

**IN THE FEDERAL SHARIAT COURT**  
(ORIGINAL JURISDICTION)

**PRESENT**

MR. JUSTICE MUHAMMAD NOOR MESKANZAI, CHIEF JUSTICE  
MR. JUSTICE DR. SYED MUHAMMAD ANWER  
MR. JUSTICE KHADIM HUSSAIN M. SHAIKH

**SHARIAT PETITION NO.10/I OF 2020**

FAROOQ OMAR BHOJA SON OF OMAR BHOJA, BHOJA  
TERRACE, SHAHRAH-E-LIAQAT, KARACHI

PETITIONER

**VERSUS**

FEDERATION OF PAKISTAN THROUGH MINISTRY OF  
LAW AND JUSTICE OF PAKISTAN ETC THROUGH ITS  
SECRETARY 3<sup>RD</sup> FLOOR, S-BLOCK, PAK SECRETARIAT,  
ISLAMABAD.

RESPONDENT

COUNSEL FOR THE  
PETITIONER

SAYYED TANVIR SOHAIL  
SHAH, ADVOCATE.

DATE OF INSTITUTION      ...      08 09.2020  
OF PETITION

DATE OF HEARING      ...      23.09.2021

DATE OF JUDGMENT      .      25 10 2021

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**JUDGMENT:**

**DR. SYED MUHAMMAD ANWER, J.** Through this  
Shariat Petition, the petitioner has challenged Sections 4, 5 and 6 of the  
Child Marriage Restraint Act, 1929 (hereinafter referred to as the  
“Impugned Provisions of law”) According to the petitioner, the

impugned Sections 4, 5 and 6 of the Child Marriage Restraint Act, 1929 are in contradiction with Islamic law and rules. The petitioner presented following two Ahadis

(i) **First Hadith:**

سیدہ عائشہ رضی اللہ عنہا کہتی ہیں کہ: ”نبی صلی اللہ علیہ وسلم نے مجھ سے نکاح کیا تو میری عمر اس وقت چھ سال تھی۔ پھر جس وقت ہم مدینہ آئے اور بنی حارث بن خزرج کے ہاں ٹھہرے، تو مجھے وہاں بخار ہو گیا اور اس کی وجہ سے میرے بال جھڑ گئے پھر جب کندھے تک لمبے ہوئے تو میری والدہ ام رومان میرے پاس آئیں میں اس وقت اپنی سہیلیوں کیساتھ جھولے لے رہی تھی۔ میری والدہ نے مجھے زوردار آواز دے کر بلایا میں ان کے پاس آئی مجھے نہیں معلوم انہوں نے مجھے کس لئے بلایا تھا۔ میری والدہ نے میرا ہاتھ پکڑا اور گھر کے دروازے پر پہنچ گئیں۔ میرا سانس اس وقت پھولا ہوا تھا، جب میرا سانس آپس میں ملا تو پانی سے میرا سر اور چہرہ دھویا، پھر مجھے ایک گھر میں لے گئیں، تو وہاں انصار کی کچھ خواتین پہلے سے ہی موجود تھیں، انہوں نے میرے بارے میں کلمات خیر کہے اور میری والدہ نے مجھے ان کے سپرد کر دیا۔ ان خواتین نے میرا بناؤ سنگھار کر دیا، مجھے کسی بات کا علم ہی نہیں تھا کہ چاشت کے وقت رسول اللہ صلی اللہ علیہ وسلم آئے اور میری والدہ نے مجھے آپ کے سپرد کر دیا اور میری عمر اس وقت نو سال تھی۔“

(1422) • بخاری: (3894) مسلم

(ii) **Second Hadith:**

عن عائشة ، ان رسول الله صلى الله عليه وسلم تزوجها و هي بنت ست و بنى بها و هي بنت تسع -

It was narrated from 'Aishah that the Messenger of Allah (S A.W ) married her when she was six years old, and consummated the marriage with her after she was nine

|                      |                             |
|----------------------|-----------------------------|
| Reference:           | Sunan an-Nasa'i 3255        |
| In-book reference:   | Book 26, Hadith 60          |
| English translation: | Vol 4, Book 26, Hadith 3257 |

The petitioner also relied upon a few other Ahadith narrating the event of solemnization of Nikah and marriage of Hazrat Ayesha (R.A.) like Ahadith Nos 3894, 3895 of Muslim Shareef and Hadith No 3896 of Bukhari Shareef

