

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

WRIT PETITION NO. 4227 OF 2021

Mst. Mumtaz Bibi

Vs

Qasim and others

PETITIONER BY: Ms. Sadaf Sehar Moon, Advocate.

RESPONDENTS BY: Mr. Shazeb Nawaz Khan, State Counsel.
Ms. Nosheen Gul Kharal, Advocate for
respondents No. 1 to 3.
Mr. Talat Mehmood, S.I, P.S Golra Sharif,
Islamabad.

DATE OF HEARING: 03.01.2022.

=====

BABAR SATTAR, J.- The petitioner is aggrieved by the abduction of her daughter, Swera Falak Sher ("**Minor**"), who was born on 07.03.2006, and seeks her recovery.

2. Learned counsel for the petitioner stated that an application for registration of FIR was made by the son of the petitioner after the incident of abduction dated 18.05.2021 and FIR No.351/2021 was subsequently registered on 06.06.2021 under section 365-B/34 of Pakistan Penal Code, 1860 ("**PPC**") at Police Station Golra Sharif, Islamabad against respondents No. 1 and 2 and other unknown accused. She submitted that despite persistent efforts the police authorities neither included respondent No.1 in the investigation nor produced the 15-year old daughter of the petitioner who has been missing since 18.05.2021. Learned counsel for the petitioner further submitted that pursuant to application filed under Section 491 of the Code

of Criminal Procedure ("**Cr.P.C.**") a bailiff was appointed who submitted a report before the learned Additional Sessions Judge stating that the wife of respondent No.3 had informed the bailiff that the daughter of the petitioner had been married to respondent No.1. And it was on this basis that the learned Additional Sessions Judge passed order dated 20.10.2021, pursuant to which the petition was dismissed.

3. On 03.12.2021 the SHO, Police Station Golra Sharif, Islamabad appeared in person and assured the court that the Minor would be produced in the Court by 06.12.2021. On the said date, the SHO produced the Minor, who stated in court that she had married respondent No.1 and was unwilling to go along with the petitioner (i.e. her mother) to her family home. This Court then ordered that the Minor be lodged in Dar-ul-Aman and directed the Administrator, Dar-ul-Aman to allow the petitioner to meet with the Minor under the supervision of Administrator Dar-ul-Aman. It was also directed that an analysis of the psychological and mental state of the Minor be undertaken by the psychologist at Dar-ul-Aman and a report be submitted to the Court. The Court had further directed National Database and Registration Authority ("**NADRA**") to place a report before this Court verifying the details in the Family Registration Certificate ("**FRC**") of the petitioner's family reflecting the date of birth of the Minor as 07.03.2006. Further the SHO, respondent No.5, was directed to interview the petitioner along with her husband and the brothers of the Minor, and file a report before the Court stating whether the Minor's safety would be in jeopardy in the custody of the petitioner. On 16.12.2021 the psychologist of Dar-

ul-Aman appeared before the Court and stated that she had interviewed the Minor who was stable and not a threat to herself. On 23.12.2021 the father of the Minor along with brothers of the Minor appeared in Court along with the petitioner and assured the Court that as a family of the Minor they would be responsible for her security and well-being. On the said date the Court directed that the Minor continue to stay in Dar-ul-Aman and that the father and brothers of the Minor may also be allowed to meet the Minor at Dar-ul-Aman under the supervision of the Administrator.

4. Learned counsel for the petitioner stated that the FRC reflected that the Minor was 15 years of age and the said FRC had been verified by NADRA as well. She relied on **Muhammad Safer Vs. Additional Sessions Judge (West) Islamabad and others (2018 PLD Islamabad 385)** for the proposition that where a report submitted by NADRA confirmed the date of birth of a party to a marriage there was no reason to order a medical examination of such person. She further relied on **Mst. Alishba Bibi Vs. The State and 7 others (2020 PLD Islamabad 28)**, where this Court had given detailed directions to the concerned authorities to curb the evil of child marriages. In the said judgment it had been held that question of age of the Minor should be determined by the court of competent jurisdiction after recording of evidence. She further relied on **Mst. Bakhshi Vs. Bashir Ahmed (PLD 1970 SC 323)** for the proposition that any person who married a girl below the age of 16 years was criminally liable under provisions of the Pakistan Penal Code, 1860 ("**PPC**"). She submitted that the petitioner

and her husband were the parents and natural guardians of the Minor, who was living with them in her family home before she was abducted by respondent No.1. That the Minor had now filed a suit for jactitation of marriage before the court vested with jurisdiction, and pending the decision of such suit the Minor ought to be released in the custody of the petitioner.

5. Learned counsel for respondents No.1 and 3 submitted that the Minor had married respondent No.1 and respondent No.1 be allowed to meet the Minor. And further that the Minor may be released in the custody of respondent No.1, who was the husband of the Minor. She relied on **Muhammad Khalid Vs. Magistrate Ist Class and 2 others (PLD 2021 Lahore 21)** for the proposition that a girl who had attained puberty, even if she was 14/15 years of age, could enter into a contract of marriage with a man of her choice and that it was not necessary for such girl to obtain the consent of her guardian/wali. In the said judgment the learned Lahore High Court after relying on **Muhammad Iqbal v. The State (PLD 1983 FSC 9)** and **Mauj Ali Vs Safdar Hussain Shah (1970 SCMR 437)** held that a minor girl who had attained puberty and married of her own free will was to be released from Dar-ul-Aman and proceed with her husband or with her parents as she pleased. She further relied on **Rashad Nazir Vs. The State and 3 others (2000 SCMR 1179)** for the proposition that a sui juris girl could not be directed to live in Dar-ul-Aman. She also relied on **Muhammad Bashir Vs. Muhammad Usman (2003 SCMR 1339)** where a sui juris girl appeared before the High Court and admitted that

she had contracted marriage with the accused against whom an FIR for her abduction had been registered. The august Supreme Court upheld the judgment of the learned Lahore High Court quashing the said FIR.

