

## Child Marriages: A Commentary on the Recent Judgment by Justice Anwar ul Haq Pannun

By: Sara Raza

### Introduction

Child marriage, which is considered as violence against children by the United Nations Children's Fund (UNICEF), has a disproportionately high rate in South Asia, with an overwhelming majority of children being girls.<sup>1</sup> Pakistan has the sixth highest number of child marriages in the world, where 21% of the girls are reported to have gotten married before 18 years of age and 3% before they turned 15, with the former globally known as the age of transition from adolescence to adulthood.<sup>2</sup> Child Marriage in Pakistan, which was earlier a federal subject within the ambit of the federal legislature, was devolved to the provinces and became a provincial subject by virtue of the 18<sup>th</sup> Amendment, as a result of which each province in Pakistan was giving the power and mandate to legislate over the issue and matter of child marriages. In Pakistan, unlike in India, Nepal and Bangladesh, child marriage is still legal if a girl is above the age of 16,<sup>3</sup> with the exception of Sindh, which has incorporated the universally recognized age of the child within the Sindh Child Marriage Restraint Act 2013, where a child has been defined as any person below 18 years of age.

In the wake of patriarchal notions of marriage, a recent landmark judgment rendered by the Multan Bench of the Lahore High Court recommended stringent measures to be observed in ensuring that no child marriages are given legal effect by the *Nikkah* Registrars and the local authorities responsible for registering marriages. The case *Tahira Bibi v SHO and others*,<sup>4</sup> decided in October 2019 and authored by Justice Anwaar ul Haq Pannun, sheds light on some of the most significant

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<sup>1</sup> <https://www.unicef.org/rosa/what-we-do/child-protection/child-marriage>

<sup>2</sup> <https://www.girlsnotbrides.org/child-marriage/pakistan/#:~:text=21%25%20of%20girls%20in%20Pakistan,brides%20in%20the%20world%20%E2%80%93%201%2C909%2C000.>

<sup>3</sup> See, for e.g., CEDAW Committee, General Recommendation No. 24: article 12 of the convention (women and health), (20th Sess., 1999), in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 359, para. 28, U.N. Doc. HRI/GEN/1/ Rev.9 (Vol. II) (2008); ECSR Committee, General Comment No. 14: The right to the highest attainable standard of health (Art. 12), (22nd Sess., 2000) in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at 84, para. 21, U.N. Doc. HRI/GEN/1/Rev.9 (Vol. I) (2008).

<sup>4</sup> Writ Petition No.15567 of 2019.

traits of child marriage and explores the gruesome consequences of marrying young girls to men from varying age brackets, which is something customarily practiced in Pakistan.

This commentary aims to analyze firstly, the decision by Justice Pannun in the *Tahira Bibi* case as he highlights the issue of the age and identity of girls at the time of registering and solemnizing the marriage and explores the socio-economic context in which a child marriage may take place. Apart from the reasons why such matrimonial bonds exist and are given effect, the commentary also discusses the consequences that unleash with forced matrimony and the severity of harm that a child bride may have to bear the burden of. Hence, as a result of legal analysis from both domestic and international spheres, the recommendations propose not only prevention against child marriages, but also the same to be declared invalid, illegal and to be dissolved at the very outset.

### **Facts of the Case**

A brief factual background of the case allows us to understand the context in which the need to discuss the issue of child marriages was presented before the Court. The petitioner who had attained majority and was *sui juris* had entered into a matrimonial bond with Muhammad Bashir out of her own free-will and against the wishes and without the blessings of her parents. After the marriage was solemnized, respondents No. 1 to 3, including the SHO, on behalf of the private respondents started harassing and intimidating the petitioner, forcing her to divorce her husband. Amidst these threatening circumstances, the respondents illegally conducted a raid at the petitioner's house, which led to people from the locality being gathered to the spot to rescue her from the illegal harassment that the respondents subjected her to. In the wake of the aforementioned facts, the Lahore High Court's jurisdiction was invoked where the petitioner claimed being aggrieved of the behavior and conduct of the official respondents and prayed for an end to having herself and her family harassed at the hands of those trying to meddle and interfere with her matrimonial life.

### **Issues before the Learned Judge and Analysis of the Applicable Law**

Justice Pannun, in his judgment, has carefully scrutinized the nature of similar cases, where one of the parties to a *lis* may have contentions over the allegedly illegal marriage, while the other may try to prove the validity of the marriage and pray for the undue influence and harassment at the hands of family members and relatives to be put to an end.

