
A *Shar-ah* Appraisal of ‘Child Marriages Restraint Act, 1929’

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Abstract:

Marriage is a sacrosanct in Islamic law. However, there are various forms of marriages that are not up to the mark according to the ethical standards of *Shar-ah*. This research paper analyses whether or not Islamic law recognise child marriages. In this context, the research paper expounds the law related to the restraint of child marriages in Islamic Republic of Pakistan. The law dealing with the issue in Pakistan is ‘Child Marriages Restraint Act, 1929’ that is an inherited piece of legislation from the British-India. The research has critically evaluated the ‘Child Marriages Restraint Act, 1929’ in the perspective of *Shar-ah* with the aim to identify that whether or not the existing piece of Law is in conformity with the principles of *Shar-ah*. The role of higher judiciary is also highly celebrated in this regard. So, the research paper is based on the principles of classical Islamic family law, statutory provisions of the relevant law, case law and research papers of the eminent scholars in the field. It has been concluded with most important results and recommendations.

Key Words: *Shar-ah*, Law, Child, Marriage, Restraint

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Introduction

The Child Marriage Restraint Act 1929 was one of the private members bill introduced by Muhammad Ali Jinnah; the founder of Pakistan, while he was a member of the British India Legislative Assembly. The Act was passed on October 1, 1929, to restrain the solemnization of child marriages, effective April 1, 1930 to the whole of India. It still remains in force, and extends to the whole of Pakistan. Prior to this Act, the Age of Consent Act was enacted in 1891 which laid down the minimum age for consummation; the age below which a marriage should not be consummated.[‡] Child marriages however, was continued and not discussed in the Act 1891. It was in order to control the child marriage completely; the Act of 1929 was enacted, as signified by its preamble, to restrain the solemnization of child marriages.[§]

The topic is very important as the child marriage affects the person and the society in both the manners; good and bad. If we see the positive effects, we find that the woman reach the perfection only after the marriage and getting the children. Similarly, difficulties of pregnancy and the labor have been proved to be less in the early stage according to some studies. It will save the youth from the evils and provide them the feeling of stability and the tranquility. On the other hand, if we consider the negative effects, we find that perfection of the genitals is something necessary for the good sexual relations, which cannot be experienced in the early age. Likewise, the married women at early stage may face the anemia and other diseases. She has less experience in life which may lead the spouses towards the

[‡]The Age of Consent Act, 1891, the Act No. X of 1891, was enacted on 19 March 1891 in [British India](#). It raised the [age of consent](#) for sexual intercourse for all girls from ten to twelve years, violation of which is subject to criminal prosecution as rape. For detail see www.en.wikipedia.org/wiki/Age_of_Consent_Act,_1891. Last visited on 15-04-2014.

[§] See preamble of the Child Marriage Restraints Act 1929; Also see www.en.wikipedia.org/wiki/Child_Marriage_in_Pakistan#cite_note-restraint_again-12; www.dawn.com/news/918012/how-to-curb-child-marriages-in-pakistan. Last visited on 13-04-2014.

difficulties in their marital life. It may be a reason to stay away from the education.

Another side of the coin is that Islam encourages for marriage, but at the same time it did not ignore the welfare of the spouses. For this reason, Muslim Jurists discussed this topic a lot but due to passage of time it may be in need of some further attention and regulation. In Pakistan, we have the legislation in hand concerning this issue, but it received different opinion which necessitates a deep and close look so that to bring it in conformity with the *Sharʿah* principles.

One area of Islamic law that has been subject to much criticism as of late is the practice of child-marriage.^{**} Some, preferring to view Islam suspiciously, tend to create a caricature of Muslims as morally depraved individuals who force young daughters into marriages to old men for financial gain.^{††}

Who is a ‘Child’?

Before we discuss the legal status of child marriages it is pertinent to know the meaning of child according to the law. According to the Section 2 (a) of the Child Marriages Restraint Act, 1929 child is “a person who, if a male, is under eighteen years of age, and if female, is under sixteen years of age”.^{‡‡} So, in the Law, it is sixteen or eighteen years as the case may be which transfers a child towards majority.

As far as the Islamic Law is concerned, it is the factor of puberty that transfers a child from its childhood towards the majority. So, puberty is the standard which is known primarily by ejaculation in male and menstruation

^{**} Jeremiah J. Bowden, Marriageable Age in Islam: A Study on Marriageable Age Laws and Reforms in Islamic Law, *LUX: A Journal of Trans-disciplinary Writing and Research from Claremont Graduate University*, Vol. 2, Issue.5, Article.5.

^{††} Ibid.