2. We heard the arguments of the petitioner at length and reached at the following conclusion:

i) Hadith No.3896 of Muslim Shareef, which is also referred to and relied upon by the petitioner contains two of the principles for such marriage contract, which are solemnized with the girl of much young age. The Hadith is reproduced as under, which is narrated by Urwa Bin Zubair -

"تُؤْفِيتُ حَدِيحَةَ قَتْلَ مَحْرَحِ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ إِلَى الْمَدِينَةِ ثَلَاثَ سِنِينَ قَالَتْ سَنَتَيْنِ أَوْ قَرِيبًا مِنْ ذَلِكَ وَكَحَّ عَائِشَةُ وَهِيَ بِنْتُ سِتِّ سِنِينَ ثُمَّ بَنَى بِهَا وَهِيَ بِنْتُ تِسْعِ سِنِينَ"

کہ خدیجہ رضی اللہ عنہا کی وفات نبی کریم صلی اللہ علیہ وسلم کی مدینہ کو ہجرت سے تین سال پہلے ہو گئی تھی۔ نبی کریم صلی اللہ علیہ وسلم نے آپ کی وفات کے تقریباً دو سال بعد عائشہ رضی اللہ عنہا سے نکاح کیا اس وقت ان کی عمر چھ سال تھی جب رخصتی ہوئی تو وہ نو سال کی تھیں۔

(مسلم شریف)

a) The first principle is that the Nikah can be contracted of a minor aged girl through her wali; however, the marriage has to be consummated after the girl attains adulthood or adult age. This Principle was set by Islam through the marriage of Hazrat Ayesha (R.A.) according to this Hadith.

b) The second principle is that the Rukhsati of the girl or consummation of marriage in such marriage should be made after the attainment of adulthood by the girl This age varies, because it is a settled medical principle that

the age at which a girl can be said to be “medically adult for marriage” varies. It depends on the cast, creed of the girl, weather conditions of that area where that girl lives and brought up, the diet she takes and also the social economic condition of the family, etc

3. Based on these above two principles, which can be drawn from the Ahadith Shareef. The minimum age of girl for marriage is set at 16 years by the Government of Pakistan in the impugned law. Evidently, there is more probability of eliminating the possibility, to the maximum extent, of any marriage to be consummated before attaining adulthood by the girl in that particular sense. Hence, it stands nearer to this second principle which can be drawn from this Hadith.

4. There are certain acts in Islam which are specifically associated with the personality of Nabi Kareem (S A.W.) like farzeeiati-e-Namaz-e-Tahajud and solemnization of marriage contract with the Ummahat-ul-Momineen (R A.) on the direction of Almighty Allah, etc. The Nikah of Hazrat Ayesha (R A.) with Nabi Kareem (S A W.) is one of them

(تفسير القرآن از مفتی محمد شفیع، معارف القرآن، سورت الاحزاب، آیت نمبر 50-52، ج 7، ص 186-196)

5. In Islamic fiqh, there is a consensus amongst the jurists that a girl whose Nikah is solemnized by her family members, elders or wali at her minor age has the right to repudiate/cancel that Nikah after attaining the age of marriage, i.e., puberty, but before consummation of the marriage. This right of a girl is known as Khiaar-ul-Blugh (خیار البلوغ). Under normal conditions 16 years of age is reasonable age for a girl to use this right of Khiaar-ul-Blugh, but it may vary in each case

6 It is settled principle of Shariah if any Mobah (مباح) act appears to be harmful to the society collectively or to a particular segment of a society, the State has power to make that act prohibited so that the society can be protected from a larger damage. Many example of such actions taken by the Muslim State are available in the historical record. One such example is of Hazrat Umar (R.A.), the second caliph of Islam who made it prohibited under the law for Muslim males to enter into a marriage contract with Ahle Kitab (اهل كتاب) ladies, although in Shariah it is legally (جائز) (*jaiz*) or (مباح) (*Mubah*) permitted but for the larger interest of the Muslim community of the Muslim State at that particular time, Hazrat Umar (R.A.) prohibited such marriages. In addition to that Hazrat Umar (R.A.) took several steps in which under special circumstances, he suspended even some wajibaat. Hence, setting limitations on a (مباح) (*Mubah*) act in such a precautionous way that it does not effect any other *hukum* setout by *Shariah*. The setting of the minimum age limit of 16 for girls is one of such examples