6. Mr. Shazeb Nawaz Khan Advocate, the learned State Counsel, submitted that while the Muslim Family Laws Ordinance, 1961 ("**MFLO**") dealt with the registration of marriage, divorce etc., neither the said Ordinance nor the rules framed thereunder addressed the issue of marriage with a minor. He submitted that section 23 of the Family Courts Act, 1964, prohibited the court from questioning the validity of a marriage which was registered under the MFLO. He submitted that in view of the lack of clarity within the MFLO, marriages of the minors under the age of 18 years have continued as a matter of practice in view of the customary understanding of law that marriages of Muslim citizens are regulated by the Muslim Personal Law. He further stated that under the West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, Muslim Personal Law on the question of marriage was applicable subject to provisions of any enactment for the time being in force. Consequently, Muslim Personal Law could be relied on as a source of law with regard to a question relating to a marriage that arose before the court. He submitted that Child Marriage Restraint Act, 1929 defined "child" in case of a female as a person under 16 years of age and section 4 provided that a male married a female under the age of 16 years of age was punishable with simple imprisonment which may extend to one month. He further stated that pursuant to section

2(vii) of Dissolution of Muslim Marriages Act, 1939, a minor girl was entitled to seek dissolution of marriage before she attained the age of 16 years provided that the marriage was not consummated. He submitted that most of the case law on the question of marriage had relied on commentary on Muslim Personal Law by Dinshaw F. Mulla wherein under para 251 of the commentary it has been stated that it would be assumed that a female had capacity to enter into a marriage contract if she had attained puberty. He contended that while the said commentary was not a source of law or binding on the court, a perusal of case law reflected that it had been treated as a source of law and relied on by the courts to determine the question of legal capacity of a minor to engage in a marriage. He then drew the court's attention to **Muhammad Aslam Vs. State (2012 PCr.LJ 11)**, wherein the learned Federal Shariat Court, contrary to the suggestion that puberty alone determined a girl's capacity to marry, had dwelled on the meaning of consenting adults for purposes of marriage, and had held that such consenting adult is a person who has come of age responsible enough to understand the consequence of marriage and the responsibilities that it entails. He relied on **Mst. Shahida and another Vs. Province of Sindh through Home Secretary, Sindh and others (2016 PCr.LJ Note 61)** for the proposition that no minor was capable of giving consent. He then relied on **Tariq Mahmood and another Vs. The State (2000 PCr.LJ 226)** wherein the learned Federal Shariat Court while adjudicating the question of marriage of a 13-year-old girl had held that where the female was not 16 years of age on the date of Nikah and her attaining puberty could

not be proved from the record she was not sui juris and was not capable of granting consent for marriage. He relied on **Ghulam Qadir Vs. The Judge Family Court, Muree and another (1988 CLC 113)** for the proposition that a minor was not competent to contract marriage. In the said judgment, the learned Lahore High Court had held that the marriage of a child was not invalid but could be annulled. It further held that a guardian could contract the marriage of child. He relied on certain cases where the alleged abductee was found to be sui juris and admitted to have contracted marriage with the accused against whom an FIR had been registered, and the courts found that there was no basis for registration of an FIR and quashed the same. The learned State Counsel concluded by saying that in view of the provisions of the Child Marriage Restraint Act, 1929, read together with the Dissolution of Muslim Marriages Act, 1939, the legislative intent was clear that a girl under the age of 16 years could not enter into a contract for marriage. But notwithstanding statutory provisions prohibiting such marriage contracts, marriages of minors had continued as the MFLO had not clearly declared that marriages of minors would be invalid.

7. In view of the FRC, as verified by NADRA, the date of birth of the Minor is 07.03.2006. She was 14 years and 02 months old at the time (i.e. 18.05.2021) when she was allured by respondent No.1 to come along with him for purposes of entering into a relationship and executing a marriage contract. The question of validity of such marriage is not the main question before this Court, but arises incidentally in discharge of its duty of

treating the Minor in accordance with law and determining who ought to be handed over the custody of the Minor till such time that a court of competent jurisdiction rules on the existence and legality of any relationship between the Minor and respondent No. 1. This Court can therefore not pass a declaration whether or not the purported marriage contract between the parties is valid or not as doing so would require definitively determining the age of the Minor, which could require recording of evidence, and this Court in its constitutional jurisdiction cannot undertake such exercise. This Court must however decide whether the Minor who has been produced before the Court and is presently lodged in Dar-ul-Aman is to be released in the custody of the petitioner, who is her mother, or is to be released in the custody of respondent No.1, who claims to have solemnized a contract of marriage with the minor. The issues that arise in relation to such question include the following:

1. Can a Minor execute a valid contract of marriage and can a marriage between an adult and a child, even if with the consent of the child, be deemed to be a valid marriage?
2. What is the age of majority in Pakistan, and does a Minor have the legal competence to enter into a contract of marriage before attaining the age of majority?
3. Can the consideration and purpose of contract of marriage be regarded as lawful in view of section 23 of the Contract Act, 1872, read together with sections 375 and 377A of Pakistan Penal Code, 1860?

4. Can a contract of marriage, involving an object and purpose that is proscribed, be treated as a valid contract while simultaneously creating criminal liability for the male for carrying out acts conceived by such contract?

8. The foundational purpose of rule of law is to enable citizens to order their lives in accordance with provisions of law and to be able to understand which actions are permissible that the citizens are free to engage in for not having been prohibited, and which actions are proscribed by law and consequently not to be undertaken. Article 4 of the Constitution guarantees a right to every individual to be dealt in accordance with law and states the following:

4. Right of individuals to be dealt with in accordance with law, etc. (1) *To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan.*

(2) *In particular—*

(a) *no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*

(b) *no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*

(c) *no person shall be compelled to do that which the law does not required him to do.*

9. In order for citizens to ensure that their actions do not fall foul of the law attracting punitive liability, it is imperative that law lays down the acceptable rule of conduct with clarity. It cannot be countenanced that in a rule of law system an action

would be prohibited by law engaging in which constituted a crime attracting significant jail time, while on the other hand the very same action was to be treated as the foundation of a valid contractual relationship. In order to make sense of the concept of rule of law, the laws of a country must speak with one voice that the citizens can understand in order to comply with the requirements of law and know in advance which actions are proscribed and would result in legal liability. This is why courts of law while discharging the function of interpreting laws take a holistic view of the statutes in force in order not to accord them contradictory interpretations, as it is to be assumed that the legislature while promulgating a law would not have intended to enact provisions that would contradict other provisions of law also in force. Principles of statutory interpretation thus require courts to accord meaning to provisions of a statute in a manner that they do not contradict the intent and purpose of other statutes to the extent possible. And if in view of the clear text of a statute such interpretation is not possible, there are other principles of statutory interpretation (i.e. as a general matter the law later in time prevails as the latest expression of legislative intent) applied to lay down for the benefit of citizens the applicable requirements of law with clarity.

10. Let us start with the framework of rights of children as guaranteed by the Constitution. Children like adults have been guaranteed the right to life and liberty by Article 9 of the Constitution. Article 9 was interpreted expansively by the august Supreme Court in **Ms. Shehla Zia and others Vs. WAPDA**

(PLD 1994 SC 693) as a meaningful right to enjoy life and not just to exist. Through the 18th Constitutional Amendment, Article 25A was added to the Constitution, which holds that "*the State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.*" Thus, the Constitution itself declares that it is mandatory for the State to ensure that children up to the age of 16 are given educational instruction. Article 35 of the Constitution holds that "*the State shall protect the marriage, the family, the mother and the child.*"

11. In any rule of law framework, a distinction is drawn between actions of adults versus the actions of children. The reason is simple. Adults are assumed to understand the consequences of their actions and are accordingly held accountable for such consequences. Children, on the other hand, are not assumed to have complete agency and the law therefore acknowledges that they might neither understand the consequences of their actions nor can be held completely responsible for such actions. Every State through legislative enactment determines the age at which a person is to be treated as an individual with autonomy and human agency for purposes of certain actions. This is the age at which his or her actions are deemed valid and are to be given effect as he or she has the capacity to understand their consequences, and the law accordingly holds such person accountable for them. Part of the question before us is the age at which a person in Pakistan is deemed to have the agency and capacity to enter into a contract

for marriage and grant informed consent while understanding the myriad consequences and responsibilities marriage entails.