^{‡‡} Child Marriages Restraint Act 1929. Sec. 2 (a).

in female.^{§§} The Prophet (PBUH) said: "No responsibility, charge devolves upon three persons, the one who is sleeping till he wakes up, the child till he wets dream, and the mad (insane) till he becomes of sound mind".^{***} He (PBUH) also said: "Allah does not accept the prayer of a menstruating woman unless she wears a veil".^{†††} These two *ahadith* are proof for signs of puberty. The age factor comes for determination of the puberty only when the signs do not appear. In that case, majority of the Muslim jurists is of the view that both male and female get puberty at the age of fifteen years^{†††} whereas in the opinion of Imam Abul Hasan Ali Nadwi male at the age of eighteen years and female at the age of seventeen years are supposed to have got puberty.^{§§§}

The Act has ignored the factor of puberty and its primary signs as standard for transferring the child to be a major and has moved towards the secondary criteria for the puberty i.e. the age factor. Perhaps this makes the affairs and job of the state easy.

What is the Legal Status of 'Child Marriages'?

Marriage is defined as "legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners and accords status to their offspring (if any)".^{****}

^{§§} See al-Astrosht, Muhammad bin Mahmud, *Al-Fiqh al-Islami* (Bayrut: Dar al-Kutub al-Ilmiyyah, 1997), 119.

^{***} Al-Bayhaqi, *Al-Sunan Al-Kubra* vol. 3 (Al-Riyad: Maktabah Al-Rushd, 2004), 122, *adith* No. 5191.

^{†††} Abul Hasan Ali Nadwi, *Sunan*, vol. 1 (Syria: M. Ali Al-syed, 1969), 421, *adith* No. 641.

^{†††} Al-Bahadur, *Kashshaf Al-Qin'at* 'an Matn Al-Iqna', vol. 3 (Bayrut: Dar al-Kutub, 1997), 147; Al-Khurshid, *Al-Khurshid li Mukhtasar Sayyid Khalid*, vol. 5 (Bayrut: Dar Al-Fikr), 290; Al-Qazwini, *Al-Muqarrar* (Bayrut: Dar Al-Kutub Al-Ilmiyyah, 2005), 181.

^{§§§} *Al-Hidayah*, vol. 3, 1351.

^{****} *Britannica Concise Encyclopedia*, s.v. "Marriage".

In Islamic Law, it is a contract that validates the enjoyment between the spouses.⁺⁺⁺ According to Muslim Jurists, rule of *nikah* (marriage) differ with regard to different kinds of people. It is *wajib* (obligatory) if a person is afraid that he may fall in adultery and he is capable to maintain. The reason being that marriage is only the solution for this. Secondly, it is *haram* (prohibited) for a person unable to maintain the marriage or he is certain to do injustice to would be spouse. It is because in this case he will not get benefit of the marriage, instead he will be harming would be spouse.⁺⁺⁺ Importantly, if a person afraid that he may fall in adultery and afraid also from doing injustice towards the spouse, following is *hadd* of the Holy Prophet (PBUH) which guides in this situation:

(يَا مَعْشَرَ الشَّبَابِ، مَنْ اسْتَطَاعَ الْبَاءَةَ فَلْيَتَزَوَّجْ، فَإِنَّهُ أَغَضُّ لِلْبَصَرِ وَأَحْصَنُ لِلْفَرْجِ، وَمَنْ لَمْ يَسْتَطِعْ فَعَلَيْهِ بِالصَّوْمِ فَإِنَّهُ لَهُ وَجَاءٌ).^{§§§§}

(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 diminishes his sexual power).

The third situation is when a person is feeling fear to do injustice with would be spouse but this is just fear. In this case the marriage is *makruh* (disapproved). The forth is when a person is moderate in nature. According

⁺⁺⁺ Al-Tuwayjar¹, Muhammad bin Ibrahim, *Maus'ah al-Fiqhal-Islami*, vol. 4 (Bayt al-Afkār al-Dawliyyah, 2009), 9.

⁺⁺⁺ Al-Zayla², Fakh-al-Din, *Tabyih al-Haqiq*, vol. 2 (Cairo: al-Ma'ba'ah al-Kubra al-Amiriyyah, 1313H), 95; Al-Qur'abi, Muhammad bin Rushd, *Bidayah al-Mujtahid wa Nihayah al-Muqtadid*, vol. 3 (Cairo: Dār al-Adab, 2004), 30; Al-Sharb³, Muhammad al-Khaṭīb, *Mughnī al-Muṭṭaj*, vol. 4 (Dār Al-Kutub al-'ilmiyyah, 1994), 205; Al-Bah⁴, Manṭiq Bin Yūsuf. *Kashshaf Al-Qin'ān Matn Al-Iqnā*, vol. 5 (Dār Al-Kutub al-'ilmiyyah, N.D) 7; Zuṭayl⁵, Wahbah. *Al-Fiqh Al-Islamī Wa Adillatuh*, vol. 7 (Dār al-Fikr, N.D), 45-47.

