JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.32798 of 2023

Azka Wahid

Versus

Province of Punjab & others

J U D G M E N T

Date of Hearing.	07-03-2024
PETITIONERS BY:	M/s Barrister Hamza Shahid Buttar, Barrister Daraab Wali Furqan, Abuzar Salman Khan Niazi, Osama Zafar, Tanveer Ahmad, Hannan Masood, Muhammad Naumman Sarwar and Malik Muhammad Zarif, Advocates.
RESPONDENTS BY:	M/s Muhammad Wazir Ali Khan, Zain sheikh, Waqas Hafeez and Rana Muhammad Afzal Razzaq Khan, Advocates for respondent No.4. Mr. Asad Ali Bajwa, D.A.G. Mr. Hassan Ijaz Cheema, A.A.G.

Shahid Karim, J:-. This constitutional petition brings a challenge to the definition of 'child' contained in the Child Marrige Restraint Act, 1929 (**1929 Act**) as amended and substituted by the Punjab Child Marriage Restraint (Amendment) Act, 2015. In particular, section 2(a) and (b) of the 1929 Act have been sought to be declared unconstitutional on the ground that they offend the equality clause in the Constitution of the Islamic Republic of Pakistan, 1973 (The Constitution).

2. Section 2(a) and (b) of the 1929 Act provide that:

> *"2(a) "child" means a person who, if a male, is under eighteen years of age, and if a female, is under sisteen years of age;*
>
> *(b) "child marriage" means a marriage to which either of the contracting parties is a child."*

3. It can be seen that definition of 'child' given in the above definition means a person who if a male is under 18 years of age and if a female is under 16 years of age and the punishments have been accordingly given in section 4 of the Act. In other Provinces such as Sindh, The Sindh Child Marriage Restraint Act, 2013 has been promulgated where the definition of a 'minor' has been done away with and a

person can either be a child or a major. The genders have also been treated equally.

Child Marriage:

4. The learned counsel for the petitioner reiterated the grounds taken in the petition and the arguments in this Court centred on the apparent distinction drawn on the basis of gender. These arguments shall be dealt with during the course of this opinion. learned Advocate General filed a brief which makes an interesting reading. The brief eruditely and in a scholarly manner alludes to the premise on which the difference may be justified. Reference has also been made to Islamic jurisprudence regarding age of puberty as the traditional interpretative toolkit. Doubtless, medical science, too, supports the notion of a female attaining puberty at an age which materially differs from a male. But that does not necessarily lead to granting a license in the hands of a parent or guardian to marry off a female child. The nuanced concepts of puberty and age of majority are not required to be invoked here.

5. In any enquiry, the first step is to ask the right question. The resolution of this wrinkle does not entail a debate regarding age of puberty. There may not be much sunlight between our opinions on this aspect. The right question to ask is whether notwithstanding the appearance of signs of puberty differently in males and females, the Government is empowered to prescribe a minimum age for marriage or not? For, that is what the 1929 Act seeks to achieve. If this were not the case, the definition of child would have had relation to age of puberty and not ages determined reflexively or randomly. Otherwise there are no manageable standards for assigning ages of sixteen and eighteen for female and male respectively. In my opinion, there is no prohibition in the Constitution on prescribing a minimum threshold for marriage and therefore to criminalise child marriage. The theme of the 1929 Act is to “restrain the solemnization of child marriage.” That purpose has been muddled by providing different ages for males and females for which there is no intelligible criteria. There may be a myriad of

factors considered by the legislature while enacting the law. Some of them have been narrated by the learned Advocate General to state that:

> *There is no caveat to the fact that child marriages constitute a violation of the fundamental rights of children. In Pakistan, many children are victims of child marriage and it is also a matter of record that the burden of child marriage is disproportionately borne by girls as opposed to boys. Early marriage excludes children from education and makes them vulnerable to various health complications. As many as 21% of girls are married before the age of 18 years and 3% before the age of 15 years in Pakistan according to UNICEF database 2016, based on Demographic Health Survey of Pakistan 2012-2013. Recent Demographic Health Survey of Pakistan (2017-2018), report that although on an average the age of marriage of girls is increasing but a deeper analysis of the data shows that child marriage at the age of 15 years has increased from 1.6 per cent to 1.8 percent.*
>
> - *Child marriage deprives a child of the right to education.*
> - *In Pakistan, Pregnancy and childbirth related complications are the main causes of death for mothers aged 15 to 19.*
> - *Child Marriage further perpetuates the cycle of poverty and the impact of inter-generational cycle of mal-nutrition.*

6. These are formidable reasons to compel a Government to put a restraint on child marriage. The extract set out above makes a compelling case based on physiological and sociological factors for the executive to step up and take effective measures to counter the debilitating effect of child marriage. It was a data-driven exercise based on pragmatic considerations to ensure a healthy society. It is an attempt to tap into the potential of more than half the population and pivots the mother to the centre of the debate. To the above, population control may also be added. In a nub, the purpose of law is anchored primarily in social economic and educational factors rather than religious. We, as a nation, woefully lag behind in all major indicators and half of our population cannot be lost to child-bearing at an early age while its potential remains untapped. Equal opportunities for females means equal restraint on marriage as the males. It is thus a fallacy to assume that the discourse is coloured by some underlying notions unrelated to the real purpose that permeates the law of child marriage.

7. The concept can also be culled out of Article 35 of the Constitution which provides:

> *"35. The State shall protect the marriage, the family, the mother and the child.*

8. This principle of policy obliges the State to protect marriage, the family, the mother and the child. The 1929 Act (and its amendments) is a step towards fulfilment of duty by the State under Article 35. It specifically mentions the mother and not the father. It is of crucial importance 'to protect marriage, the family, the mother and the child' to put a restraint on child marriage yet the centre of the family, the mother, has been grossly discriminated which undermines the cogency of the constitutional scheme. It is essential for the protection of family (with the mother and the child as its more important elements) to protect a female from being subjected to child marriage. The mandate of Article 35 was not lost on the legislature while enacting the 1929 Act. But, for some reason which cannot be discerned, unmistakable partisan slant has muddled the clear stream of policy objectives animating the 2015 amendments. The difference in ages in the definition of 'child' was left unchanged in the 2015 amendments, which does not comport with the mandate of Article 25.

9. Article 25 of the Constitution provides that:

> *25. (1) All citizens are equal before law and are entitled to equal protection of law.*
>
> *(2) There shall be no discrimination on the basis of sex .*
>
> *(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children.*

10. The above article in the Constitution states, without equivocation, that "there shall no discrimination on the basis of sex", and the State is only permitted to make special provision for the protection of women and children. The definition of 'child' in the 1929 Act while making a distinction on the basis of age, is not based on an intelligible criteria having nexus with the object of the law. The definition is indeed a special provision for the protection of

women but in the process it tends to afford greater protection to males by keeping their age of marriage higher than females. Clause (3) of Article 25 is an instance of affirmative action, a concept of American constitutional law and introduced in our Constitution through this provision. I have no doubt in my mind that the definition of child, in its present form, in 1929 Act is discriminatory.

11. In sum, the words in section 2(a) *viz*. "if a male ….and if a female is under sixteen years of age" being unconstitutional are held to be without lawful authority and of no legal effect. They are struck down.

12. The Govt. of Punjab (its relevant department) is directed to issue the revised version of 1929 Act (based on this judgment) within the next fifteen days and shall also upload that version on its website for information.

(SHAHID KARIM)
JUDGE

Announced in open Court on 09.04.2024.

Approved for reporting.

JUDGE

✯

Rafaqat Ali