12. The case law on the question of competence of a Minor to consent to a contract of marriage is divergent. It has been assumed that the question of legal competence of a Minor to solemnize a marriage contract is regulated by Muslim Personal Law and not statutes enacted by the legislature. Research of the case law on the subject throws up references from paragraphs of Dinshaw F. Mulla's commentary on Muslim Personal Law on the basis of which it has been held that a female child is competent to enter into a contract of marriage once she has attained puberty. Paragraphs 250 and 251 of Mulla's commentary on Muslim Personal Law state the following:

250. Definition of Marriage.—*Marriage (nikah) is defined to be contract which has for its object the procreation and the legalizing of children.*

251. Capacity for marriage.—*(1) Every Muhammedan of sound mind, who has attained puberty, may enter into a contract of marriage.*

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians.

(3) A marriage of a Muhammedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

13. Before we proceed with the question of application of Muslim Personal Law to determine the legal competence of a child to execute a marriage contract, a comment on Mulla's commentary on Muslim Personal Law as a source of law is called for. Dinshaw Fardunji Mulla was not a muslim scholar who can be accredited with religious expertise to interpret precepts of Islam. Dinshaw Fardunji Mulla, of Zoroastrian faith by descent,

was a legal scholar who authored treatises on various subjects of law, including contract law and Muslim Personal Law. His treatise on Muslim Personal Law is therefore like any other legal commentary by a scholar of law as opposed to the commentary by a Muslim jurist with expertise or authority to interpret primary sources of Islamic Law. 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.

14. The suggestion that questions such as marriage, maintenance and divorce for the Muslim citizens of Pakistan are regulated by Muslim Personal Law and not by statute is misconceived and emanates from a flawed reading of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962 ("**Act of 1962**"). Section 2 of the Act of 1962 states the following:

2. Application of the Muslim Personal Law.—
*Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions, including waqfs, trusts and trust properties, the rule of decision, **subject to the provisions of any enactment for the time being in force**, shall be the Muslim Personal Law (Shariat) in case where the parties are Muslims.*
[Emphasis supplied]

15. It is evident from the text highlighted above that application of Muslim Personal Law in relation to subjects mentioned in section 2, including marriage, is subject to

provisions of enactments for the time being in force in Pakistan. Sections 3 and 4 of the Enforcement of Shari'ah Act, 1991 ("**Act of 1991**"), which Act is subsequent to the Act of 1962, state the following:

3. Supremacy of Shari'ah. (1) *The Shari'ah that is to say the Injunctions of Islam as laid down in the Holy Qur'an and Sunnah, shall be the supreme law of Pakistan.*

(2) *Notwithstanding anything contained in this Act, the judgment of any Court or any other law for the time being in force, the present political system, including the Majlis-e-Shoora (Parliament) and Provincial Assemblies and the existing system of Government, shall not be challenged in any Court, including Supreme Court, the Federal Shariat Court or any authority or tribunal:*

Provided that nothing contained herein shall affect the right of the non-Muslims guaranteed by or under the Constitution.

4. Laws to be interpreted in the light of Shari'ah. *For the purpose of this Act—*

(a) *while interpreting the statute-law, if more than one interpretation is possible, the one consistent with the Islamic principles and jurisprudence shall be adopted by the Court; and*

(b) *where two or more interpretations are equally possible, the interpretation which advances the Principles of Policy and Islamic provisions in the Constitution shall be adopted by the Court.*

16. The question of application of Muslim Personal Law and to what extent a High Court can employ understanding of Muslim Personal Law in adjudicating matters before it came before this Court in **Shahab Saqib Vs. Sadaf Rasheed** (W.P No.

2355/2015). It could be useful to reproduce excerpts of this Court's opinion rendered in **Shahab Saqib:**

30. As a historical matter, certain relationships, such as marriage and interactions within the family, were left outside the domain of public law and were regulated by the personal law of the community in question. The customs and personal laws of communities came to be guided by their respective religious beliefs and edicts. And the process of codification of personal laws of communities also began taking root. Therefore, codified statutory provisions as well as uncodified personal law both constituted sources of law guiding courts in reaching decisions in areas that traditionally belonged to the province of private law.

31. Overtime there has been a rethink on the virtues of leaving certain relationships, such as marriage and whatever transpires within it, in the private realm. The state has found that it has a legitimate interest in regulating these relationships as well, and we have consequently seen legislation on the issue of domestic abuse and statutory law regulating marriage, divorce and maintenance etc. The Muslim Family Law Ordinance, 1961, is one manifestation of the evolving jurisprudential approach with the state regulating relationships that erstwhile fell outside the public domain and were treated as a private matter regulated in accordance with customs as informed by the religious beliefs of communities.

33. ...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.

34. The Constitution has thus addressed this issue as also elucidated by the august Supreme Court in Malik Muhammad Mumtaz Qadri (PLD 2016 SC 17). 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... Further the Council of Islamic Ideology has been created under Article 228 of the Constitution, which is conferred with the authority to make recommendations to the Parliament and Provincial Assemblies as to ways and means to enable Muslims of Pakistan to enable their lives in accordance with the injunctions of Islam. It is then for the Parliament to amend existing laws or promulgate new laws for such purpose. It is however, nor for the High Court to usurp the jurisdiction of the Federal Shariat Court on the one hand or the Council of Islamic Ideology comprising religious scholars and the Parliament on the other, by importing one's personal understanding of principles emanating from the Quran and the Sunnah in deciding cases in the presence of clear statutory provisions addressing the subject matter.

37. The Enforcement of Shariah Act, 1991, was then promulgated and Section 4 clearly provides that laws to be interpreted in the light of Shariah where more than one interpretation of a statutory provision is possible and one such interpretation is consistent with or promotes the jurisprudence and principles of Islamic Law. In other words, jurisprudence and principle of Islamic Law can be used as a tool for interpretation of statutes where the text of the statute in view of its plain meaning can be accorded more than one interpretation. If the language of the statute unequivocally conveys the intent of the law, no external source of law can be employed to read into the statute. Framed another way, the jurisprudence and principle of Islamic Law do not trump the principle of casus omissus. A court cannot supply to a statute language that is not provided therein. It is only while undertaking an interpretive exercise to resolve some ambiguity in statutory law that Section 4 of the Enforcement of Shariah Act, 1991 comes into play and the jurisprudence and principles of Islamic law can be used as sources of law to guide the interpretive exercise.