^{§§§§} Al-Bukhari⁶, Muhammad Bin Isma'īl, ed. Muhammad Zuhair, *Saheeh Al-Bukhari*, vol. 7 (Dār Tauq al-Najah, 1422H), 3, ḥadīth No. 5066.

to the majority of the Muslim Jurists, the marriage is *sunnah* or *mandub* (recommended) for him. However, according to Imam Shafi'i, it is permitted and optional and the busyness in worship is better than marriage. He argues from the *adath* of the Holy Prophet (PBUH):

(جَاءَ ثَلَاثَةٌ رَهْطٍ إِلَى بُيُوتِ أَزْوَاجِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ،
يَسْأَلُونَ عَنْ عِبَادَةِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَلَمَّا أُخْبِرُوا كَانَهُمْ
تَقَالُوهَا، فَقَالُوا: وَأَيُّ نَحْنُ مِنَ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ؟ قَدْ غُفِرَ لَهُ
مَا تَقَدَّمَ مِنْ ذَنْبِهِ وَمَا تَأَخَّرَ، قَالَ أَحَدُهُمْ: أَمَا أَنَا فَإِنِّي أَصَلِّي اللَّيْلَ أَبَدًا،
وَقَالَ آخَرُ: أَنَا أَصُومُ الدَّهْرَ وَلَا أَفْطِرُ، وَقَالَ آخَرُ: أَنَا أَعْتَزِلُ النِّسَاءَ
فَلَا أَتَزَوَّجُ أَبَدًا، فَجَاءَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَيْهِمْ، فَقَالَ:
«أَنْتُمْ الَّذِينَ قُلْتُمْ كَذَا وَكَذَا، أَمَا وَاللَّهِ إِنِّي لَأَخْشَاكُمْ لِلَّهِ وَأَتَقَاكُمْ لَهُ، لَكِنِّي
أَصُومُ وَأَفْطِرُ، وَأَصَلِّي وَأَرْفُدُ، وَأَتَزَوَّجُ النِّسَاءَ، فَمَنْ رَغِبَ عَنْ سُنَّتِي
فَلَيْسَ مِنِّي».) *****

(A group of three men came to the houses of the wives of the Prophet (PBUH) asking how the Prophet (PBUH) worshipped (Allah), and when they were informed about that, they considered their worship insufficient and said, "Where we are from the Prophet (PBUH) as his past and future sins have been forgiven." Then one of them said, "I will offer the prayer throughout the night forever." The other said, "I will fast throughout the year and will not break my fast." The third said, "I will keep away from the women and will not marry forever." Allah's Messenger (PBUH) came to them and said, "Are you the same people who said so-and-so? By Allah, I am more submissive to Allah and more

***** Al-Bukhari, Muhammad Bin Ismail, ed. Muhammad Zuhair, *Shahih Al-Bukhari*, vol. 7 (Dhau al-Najj, 1422H), 2, hadith No. 5063.

afraid of Him than you; yet I fast and break my fast, I do pray and sleep and I also marry women. So, he who does not follow my tradition in religion is not from me (not one of my followers).

As far as child marriage is concerned, it is a marriage to which either of the contracting parties is a child. In case of Pakistan, for the purpose of marriage, female under the age of sixteen and male under the age of eighteen is considered to be child.⁺⁺⁺⁺ On the other side, there are three opinions on this subject matter in Islamic Law.

The majority of the Muslim Jurists allow child marriage. They provided different arguments for their opinion.⁺⁺⁺⁺ First of these arguments is the verse of Holy Qur'^{an} which mentions *iddah* (waiting period) of the female child as three months. All^h Almighty says:

(وَاللَّائِي يَئْسَنَ مِنَ الْمَحِيضِ مِنْ نِسَائِكُمْ إِنْ ارْتَبْتُمْ فَعِدَّتُهُنَّ ثَلَاثَةُ أَشْهُرٍ
وَاللَّائِي لَمْ يَحْضُنْ وَأُولَاتُ الْأَحْمَالِ أَجَلُهُنَّ أَنْ يَضَعْنَ حَمْلَهُنَّ وَمَنْ
يَتَّقِ اللَّهَ يَجْعَلْ لَهُ مِنْ أَمْرِهِ يُسْرًا).^{§§§§§}

(Such of your women As have passed the age of monthly courses, for them the prescribed period, if ye have any doubts, is three Months, and for those who have no courses (it is the same): for those who carry (life within their wombs), their period is until They deliver their burdens: and for those who fear Allah, He will make their path easy).

⁺⁺⁺⁺ See Child Marriage Restraint Act 1929, section 2 (a) & (b).

⁺⁺⁺⁺ See, Zu ^{rayl}, Wahbah. *Al-Fiqh Al-Islam^{ah} wa Adillatuh*, vol. 7 (D^{ar} al-Fikr, N.D), 183-

184.
^{§§§§§} Al-Qur'an 65 / 4.

Their second argument is the following *ad-h*:

(عَنْ عَائِشَةَ رَضِيَ اللَّهُ عَنْهَا، قَالَتْ: تَزَوَّجَنِي النَّبِيُّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَأَنَا بِنْتُ سِتِّ سِنِينَ، وَبَنَى بِي وَأَنَا بِنْتُ تِسْعِ سِنِينَ).

