not *Rukhsatī*, if they see an interest of the minor.
- The principle of blocking means to haram (*Sadd al-Dhara'i*) should be applied to prevent fornication (Zinā), not to delay marriage.

- Courts should harmonize judgments to avoid conflicting interpretations of Sharī‘ah (Islamic Law) and statutory law.
- Courts should seek assistance from Islamic scholars ('ulamā), and they should be actively involved in legal interpretation and policymaking.
- Sharī‘ah (Islamic law) must be taught in all legal educational institutions, so that students of law also have a basic understanding of Islamic law.
- Sharī‘ah must be the basic requirement for the appointment of judges, which means they must be knowledgeable about Sharī‘ah and Islamic law.
- Those customs and practices of people should be allowed by law that are not against Islām and are not harmful to the health of boys and girls.
- At present, due to the challenges posed by social media, co-education, and globalization, avenues for moral deviation and the establishment of un-Islamic and illegal relationships have been facilitated. Therefore, it is necessary to allow marriage immediately after puberty and to grant guardians full authority to arrange the marriage of minor children even before puberty, within the bounds of Islamic law.

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111. The Enforcement of Sharī‘ah Act,1991
112. The Muslim Family Laws Ordinance 1961
113. The Sindh Child Marriage Restraint Act, 2013
114. The Sindh Orphanages (Supervision and Control) Act,1976
100. United Nations Convention on the Rights of the Child, 1989, Article No. 1

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## List of the Qur'ānic verses

Sr. No.	Qur'ānic Verse	Page No.
1.	"وَلَقَدْ أَرْسَلْنَا رُسُلًا مِنْ قَبْلِكَ وَجَعَلْنَا لَهُمْ أَرْوَاحًا وَدُرَيْةً"	2
2.	وَمِنْ عَابِرِهِ أَنْ خَلَقَ لَكُمْ مِنْ أَنفُسِكُمْ أَرْوَاحًا لِتَسْكُنُوا إِلَيْهَا وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً إِنَّ فِي ذَلِكَ لَكَيْاً ثُلَّتْ لِقَوْمٍ يَتَفَكَّرُونَ	10
3.	وَجَعَلَ بَيْنَكُمْ مَوَدَّةً وَرَحْمَةً"	12
4.	فَانْكُحُوا مَا طَابَ لَكُمْ مِنَ النِّسَاءِ مَنْتَنَ وَثَلَثَ وَرُبَاعٍ	16
5.	"غَيْرَ مُسَفِّحَاتٍ وَلَا مُتَّخِذَاتٍ أَخْدَانٍ"	16
6.	"هُنَّ لِيَامُ لَكُمْ وَأَنْتُمْ لِيَامُ لَهُنَّ"	21
7.	فَإِنْ عَالَسْتُمْ مِنْهُمْ رُشْدًا	26
8.	"وَإِذَا بَلَغَ الْأَطْقَلُ مِنْكُمُ الْحُلُمَ فَلَيْسَ عِذْنُوا كَمَا أَسْتَعْدَنَ الَّذِينَ مِنْ قَبْلِهِمْ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمْ عَابِرِهِ وَاللَّهُ عَلِيمٌ حَكِيمٌ"	31
9.	وَكَانُوا أَحَقُّ بِهَا رَأْهُلَهَا	35
10.	وَالَّذِي يَوْسِنَ مِنَ الْحَيْضَرِ مِنْ ذَسَائِكُمْ إِنْ أَرْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةً أَشْهُرٍ	40

11.	وَإِنْ خَفْتُمْ أَلَا تُقْسِطُوا فِي الْيَتَامَىٰ فَإِنَّهُمْ يُخْرُجُونَ مَا طَابَ لَهُمْ مِّنَ الْيَتَامَىٰ مَتَّعْنَىٰ وَمُؤْكِدَتُ وَرُبَّعٌ	41
12.	"وَأَبْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا الْتِكَاحَ فَإِنْ عَانَتْهُمْ مِّنْهُمْ رُشْدًا	48
13.	"وَلَا تَنْكِحُو مَا نَكَحَ عَابِرُوكُمْ	51
14.	"الرَّازِي لَا يَنْكِحُ إِلَّا رَازِيَةً	51
15.	"وَأَبْتَلُوا الْيَتَامَىٰ حَتَّىٰ إِذَا بَلَغُوا الْتِكَاحَ	97
16.	وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْصَنَ بَعْضُهُمْ إِلَى بَعْضٍ وَأَخْذُنَ مِنْكُمْ مِّيقَانًا عَلَيْهَا	112

## List of Hadīths

Sr. No	Text of Hadīths	Page. No
1.	"إذا تزوج العبد فقد استكمل نصف الدين فليتق الله في النصف الباقي	17
2.	"لا يتم بعد احتلام"	43
3.	"عن عائشة رضي الله عنها قالت: تزوجها رسول الله صلي الله عليه و سلم و هي ست سنين و أدخلت عليه و هي بنت تسع و مكثت عنده تسعًا"	46
4.	"فروجه رسول الله - صلي الله عليه و سلم - بنت حمزة: و هما صبيان صغيران: فلم يجتمعوا حتى ماتا اخ"	46
5.	"تزوج قدامة بن مظعون - رضي الله عنه - إبنة الزبير حين نفست فقيل له ف قال: إبنة الزبير إن مات ورثني و إن عشت كانت امرأتي"	47
6.	"زوج علي - رضي الله عنه - أم كلثوم إبنته و هي صغيرة عمر بن الخطاب - رضي الله عنه	47
7.	"ولدت من النكاح" أي من وطء حلال"	51
8.	"يحل للرجل من إمرأته الحائض كل شيء إلا النكاح"	52
9.	أربعة من سنن المرسلين: الحياة والتعطر والسواك و النكاح	117
10.	"يَا مَعْشَرَ الشَّبَابِ مَنِ اسْتَطَعَ الْبَاءَةَ فَأَبْيَأْرُجْ، فَإِنَّهُ أَعْنَى لِلْبَصَرِ، وَأَعْصَنَ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ، فَإِنَّهُ لَهُ وِجَاءٌ".	127