It was therefore concluded that it is in view of the provisions of the Constitution as well as the law laid down by the august

Supreme Court in **Malik Mumtaz Qadri Vs State (2016 PLD SC 17)** it is not for a presiding judge to employ his own subjective understanding of principles of Muslim Personal Law to decide the case before the court in the presence of clear statutory provisions addressing the subject matter.

17. In **Farooq Omar Bhoja vs. Federation (Shariah Petition 1/2020)** the learned Federal Shariat Court dismissed a challenge to sections 4, 5 and 6 of the Child Marriage Act, 1929, for being in contradiction with principles of Islamic Law. It observed that amongst Islamic Jurists there was disagreement over whether or not the nikah of a minor girl is permissible. However, it held that it was not un-Islamic for the state to determine the permissible age for entering into a contract for marriage. The question of what amounts to consent for purpose of entering into a marriage contract was addressed by the learned Federal Shariat Court in **Muhammad Aslam vs. The State (2012 P.Cr.L.J 11)** wherein the following was held:

9. Awareness about marriage encompasses more serious matters than mere carnal knowledge (relating to physical feelings and desires of body). Therefore, Islam places conjugal consent over high pedestal of morality rather than carnality. Consequently consenting adult is a person who has come of age enough, and therefore responsible enough, to decide and understand consequences of marriage.

10. Marriage involves a consent which is quite distinct in definition and in differentiation from all types of other consent, e.g., common consent, mutual consent, or implied or express consent. Consent for marriage is eloquent and declaratory, being more specific and

expressive. Consent for marriage has deeper and wider implications for criminal, civil, and family laws, e.g., inheritance, etc. Therefore, free consent, for marriage, does not mean just acceding to or saying 'yes' to the circumstantial or situational dictate. While analyzing quality, value or worth and features of such a free consent, following need to be considered: Ability of exercising free choice; capacity (legal capacity: not only sane, but mature mind, i.e., not only puberty, mere majority but age of responsive and conscious consent); capability to use that capacity; depending upon capacity, impediments to or assistance available for application of mind e.g., availability of assistance of wali and wakil (guardian-counsel and supporter-protector); in one's own interest or benefit; extent of free availability of possible options to choose from; environ of freedom.

In view of the jurisprudence produced by the learned Federal Shariat Court, the State regulating the permissible age for entering into a marriage contract or what constitutes a prohibited object or purpose of a contract is not un-Islamic. Further, as noted in **Farooq Omar Bhoja**, there is no agreement amongst Islamic scholars and jurists with regard to the minimum permissible age for marriage. Consequently, such age is to be determined in view of provisions of enactments in force in Pakistan at the present time, with a view to promoting Principles of Policy prescribed in the Constitution while contradicting principles of Islamic law and jurisprudence.

18. 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 behavior, 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. Before we consider enactments in force at the moment, it must be noted that legislative instruments enacted prior to Pakistan's independence, while India was a British colony, largely refrained from regulating conduct that was deemed to fall within the province of private law of citizens (as also discussed in **Shahab Saqib**). And consequently, the colonial regime sought not to interfere with local practices beyond a point even when certain practices were considered undesirable, such as child marriages. The limitations that bound the colonial government do not constrain the state in a democracy where the populace administers itself through a representative government. The Constitution provides for separation of powers and checks and balances. Part of the system of checks and balances includes institutional structures, in the form of the Council of Islamic Ideology with the power to make recommendations to the legislature to ensure that laws of the country are in consonance with teachings of Islam, and in the form of a Federal Shariat Court to consider whether the provision of a law is in conflict with Islamic law and jurisprudence. It is due to the institutional framework to enact laws for the welfare of the citizens in accordance with the Constitution that the state of Pakistan is not constrained in the manner that the colonial state was, and the legislature can enact laws to proscribe abhorrent practices and social customs and prescribe penal consequences to root out such practices and customs. It is also important to bear in mind that

while the fundamental right of a child to have his/her best interest protected might have been a recognized right even a century ago, the standard of behavior that is required in order to uphold such right has evolved over a period of time. And this evolution in the expected standard of behavior, as prescribed, is reflected in our legislation.

19. Let us now turn to the statutory instruments relevant for our present purposes. We will first list the relevant provisions of statutes enacted by the government in British India, which reflect a policy of the colonizing power to avoid interference with local customs and practices within the domain of private law.

(i) The Majority Act, 1875.

2. Savings:-- Nothing herein contained shall effect.-

(a) the capacity of any person to act in the following matters (namely), marriage, dower, divorce and adoption;

(b) the religion or religious rites and usages of any class of citizens of Pakistan;

3. Age of majority of persons domiciled in Pakistan.-

Subject as aforesaid, every Minor of whose person or property, or both a guardian, other than a guardian for a suit within the meaning of Order 32 of the First Schedule of the Code of Civil Procedure, 1908 (V of 1908) has been or shall be appointed or declared by any Court of Justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age shall, notwithstanding anything contained in the that age shall, notwithstanding anything contained in the Succession Act, 1925 (XXXIX of 1925) or in any other enactment, his majority when he shall have completed his age of twenty-one years and not before.

(ii) The Child Marriage Restraint Act, 1929.

2. Definitions.– In this Act:

- (a) "**child**" means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age;
- (b) "**child marriage**" means a marriage to which either of the contracting parties is a child;
- (d) "**minor**" means person of either sex who is under eighteen years of age.

4. Punishment for marrying a child.– If a person, not being a minor, contracts child marriage, he shall be liable to punishment of simple imprisonment which may extend to six months and fine of fifty thousand rupees.

5. Punishment for solemnizing a child marriage.– Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to [8][six months and fine of fifty thousand rupees], unless he proves that he had reason to believe that the marriage was not a child marriage.

6. Punishment for parent or guardian concerned in a child marriage.– (1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnized, or negligently fails to prevent it from being solemnized, shall be punishable with simple imprisonment which may extend to [9][six months and fine of fifty thousand rupees]:

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

(iii) The Dissolution of Muslim Marriages Act, 1939.