(‘ishah (RAA) reported: All-h’s Apostle (PBUH) married me when I was six years old, and I was admitted to his house when I was nine years old).

Third of their arguments is that many examples have been transmitted to us where practice of giving minors into marriage has been proved among the companions of the Prophet (PBUH). For example, Ibn ‘Umar (RAA) gave his minor daughter into marriage with ‘Urwah bin al-Zubair (RAA). Likewise, spouse of ‘Abdullah bin Mas-d (RAA) gave her minor daughter into marriage with son of Musayyib (RAA).

The ʿanafiyah allow the marriage done by the father, grandfather and by other guardians as well. According to Muhammad and Ab-Y-suf (pupils of Im-m Ab-an-fah), the spouses should match each other (*kufu*). According to them, if female minor has been given into marriage by her father, then she will not have option of puberty on attaining the puberty. It is because the father has complete love and affection towards his children. As far other guardians are concerned, they have the affection towards their ward but that is not complete like father. So, if one of them gives minor into marriage, the minor will have option of puberty on attaining of puberty.⁺⁺⁺⁺⁺

***** Muslim, Bin al-raj-j. ed. Muhammad Fo-d Abdul Baq, *al-Musnad al-Sa*, vol. 2 (D-I al-Tur-th al-‘Arabi, N.D), 1039. *ad-h* No. 1422.

+++++ Al-Sarkhas, Shams Al-D-n, *Al-Mabs-t*, vol. 4 (Bayr-t: D-I al-Ma’rifah, 1993), 212-216.

Mālikīyah have the view that father, *waṭṭ*^{#####} and the judge can give female minor into marriage. Moreover, it is valid for the father to force his minor son for marriage. On the other hand, if any one of the other guardians or a person appointed by the father gave the female minor into marriage without any necessity, the *nikḥ* will be annulled (*faskh*) and if it remained till her puberty, the *nikḥ* (marriage) will be irregular and the spouses will be separated.^{§§§§§}

According to shāfi'īyah, father and the grandfather can do minor's marriage provided that there should be a valid interest to do so. As for option of puberty, shāfi'īyah have two opinions in case the father gives her female minor into marriage without similarity (match) between spouses and without consent of the female minor. One is that the marriage will be void. The second opinion says that the marriage will be valid and the female minor remains with her option of puberty on attaining the puberty to annul it.^{*****}

However, according to hanbīlah, father, *waṭṭ*[/] and the judge are authorized to do marriage of the female minor. They have two opinions regarding option of puberty for a female minor reached nine years of age. First opinion says that she is like other female minors and all the rules of female minors will apply. Second opinion says that she is like the major girl because Imām Aḥmad has transmitted from 'Abū Ḥshah (RAA) her saying that female minor of nine years is woman.⁺⁺⁺⁺⁺ So, all the rules of major female

⁺⁺⁺⁺⁺It is guardian appointed by the father.

^{§§§§§} Al-Kalbī, Muhammad Bin Juzzī, *al-Qawānīn al-Fiqhiyyah*, 133-134; Al-Rub'ī, Al-Bin Muhammad, ed. Aḥmad Abd al-Karīm, *Al-Tabḥīrah*, vol. 4 (Qatar: Ministry of Owqāf and Islamic Affairs, 2011), 1799-1808.

^{*****} Al-Sharbīnī, Muhammad al-Khaṭīb, *Mughnī al-Muṭṭaj*, vol. 4 (Dār al-Kutub al-'Ilmiyyah, 1994), 272-278.

⁺⁺⁺⁺⁺ Al-Tirmidhī, Muhammad bin 'Isā, *Sunan al-Tirmidhī*, ed. Bashshār Awād Ma'rūf, vol. 2 (Bayrūt: Dār al-Gharb al-Islamī, 1998), 409.

will apply on female minor of nine years of age and she will have no option of puberty.+++++

It has been transmitted that IbnShubrumah, Ab-Bakral-Aam and 'Uthm al-Batt consider that the child marriage is void. It is because Allh Almighty says as translated: "make trial of orphans until theyreach the age of marriage". They inferred from this verse that Allh has pointed out to the age for marriage. Secondly, the children do not need the marriage because at this stage they do not desire the sexual pleasure; the base and reason for offspring.

Here, the view of Ibnazm; a renowned jurist of Zahir school of thought is different. He says that only the minor female can be given in marriage because many of the traditions prove its validity, but giving minor male in marriage is not valid due the verse already mentioned above, that is, analogy of minor female on minor male is not allowed. He stated in his book as translated: "The father has the right to arrange marriage of his minor virgin daughter without her consent and she would have no option after attaining the puberty".+++++

After all this difference, one thing is very important, the consummation happens on capability of the spouses for sexual intercourse.+++++ They inferred both of these rules from the tradition that the Holy Prophet (PBUH) married 'ishah (RAA) when she was of six years of age and consummated when she was of nine. Other argument of the majority

+++++ Al-Maqdis, Ibn Qudmah, *Al-Mughn*, vol. 7 (Maktabah al-Qahirah: 1968), 41-42.

