

Child Marriages: Determination of the Age of Marriage Under the Law of Pakistan

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Abstract

Despite global progress, Pakistan struggles with the challenge of child marriages, owing to anachronistic laws and ineffective enforcement. Girls Not Brides, an international non-governmental organisation, reports that 18% of Pakistani girls are married before their eighteenth birthday. The Child Marriage Restraint Act, 1929 ('CMRA' or the 'Act') is almost a hundred years old, enacted to restrict marriages amongst underaged children in the Indian subcontinent. While many countries have developed and adopted effective legislation tackling child marriages, Pakistan still subscribes to this archaic Act. The state has taken few legislative steps to outlaw child marriages, and these efforts have largely been unsuccessful in domesticating international treaty requirements or curbing child marriages. This paper examines the factors contributing to child marriages in Pakistan and the relevant jurisprudence, and recommends that significant legislative changes be introduced by the Parliament. This paper suggests that underaged marriages should be invalidated, greater punishments should be imposed on *Nikah* (marriage contract) registrars for solemnising child marriages, and medical boards should be constituted in cases of 'disputed ages'. In sum, a comprehensive overhaul of the law on child marriages is needed to completely do away with this practice.

Introduction

Article 35 of the Constitution of the Islamic Republic of Pakistan, 1973 (the 'Constitution') provides for the protection of the family, the mother, and the child, while Article 37 of the Constitution specifically prescribes the promotion of social justice and eradication of social evils.¹ Whereas the Constitution has guaranteed these rights, domestic legislation, in the form of the CMRA—which is nearly a

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¹ *Alisha Bibi v. State* PLD 2020 IHC 28 [20], wherein child marriages were expressly referred to as a social 'evil'.

hundred years old—has been unable to restrain child marriages adequately. By continuing with the archaic provisions of the CMRA, the state has been unable to cater to the morphing social conditions of the modern day and has also failed to comply with its international commitments.

Furthermore, the Parliament's reluctance to amend the law has contributed to some perturbing contradictions in the jurisprudence. As suggested by numerous recent decisions of the Pakistani courts, only an all-encompassing reform effort can put the issue of child marriages to rest once and for all and bring the domestic legislation in line with country's international obligations and commitments.

Background

I. Prevalence and Impact of Child Marriages

As per the United Nations International Children's Emergency Fund ('UNICEF'), a child marriage 'refers to any formal marriage or informal union between a child under the age of 18 and an adult or another child.'² According to an Islamabad-based non-governmental organisation, there were 119 cases of child marriages reported in Pakistan in 2020, of which 95% and 5% involved girls and boys, respectively.³ Girls Not Brides further reports that '18% of girls in Pakistan are married before their 18th birthday, and 4% are married before the age of 15.'⁴ UNICEF notes that in 2018, 4.6 million girls in Pakistan had been married before the age of fifteen, and 18.9 million had been married before the age of eighteen.⁵

Child marriage has many adverse effects, especially for girls who, as a result of such marriages, lose their rights to personal development, education, and health. According to the National Library of Medicine, child marriages prevent girls from

² UNICEF, 'Child marriage' (*unicef*) <<https://www.unicef.org/protection/child-marriage>> accessed 23 July 2022.

³ Sahil, 'Cruel Numbers 2020' (*Sahil*) <<https://sahil.org/cruel-numbers/>> accessed 5 September 2022.

⁴ 'Pakistan' (*GirlsNotBrides*) <<https://www.girlsnotbrides.org/learning-resources/child-marriage-atlas/regions-and-countries/pakistan/>> accessed 29 July 2024.

⁵ UNICEF Pakistan, 'Child Marriage Country Profile' <<https://www.unicef.org/pakistan/media/4151/file/Child%20Marriage%20Country%20Profile.pdf>> accessed 21 July 2024.

‘obtaining an education, enjoying optimal health, bonding with others their age, maturing, and ultimately choosing their life partners.’⁶ The United Nations Population Fund Pakistan (the ‘UNFPA’) reports how girls who are subject to child marriages fall victim to domestic abuse and violence and experience significant health issues.⁷

II. Legislation and Jurisprudence

One of the main flaws in the CMRA is the distinction it creates between the definition of a female and male child. The CMRA defines a child as ‘a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age.’⁸ By way of comparison, other Muslim-majority countries have prescribed the minimum age of marriage for girls as eighteen years or higher. For example, the minimum age of marriage for boys and girls in Egypt, Oman, Qatar, Morocco, and Turkey is eighteen years.⁹ In Algeria, the minimum age for marriage is nineteen years for boys and girls, whereas in Bangladesh, the age limit is set at eighteen years for girls and twenty-one for boys. Similarly, Indonesia has fixed the minimum marriage age for boys and girls at nineteen years.¹⁰

Although some of the aforementioned countries do not strictly follow the same schools of *Shariah* law,¹¹ the examples are noteworthy because they show that the problem transcends any single school of Sunni Islamic jurisprudence. For instance, Turkey is predominantly Hanafi, while Egypt follows the Shafi School, with Morocco and Qatar adhering to the Maliki and Hanbali schools, respectively.

⁶ Nawal M. Nour, ‘Health consequences of child marriage in Africa’ (2006) 12(11) NLM 1644 <<http://dx.doi.org/10.3201/eid1211.060510>> accessed 29 July 2024.

⁷ UNFPA Pakistan, ‘Child Marriage in Punjab: A Political Economy Analysis and Policy Options’ (2022) 17 <<https://pakistan.unfpa.org/en/publications/child-marriage-punjab-political-economy-analysis-and-policy-options>> accessed 29 July 2024.

⁸ Child Marriages Act 1929, s 2(a).

⁹ Mega Puspita and Nindya Octariza, ‘The Rule Minimum Age of Marriage in Islamic Family Law in the Muslim World’ (2022) IJSSR 196 <https://www.researchgate.net/publication/361846686_The_Rule_Minimum_Age_of_Marriage_in_Islamic_Family_Law_in_the_Muslim_World> accessed 21 July 2024.