2. Grounds for decree for dissolution of marriage. A woman married under Muslim Law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely:

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of sixteen years, repudiated the marriage before attaining the age of eighteen years:

Provided that the marriage has not been consummated;

20. Section 2 of the Majority Act, 1875, excluded from its scope the subject of marriage. The Dissolution of Muslim Marriages Act, 1939, contemplated the possibility of a child under

the age of 16 being married off by her father or guardian. It was due to these provisions, together with lack of a clear provision in the Muslim Family Laws Ordinance, 1961, prescribing the age for a valid marriage, that courts while relying on commentaries on Muslim Personal Law held that marriage with a female child under the age of 16 while attracting criminal liability under sections 4, 5 and 6 of the Child Marriage Restraint Act, 1929, did not invalidate the contract of marriage itself. In this regard various judgment rendered by High Courts rely on the decision of the august Supreme Court in **Mst. Bakhshi Versus Bashir Ahmad (1970 PLD SC 323)** where a 15 years old girl whose father had passed away when she was very young and her mother had contracted a second marriage, had contracted a marriage of her own will. Her mother then lodged an FIR against the daughter's husband for kidnapping her. The girl was medically examined and the doctor opined that she was between 16/17 years of age. The husband filed an application before the High Court under section 491 of Cr.P.C to secure the release of his wife. The High Court released the minor girl and left it up to her to determine who she wished to live with. The apex Court upheld the decision and observed that where a girl below the age of 16 got married in violation of provisions of the Child Marriage Restraint Act, 1929, the marriage itself would not become invalid, although the husband who contracted such marriage or individuals who helped solemnize the marriage may be held criminally liable. The apex Court further held that in view of section 2 of West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, that question of marriage

was to be regulated by Muslim Personal Law in case where the parties were Muslim.

21. The law as laid down in **Mst. Bakhshi Versus Bashir Ahmad (1970 PLD SC 323)** is now distinguishable for a few reasons. One, the said law was laid down before the promulgation of the Constitution of 1973, which as discussed above, now provides for an institutional framework, including the Council of Islamic Ideology and the Federal Shariat Court, to determine the question of compliance of statutory laws with the injunctions of Islam. Two, that West Pakistan Muslim Personal Law (Shariat) Application Act, 1962, which was subject to enactments for the time being in force, was succeeded by the Enforcement of Shariat Act, 1991, whereby principles of Islamic law are to be employed as tools where statutory provisions create room for more than one interpretation. Three, and probably the foremost distinguishing factor is that United Nations Convention on the Rights of Child ("**UNCRC**") was adopted by the United Nations General Assembly in 1989 and entered into force on 02.09.1990. UNCRC has done for the rights for children what United Nations' Human Rights Declaration did for fundamental human rights more generally. Pakistan is a party to the UNCRC and is under an obligation to comply with its provisions. It has done so by enacting a string of legislation and the introduction of Article 25A of the Constitution is also part of the legislative measures taken by Pakistan to bring its laws in compliance with the UNCRC. Reproduced below are some of the most relevant clauses and sub-clauses of UNCRC that seek to

entrench, operationalize and protect the fundamental rights of children across nation-states:

Article 1

For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the

family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 19

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.

2. States Parties shall in accordance with their national laws ensure alternative care for such a child.

3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

Article 24

1. States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

3. States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children.

Article 28

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity.

Article 31

1. States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

2. States Parties shall respect and promote the right of the child to participate fully in cultural and artistic life and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.

Article 32

1. States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development.

2. States Parties shall take legislative, administrative, social and educational measures to ensure the implementation of the present article. To this end, and having regard to the relevant provisions of other international instruments, States Parties shall in particular:

- (a) Provide for a minimum age or minimum ages for admission to employment;
- (b) Provide for appropriate regulation of the hours and conditions of employment;
- (c) Provide for appropriate penalties or other sanctions to ensure the effective enforcement of the present article.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

- (a) The inducement or coercion of a child to engage in any unlawful sexual activity;
- (b) The exploitative use of children in prostitution or other unlawful sexual practices;
- (c) The exploitative use of children in pornographic performances and materials.

Article 36

States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare.

22. The issue of giving effect to international law came before the august Supreme Court in **The Hanover Fire Insurance Company Vs. Muralidhar Banachand (PLD 1958 SC 138)**, wherein the following was held:

"It is therefore necessary to act in accordance with the reciprocal arrangements arrived at between Pakistan and the country concerned i.e. Pakistan and India in the present case; otherwise our Courts would be passing orders inconsistent

with rules of international law. In this connection the following passage of Maxwell on Interpretation of Statute Tenth Edition (p.148) is instructive:

"Under the same general presumption that the legislature does not intend to exceed its jurisdiction, every statute is to be so interpreted and applied, as far as its language admits, as not to be inconsistent with the comity of nations, or with the established rules of international law. if, therefore, it designs to effectuate any such object, it must express its intention with irresistible clearness to induce a Court to believe that it entertained it, for if any other construction is possible, it would be adopted to avoid imputing such an intention to the legislature. All general terms must be narrowed in construction to avoid it. But if the statute is unambitious, its provisions must be followed, even if they are contrary to international law."

This question came before the learned Sindh High Court in **Najib Zarab Limited Vs. Government of Pakistan (PLD 1993 Karachi 93)**, wherein the following was held:

"We are of the view that nations must march with the international A community and the municipal law must respect rules of international law, even as nations respect international opinion. The comity of nations requires that rules of international law may be accommodated in the municipal law even without express legislative sanction provided they do not run into conflict with Acts of Parliament. But when they do run into such conflict, the sovereignty and the integrity of the Republic and the supremacy of the constituted Legislatures in making laws, may not be subjected to external rules except to the extent legitimately accepted by the constituted Legislatures themselves. ...National Courts will endorse international law but not if it conflicts with national Law. National Courts being organs of the National State and not organs of international law, must perforce, apply national law if international law conflicts with it. But the Courts are under an obligation within the legitimate limits, so to interpret

the municipal statute as to avoid confrontation with the comity of nations or the well-established principles of, international law. But if conflict is inevitable, the latter must yield.

23. In view of the law on the issue of treaty obligation as enumerated in **Societe Generale De Surveillance S.A. Versus Pakistan through Secretary, Ministry of Finance Revenue Division, Islamabad (2002 SCMR 1694)**, for provisions of treaty to be given effect in Pakistan it is for the Parliament to enact legislation for such purpose. In the event that municipal law of Pakistan is in conflict with provisions of international law, the municipal law for the time being in force is to be given effect by the courts in Pakistan notwithstanding any conflicting international obligation. However, for purposes of interpretation, where the express provisions of municipal law of Pakistan do not contradict obligations undertaken by Pakistan by becoming party to a treaty or convention, it is to be assumed that the legislature never intended to set up municipal law in conflict with Pakistan's obligations under international law. Thus, where the text of a statutory instrument provides room for interpretation, the interpretation is to be undertaken such that it is not in conflict with Pakistan's obligation under international law. In the context of UNCRC, however, Parliament has enacted legislation for the specific purpose of bringing the laws of Pakistan in conformity with the Pakistan's obligations under UNCRC. These enactments include the following:

(I) Article 25A of the Constitution.

The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.