§§§§§ Zuhayli, Wahbah, *Al-FiqhAl-Islami wa Adillatuhu*, vol. 9 (Syria: D al-Fikr, 1997), 6682. [hereinafter referred to as *Al-FiqhAl-Islami wa Adillatuhu*].

***** Al-Qur'an 4 / 6.

+++++ Ibn azm, al-Muall bil th, vol. 9 (Bayr: D al-Fikr, N.D), 38-45.

+++++ Al-Sarakhs, Muhammad bin Ahmad, *Al-Mabs*, vol. 4 (Bayr: D al-Ma'rifah: 1993), 213. [hereinafter referred to as *Al-Mabs*].

§§§§§ Al-Bukh, Muhammad Bin Ism, *Al-Bukh*, vol. 5 (D al-Najh, 1422H), 55, adth No. 3894. [hereinafter referred to as *Al-Bukh*]; Muslim Bin Al-ajj,

is that Allāh has mentioned in Sūrah al-Ṭalq the waiting period for the females who still do not experience the menses, He says, as translated: "such of your women as have passed the age of monthly courses, for them the prescribed period, if you have any doubts, is three months, and for those who have no courses".^{*****} Moreover, they answered the argument of the former opinion replying that the *age of marriage* mentioned in the verse of Sūrah al-Nisā means the wet dream, it does not mean the age when the marriage becomes valid. Then there are many traditions and narrations of the companions whereby the minor have been given in marriage⁺⁺⁺⁺⁺⁺ e.g. 'Alī bin Abī Ḥabīb (RAA) gave his minor daughter Umm-e-Kulthūm (RAA) in marriage with 'Umar bin Khaṭṭāb (RAA).⁺⁺⁺⁺⁺⁺

The Act in hand starts with the statement showing its purpose i.e. to restraint the solemnization of the child marriage.^{§§§§§§§§} The problem in the statement of the purpose as aforementioned is that the Act ignored or neglected the majority opinion of Muslim Jurists about child marriage which strongly validates the child marriage and not the consummation before the spouses gets its capability.

What is the Role of Guardian in Child Marriages?

As discussed earlier, the majority of the Muslim Jurists agree on the validity of the child marriage, but the problem is that the child during the period of his /her childhood cannot enter into the contract of marriage himself. Like

7a / Muslim, vol. 2 (Bayrūt: Dār Iṭyā al-Turūth Al-'Arabī), 1039, ṣadḥ No. 1422. [hereinafter referred to as *Muslim*].

***** Al-Qur'ān 65:4.

++++++ See *Al-Mabsūṭ*, vol. 4, 212; Al-Jazairī, 'Abdurrahman, *Al-Fiqh 'Ilal-Madh-hib al-'Arba'ah*, vol. 4 (Bayrūt: Dār al-Kutub al-'Ilmiyyah, 2003) 46; *Al-Fiqh Al-Islāmi wa Adillatuhu*, vol. 9, 6682.

++++++ Ibn Abī Shaibah, Abī Bakr, *Al-Muḥannaḥ*, vol. 4 (Al-Riyāṭ: Maktabah al-Rushd, 1401H), 17, ṣadḥ No. 17341.

§§§§§§§§ First sentence of the preamble.

the marriage, there are other issues, affairs and matters to be settled and managed e.g. his property should be saved, protected and managed towards good. Likewise, his person should also be protected. For this reason, all these matters are submitted to a guardian and he becomes responsible for overall welfare of the child. He is bound to do what is best for the ward.

A guardian in a literal sense relates to a person who protects something or a person who is legally responsible for the care of another person. And it is antonym to enemy.^{*****} Guardian according to "The Guardians and Wards Act 1890" means a person having the care of the person of a minor or his property, or of both his person and property.⁺⁺⁺⁺⁺⁺ It is in fact, the one who has authority. If we see the Islamic Law, it defines it as the ability to proceed without need of permission of anyone.⁺⁺⁺⁺⁺⁺

One of the important duties of the guardian of the person is to look after the affair of marriage of the ward. This type of guardianship has been divided into two kinds. First is *Wil-yahal-Ijb* (guardianship with binding authority) and the second is *Wil-yahal-Ikhtiy* (guardianship without binding authority). According to Anḥ, all of the guardians can give the child in Marriage. The child in this case will have the *khayṭal-Bul-gh* (option of puberty); they may choose annulment of the marriage or its continuity on attaining the puberty except when the guardian giving in marriage is father or grandfather; there is no such option in this case.^{§§§§§§§§} On the other hand, according to others; Mḥikiyyah and Ḥanḥilah only the father can give his child in marriage and the child will have no option of puberty on attaining it. Shḥfiyyah recognize capacity of

***** Oxford, s.v. "guardian". See also *Mukhtṭ Al-ḥiṭṭ* s.v. "و ل ي".

++++++ The Guardians and Wards Act 1890, section 4(2).