¹⁰ Ibid.

¹¹ The Constitution of the Arab Republic of Egypt 2014, art 2 which declares Islamic *Shariah* to be the principal source of legislation; Basic Statute of the State (Oman) 1996, art 2 which declares that *Shariah* law shall be the basis of legislation; and the Permanent Constitution of the State of Qatar 2004, art 1 which states that *Shariah* shall be the main source of legislation.

All of the aforementioned countries are signatories to treaties such as the Convention on the Rights of the Child¹² ('CRC'), the Convention on the Elimination of All Forms of Discrimination Against Women¹³ ('CEDAW'), and the Universal Declaration of Human Rights¹⁴ ('UDHR'). This shows that despite varying forms and levels of enforcement of *Shariah*, these countries have abided by their treaty obligations to balance human rights laws with Islamic standards. This further implies that the countries deem the potential harms associated with child marriages to outweigh religious factors.¹⁵ In comparison, the Pakistani Parliament has, on multiple counts, refused to update the minimum age of marriage for girls in the CMRA citing 'religious reasons.'¹⁶

The Parliament, by enacting the CMRA, did acknowledge the need for imposing sanctions on child marriages. However, despite the existence of the Act, child marriages are still prevalent in Pakistan. This suggests two main points of contention. First, the implementation of the Act, in its current form, has been inefficient. Second, the Parliament was not convinced to move for a change to the CMRA despite the developing social norms of the country, newly discovered medical impacts, and legal loopholes, thereby resulting in an ineffective and outdated law. Similarly, the courts also reached conclusions that were at odds with the core purpose of the CMRA, which is to restrict child marriages. For instance, in *Bakshi v. Bashir Ahmed*, the Supreme Court of Pakistan ('Court') held the marriage of a girl under the age of sixteen to be contractually valid.¹⁷ This clearly undermined the very purpose of the Act.

¹² Pakistan ratified the Convention on the Rights of the Child on 12 November 1990, making a reservation on interpreting its provisions following the principles of Islamic laws and values. In 1997, Pakistan decided to withdraw its reservation.

¹³ Pakistan ratified CEDAW on 3 December 1996.

¹⁴ Pakistan became a signatory to the UDHR in 1948.

¹⁵ Religious factors refer to the belief that one may enter into a contract of marriage on the onset of puberty.

¹⁶ Ikram Junaidi, 'Senate body rejects amendment to child marriage act as "un-Islamic"' *Dawn* (Islamabad, 12 October 2017) <<https://www.dawn.com/news/1363275/senate-body-rejects-amendment-to-child-marriage-act-as-un-islamic>> accessed 29 July 2024.

¹⁷ *Mst. Bakshi v. Bashir Ahmed* PLD 1970 SC 323.

The Lahore High Court has, however, delved into the devastating medical implications of child marriages in *Tahira Bibi v. SHO*.¹⁸ The case law that followed highlights the gaps in the CMRA more clearly.¹⁹ In *Tahira Bibi*, Justice Anwaar ul Haq Pannun used empirical evidence as support for the notion that a lower age of marriage for girls would ‘not only restrict women from socio-economic opportunities but also affect their reproductive health status such as forced sexual relations, early and complicated pregnancies, higher fertility rate and large family size formation.’²⁰ Justice Pannun expanded the ambit of his argument, citing how the issue of child marriages ‘hampers the development process of a region or a country’ as a ‘substantial part of the human population, the women, remain uneducated or less educated, unemployed and underprivileged with poor health measures and no decision-making power.’²¹

The *Tahira Bibi* decision is notable in how it supports the idea that changing social mores have made girls more vulnerable to the after-effects of child marriages—no prior judicial decision had acknowledged the egregious implications of child marriages. While the judgement does not comment on whether the minimum age of marriage for girls should be enhanced,²² it nonetheless reiterates that *Nikah* registrars are under a legal duty to verify whether the contracting parties to a marriage are of legal age. The judgement offers support for the idea that there is an ever-present need to update the CMRA, as the law in its current form is virtually toothless:

It is a matter of great concern that despite ninety years of the promulgation of the Act, 1929, its objectives could not have been achieved satisfactorily due to certain lapses or loopholes in the mechanism for its enforcement. The children are still being lured by unscrupulous elements through deceitful means to abuse their innocent souls.²³

¹⁸ *Tahira Bibi v. SHO* PLD 2020 LHC 811 [9]: ‘Physically, the child bride has a small pelvis and is not prepared for childbearing. It results in deliveries that are too early or late. This exposes them to different complications.’

¹⁹ *Abdul Razaq v. State* PCrLJ 2022 IHC 953 [7]: ‘...the law is vague and not clear about the age of a person to contract *Nikah*.’

²⁰ *Tahira* (n 18) [9].

²¹ *Ibid*.

²² *Ibid* [8]: ‘It is quite vivid that the act does not hold the minor responsible for violation of the provision of the Act 1929. It also does not invalidate the marriage itself...’

²³ *Ibid*.

The Legal Landscape and Contributors to Child Marriages

I. Incompatibilities in the Domestic Law

In Pakistan, the various statutes on marriage rights are sparse in their wording and do not prescribe a single, unanimous minimum age for marriage. The Muslim Family Law Ordinance 1961 ('MFLO') does not incorporate a minimum age requirement for constituting a valid marriage, while the Dissolution of Muslim Marriages Act, 1939 ('DMMA') only provides for the possibility of dissolution when a girl under the age of sixteen had been married off by her guardian.²⁴ The assumption under the DMMA is that sixteen is the age of majority—the age after which an individual is no longer classified as a 'child'.

Similarly, while the CMRA defines a girl as being above 'sixteen years' for the purposes of entering into a contract of marriage, Section 3 of the Majority Act, 1875 ('Majority Act') defines a minor as an individual who is below the age of 'eighteen'. This highlights the inherent inconsistency between the two Acts. However, some commentators have pointed out that the Majority Act itself resolves this contradiction. Section 2(a) states that 'nothing herein contained shall affect the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption.' This ostensibly means that these matters shall be governed by the statutes that respectively apply to them.