It has already been discussed above that Article 25A was enacted through the 18th Constitutional Amendment whereby the State was placed under a mandatory obligation to ensure the education of children up to 16 years of age. The scope of Article 25A of the Constitution came before the august Supreme Court in **Liaquat Hussain Vs. Federation (PLD 2012 SC 224)** and the object of Article 25A and its significance, was explained as follows:

Main purpose of education is to educate individuals so that they get prepared to form the next generation of leaders. It will yield strong families and strong communities. Education plays an important role to promote knowledge and understanding of rural communities. In almost all societies, receiving education and attending school is necessary to achieve success. It is the key to move forward and ultimately succeed in life. For preparing the children and young people to effectively participate in the development of the society, the schools play a vital role. The knowledge and wisdom can only be gained through the experience of learning.

(II) Protection of Women (Criminal Laws Amendment) Act, 2006.

WHEREAS it is necessary to provide relief and protection to women against misuse and abuse of law and to prevent their exploitation;

AND WHEREAS Article 14 of the Constitution ensures that dignity of man and, subject to law, the privacy of home, shall be inviolable;

AND WHEREAS Article 25 of the Constitution guarantees that there shall be no discrimination on the basis of sex alone and that the State shall make provisions for the protection of women;

AND WHEREAS Article 37 of the Constitution encourages promotion of social justice and eradication of social evils;

AND WHEREAS the objective of this Bill is to bring in particular the laws relating to zina and qazf in conformity with the stated objectives of the Constitution and the injunctions of Islam,

AND WHEREAS it is expedient for the aforesaid objectives further to amend the Pakistan Penal Code (Act XLV of 1860), the Code of Criminal Procedure, 1898 (Act V of 1898, the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939), the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (VII of 1979), and the Offence of Qazf (Enforcement of Hadd) Ordinance, 1979 (VIII of 1979) and for the purposes hereinafter appearing,

375. Rape:- *A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,*

(i) against her will.

(ii) Without her consent

(iii) With her consent, when the consent has been obtained by putting her in fear of death or of hurt,

(iv) With her consent, when the man knows that he not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

376. Punishment for rape *(1) whoever commits rape shall be punished with death or imprisonment of either description for a term which shall not be less than ten years or more, than twenty-five years and shall also be liable to fine.*

(2) When rape is committed by two or more persons in furtherance of common intention of all, each of such persons shall be punished with death or imprisonment for life.

The statements of objects of the Protection of Women (Criminal Laws Amendment) Act, 2006, read together with provisions of sections 375 and 376 of PPC now provide unequivocally that no child up till the age of 16 is to engage in sexual intercourse under any circumstances. Even if a child were to consent to

engaging in sexual intercourse, the action would still constitute rape for purposes of section 375 of PPC punishable with death or life imprisonment notwithstanding such consent.

(III) The National Commission on the Rights of Child Act, 2017.

2. Definitions-- *In this Act, unless there is anything repugnant in subject or context,--*

(b) "child" *means any person below the age of eighteen years;*

(c) "child rights" *mean and include, but limited to, rights of child in the United Nations' Convention on Rights of the Child and in any other domestic law;*

15. Functions of the Commission.- *The Commission shall perform all or any of the following functions, namely:-*

(c) *examine and review any law or policy or practice, for the time being in force, for protection of child rights and recommend measures for their effective implementation;*

(e) *inquire into violation of child rights and recommend to the relevant agency or department initiation of proceedings in such cases;*

(f) *examine all factors that inhibit enjoyment of rights of child, such as violence, abuse and exploitation, trafficking, torture, pornography and prostitution and recommend appropriate remedial measures;*

Through the definition of "child rights" in this Act, the Parliament has provided the clearest possible statement that the rights of children as guaranteed in Pakistan include the rights as defined in UNCRC. It has further put in place a statutory body to ensure that the rights of children as defined in UNCRC and domestic law are given effect and children are protected against abuse and exploitation.

(VI) Juvenile Justice System Act, 2018.

2. Definitions. *In this Act, unless there is anything repugnant in the subject or context,-*

(a) "best interest of the child" means the basis for any decision taken regarding the child to ensure fulfillment of his basic rights and needs, identity, social well-being, physical, emotional and psychological development;

(b) "child" means for the purposes of this Act a person who has not attained the age of eighteen years;

The Juvenile Justice System Ordinance, 2000 was repealed and replaced by the Juvenile Justice System Act, 2018. The provisions of this law take into account the principles of agency and autonomy and while holding children accountable for criminal conduct proportionally, it creates a distinction between criminal liability attributable to actions of minors versus liability flowing from actions attributable to adults. It further provides for a different set of policy objects for initiating penal action against minors, driven by considerations of reform as opposed to deterrence.

(V) Islamabad Capital Territory Child Protection Act, 2018.

Preamble. WHEREAS it is expedient to provide for protection and care of children in Islamabad Capital Territory from all forms of physical or mental violence, injury, neglect maltreatment, exploitation, abuse and matters ancillary thereto;

Definitions.- (1) In this Act, unless the context otherwise requires,-

(d) "child" means a person who has not attained the age of eighteen years;

(t) "sexual abuse and exploitation" includes the inducement or coercion of a child to engage in any unlawful sexual activity including use of children in audio or visual images for child pornography, child prostitution, trafficking within and between countries for sexual exploitation and sale of children for sexual purposes;

5. Child in need of care.- A child in need of protection and care shall include a child who-

(a) has been subjected to or is under serious threat of being subjected to child abuse or child exploitation while in the care of parents, legal guardian or any other person who has custody of the child in any manner; or

(b) is unattended, victim of an offence, child, domestic and such other workers, found begging, imprisoned with the mother or lives in an immoral environment.

16. Care and placement of a child.- *Notwithstanding the provision of section 15, where the child care plan specifies that the child will be at risk of significant harm, abuse or exploitation if he remains in care of his parent, legal guardian or other current carer, if any, an application shall be made immediately to the Court for the care and placement of the child in an appropriate form of alternative care.*

Through this Act, Parliament has declared that upholding and protecting the rights and welfare of children is ultimately the responsibility of the State, and the relationship between a parent and a child is not a private family affair that does not concern the State. It creates an obligation for the State to ensure that the needs of children up to the age of 18 are provided for and in the event that any child is at the risk of significant harm, abuse or exploitation, while in the care of parents, legal guardians or other caregivers, the State is to make sure that such child is placed in an appropriate form of alternative care. This law clarifies that to uphold the rights of a child to protection and care is the obligation of a parent or guardian. But where such parent or guardian is delinquent in discharge of such obligation, the state is under an obligation to take the child out of the care of such parent or guardian and make arrangements for alternative care in the best interest of the child to

provide for his/her safety, wellbeing, and physical, emotional and educational needs, etc.

(VI) Criminal Law (Second Amendment) Act, 2016.