++++++ *Al-Fiqh Al-Islḥi Wa Adillatuhu*, vol. 9, 6690.

§§§§§§§§ Al-Murḥḥnḥ, Burḥḥn Al-Dḥ, *Al-Hid-yah*, vol. 2 (Cairo: Dḥḥal-Salḥm, 2000), 480-481. [hereinafter referred to as *Al-Hid-yah*].

the grandfather as well in the absence of the father to give the grandchild in marriage.

Annulment of Marriage due to Non-Consent by the Female Side

(عَبْدُ الرَّحْمَنِ بْنِ يَزِيدَ، وَمُجَمِّعُ بْنُ يَزِيدَ الْأَنْصَارِيِّينَ، أَخْبَرَاهُ أَنَّ رَجُلًا مِنْهُمْ يُدْعَى خِذَامًا أَنْكَحَ ابْنَةً لَهُ، فَكَرِهَتْ نِكَاحَ أَبِيهَا، فَأَتَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ، فَذَكَرَتْ لَهُ، فَرَدَّ عَلَيْهَا نِكَاحَ أَبِيهَا، فَتَنَكَحَتْ أَبَا لُبَابَةَ بْنَ عَبْدِ الْمُنْذِرِ. وَذَكَرَ يَحْيَى أَنَّهَا كَانَتْ نَبِيًّا).
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(Abdul Rahman bin Yazīd Al-Anṣarī and Mujamma' bin Yazīd Al-Anṣarī said that a man among them who was called Khidhām arranged a marriage for his daughter, and she did not like the marriage arranged by her father. She went to the Messenger of Allāh and told him about that, and he annulled the marriage arranged by her father. Then she married Abū Lubābah bin Abdul-Mundhir).

(عَنْ خُنْسَاءَ بِنْتِ خِزَامٍ الْأَنْصَارِيَّةِ، أَنَّ أَبَاهَا، زَوَّجَهَا وَهَى ثَيِّبٌ، فَكَرِهَتْ ذَلِكَ فَأَتَتْ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَرَدَّ نِكَاحَهُ).
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***** Al-Mardawī, 'Al-Uddah, Al-Infāḥ Ma'rifaḥ al-Riḥ Min al-Khilāf, vol. 8 (Dīr al-Turath al-'Arabī, 2nd edition), 57; Ibn Qudamah, Muwaffaquddh, Al-Mughnī, vol. 7 (Maktabah al-Qahirah, 1968), 41; Al-Fiqh al-Islāmī Wa Adillatuhu, vol. 9, 6684-6685.

+++++ Ibn Mājah, al-Qazwānī, ed. Muhammad Fuḥd Abd al-Bāqī, Sunan Ibn Mājah, vol. 1 (Dīr al-Turath al-'Arabī, N.D.), 602, ḥadīth No. 1873.

+++++ Al-Bukhārī, Muhammad Bin Ismā'īl, ed. Muhammad Zuhair, Saḥīḥ al-Bukhārī, vol. 7 (Dīr al-Tauq al-Najīh, 1422H), 18, ḥadīth No. 5138.

(Narrated Khansah bint Khidh'm Al-An'riyyah that her father given her in marriage when she was a matron and she disliked that marriage. So she went to Allah's Messenger (PBUH) and he declared that marriage invalid).

In Pakistani Law, we don't find any distinction of the guardian to this effect. To the knowledge of the writer, any person can be appointed as guardian on application to the court.^{§§§§§§§§§§} Only a provision is there whereby a woman is authorize to repudiate her marriage before her age of eighteen if she has been given in marriage by her father or the guardian before her age of sixteen and the marriage has not been consummated.^{*****} However, according to Islamic Law, this legal provision is also a matter of further consideration and thought.

Is the State Authorized to Restrict Age Limit for Marriages?

This is an important issue that received different opinions among the Muslim jurists. Some modern Muslim scholars are of the view that fixing the minimum age for validity of the marriage is prohibited. Among these scholars are ^{¶¶¶¶}Al-Faoz'n who clearly said that the people who are of the view to fix the minimum age for marriage should fear Allah as it is something in contradiction of the Shar'ah.⁺⁺⁺⁺⁺ Another scholar, Mu^{¶¶¶}af' Al-Sib'¶, has the same opinion.⁺⁺⁺⁺⁺ Base of their opinion is the aforementioned ^{¶¶¶}ad-th of 'ishah (RAA) that the Prophet Muhammad (PBUH) married her at the age of six and He consummated when she was of

§§§§§§§§§§ The Guardians and Wards Act 1890, section 8 (a) & (b).

***** The Dissolution of Muslim Marriages Act 1939, section 2 (vii).

+++++ For detail see www.alfawzan.af.org.sa/node/13405. Last visited on 10/03/2014.