Moreover, as mentioned previously, Pakistan is a signatory to the CRC, CEDAW, and the UDHR, all of which have fixed the threshold for the minimum age of marriage at eighteen years for all children.²⁵ By signing these treaties, Pakistan is under a duty to legislate in a way that is consistent with the manner and form of these treaties. However, to date, only the province of Sindh has increased the minimum age of marriage to eighteen years for girls through the Sindh Restraint

²⁴ Dissolution of Muslim Marriages Act 1939, s 2(vii).

²⁵ Angela Melchiorre, 'A minimum common denominator? Minimum ages for marriage reported under the Convention on the Rights of the Child' (2011) OCHR <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/AngelaMelchiorre.pdf>> accessed 29 July 2024.

of Marriage Act, 2013—the implementation of which has also been rather ineffective.²⁶

II. Cultural Practices

In the rural areas of Pakistan, the practice of *Swara*²⁷ (also known as *Wani* or arranged or forced marriage) is often used to solve familial disputes. This practice employs the *Jirga* (tribal council) system which consists of councils of senior and religious members of the society who act as an informal judicial body.²⁸ *Jirgas* often give away female offspring or women to solve conflicts between disputing parties. For instance, if a member of one family kills a member of another, the *Jirga* may urge the former family to marry off their female child to a member of the wronged family. The wronged family, in turn, accepts that female child as compensation for the crime.²⁹

The statistics on marriages conducted under the *Swara* system in Pakistan are concerning, particularly in the provinces of Sindh, Khyber Pakhtunkhwa, and Balochistan. According to a 2013 household survey of five thousand women conducted by the Rutgers World Population Foundation in Naseerabad, Muzaffargh, Jaffarabad, Dera Ghazi Khan, Kashmore, and Jacobabad, more than 77% of marriages were arranged under *Swara*.³⁰ As per government statistics from the same year, merely nine instances of *Swara* marriages were reported, while

²⁶ Hafeez Tunio, 'Law Fails to Thwart Child Marriages' *The Express Tribune* (Islamabad, 7 October 2022) <<https://tribune.com.pk/story/2380506/law-fails-to-thwart-child-marriage>> accessed 29 July 2024.

²⁷ Dr Mudasra Sabreen, 'Swara Marriages and Related Legal Issues' (2015) IIU 40 <<http://dx.doi.org/10.2139/ssrn.3641315>> accessed 5 July 2022.

²⁸ Farooq Yousaf, 'Jirga, Its Role and Evolution in Pakistan's Pashtun "Tribal" Society' (2021) *Clan and Tribal Perspectives on Social, Economic and Environmental Sustainability*, Emerald Publishing Limited 105–117 <https://www.researchgate.net/publication/349696680_Jirga_Its_Role_and_Evolution_in_Pakistan's_Pashtun_Tribal_Society> accessed 13 July 2024.

²⁹ National Commission on the Status of Women, 'Women, Violence and Jirga' (2017) 17 <<https://ncsw.gov.pk/SiteImage/Downloads/Women,%20Violence%20and%20Jirgas%20Consensus%20and%20Impunity%20in%20Pakistan.pdf>> accessed 29 July 2024.

³⁰ Sehrish Wasafi, 'Survey finds 77% of marriages made in traditional exchanges' *The Express Tribune* (Islamabad, 12 February 2013) <<https://tribune.com.pk/story/506066/survey-finds-77-of-marriages-made-in-traditional-exchanges>> accessed 22 July 2024.

human rights advocates posit that the actual number of *Swara* cases was significantly greater.³¹

Section 310-A of the Pakistan Penal Code, 1860 ('PPC') explicitly bars the practice of *Swara* and prescribes a punishment 'which may extend to seven years but shall not be less than three years' for engaging in the act. In addition to the precise language used by the legislature, the Court in the case of *Samar Minallah*³² specifically abolished the custom of *Swara*, ruling that weddings consummated under such a custom had no legal standing. As a result, all women whom the *Swara* custom had constrained into arranged marriages were to be set free. Though the Court did not specifically refer to an international human rights standard as justification for the decision, it nonetheless unambiguously declared that women have fundamental rights that were unalienable under the law.

The court's declaration that *Swara* weddings are blatant defilements of women's freedom with no legal validity³³ is particularly interesting given how the scope of this argument was not extended to forced child marriages conducted outside the *Swara* context. In comparison, it appears strange that an underaged child who is forced into a marriage by a *Wali* (guardian) cannot have the marriage contract repudiated while an identical marriage in the context of *Swara* stands null and void in the eyes of law.

III. Religious Beliefs & Inconsistencies in Interpretation

Another major contributor to the ineffective implementation of the minimum age requirement for marriage in Pakistan stems from certain interpretations of religious injunctions by different courts, which have given rise to inconsistencies in the law.

³¹ Ibid.

³² *Samar Minallah v. Federation of Pakistan* Constitutional Petition No. 16 of 2004.

³³ *Mst. Sakeena Bibi v. Secretary Law, Government of Pakistan* PLD 2022 FSC 57 [13]; see also *Gul Sher v. Additional and Sessions Judge* PLD 2023 LHC 171 [3]–[12]. The judgement alluded to the UDHR, ICCPR, and CEDAW as well as Articles 25, 36, and 37 of the Constitution of Islamic Republic of Pakistan, 1973 to conclude that 'the custom of *vani* or *swara* is un-Islamic.'