اصول التشريع الاسلامي، على حسيب الله، ناشر: ادارة القرآن و العلوم الاسلاميه، ص 79

7 In Islamic law, there is a well developed concept of Sad-uz-Zaraey (سدالزرائع) based on Quran and Sunnah, according to this principle it is also a duty of the State to control, curtail or curb any act in a society, which may lead to harmful consequences to society at large or to any of its segments, no matter how minor it is According to this principle of Sad-uz-Zaraey (سدالزرائع), therefore, such enactment like the



“impugned sections” of a law are not against Quran and Sunnah. As in the reign of Hazrat Umar (R A ) when people started to divorce their wives very commonly and very easily by saying the word of “talaq” three times in one go and subsequently demanded that it may be considered as only one Talaq and on that pretext they took that lady back as their wife. Hazrat Umar (R.A.) in order to discourage this ill practice commonly undertaken by men passed a law that: henceforth on uttering the word of “Talaq” three times in a row will be considered as three Talaqs causing permanent separation in that couple. Hazrat Umar (R.A.) did that because marriage is a sacred relation and one should not be allowed to mock it according to his whims. This famous ruling of Hazrat Umar (R.A.) is a perfect example that when a rule is efficiently abused or misused then it can be defined clearly to protect it from being abused. The impugned provisions of the law do the same thing. The law or principle of Shariah is defined in a more clear way, that minimizes the chance of its abuse or misuse, i.e., a marriage should not be consummated before the attainment of the age of medical maturity by the girl. Setting an age of 16 years reduces the possibility of breach of this principle of Shariah to the maximum. There are many other examples available from the life of Hazrat Umar (R.A.).

(اصول التشريع الاسلامى، الفقه الاسلامى وادلتة، الدكتور وهبة الزحيلي ، ج

٧، ص 183)

8. Although majority of Muslim jurists are of the view that the Nikah of a minor girl is permissible, there are some jurists having opposing opinion also like Imam Ibn-e-Shabarma who was a Muslim jurists contemporary of Imam Abu Hanifa in Iraq alongwith him Qazi Abu Bakar Al-Ism also had opposing opinion. There are a few more in addition to them who have this opposing opinion, i.e , Nikah of a minor girl is not permissible in Islam which means both point of views do exist among Muslim jurists. (Reference Al-Mughni Ibn-e-Qudaima, Volume-7, Page-487, Majmooa-i-Qawaneen-e-Islam, Volume No.1, Pages-214 and 215 by Dr Tanzeel-ur-Rehman). Dr Tanzeel-ur-Rehman (late) has dedicated a complete section of his book Majmooa-i-Qawaneen-e-Islam on this topic, although the whole section is very pertinent to this topic, however, the relevant portion of this section is reproduced herein below for bringing clarity to the issue:

یہ امر کہ صغر سنی کی شادیوں کو پاکستان میں ممنوع قرار دے دیا گیا ایک سماجی مسئلہ ہے، اور اس مسئلہ کو خالص مذہبی انداز میں سوچنے کے بجائے سماجی اور معاشرتی پہلو سے بھی سوچنا اور غور کرنا چاہیے۔ دوسری بات جو اس سلسلے میں ذہن نشین رکھنی چاہیے یہ ہے کہ نابالغوں کی شادیاں کرنا کوئی امر تاکیدی نہیں ہے، بلکہ ایک امر مباح ہے۔ مقتدر اعلیٰ یا ملک کا قانون ساز ادارہ معاشرے کے مفاد میں اس کو موقوف، معطل یا مقید کر سکتا ہے لیکن اس کا مطلب ہرگز یہ نہ ہوگا کہ مقتدر اعلیٰ یا قانون ساز ادارہ ایسے نکاح کو ناجائز خیال کرتا ہے بلکہ یہ کہا جائے گا کہ معاشرتی مصالح کے پیش نظر سماجی برائیوں کے انسداد کی غرض سے اس امر کو موقوف یا مقید کر دیا ہے۔ اسلام میں مقتدر اعلیٰ کے حق قانون سازی کو تسلیم کیا گیا ہے۔ اس کو اختیار ہے کہ وہ بندگان خدا کو فتنہ و فساد اور شر سے محفوظ رکھنے کے لیے بعض امور کو (جو اگرچہ مباح ہیں) معطل یا مقید کر دے یا اس میں شرعی حدود میں رہتے ہوئے انتہائی احکام جاری کرے۔