+++++ Al-Sib'¶, Mu^{¶¶¶}af' Al-Mar'ahbain Al-FiqhwaAl-Q'n-h (Al-Riy'¶. MaktabahAl-Warr'q, 1999), 50-51.

nine. They argued that this is the practical tradition of the Prophet (PBUH) whereby it is a clear negation of fixation of the minimum age for the marriage. Then, age of puberty is not stable due to difference of environments and atmospheres of different places, so, it is unjustified to fix one minimum age for marriage for all.

Many other scholars have the opinion that the minimum age for the marriage can be determined by the state. In other words, child marriage can be restricted. Examples of such scholars are Muhammad bin Al-Uthaymīn and Yusuf Al-Qaradawi. Base of this opinion is the verse saying: "make trial of orphans until they reach the age of marriage..." Their stance is that the age of marriage is the puberty which can be experienced either by reaching the known signs or, in case of their non-appearance by reaching the specific age, as suggested by the Muslim Jurists. So, there is no probability of its being contrary to Sharh because specifying age for puberty is not something new in Islamic Law. Secondly, Islamic Law did not fix the age of marriage and left it for the change of times, places and the interest for the spouses. According to them, in this modern time, minority view of the Muslim Jurists can be opted keeping in view the public interest (Al-Malah Al-Immah), especially, when it is proved that child marriages at present result into insecurity to the lives of the spouses and their children, one to all. Likewise, some cases of child marriage proved to be benefiting others than the spouses. So, due to these reasons, these scholars favor

Al-Bukhari, vol. 5, 55, Hadith No. 3894; Muslim, vol. 2, 1039, Hadith No. 1422.

www.ahlalheeth.com/vb/showthread.php?t=145777. Last visited on 13-04-2014.

www.qaradawi.net/new/takareer/6351-2012-12-13-13-09-12. Last visited on 13-04-2014.

Al-Qur'an 4 / 6.

Details on the signs and the ages will come later in the discussion of the term child.

In this case, these Jurists are IbnShubrumah, Ab-Bakr al-Ajam and Uthman al-Bah, as mentioned earlier in discussion of status of child marriage.

restriction on the child marriage by the state applying the principle of public interest (*Al-Maḥalah Al-ḥimah*).

Opinion of Imam Shauk-ṇ¹ is that child marriage should consist of the *maḥalahmu'tabarah* (considerable interest), otherwise, the *nik-ḥ* will be void, and in such a case, it is allowed rather obligatory for the state to make the spouses separate.⁺⁺⁺⁺⁺ We may infer from the writing of Imam Shauk-ṇ¹ that he favors restriction on the child marriage. Pursuant to that, we find Personal Laws of majority of the Muslim countries have picked out the minority opinion restricting the child marriage. For example, law of Iran specifies that the age of majority for boys is 15 lunar years and for girl 9 lunar years.⁺⁺⁺⁺⁺ It clearly states that the marriage before the age of majority is prohibited.^{§§§§§§§§§§} Similarly The Moroccan Family Code (*Moudawana*) states “*men and women acquire the capacity to marry when they are of sound mind and have completed eighteen full Gregorian years of age*”.^{*****} It also says that this capacity is one of the conditions to contract marriage for both of the spouses.⁺⁺⁺⁺⁺

In a non-Islamic democracy, parliament is the legislature; it may enact any law within the constitution of that constitution. As for Islamic state is concerned, it is necessary to make sure that all the Law is in conformity of Islamic Law. By this, the Islamic state can have three kinds of enactments.

One is the explicit Islamic Law rules provided in Qur'ṇ and ṇad-ṇḥ where there is no chance of difference of opinion in their interpretations. These rules should include as law of the Islamic state as they are. This needs

⁺⁺⁺⁺⁺Al-Shauk-ṇ¹, Muhammad bin Ali, *WabalAl-Gham-ṇ 'l-ṇShif-ṇAl-Aw-ṇ*, vol. 2 (Cairo: MaktabahIbnTaymiyyah, 1416H), 33.

⁺⁺⁺⁺⁺Civil Code of Iran, Art. 1210, explanation 1.

^{§§§§§§§§§§}Ibid. Art. 1041.

^{*****}Moroccan Family Code (*Moudawana*) 2004, Art. 19.

⁺⁺⁺⁺⁺Ibid. Art. 13 (1).

expert Muslim Jurists and scholars in Islamic Law to identify and help the ruler, so that these can be implemented as law of the state.

Second kind is where there is no direct solution of the problem in Qur'an and Hadith and which needs *ijtihad* and *istinbat* for interpretation by the expert Muslim jurists and scholars as well. Obviously, there is higher chance of difference of opinion in such interpretation. So, after all, one best opinion should be the law of the Islamic state in such a situation. Here, the ruler is not authorized to implement any law without consulting the Muslim Jurists.