One must keep in mind that Pakistan is an Islamic country with a large Hanafi sect.³⁴ As per the Hanafi school of thought, the age for marriage is contingent upon the onset of puberty. In this regard, it must be stated that ‘the Hanafis consider eighteen years for a boy and seventeen years for a girl as the age of maturity.’³⁵ However, that is the maximum age for maturity, whereas ‘the minimum age limit according to them is twelve years and nine years for a boy and a girl respectively.’³⁶ An introductory survey of the other sects of Sunni Islamic jurisprudence, namely the Maliki, Shafi’i, and Hanbali sects, reveals that they also ‘do not adhere to the concept of the minimum age of marriage.’³⁷

In determining the minimum age for marriage, scholars and practitioners place great reliance on legal commentaries such as D.F. Mullah’s *Mohammadan Law*. The judgement in the case of *Muhammad Khalid v. Magistrate 1st Class*³⁸ dealt with the issue of whether a 14-year-old girl could enter a contract of marriage without the consent of a guardian. The Lahore High Court, in delivering the verdict, relied heavily on the decision in *Muhammad Iqbal v. State*³⁹ for ruling that ‘a girl who has attained puberty may contract marriage with a man of her own choice.’⁴⁰ The judgement in *Muhammad Khalid* also refers to *Mohammadan Law* to rationalise the notion that the onset of puberty sanctions entry into a contract of marriage, and this was held not to violate the CMRA. The judgement, in placing reliance on a legal commentary for ruling that the onset of puberty is the determinant for obtaining the status of ‘adult’, as opposed to heeding the legal requirement under the CMRA itself, sets up a dangerous precedent. The inconsistency stems from the fact that the age of puberty varies from individual to individual, and hence, there can be no consistent determinant for marriage therein.

³⁴ John L. Esposito ‘Islam in Pakistan’ (*Oxford Islamic Studies Online*, 2012) <https://web.archive.org/web/20130618023219/http://www.oxfordislamicstudies.com/article/opr/t125/e1809?_hi=1&_pos=1> accessed 29 July 2024.

³⁵ Muhammad Jawad Mughniyya, ‘Marriage According to the Five Schools of Islamic Law’ (*Al-Islam.org*, 1997) 8 <<https://www.al-islam.org/printpdf/book/export/html/43417>> accessed 29 July 2024.

³⁶ *Ibid.*

³⁷ Afrizal Maisarah, Zulfahmi, F. Mauliza, and F. Murni, ‘Minimum Marriage Age: Study of Fiqh of Four Madhabs’ (2019) 150 *BloHS* <<http://biarjournal.com/index.php/biohs/article/view/46>> accessed 29 July 2024.

³⁸ *Muhammad Khalid v. Magistrate 1st Class* PLD 2021 LHC 21.

³⁹ *Muhammad Iqbal v. State* PLD 1983 FSC 9.

⁴⁰ *Muhammad Khalid* (n 38) [7].

Moreover, by relying on *Mohammadan Law*, the judgement undercuts the importance of the CMRA itself which is binding legislation.

If principles of *Mohammadan Law* have to be relied upon (as has been done in *Muhammad Khalid* and *Muhammad Iqbal*) to reach decisions, then it is important to also rely on the Islamic legal principle known as *la dharar*,⁴¹ which translates to ‘no harm’ or ‘avoiding harm’. This describes a situation where, if the benefit accrued from an act exceeds the harm, only then can the harmful act be condoned. Since medical science has indisputably proven that the harm inflicted upon girls through child marriages outweighs any potential benefits, it follows that an application of the principle of *la dharar* results in a ban on child marriages.

Interestingly, this aspect was dealt with in the recent Federal Shariat Court (‘FSC’) decision in *Farooq Omar Bhoja v. Federation of Pakistan*.⁴² This case involved a dispute regarding the minimum age of a child for *Nikah*. Assessing the facts of the case, Justice Dr. Syed Muhammad Anwer emphasised that a minimum age for marriage is desirable, as it is in line with Islamic values and is beneficial to the society. In reaching this conclusion, Justice Anwer referred to the ‘settled principle of *Shariah*’ wherein if ‘any *Mobah* (permitted) 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 that the society can be protected from a larger [*sic*] damage.’⁴³ Besides, Justice Anwer alludes to the principle of *Sad-uz-Zaraey* under which it is the ‘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.’⁴⁴

Thus, the courts, in *Muhammad Iqbal* and *Farooq Omar Bhoja*, have taken differing approaches and utilised contrasting interpretations in relation to child marriages. While the Court in *Muhammad Iqbal* was of the view that the onset of puberty is sufficient for contracting a marriage, the FSC in *Farooq Omar Bhoja*

⁴¹ Musawah, ‘Report to be written pursuant to HRC Resolution A/HRC/RES/24/23 on child, early and forced marriage’ (*musawah*, 13 December 2013) <<https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/ForcedMarriage/NGO/Musawah.pdf>> accessed 29 July 2024.

⁴² *Farooq Omar Bhoja v. Federation of Pakistan* PLD 2022 FSC 1.

⁴³ *Ibid* [6].

⁴⁴ *Ibid*. [7].

defended the minimum age of marriage as enshrined in the CMRA. The author of this paper argues that the decision in *Farooq Omar Bhoja* portrays the FSC's progressive stance in enforcing the minimum age bracket for a valid marriage and that the proposition of a minimum age is backed by sound religious reasoning and logic. Nonetheless, it must be noted that the FSC, in *Farooq Omar Bhoja*, did not go into detail about whether the minimum age should be increased to eighteen years. Instead, the FSC defended the currently existing minimum age of sixteen years as prescribed by the Parliament 'in the impugned law.'⁴⁵ This suggests that the FSC is willing to enforce decisions imposing a higher minimum age bracket for child marriages if Parliament amends the CMRA accordingly.

Recent Developments in Jurisprudence

Despite the Parliament's reluctance to update the law, the judiciary has recently become open to highlighting the issues in the CMRA.⁴⁶ In the recent case of *Abdul Razaq v. State*,⁴⁷ Islamabad High Court acknowledged the existence of 'anomalies in law with respect to the age of a person to contract *Nikah*.'⁴⁸ The Islamabad High Court also accepted the idea that 'it is not only puberty which is the criteria for granting consent but there is also requirement of being 'Rushd', i.e., a person being able to decide for himself and exercise good judgement.'⁴⁹

In referring to the *Dictionary of Modern Written Arabic* by Hans Wehr, Justice Aamer Farooq remarked that 'Rushd has been explained/defined as the integrity of (one's) actions, proper, sensible conduct; reason, good sense, senses; consciousness; maturity (of the mind).'⁵⁰ Therefore, a person can only contract for a *Nikah* when they have reached puberty and 'can form good decisions and have a maturity of mind.'⁵¹ In this regard, the Court's decision in *Hafiz Abdul Waheed v. Mrs. Asma Jehangir*⁵² was also referred to wherein it was stated that where a

⁴⁵ Ibid [3].