Sections 377A and 377B of PPC enacted through this Act state the following:

377A. Sexual abuse. *Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.*

377B. Punishment. *Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which shall not be less than fourteen years and may extend up to twenty years and with fine which shall not be less than one million rupees.*

These provisions were enacted within PPC to discharge Pakistan's obligations under Articles 19 and 34 of UNCRC. The object of the Act as reflected from the statements of objects and reasons was to criminalize the act of exposing children to obscene or sexually explicit conduct. Section 377A as originally promulgated carried a punishment of seven years' imprisonment. The said provision was amended by Act No. XXVII of 2018 with effect from 22.05.2018 and punishment for the offence of sexual abuse was enhanced to minimum of 14 years and up to a maximum of 20 years and fine of up to one million rupees.

(VII) Zainab Alert, Recovery and Response Act, 2020.

The preamble to this Act states that it is borne out of the necessity to make provisions for protection of missing and abducted children under the age of 18 years, which the State must ensure in light of various conventions that Pakistan is party to, with specific reference to the "*United Nations Convention on the Rights of the Child*". Once again, the term "child" (in section 2(g) of this Act) is defined as anyone who has not attained the age of 18 years at the time of commission of the offence. Section 3 of the Act establishes the Zainab Alert, Response and Recovery Agency for the purpose of effectively dispatching Zainab Alerts (whenever a child is missing or abducted), with the performance of the Agency to be analyzed by the ICT Child Protection Advisory Board (constituted under section 6 of the ICT Child Protection Act, 2018).

24. In view of sections 375, 377A and 377B of PPC there is no room for intendment within our legal framework to deem permissible any act of a sexual nature involving a child even if it is with an explicit consent of such a child. In view of the National Commission on the Rights of Child Act, 2017, read together with the Majority Act, 1875, and Article 1 of UNCRC, a child means a human being below the age of 18 years. The various statutes cited above all adopt the same age for purposes of defining a child. Pursuant to the National Commission on the Rights of Child Act, 2017, the rights of a child in Pakistan have now been defined to include all rights guaranteed to a child under the UNCRC. In

order to bring civil and criminal laws of Pakistan in compliance with UNCRC the statutory instruments listed above have been enacted by the legislature. Section 375 of PPC was consequently amended to include intercourse with a child below the age of 16 within the definition of rape, which is punishable with death or life imprisonment. Section 377A of PPC defines merely the attempt to persuade or induce or entice a child below the age of 18 in any sexually explicit conduct, with or without his/her consent, as offence of sexual abuse punishable with a jail term of up to 25 years.

25. What is evident from sections 375 and 377A of PPC, read together with UNCRC that has inspired these amendments, is that PPC prohibits the involvement of children under the age of 18 in sexual conduct in any form whatsoever. Even persuading or enticing a child under the age of 18 to engage in sexually explicit conduct of any sort is a criminal offence punishable by up to 25 years in prison. In view of such scathing criminal liability imposed on anyone engaging in or attempting to engage in sexually explicit activity with children, it cannot be conceived that the civil law applicable in Pakistan would nevertheless continue to treat a contract for the specific purposes of engaging in sexual conduct with a child to be a legal or valid contract. Our jurisprudence continues to rely on Mulla's definition of a marriage contract or nikah as a "*contract which has for its object the procreation and the legalizing of children.*" The contract of marriage by its very definition is a contract whereby the parties agree to engage in sexual relations, recognized by the State and society as legitimate, for the purpose of procreation. The consideration and

object of a marriage contract thus essentially entails two individuals agreeing to engage in legitimate sexual relations, transforming the individuals into a family warranting state protection. PPC, on the other hand, defines the very conduct for purposes of which two individuals seek to enter into a marriage contract as rape when it involves a child under the age of 16, and sexual abuse when an invitation to engage in such conduct is made to a child under the age of 18. How can a contract be deemed to be valid when the mere invitation to enter into such contract constitutes the offence of sexual abuse punishable by 25 years in prison, and the consummation of such contract constitutes rape punishable by death or life imprisonment? Under no conception of rule of law can an interpretation be accorded to statutes operating with the realm of civil and criminal laws in a jurisdiction such that a contract together with its objects and purpose is deemed valid for purposes of civil law, when giving effect to such object and purpose is defined as a crime punishable by death or life imprisonment under the penal code. The conduct for purposes of civil law is deemed legal and valid.

26. The validity of a marriage contract with a child as a party needs to be analyzed not merely from the perspective of the principle of agency and competence of the child to enter into such contract, but also from the perspective of legality of the very consideration and object of the marriage contract. Let us reproduce here the relevant provisions of Contract Act, 1872.

11. Who are competent to contract.— Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind,

and is not disqualified from contracting by any law to which he is subject.

23. What consideration and objects are lawful and what not.— The consideration or object of an agreement is lawful, unless- it is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy. In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

The question of illegal purpose of the contract has been the subject of extensive commentary, some of which is reproduced below.

Chitty on Contracts Volume I General Principles.

Illegality as to formation. *Contracts may be illegal when entered into because they cannot be performed in accordance with their terms without the commission of an illegal act. Thus the contract may involve a breach of the criminal law, statutory or otherwise, alternatively it may be a statutory requirement that the parties to the transaction possess a license and where they do not the contract will be illegal as formed.*

Pollock & Mulla The Indian Contract & Specific Relief Acts.

'Forbidden by law'

An act of undertaking may be forbidden by law if it violates a prohibitory enactment of the legislature or a principle of unwritten law. In India, where criminal law is codified acts forbidden by law seem practically to consist of acts punishable under the Indian Penal Code, under the authority derived from the legislature....In particular, it may have to be considered whether the intention of the legislator was to prevent certain things from being done, or only to lay down terms and conditions on which they might be done....Although properly drawn acts or Regulations ought to leave no doubt

on that point such doubts are possible and have not been uncommon. That which has been forbidden in the public interest cannot be made lawful by paying the penalty for in but an act which is in self harmless, does not become unlawful merely because some collateral requirement imposed for reasons of administrative convenience has been omitted. Where the contract is such that it affects not only parties to it, but if permitted or recognized would have such wider repercussions affecting adversely the public at large, it would be unlawful under s.23.

Express Prohibition

If expressly prohibited by law, the contract is void ab initio and cannot be enforced at all. There has to be a clear and unequivocal declaration by the Legislature in the public interest that the particular kind of contract shall be entered into...S.23 lays down that the object of an agreement becomes unlawful if it was of such a nature that, if permitted, it would defeat the provision of any law.

Anson's Law of Contract

(b) Implied Prohibition: Contract Illegal.

The Courts must determine whether the statutory words, construed in context including the purpose of the statute, prohibit and penalize only the prescribed conduct or whether they additionally prohibit the contract. If, for example, the purpose of the statute is to protect the public from injury or fraud the inference is likely to be that contracts made in contravention of its provisions are prohibited. Again, if a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it.

