

Azka Wahid Versus Province of Punjab & others
2024 LHC 1392

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Pakistan has the 6th highest number of child marriages in the world.¹ Around 18 percent of girls are married before they reach the age of 18.² Marriages of girls within the 16-18 years age bracket were legal under the Child Marriage Restraint Act, 1929 (“the Act”) across Punjab, Khyber Pakhtunkhwa, and Baluchistan.³ While adjudicating a recently filed petition, the Lahore High Court (“LHC”) declared the allowance of marriage of girls in this age bracket under the Act as unconstitutional.

The Petition, in this case, challenged the constitutional validity of the Sections 2(a) and 2(b) of the Act. Section 2(a) defines “child” as “a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age.”⁴ Section 2(b) then uses this definition of “child” to define and prohibit child marriage, implying that 16-18 year-old girls could legally get married, unlike males who can only marry upon attaining the age of majority at 18 years. The Petitioner alleged that this was gender-based discrimination and, consequently a violation of Article 25 of the Constitution, which provides for “equal protection of the law” for all citizens and prohibits discrimination based on sex.⁵

¹ NCSW and UNWP, *Costing Study on Child Marriage in Pakistan: A Report on Punjab and Khyber Pakhtunkhwa 2020* (2020), 2.

² ‘Child Marriage Atlas’ (Girls Not Brides) <[³ In 2014, Sindh increased the minimum age of marriage for girls to 18 years under The Child Marriage Restraint Act, 2013 to clamp down on forced marriages of young Hindu girls.](https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/atlas/pakistan/#:~:text=Minimum%20legal%20age%20of%20marriage%20below%2018%20years,-What's%20the%20prevalence&text=18.3%25%20of%20girls%20in%20Pakistan,before%20the%20age%20of%2018.> accessed 13 April 2024.</p></div><div data-bbox=)

⁴ Child Marriage Restraint Act, 1929, s 2(a).

⁵ 2024 LHC 1392, [1]

In response, the Government of Punjab argued that the difference in the legally mandated age for marriage is rooted in Islamic jurisprudence, which considers puberty as a marker of maturity, consequently allowing female children to be married off at a relatively younger age.⁶ Nevertheless, the LHC, while tracing the intent behind the legislation clarified that the issue at hand was the State’s authority to regulate minimum age for marriage – which is distinct from and not singularly a religious prerogative, and also separate from when a child may hit puberty. Relying collectively on Articles 25(3) and Article 35 of the Constitution, the Court held that the Act is a special legislation that outlaws child marriage,⁷ yet also allows 16-18 year-old girls to be legally married. The Court further held that Section 2(a) of the Act violates the right to equality protected under Article 25, and therefore, is unconstitutional to the extent that it postulates different minimum ages for marriage between both genders. Focusing on the protection of “the mother and the child” in Article 35, the Court stated that the protection of the mother is essential, and thus a law allowing child marriage of girls is problematic.⁸ To materialise the Principles of Policy set under Article 35, the State must put focus on the protection of “mother and child” as the center focus of the family.⁹ Evidently, the Court is locating the State’s authority to enact the Child Marriage Restraint Act in Article 35.¹⁰ Therefore, the judgment can be seen as a positive step in aligning ordinary statutes with Constitutional protections. It sets the tone for future jurisprudence to move towards progressive legislation that upholds the fundamental right to be treated equally, and also ensures that laws remain consistent with the Principles of Policy laid down in the Constitution.

⁶ Ibid [4].

⁷ Ibid [10].

⁸ The Constitution of Islamic Republic of Pakistan, 1973, Article 35.

⁹ Principles of Policy enshrined in Part 1 Chapter 2 of the Constitution are non-justiciable, long-term goals or ideals stipulated in the Constitution by the framers of the Constitution and are often used as tools for constitutional interpretation.

¹⁰ (n 5) [8].

Another notable aspect of the judgment is the movement away from often-quoted religious and biological justifications for child marriage. In a nub, the Court derived the intent behind the legislation of the Act to be based on socio-economic rather than religious factors, thereby providing space to maneuver out of potential inconsistencies with Islamic jurisprudence on the issue of child marriage.¹¹ While the Court did not here consider the Islamic Repugnancy clause under Article 227 of the Constitution, the finding was consistent with earlier precedent from the Federal Shariat Court. In *Farooq Omar Bhojha versus Federation of Pakistan*, the FSC held that setting a minimum age for marriage was important to ensure girls' education.¹² It also rooted its reasoning in *Hadith* to reach the decision. Regardless, that an official minimum age of marriage for girls for marriage is still a contentious topic is evident from a petition filed in the FSC against the Sindh Child Marriage Restraint Act, 2013.¹³

In addition to the factors pointed out by the Court, the intent of the legislature could have also been derived from the preamble of the Punjab Child Marriage Restraint (Amendment) Act 2015, which brought the Section 2(a) as it stood at the time of the Petition. The preamble of the said amendment act cited a need to curb the menace of child marriage prevalent in the country and to save women from exploitation on that account. While the religious contestations surrounding child marriage were not answered in this judgment, declaring Section 2(a) unconstitutional, to the extent that it discriminates between ages of male and female, is a welcome move in the socioeconomic context of Pakistan where there is a high rate of child marriages. The dismal social landscape concerning child brides not only hampers the economic potential of the country by hindering their education

¹¹ Ibid [6]

¹² PLD 2022 FSC 1.

¹³ Ishaq Tanoli, 'Federal Shariat Court upholds Sindh law on minimum age for marriage' Dawn (7 Mar 2023).

but also translates into high maternal and infant mortality rates, exacerbated health complications, and underdeveloped human resource.