⁴⁶ *Tahira* (n 18) [8].

⁴⁷ *Abdul Razaq* (n 19).

⁴⁸ Ibid [7].

⁴⁹ Ibid [7] and [12].

⁵⁰ Ibid [12].

⁵¹ Ibid.

⁵² *Hafiz Abdul Waheed v. Mrs. Asma Jehangir* PLD 2004 SC 219.

woman is of the appropriate age, the ‘consent of Wali’⁵³ is not required, and a *sui juris* (possessing full social and civil rights⁵⁴) Muslim women can enter into a valid *Nikah*/marriage of her own free will.⁵⁵

In light of this reasoning, Justice Farooq referred to how the minimum age for marriage in the Hanafi school of thought, ‘as per Imam Abu Hanifa (R.A), for male is 18 years and for female 17-years’⁵⁶ whereas ‘D.F. Mullah in *Mohammadan Law* has mentioned the age for Hanafi women as 15 years.’⁵⁷ In *Abdul Razaq*, although Justice Farooq rendered his decision in light of the parties’ respective schools of thought, which prescribed the minimum age of marriage as being ‘17 years’, this was not in line with the express wording of the CMRA. The issue here is not with courts’ deviation to ensure a just application of the law but with the legislature’s failure to update the archaic provisions of the CMRA which have, to an extent, lent themselves to varying interpretations and therefore bred gaping judicial inconsistencies.

The case of *Abdul Razaq* not only grapples with the inherent contradictions within the law on child marriages but also exposes them: although ‘other Islamic countries have passed laws fixing age for both a male and female person to contract marriage,’⁵⁸ Pakistan’s reluctance to update the CMRA in accordance with today’s currents has exacerbated the problem. In concluding his judgement, Justice Farooq expressly remarked how ‘in the above backdrop, it is appropriate that the Federal Government should intervene and legislate upon the matter to remove all the anomalies as such.’⁵⁹

More recently, the Lahore High Court dealt with this issue in *Azka Wahid v. Province of Punjab*⁶⁰ wherein the definition of ‘child’ as prescribed under Sections 2(a) and 2(b) of the CMRA was struck down. In reaching his conclusion, Justice Shahid Karim drew inspiration from the Sindh Child Marriages Restraint

⁵³ Legal guardian.

⁵⁴ *Black’s Law Dictionary* (5th edn, 1979).

⁵⁵ *Hafiz Abdul Waheed* (n 52) [29]; *Abdul Razaq* (n 19) [13].

⁵⁶ *Abdul Razaq* (n 19) [12].

⁵⁷ *Ibid*.

⁵⁸ *Ibid* [9].

⁵⁹ *Ibid* [15].

⁶⁰ *Azka Wahid v. Province of Punjab & Others* LHC 2024 1392.

Act, 2013 and the constitutional protections provided in Articles 25 and 35 of the Constitution. The primary focus of the judgement pivoted on the noticeable gap between the law and religious beliefs, and Justice Karim reasoned that ‘the purpose of law is anchored primarily in social, economic, and educational factors rather than religious.’⁶¹

In assessing the true intent of the Parliament, the Justice Karim cast aside the argument that child marriages could be justified given the early attainment of puberty for females. The essential purpose of the CMRA, the Justice Karim held, is to ‘restrain the solemnisation of child marriage’—a purpose that has ‘been muddled by providing different ages for males and females for which there is no intelligible criteria.’⁶² In concluding his judgement, Justice Karim ruled that the provincial government is empowered to enforce a minimum age for marriage, and had the Parliament intended to make the minimum age of marriage contingent on the onset of puberty, it would have expressly said so.

The Lahore High Court directed the government to amend the CMRA accordingly. This judgement is a welcome development as it takes an important step in ironing out the ambiguities plaguing incredibly inconsistent laws. However, the legislature has not, till date, brought any amendments to the Act.

The Validity and Aftermath of Child Marriages

Once a child marriage has been solemnised, the law is eerily silent as to whether it stands as a legally valid contract or is null and void. In *Bakshi v. Bashir Ahmed*,⁶³ the Court held that if a girl under the age of sixteen entered a contract of marriage in contravention of the CMRA, the marriage would not become void, though the individuals who contracted the marriage may attract criminal culpability.

*Ghulam Qadir v. the Judge Family Court, Murree*⁶⁴ also dealt with the issue of the validity of a minor entering a contract of marriage. Although the Lahore High Court acknowledged that minors were not competent to enter a contract of

⁶¹ Ibid [6].

⁶² Ibid [5].

⁶³ *Mst. Bakshi* (n 17).

⁶⁴ *Ghulam Qadir v. the Judge Family Court, Murree* CLC 1988 113.

marriage, it found that minors may still be married off by their guardians. Most notably, however, the Court opined that the marriage of a child is tantamount to a voidable contract, and it could be repudiated.