(جسٹس ڈاکٹر تنزیل الرحمن مرحوم، مجموعہ قوانین اسلام، جلد اول، ص 217)

9. Setting a threshold of minimum age at 16 years for a girl by law will generally help the girls to get at least basic education. The importance of education is self-explanatory. The need of education is equally important for everybody irrespective of gender. That is why Islam has made the acquisition of education as mandatory for every Muslim. As mentioned in Hadith, it includes males and females both:

طَلَبُ الْعِلْمِ فَرِيضَةٌ عَلَى كُلِّ مُسْلِمٍ - (بخاری)

Acquisition of knowledge is mandatory upon every Muslim.

The use of such language by the Prophet (SAWS) accentuates the farziat of education in a Muslim society, and for every Muslim in all and any circumstances. Hence, education is one of the fundamental factors for personality development of every and any human person

10. For a healthy marriage, not only physical health and economic stability etc. are necessary factors but mental health and intellectual development is equally important, which are achievable through education. Education is fundamental for women empowerment which is the key block for the development of an individual and consequently for the future generation of any nation. One of the purposes of marriage in Islam is protection and promotion of genealogy and generation of any person. This concept



comes under the topic of حفظ النسل (*nasal-un-Hifz*) which is one of the goals of Sharia according to the concept of مقاصد (Maqasid us Shariah as narrated by Shatbi. (Ibrahim Bin Musa Bin Muhammad Shatbi d. 790 Hijri, al Mowafqaat).

11. At a personal level, for a girl or for anybody irrespective of gender, the factor of getting education comes under the concept of حفظ العقل i.e. protection and promotion of intellect. (*Hifz-ul-Aql*) also is one of the basic goals of Shariah out of set five goals of Shariah, which are well explained by the concept of Maqasid-us-Shariah (مقاصد الشريعة).

اسلامی شریعت : مقاصد اور مصالح (المقاصد العامة للشریعة الاسلامیة از یوسف حامد العالم، مترجم: محمد طفیل ہاشمی، ادارہ تحقیقات اسلامی، اسلام آباد)

12. According to the teaching of Islam giving best education to a child girl or a daughter is one of the best deeds a person can do which guarantees *Jannah*. Following Hadith is the most relevant in this regard -

عن عبد الله قال : سمعت رسول الله صلى الله عليه وسلم يقول : من كانت له ابنة فاد بها فاحسن ادبها، و علمها فاحسن تعليمها، و اوسع عليها من نعم الله التي اسبغ عليه، كانت له منعة و ستره من النار-

حضرت عبد اللہ بن مسعود رضی اللہ عنہ فرماتے ہیں: میں نے رسول اکرم ﷺ کو یہ ارشاد فرماتے ہوئے سنا ہے جس کی کوئی بیٹی ہو، اس کو ادب سکھائے اور اس کی تربیت کرے، اس کو علم سکھائے اور اچھی تعلیم دے اور اللہ تعالیٰ نے اس کو جو نعمتیں دی ہیں ان نعمتوں میں سے اس پر وسعت کرے تو وہ بچی اس کے لئے دوزخ سے رکاوٹ بن جائے گی۔ (المعجم الکبیر للطبرانی 10295)

Due to its importance Imam Bukhari created a whole chapter of his famous Hadith Book جامع البخاری شریف on the topic of importance of the education of girls “باب عظة الامام، النساء و تعليمهن” almost in the beginning of his book بخاری شریف Bukhari Shareef.

13. There are many Islamic countries where such type of law is present wherein a minimum age for marriage for male and female is fixed, like in Jordan, Malaysia, Egypt and Tunisia, etc. However, in such countries according to their laws if in a specific or especial case there is an unavoidable circumstance or situation to solemnize a marriage before the age as set by the law then the family of that girl and boy must approach a specific authority made by the government allowing or disallowing such permission.

14. After examining the petition, we are of the considerate view that the petition is misconceived, hence, it is dismissed in *limine* and the Shariat Miscellaneous Application No.1-I of 2021 being infructuous is disposed of.

**JUSTICE DR. SYED MUHAMMAD ANWER**

**JUSTICE MUHAMMAD NOOR MESKANZAI,  
CHIEF JUSTICE**

**JUSTICE KHADIM HUSSAIN M. SHAIKH**

**Announced in open Court  
On 25.10.2021 at Islamabad**

*Approved for reporting*