Before delving into the analysis of the case and the discussion of the issues at hand, it is pertinent to note that the Child Marriage Restraint Act, 1929 (“1929 Act”) - the act in question - extending to the whole of Punjab, and applicable to all the citizens of Pakistan, prescribes punishment for three main parties: (i) a person (not a minor) marrying a child;<sup>5</sup> (ii) a person solemnizing a child marriage i.e. performing, conducting or directing any child marriage;<sup>6</sup> and (iii) a parent or guardian concerned in a child marriage.<sup>7</sup> However, nowhere in the Act does the law refer to a child marriage being invalid and illegal for the purposes of registration and solemnization. The law focuses on holding those involved in child marriages accountable for their acts by only putting forth deterrents such as fines and imprisonment periods, rather than nullifying the marriage in and of itself. And hence, the lack of implementation and violation of the provisions of the Child Marriage Restraint Act, 1929, kicks in at a time when one of the most significant problems of registering the marriage arises.

### Age and Identity of Girls

The practice of *Nikkah Khwans* and Registrars registering marriages without requiring any proof of the age of the parties, especially girls, is highly problematic and leads to many minors falling prey to family pressure and external influences that govern their forced matrimony. Authentic identification and documentation such as the National Identity Card issued by NADRA, B-Form, School leaving certificate, a medical certificate by a competent authority, or a Birth Certificate issued by the Union Council are examples of the identity documents that authorities can rely on at the time of registering marriages to avoid aiding in the commission of a crime that is child marriage. However, the authorization that licenses the *Nikkah* Registrars to solemnize marriages, gives them immense power to change the shape and form that a marriage may take by playing tic-ta-toe on the piece of paper called *Nikkah Nama* that goes on to govern the rights and obligations of the husband and wife. The authority assumes within it the power to cross out one of the most substantive rights provided to the wife in Islam to protect herself from an ill-timed and thoughtless *talaq* pronounced by the husband in a sudden outburst of anger – the right of *talaq al-tafwid*. *Talaq al-tafwid*, also known as delegated divorce, as a right, is articulated in column 18 of the *Nikkah Nama*, where the husband delegates to the wife the right to divorce him unilaterally. Hence, in

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<sup>5</sup> The Child Marriage Restraint Act, 1929, s. 4.

<sup>6</sup> Ibid, s. 5.

<sup>7</sup> Ibid, s. 6.

child marriages more than any other, the crossing out of clauses and columns amounts to denial of rights that have been otherwise promised to wives under Muslim Personal Law and govern the marriage by allowing them to benefit from the protections laid down to empower them. Even in the *Tahira Bibi* case, a notice of criminal negligence was issued to the Director, Local Government, Multan vide order dated 15<sup>th</sup> October 2019, wherein it was noticed that he had left some columns blank and had not filled in others as accurately as the response from the bride and the bridegroom required. Therefore, in the absence of a regulatory framework and Standard Operating Procedures (S.O.Ps) that should be put in place to ensure compliance with the provisions of the 1929 Act and the Muslim Family Law Ordinance, 1961 (MFLO), child marriages warrant an abhorrently unfair number of violations of the law.

The illegality pertaining to child marriages is evident from the incompetence of the child to enter into the contract of marriage. In Islam, the concept of a girl becoming competent is dependent upon the attainment of puberty. However, the age at which a girl is considered to have entered adulthood varies with differing resources, where the High Court relied upon *Fatawa Alamgiri* which indicates that the lowest age of puberty according to its natural signs for girls, is 9, whereas for boys, it is 12. However, in the instance that signs do not appear naturally, both males and females are considered an adult on the completion of 15 years of age. This concept of considering a specific gender as an adult without certainty of attaining puberty is intrinsically complicated to understand because some children reach puberty at later stages in their teenage. Similarly, the categorization as an adult at the age of 15 can even be construed to mean that a child can be deemed an adult by a parent or guardian and hence, be forced to set foot into a matrimonial bond, which clearly does not comply with the provisions of law against child marriage. On the flip side, it is also viewed as allowing a girl to enter into a marriage before the attainment of puberty, but at her own discretion and with sufficient understanding and by seeking the consent of a guardian. Historically, parents, guardians and other family members have used this side of the argument to justify getting their young daughters married to men of significantly older ages. Girls have been disproportionately impacted by the age difference intertwined in child marriages due to the ‘option of puberty’ also known as *Khyar-ul-bulugh*, which has been remarkably explained by Justice Pannun. He has also quoted Mohammaden Law in the following words:

“When a marriage is contracted for a minor by any guardian other than the father or father’s father, the minor has the option to repudiate the marriage on attaining the puberty.”<sup>8</sup>

While Islam allows the girl to repudiate marriage on attainment of majority and understanding the marriage, this right ceases to exist for the girl if she fails to repudiate the marriage without reasonable delay. In addition to this, even though the Dissolution of Muslim Marriages Act, 1939, does give the right to repudiate marriage before the girl turns 18, the pre-condition for a girl to opt for such repudiation is that the marriage should not have been consummated. However, the same right continues for the male till such time that he expressly or impliedly ratifies the marriage by payment of dower or cohabitation. The controversy that surrounds the option of puberty is attached to the stigma that a girl’s right to repudiate marriage is linked to the sexual status within the marriage, however, the same is not true for a man whose right is neither affected nor has any linkage or connection with the consummation of marriage.

### **Socio-Economic Concerns**

Moreover, to prevent child marriages from taking place, it is pertinent to understand the reasons why such marriages are entered into and what consequences they prevail, which need particular redressal. The socio-economic background at play is what assists the initiation of many early age matrimonial bonds. In rural and poverty-stricken areas, where people, especially girls do not have access to decision making processes and much of a say in household matters, let alone access to education, girls are more likely to get married at early ages. In addition to financial depravity, the essence of patriarchal practices and misogynistic attitudes hardly leave daughters and sisters with a choice to marry of their own will or at an age of their choice. Therefore, with haste in marriage and little to no understanding or compatibility between partners, girls at young ages end up being subjected to harsh consequences such as pregnancy-related issues and other medical and health-related complications that are furthered by domestic violence and abuse at the hands of their husbands. Early marriages are also a severe consequence of lesser economic opportunities and lower social mobility, with girls not having enough power to express refusal to marry a man at a young age let alone the one of their choice. The influence that the more powerful sex (male) exercises over disempowered, suppressed and oppressed females is what relegates women to

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<sup>8</sup> Mohammedan Law, para 274. Also, see para 6 of the judgment.

dependence on men and simultaneously, a denial of opportunity to better life for themselves. And hence, in many households this ‘circle of life’ passes on from one generation of girls to the next, with mothers not having enough say to decide differently for their daughters, and consequently helplessly watching them go through the same. It is also proven to be correct that the wider the length of the reproductive span of a girl, the greater the reproductive burden. As a result, maternal health complications lead to higher mortality rates, miscarriages, postpartum hemorrhage, and even other sexually transmitted diseases, especially when their husbands, on the other hand, are involved in polygamous relations.

### **Jurisprudential analysis, Legislative Developments and Global Trends**

The judgment by Justice Pannun also went a step further in determining the impact of lack of education on females by discussing the importance of the constitutional provisions encircling the right to life<sup>9</sup> vis-à-vis child marriages. The Court relied upon *Bushra Jabeen and 367 others v Province of Sindh through Chief Secretary and others*<sup>10</sup> wherein it was held that the right to life includes the right to education as stated under Article 25-A of the Constitution of the Islamic Republic of Pakistan, 1973. Therefore, it becomes the primary responsibility of the State to provide free and compulsory education to all children of five to sixteen years of age, which will subsequently create awareness about the law, children’s rights, and empower them through channels that promise deterrence for violation of the law. The judgment also linked the rate of literacy of a nation to its population growth and the sustainable use of resources available. In a human rights case, 2019 SCMR 247,<sup>11</sup> the Supreme Court observed as follows:

“The steadily increasing population rate in Pakistan is a ticking bomb which will certainly not wait till it is convenient for us to take note of it. What will follow this population explosion is starvation, famine and poverty, the likes of which are already visible in areas like Thar. Other indicators of overstretched resources and infrastructure are apparent in Pakistan's unemployment rate, maternal and child mortality rate, literacy and educational enrolment figures, and access to clean water and adequate food.”

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<sup>9</sup> The Constitution of Islamic Republic of Pakistan, 1973, art. 9.

<sup>10</sup> 2018 MLD 2007.

<sup>11</sup> Human Rights Case No. 17599 of 2018.

Hence, Justice Pannun remarkably pointed out one of the most noteworthy aspects of population control by making reference to the International Conference on Human Rights in Tehran in 1968, wherein the need for ‘family planning’ was recognized, both as a right and as a means of enabling other human rights. And hence, it was emphasized that parents should have the basic fundamental right and freedom to determine the number of children, and plan and space out births as they wish. When parents will focus on planned reproduction and promise a better future to their children, international community standards will be fulfilled for the progeny to have a secure life ahead and an economically viable generation to thrive in.