The abovementioned decision of the Lahore High Court is atypical in how it postulates that child marriages may be declared void, mainly owing to the fact that no specific *pari materia* legal provision in the CMRA or any other statute exists. Despite this, the view of the majority of courts on the matter is that child marriages cannot be annulled. In this regard, the Islamabad High Court took a different approach through its judgement delivered in *Mumtaz Bibi v. Qasim*:

As will be discussed later in this opinion there are clear statutory provisions proscribing acts that no one can engage in when they involve a child under the age of 18. In the presence of such clear and unequivocal statutory provisions criminalizing certain acts and behaviour, there is no room to engage in any further interpretive exercise to determine whether or not a child marriage falls within the domain of prohibited conduct in Pakistan.⁶⁵

The *ratio decidendi* in *Mumtaz Bibi* is notable for several reasons. First, it analyses the concept of child marriage vis-à-vis the law of contract while also incorporating a discussion on the penal provisions triggered by an underage marriage. Second, it uproots the idea that legal commentaries such as *Mohammadan Law* by D.F. Mullah are to be treated as law, distinguishing such commentaries from legislation passed by a democratically elected Parliament.⁶⁶ Third, it adopts a purposive approach to interpretation and attempts to decipher the true intent of the Parliament in enacting the CMRA to reduce child marriages. Fourth, it considers international commitments and treaties to which Pakistan is a signatory and stresses the need to interpret domestic jurisprudence in a way that is consistent with the form and manner of such treaties.

The underlying logic in the judgement is noteworthy—Justice Babar Sattar refers to cases such as *Shahab Saqib v. Sadaf Rasheed*⁶⁷ and *Malik Mumtaz Qadri*

⁶⁵ *Mumtaz Bibi v. Qasim* PLD 2022 IHC 228 [18].

⁶⁶ Ibid [13]: ‘Dinshaw Mulla’s commentary can therefore not be treated as a source of law itself but like any other treatise commenting on a subject of law can be used as a reference and a commentary.’

⁶⁷ *Shahab Saqib v. Sadaf Rasheed* Writ Petition No. 2355/2015.

*v. State*⁶⁸ to support the idea that the state has a legitimate interest in governing relationships under Muslim Personal Law and that preferences for certain schools of Islamic jurisprudence should not alter the trajectory of decisions that ought to be based on express statutory provisions:

...this Court's opinion rendered in *Shahab Saqib*: It can thus not be permissible for a judge to assume the role of the legislature and determine what the Muslim Personal Law ought to be (which determination is then binding in terms of Articles 189 and 201 of the Constitution) on the basis of his preference for a certain school of Islamic thought or his personal understanding of *Usool-al-fiqh* and *Shariah*. The Constitution has thus addressed this issue as also elucidated by the august Supreme Court in *Malik Muhammad Mumtaz Qadri*. A provision of law that is considered to fall foul of the commands of *Shariah* can be challenged only before the Federal Shariat Court in terms of Article 203D of the Constitution and the jurisdiction of the High Courts is ousted for such purpose under Article 203G...⁶⁹

Justice Sattar equates a contract of marriage to a contract to enter into sexual relations, and then points out the inherent contradiction in the situation as envisioned under the CMRA. The current state of law is such that it categorises as rape (under Section 375 of the PPC) instances where sexual intercourse is carried out with a woman under the age of sixteen, with or without her consent. Moreover, the offence of sexual abuse, as introduced by the Criminal Law Amendment Act, 2016 through the insertion of Sections 377A and 377B in the PPC, covers instances where the victim is less than eighteen years of age, irrespective of whether the act is performed with the consent of the victim. As such, Justice Sattar reasons that to hold that contract law would condone such a contract while the corresponding penal provisions envision criminal culpability would be greatly illogical and wholly unsustainable.⁷⁰

The foregoing, in conjunction with Sections 11 and 23 of the Contract Act, 1872 and Pakistan's international commitments under the CRC and the UDHR, led

⁶⁸ *Malik Mumtaz Qadri v. State* PLD 2016 SC 17.

⁶⁹ *Mumtaz Bibi* (n 65) [16].

⁷⁰ *Ibid* [25].

Justice Sattar to conclude that the marriage of a girl below the age of eighteen constitutes an illegal contract and is *void ab initio*.⁷¹ The applicability of the judgement in *Mumtaz Bibi*, in invalidating marriages of children aged below eighteen, remains restricted to Islamabad. Nonetheless, it has a persuasive effect on the rest of the provinces. Apart from accounting for Pakistan's international obligations, the judgement is progressive in nature and sound in reasoning.

I. Disputed Age Cases

The validity of a marriage is often called into question where there is an issue of 'disputed ages'. The typical dilemma in such situations is that a minor elopes against the wishes of her legal guardians, but later contends that she is *sui juris* and has attained puberty. A recent case that dealt with such a matter is *Alisha Bibi v. State*⁷² wherein the Islamabad High Court held that the accurate determination of age is a question of evidence which is to be decided by the trial court. Moreover, the High Court issued directions to 'curb the evil of child marriages'⁷³ by: (i) revoking the licences of and criminally prosecuting *Nikah* registrars for conducting child marriages; and (ii) directing that National Database and Registration Authority ('NADRA') link marriage registration certificates to birth certificates to avoid inconsistencies as to one's age.

The progressive nature and rationale of the *Alisha Bibi* judgement does not appear to have influenced the jurisprudence in other provinces. The problem of disputed ages was again brought to the spotlight through the Dua Zehra case. Dua Zehra, a fourteen-year-old resident of Karachi, was reported missing from Korangi on the 16th of April 2022.⁷⁴ On the 25th of April, Zehra was found, but she stated that she was eighteen years old and had eloped to marry, while her parents vehemently contested the marriage, claiming that she was underage.⁷⁵ On the 19th of May, a magistrate refused to accept the police's plea seeking a medical examination to determine Zehra's age. After several attempts, a medical board was finally constituted on 25th June by the Sindh High Court. Zehra's test results were

⁷¹ Ibid [28].

⁷² *Alisha* (n 1) [20].

⁷³ Ibid.

⁷⁴ Editorial, 'Timeline of the Dua Zahra case' *AAJ News* (Karachi, 9 January 2023) <<https://www.aajenglish.tv/news/30293228>> accessed 29 July 2024.