As for the third kind, it is the options where there is general guideline but no specific rule by the Islamic Law and which is left for the people to decide their rules by themselves because they change with needs of the people and passage of time. For example, decisions of the salaries of the public officers, election of the local governments and taxes on imports and exports. This kind may be enacted and implemented by the ruler or the legislative body of the state on his behalf, however, after consultation of Muslim jurists and scholars because there may be some point which is not in conformity with Islamic Law.+++++

Let us now discuss that according to the Act marriage of both minor girl and boy is to be restrained. According to the Act, the court shall take notice of such marriages and order prohibition of the same. It says:

“Power to issue injunction prohibiting marriage in contravention of this Act:

(1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied

+++++ See, Usmani, Muhammad taqi, *Islam aor Siyasat-Nazariyat*, (Karachi: Maktabah Ma'arif al-Qur'an, 2010), 272-277; Muhammad Zahid Iqbal, *Islam-Nizam-e-Khilafat aur Hamd-e-Dhimm-e-Dar* (Lahore: Idarah Nashariyyat Mahmud Hasan, 2008), 382-389.

from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnized, issue an injunction against any of the persons mentioned in sections 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under sub-section (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved, rescind or alter any order made under sub-section (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever, knowing that an injunction has been issued against him under sub-section (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both:

Provided that no woman shall be punishable with imprisonment". §§§§§§§§§§§§§§§§

This section applies in case of child marriages. The procedure given in the section is that acting upon complaint or otherwise the court will issue notices to such person and will afford an opportunity to show cause against the issue of the injunction. The Court may either on its own motion or on the application of any person aggrieved, rescind or alter any order made under sub-section. If someone, knowing that an injunction has been issued against him disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both. It is provided that no woman shall be punishable with imprisonment.

The Role of the Council of Islamic Ideology

In the matter of restriction of the child marriage by the state, the recommendation of the Council of Islamic Ideology is much worthy and notable. It recommended in case of fixation of the minimum age for marriage by the state that if the child; male or female, attained the puberty and desires marriage before reaching the legal age for marriage, he/she should be allowed the marriage through permission of the Chairman of the concerned union council. Pointing out to the reason of their recommendation, the Council said that making them avoid the marriage even after attaining of the puberty is prohibited. Likewise, this restriction may lead them towards the evils. *****

§§§§§§§§§§§§§§§§ Child Marriages Restraint Act 1929. Sec. 12.

***** Council of Islamic Ideology, Islamabad, *Eighth Report on Islamization of Laws*, June 1983, p. 45; *Tenth Report on Islamization of Muslim family Laws*, April 1983, p. 92.

This seems to be a rich recommendation if we look towards the positive effects it may lead to. It is worthy to note that personal laws of many of the Muslim Countries already have such provision. For instance, the Moroccan Family Code rules that The Family Affairs Judge in charge of marriage may authorize the marriage of a girl or boy below the legal age of marriage⁺⁺⁺⁺⁺, subject to explaining the interest and reasons justifying the marriage, and after having heard the parents or the legal tutor of the minor, along with the assistance of the medical experts or after having conducted a social enquiry.⁺⁺⁺⁺⁺ If the legal tutor is not willing to consent, the Family Affairs Judge is authorised to rule on the matter.^{§§§§§§§§§§§§§§§§} Another example is the Family Law of Iran which states that the marriage before puberty by permission of the guardian and subject to taking into consideration the interest of the ward is proper.

Conclusions

According to Islamic Law, if a girl is a minor; did not attain puberty, she may be given in marriage by her father. In this case, she has the right to continue or discontinue her marriage on attaining the puberty. So, this is not an easy job to rule the child marriage as void because majority of the Muslim Jurists consider it valid depending on many strong arguments. Perhaps this is the reason that Child Marriage Restraint Act 1929 though make the child marriage punishable but provides no provision to make it void once solemnized. The Dissolution of Muslim Marriages Act 1939 permits a woman having been given in marriage before her age of sixteen to repudiate

+++++ It is eighteen full Gregorian years of age. See Moroccan Family Code (Moudawana) 2004. Art. 19.

+++++ Moroccan Family Code (Moudawana) 2004. Art. 20.

§§§§§§§§§§§§§§§§ Ibid. Art. 21.

***** Civil Code of Iran, see the note of Art. 1041.

her marriage before the age of eighteen with the condition that her marriage has not been consummated.⁺⁺⁺⁺⁺ This is also a proof that even the law does not invalidate the child marriage once it is solemnized.

However, the state can regulate it applying the principle of public interest. The age fixed by the state i.e. eighteen years for marriage can be reviewed keeping in view requirements of our time. The reason is that it may not be justifiable for those people who cannot wait the eighteen year to marry; especially, in the ongoing era of media. Moreover, this may lead towards the abyss of deviation, moral corruption and offences which is evident nowadays.

Moreover, the Act may also provide a mechanism for the one who has attained the puberty and desires the marriage before the age fixed by the State for marriage through accommodating the opinion of his / her guardian and medical certificate as many of the Muslim countries has been experiencing it very well.

By this, we may avoid the problems of the child marriage. At the same time, we save our society from the evils. More importantly, this makes jobs of the state easy in a way not contradicting the Islamic law.

⁺⁺⁺⁺⁺ The Dissolution of Muslim Marriages Act 1939, section 2 (vii).