The requirement of a minimum age for marriage is a condition most needed to discourage parents and guardians from marrying off their daughters at early ages. According to the International Covenant on the Rights of Child, a child is defined as a male or female below the age of eighteen. Even though internationally and legally, all over the globe, a child is any person below eighteen, Pakistan has set different standards for considering if a person is a child, while also differentiating between a male and female child. Sindh is the only province that has the same legal age for both male and female, with a child being anyone below the age of 18. However, in Punjab the legal age for marriage remains 18 for boys and 16 for girls, with the latter still standing in contravention with the globally recognized standards for marriage. While Balochistan is still governed by the Child Marriage Restraint Act 1929, there is currently a bill on prevention of child marriages being tabled in the KPK Assembly.<sup>12</sup>

The issue with the law is the absence of a clause that requires the dissolution of a child marriage. In 2015, a bill was proposed on federal and provincial levels where it, inter alia, stated that once the court takes notice of a child marriage, it will stand dissolved. However, no such amendment has been introduced in any of the provincial legislations. One of the contentions raised by the Council for Islamic Ideology was that Islam prescribes no age for marriage hence, the law must remain silent on setting the age of the person eligible to marry.<sup>13</sup> Perhaps the most discouraging attitudes of our government stemmed from the Council of Ideology’s perspective on this bill that they considered to be anti-Islamic, especially after it had already been opposed and termed as un-Islamic by the Religious Affairs Minister and the Minister of State for Parliamentary Affairs.

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<sup>12</sup> <https://www.geo.tv/latest/232082-child-marriage-is-illegal-in-sindh-but-not-in-other-provinces>

<sup>13</sup> <https://voiceofbalochistan.pk/opinions-and-articles/social-development/balochistan-awaits-legislation-on-child-marriages/#:~:text=It%20discourages%20the%20solemnization%20of,law%20has%20a%20few%20shortcomings.>

However, among many women who supported the bill in the National Assembly, Dr. Shireen Mazari speaking in favour of the bill presented arguments similar to those proposed by PPP's Sherry Rehman who had upheld the same rationale during discussions on her bill in the Senate. Dr. Mazari added that a “number of Islamic countries, including the UAE, Turkey, Egypt and Bangladesh, had already enforced similar laws restraining the marriages before the age of 18”<sup>14</sup> which is a clear and helpful example for Pakistan.

Even though child marriages have a number of complications and issues associated with the relationship dynamics it ensues, the way it affects a girl's personal space, health, and bodily autonomy has been widely criticized and advocated against by international experts and human rights organizations. In a joint statement by the executive directors of the UNICEF, United Nations Population Fund and the U.N. Women on the International Day of the Girl Child 2012, it was stated:

“Married] girls are not only at risk of early and unwanted pregnancies, but the complications associated with pregnancy and child-birth are among the leading causes of death for girls aged 15-19 worldwide. Child brides are also more likely to experience discrimination and violence. Too often, they have little or no ability to leave abusive partners and secure the social and legal support they need to improve their situation.”<sup>15</sup>

Serious reproductive health concerns have also been highlighted and studied by international organizations such as the Center for Reproductive Rights, where in its child marriage fact sheet, it pointed out the key issues associated with child marriages in South Asia and how only a few countries were involved in resolving the problem.<sup>16</sup> Unfortunately, there was no mention of steps that Pakistan was taking in order to address the heinous crime that is being committed in every part of the country. With regards to access to adolescent-friendly sexual and reproductive health information, the Committee on the Rights of the Child (CRC Committee) expressed grave concerns regarding the people in Pakistan who are yet to openly accept the concept and understanding of adolescent reproductive health in order to work towards it and implement measures for the same. The Committee emphasized that there is a clear “lack of access to sexual

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<sup>14</sup> <https://www.dawn.com/news/1479444>

<sup>15</sup> <http://www.unwomen.org/en/news/stories/2012/10/joint-statement-international-day-of-the-girl-child-2012/#sthash.IpIX3Gnj.dpuf>