⁷⁵ Ibid.

then returned on 4th July, declaring her to be fourteen years of age.⁷⁶ Zehra's custody was given to her parents, through whom she then filed a petition for annulment of marriage. However, on 8th March 2025, a judicial magistrate in Karachi dismissed the petition, declaring the marriage to be lawful.⁷⁷

The Dua Zehra case presents a fine example of how the laws concerning child marriages are riddled with insurmountable inconsistencies. Nonetheless, till date, no amendments have been brought in the law requiring mandatory medical examinations where there is uncertainty about the betrothed parties' ages. The reluctance to reform the law on child marriages has resulted in an almost identical situation in the case of a fourteen-year-old girl, Nimra Kazmi.⁷⁸ It is argued that concrete changes, along the lines of the directions contained in the *Alisha Bibi* judgement—which mandate strict punishments for *Nikah* registrars, promote government-maintained online portals for verifying ages, and require medical examinations for determining disputed ages—ought to be brought.

II. The Potential for Reforms in the Child Marriages Act

The reluctance of the Pakistani Parliament to legislate on this issue has become apparent on multiple occasions. At the provincial level, a proposed Child Marriage Amendment Bill in 2014 failed to gain approval from the Khyber Pakhtunkhwa Assembly. Similar bills were also mooted in both 2019⁷⁹ and 2021⁸⁰; however, nothing came to fruition. On the other hand, Punjab introduced the Punjab Marriage Restraint Act in 2015, which did not alter the legal age for marriage but instead

⁷⁶ Rana Bilal, 'Dua Zehra moved back to Karachi from Lahore, placed in child protection centre' *Dawn* (Islamabad, 24 July 2022) <<https://www.dawn.com/news/1701330>> accessed 27 July 2024.

⁷⁷ News Desk, 'Court declares Dua Zehra, Zaheer Ahmed's marriage valid' *The Express Tribune* (Islamabad, 8 March 2025) <<https://tribune.com.pk/story/2533092/court-declares-dua-zehra-zaheer-ahmeds-marriage-valid>> accessed 19 March 2025.

⁷⁸ Tariq Ismail, 'Missing Nimra Kazmi emerges happily married in DG Khan' *The Express Tribune* (Islamabad, 26 April 2022) <<https://tribune.com.pk/story/2354255/missing-nimra-kazmi-emerges-happily-married-in-dg-khan>> accessed 27 July 2024.

⁷⁹ UNFPA, 'Child Marriages in Khyber Pakhtunkhwa: A Political Economy Analysis and Policy Options' (2020) 32 <https://pakistan.unfpa.org/sites/default/files/pub-pdf/child_marriage_kpk_book_1_0.pdf> accessed 29 July 2024.

⁸⁰ Editorial, 'Bill to restrain underage marriage submitted in KP Assembly' *Associated Press of Pakistan* (Islamabad, 14 June 2021) <<https://dailytimes.com.pk/772871/bill-to-restrain-child-marriage-submitted-in-kp-assembly/>> accessed 29 July 2024.

increased prison sentences and fines for child marriages.⁸¹ These parliamentary efforts highlight the ongoing struggle to address and reform child marriage laws in Pakistan.

At the national level, the Child Marriage Restraint (Amendment) Bill, 2017, was swiftly rejected by the Senate Standing Committee, which reasoned that ‘increasing the minimum age for girls to marry from 16 to 18, was contrary to Islamic injunctions.’⁸² Senator Kamran voiced the frustration of many citizens stating, ‘Girls as young as ten are being married off in Pakistan even though the legal minimum age for getting married is 16...If the government thinks 16-year-old girls are adults, they should also be issued driving licences and allowed to cast votes.’⁸³ Another attempt to amend the law came with the Child Marriage Restraint (Amendment) Bill, 2019, which sought to expand the definition of a child to include individuals under eighteen. However, despite being passed in the Senate,⁸⁴ it was ultimately rejected by the National Assembly.⁸⁵

Apart from the *Azka Wahid* judgement, the closest glimmer of reform from the Lahore High Court appears in the *Tahira Bibi v. SHO* judgement, which has suggested that rigorous measures ought to be enforced to curb child marriages. In his judgement, Justice Pannun highlighted numerous flaws observed in the *Nikah* registration process. He observes that *Nikah* registrars often fail to demand proof of the betrothed parties’ ages in the form of their authentic NADRA-issued National ‘Identity Card, B-Form, or school leaving certificate(s). Instead, they rely on self-estimates as to their age during registration of the marriage.’⁸⁶ To address this issue, Justice Pannun recommended making it mandatory to provide authentic proof of identity, specifically birth certificates issued by the concerned Union Council and

⁸¹ Punjab Marriage Restraint (Amendment) Bill 2015, s 4–6.

⁸² Junaidi (n 16).

⁸³ Ibid.

⁸⁴ Mumtaz Alvi, ‘Bill against marriage under 18 sails through Senate’ *The News International* (Islamabad, 30 April 2019) <<https://www.thenews.com.pk/print/465072-bill-against-marriage-under-18-sails-through-senate>> accessed 29 July 2024.

⁸⁵ Muhammad Anis, ‘NA body on Law rejects Child Marriage Restraint Bill’ *The News International* (Islamabad, 22 August 2019) <<https://www.thenews.com.pk/print/515514-na-body-on-law-rejects-child-marriage-restraint-bill>> accessed 29 July 2024.

⁸⁶ *Tahira* (n 18) [4].

‘medical certificate(s) based on ossification test(s) issued by the competent authority.’⁸⁷

In concluding his judgement, Justice Pannun strongly urged that *Nikah* registrars and Union Councils assume greater responsibility in preventing child marriages, suggesting stricter checks and balances such as revoking the registration licences of those found illegally facilitating such marriages.

Nonetheless, the common thread running throughout the *Tahira Bibi* judgement is that much more could be done to curb child marriages, such as the Parliament legislating to render child marriages *void ab initio*, as suggested by the Islamabad High Court in *Mumtaz Bibi*. Moreover, medical tests to determine age should be mandated in cases where the individual’s age is contested or unclear. Ultimately, the judiciary can only demand a strict application of the existing law. However, where the situation demands that the law be amended, as in the case of child marriages, the judiciary’s hands remain shackled pending further legislation by the concerned legislatures.⁸⁸

III. International Obligations

From an international perspective, it appears that Pakistan has not taken its commitments seriously. When a nation ratifies a particular international treaty, it is obligated to enact domestic legislation that complies with the terms of the agreement and should effectively integrate the latter’s provisions within the local legal framework.⁸⁹ International bodies can hold Pakistan accountable for keeping the marriageable age of girls at sixteen, for failing to exercise due diligence, and for the continued prevalence of customary child marriages within its society, as documented by statistical evidence.