<sup>16</sup> [http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/ChildMarriage\\_FactSheet\\_Web.pdf](http://reproductiverights.org/sites/crr.civicaactions.net/files/documents/ChildMarriage_FactSheet_Web.pdf)

and reproductive health counselling and services, especially within rural areas of Pakistan”<sup>17</sup> which does not make the Pakistani society very open to the idea that awareness and education about sexual or reproductive health should be disseminated widely. The CRC Committee encouraged Pakistan to “establish more programmes and confidential services in the area of adolescent health”<sup>18</sup> and “elaborate clear policies and, when applicable, legislation addressing adolescent health-related issues, in particular early marriage and pregnancies.”<sup>19</sup>

Moreover, in order to address violence against women and girls within the context of marriage, international bodies and experts have once again expressed grave concerns regarding child and forced marriages in South Asia. With the CEDAW Committee voicing their concerns regarding marital rape and the absence of clear legislation criminalizing the said act,<sup>20</sup> there is a dire need for the legislature to delve into making laws that address not just the illegality of child marriages, but the acts that follow through, such as forced sexual intercourse (rape) under the grab of marriage, which should be criminalized regardless of the marriage being valid or invalid.

### Recommendations and Conclusion

Union Councils, in instances of child marriages, are required to play a proactive role, which the Court has called *loco Parentis* i.e. ‘in place of a parent’. The obligation is on the Union Council to lodge complaints effectively and immediately on the receipt of *Nikkahnama* forms, columns of which have not been accurately filled. Furthermore, a quarterly report needs to be prepared in order to document and record all complaints lodged during a quarter and furnish the same to the Director General Office for information. And most importantly, an authority and entity that fails to fulfil its duty and function amounting to negligence, shall render himself liable for imputation of disciplinary proceedings against him under the relevant law. While there are some conditions that are stipulated within the judgment and shall be abided by before a marriage is solemnized and contracted, every solemnized marriage under the Muslim Family Law is mandatory to be registered. And according to the MFLO and West Pakistan Rules under MFLO, the Union Council is authorized to issue a license to one or more persons who are fit and proper to solemnize the *Nikkah* and are known as *Nikkah Khwans or Nikkah Registrars* as has been mentioned above. It is with issuance of such a

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<sup>17</sup> CRC Committee, Concluding Observations: Pakistan, para. 64, U.N. Doc. CRC/C/PAK/CO/3-4 (2009).

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> CEDAW Committee, Concluding Observations: Pakistan, para. 21, U.N. Doc. CEDAW/C/PAK/CO/4 (2013).

license that the so-called registrars attain the status of a licensee, wherein if they violate the provisions of law and fail to register the marriage according to specified S.O.Ps (such as requiring proper identity documentation), their license can be revoked and cancelled by the Union Council. Hence, if an invalid and illegal marriage comes into the knowledge of the Union Council, the complaint filed by them can result in the contracting party, promoters of the marriage and the guardians being held liable for arranging and contracting the marriage against the Child Marriage Restraint Act, 1929. Additionally, when such a marriage is brought to the notice of the Court, it becomes the responsibility of the judiciary to dissolve the child marriage on the pretext of being illegal and invalid. However, the hands of the judiciary are tied unless the legislature passes a law on the dissolution of child marriages to dissuade parents, guardians and others directing, conducting and performing a child marriage from getting involved or aiding in an act that should not even be recognized under the law in the first place, let alone be registered.

As is stated in our constitutional jurisprudence, the State shall protect the institution of ‘marriage, the family, the mother and the child’, and similarly, it is important for us to navigate our roles within the larger framework, rather than solely depend on the State to take action. With each child marriage that is contracted, a child’s fundamental guarantees under the Constitution and basic freedoms embedded in the international human rights framework are violated. Adolescents and even younger children are the children of the State, of their guardians, of their family members. They are the responsibility of each party involved in making decisions for them. For every other child that gets married, a heinous crime of an insensitive and cruel nature is committed, which is unkind to the life a child can most likely spend, away from the horrific torture inflicted upon them of tying the knot at an age where they are lacking basic understanding of themselves, their bodies, their habits, and growing into a person that they are becoming familiar with.

At an age when children are known as minors under the law, pushing them to have married lives of their own, is abhorrently unfair to them as they neither understand the concept of a matrimony nor are they mentally or physically ready to accept the intrusion it brings to their life. Hence, child marriages should be strictly monitored to penalize the people actively involved in contracting the marriage (except children) and those abetting and aiding in the same. For bringing an end to child marriages, an end to illiteracy is what is needed, and should be struggled for; with literacy, not being limited to textbook curriculum, but extending further to actively understanding the

obligations of parents and guardians, and the rights and protections afforded to children under the law.

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