In 1990, Pakistan became a signatory to the CRC, committing to set the minimum age of marriage at eighteen years. In 1996, Pakistan signed CEDAW,

⁸⁷ Ibid.

⁸⁸ Sara Raza, ‘Child Marriages: A Commentary on *Tahira Bibi v. SHO and Others*’ (*Lahore Education and Research Network*, 2020) <<http://learnpak.com.pk/wp-content/uploads/2020/08/TBSOCC.pdf>> accessed 20 July 2024.

⁸⁹ Vienna Convention on the Law of Treaties 1969, art 26–27; ICCPR, art 2(2); CEDAW, art 2(a).

which obligates states to ensure free and consensual marriages amongst its citizens. Moreover, Article 16(2) of CEDAW expressly requires states to set a specific minimum age for marriage and further states that the ‘betrothal and the marriage of any child’ below the prescribed minimum age should have ‘no legal effect’—a provision that still has not found a place in Pakistan’s domestic legal framework. It is nonetheless apparent from the foregoing that Pakistan has failed to comply with its international obligations.

Pakistan has also not ratified the Optional Protocol to CEDAW. The Optional Protocol provides a mechanism through which citizens can submit complaints to the CEDAW Committee and directly hold the state parties accountable for violations of rights. Pakistan’s refusal to ratify the Optional Protocol demonstrates a lack of legislative ambition, as avoiding the Protocol prevents it from being held liable under the international agreement. Without an individual complaint and inquiry procedure, CEDAW loses its ability to impose sanctions on the nation.

In addition to these treaties, Pakistan has also subscribed to the South Asian Initiative to End Violence Against Children (‘SAIEVAC’), which is committed to ending child marriages by 2018.⁹⁰ Moreover, Pakistan committed to ending child marriages on the South Asian Association for Regional Co-operation’s (‘SAARC’) platform, the Kathmandu Call to Action to End Child Marriage, too.⁹¹ These international commitments amount to little more than hollow promises, as the Parliament has repeatedly failed to enact effective restraints on child marriages despite numerous opportunities. By reviewing judicial precedents on child marriages, it appears as though *Mumtaz Bibi* is one of the very few judgements that recognised Pakistan’s international commitments vis-à-vis child marriages and employed them as a tool of statutory interpretation.

⁹⁰ SAIEVAC ‘Regional Action Plan to End Child Marriage in South Asia’ <https://www.girlsnotbrides.org/documents/719/RAP_Child_Marriage.pdf> accessed 29 July 2024.

⁹¹ European External Action Service, ‘South Asian Association for Regional Cooperation (SAARC)’ (*European Union External Action*) <https://www.eeas.europa.eu/eeas/south-asian-association-regional-cooperation-saarc_en> accessed 29 July 2024.

Conclusion and Recommendations

In conclusion, the CMRA is outdated and fails to provide adequate protection against child marriages. This paper has demonstrated that Pakistan's legislative framework on child marriages is internally inconsistent, creating significant social and legal challenges. Pakistan has made several international commitments on the matter and is therefore obligated to align its domestic laws and practices with the treaties and conventions to which it is a signatory.

Additionally, merely passing an amendment is insufficient to discharge Pakistan's obligation of due diligence under international agreements. Thorough investigations, criminal prosecution, and payment of just compensation to the victims are additional measures that must be introduced as part of the obligation of due diligence; failing to do so may result in a breach of international treaties. It is further suggested that in order to demonstrate its resolve to end child marriages before the international community, Pakistan should ratify the CEDAW Optional Protocol and routinely report to the CRC and CEDAW Committees regarding its implementation. The Parliament cannot ignore the issue of child marriages for much longer as it continues to affect millions of children in the country.

However, simply bringing about legislative changes may not be enough. The key issue is that of implementation of the law. The courts can only do so much if their rulings are not executed on the ground. At the same time, legislative changes themselves are subject to conflicting views of modern scientific research and religious beliefs. As has been discussed earlier in this paper, legislative apathy can largely be attributed to legislators' reluctance to challenge orthodox interpretations of Islamic teachings. Here, the role of institutions like the Council of Islamic Ideology and the FSC is especially significant in reconciling religious beliefs with scientific evidence and affirming that child protection legislation is not un-Islamic.

The judiciary has, in the past few years, delivered commendable decisions that eloquently address the menace of child marriages. This paper recommends that the concerned legislatures undertake a comprehensive overhaul of the CMRA in all of the provinces in light of such progressive judgements to establish a robust and watertight legal framework. The cases of *Farooq Omar Bhoja* and *Azka Wahid* suggest that the Parliament should impose a single, uniform minimum age of

marriage for girls, and international obligations mandate that this should be eighteen years. *Mumtaz Bibi* indicates that reliance on reductionist theories and commentaries that equate the onset of puberty as an entry point for matrimonial proceedings should be abandoned entirely. The judgement also recommends that all marriage contracts undertaken between underage parties should be declared invalid and *void ab initio*. *Alisha Bibi* and *Tahira Bibi* highlight the need for *Nikah* registrars to verify the parties' ages through documents such as NADRA-issued identification cards and birth certificates. Moreover, *Nikah* registrars should be punished with harsh penalties and fines for solemnising and registering child marriages. Their licences should be revoked to deter them and others from engaging in such practices. A central committee of registrars should also be established to review the marriage documents of Union Councils in specific areas to ensure the effective implementation of the law. Lastly, it is recommended that in cases where the age of the betrothed is disputed, the constitution of a medical board and the provision of medical tests should be made mandatory.

Only through holistic reform and strict implementation of the foregoing recommendations can the plague of child marriages be effectively eradicated.