27. In view of section 23 of the Contract Act, 1872, courts refuse to enforce contracts forbidden by law i.e. where the consideration or object of the agreement is itself forbidden by law or the contract is of a nature that could defeat the provisions of law if given effect. Neither the State nor a court of law can

become an instrument in facilitating or enforcing a contract forbidden by law or enabling an object which is forbidden and attracts criminal liability. In this context, no sensible distinction can be drawn between rules regulating behavior that fall within the domain of civil law and those that fall within the domain of criminal law. When PPC explicitly and unequivocally provides that a child under the age of 18 is not even to be enticed or invited to engage in sexually explicit conduct of any form, notwithstanding the child's consent to such sexual conduct, and anyone engaging with or inducing a child to engage in sexual conduct is liable to punishment, a court cannot read into sections 375 and 377A of PPC the suggestion that such conduct would not attract criminal liability if the child in question was party to a marriage contract within the scope of which such sexual conduct was to take place. Such interpretation would make a mockery of the concept of rule of law by failing to provide in clear terms the conduct that is permissible in the eyes of law and the conduct that is prohibited and attracts penal liability. It would also be contrary to the Article 9 rights of a child to meaningful life read together with the rights guaranteed under UNCRC. Such interpretation would also undermine public policy as reflected in a string of legislative enactments promulgated for purposes of bringing the laws of Pakistan in compliance with the rights of children as defined under UNCRC and creating statutory mechanisms to ensure that such rights are upheld.

28. In view of sections 375 and 377A of PPC read together with provisions of UNCRC any contract of marriage entered into in which one of the contracting parties is below the age of 18 would

be a contract the object and consideration of which is unlawful and which is consequently forbidden by law. Any such contract is therefore void in view of provisions of section 23 of the Contract Act. Giving effect to such prohibited contract would not be permissible as it would be tantamount to defeating provisions of sections 375 and 377A of PPC as well as Pakistan's obligations towards children as defined under the UNCRC. Such illegal contract can neither be registered under provisions of the Muslim Family Laws Ordinance, 1961 nor be given recognition or effect by a court of law, as powers vested in the executive to register marriage contracts and in the courts to give effect to valid contracts and promises cannot be exercised in order to defeat provisions of the law.

29. Our jurisprudence on the distinction between directory and mandatory provisions of law is clear. It was held in **Province of Punjab Vs. Javed Iqbal (2021 SCMR 328)** that:

"The ultimate test is the intent of the legislature and not the language in which the intent is clothed. The object and purpose of enacting the provision provide a strong and clear indicator for ascertaining such intent of the legislature.¹ The intention of the legislature must govern and this is to be ascertained not only from the phraseology of the provision but also by considering its nature, its object, and the consequences which would follow from construing it one way or the other. This exercise entails careful examination of the scheme of the Act in order to discover the real purpose and object of the Act. A provision in a statute is mandatory if the omission to follow it renders the proceedings to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding. One of the important test that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-

compliance of a particular provision causes inconvenience or injustice and, if it does, the court would say that that provision must be complied with and that it is obligatory in its character.”

It was held in **Province of Punjab Vs. Murree Brewery Company Limited (2021 SCMR 305)** that:

6. The test to determine whether a provision is directory or mandatory is by ascertaining the legislative intent behind the same. The general rule expounded by this Court is that the usage of the word 'shall' generally carries the connotation that a provision is mandatory in nature¹. However, other factors such as the object and purpose of the statute and inclusion of penal consequences in cases of non-compliance also serve as an instructive guide in deducing the nature of the provision.

In **Murree Brewery** the apex Court cited with the approval the decision of Indian Supreme Court in *New India Insurance Co. Ltd. Hilli Multipurpose Cold Storage Pvt. Ltd. (2020) 5 SCC 757* where it was held that:

If the provision is couched in prohibitive or negative language, it can rarely be directory, the use of peremptory language in a negative form is per se indicative of the interest that the provision is to be mandatory.

It further cited the decision of the Indian Supreme Court in *May George Vs. Special Tehsildar and others ((2010) 13 SCC 98)* where one of the factors to be taken into account in construing the intent of the legislature was that:

The Court has to give due weight age to whether the interpretation intended to be given by the Court would further the purpose of law or if this purpose could be defeated by terming it mandatory or otherwise.

30. In relation to the question before this Court there is no manner of doubt that provisions of sections 375 and 377A are mandatory as they criminalize sexual intercourse with a child under the age of 16 or inviting or enticing a child under the age of 18 years to engage in sexually explicit conduct. The provisions are also mandatory and in public interest as they are framed to protect the rights of child to life and liberty as guaranteed by the Article 9 of the Constitution read together with provisions of UNCRC. The intent of the various legislative instruments cited above is to ensure that no child is subjected to an environment or activity that is deemed by the state to not be age appropriate. A child is defined as an individual under the age of 18 years. The obligation of the state to provide free education to children up to the age of 16 has been guaranteed by the Constitution. Likewise, under Article 9 read together with provisions of UNCRC, children have the right to be cared for, to play, to leisure, and to not be burdened with responsibilities not appropriate for children.

31. The relationship of marriage does not just entail engagement in permissible sexual conduct. The purpose of marriage is to enter into a contract whereby two people agree to become a family and look after one another, and further agree to bring children into this world and be responsible for the safety and physical and emotional wellbeing of such offspring. The Guardian and Wards Act, 1890 read together with Islamabad Capital Territory Child Protection Act, 2018, provides that a child under the age of 18 remains in the supervision and guardianship of an adult whether such adult is a parent, guardian or other caregiver provided by the State or appointed by a court of

competent jurisdiction. Section 21 of the Guardian and Wards Act, 1890, makes some allowance for a minor being the guardian of his own wife or child. But this law was enacted over 132 years ago in colonial India, and section 21 is now in conflict with provisions of UNCRC, to give effect to which Islamabad Capital Territory Child Protection Act, 2018, has been promulgated, and also sections 375 and 377A of PPC, as discussed above. In view of the statutory provisions enacted by Parliament to give effect to UNCRC, our law no longer creates a carve-out for purposes of marriage to allow a child under the age of 18 years or even under the age of 16 years to enter into a contract of marriage and bring her own children into this world for whose safety, welfare and well-being she would be responsible while being a child herself and under somebody else's care.

32. The issue of competence of a child to enter into a contract came before the august Supreme Court in **Yar Muhammad Khan Vs. Sajjad Abbas (2021 SCMR 1401)**, in which the court held the following:

8. To protect minors and their interests a minor cannot enter into an agreement nor grant a power of attorney to another to do so. Section 11 of the Contract Act, 1872 explicitly stipulates that only those who are 'of the age of majority according to the law to which he is subject' are 'competent to contract'; the law is the Majority Act, 1875 section 3 whereof stipulates eighteen years as the age of majority. This Court in the case of Abdul Ghani v. Yasmeen Khan (above, which was decided by three learned Judges) held that: The provisions as enumerated in section 11 of the Contract Act, 1872 would make minor incompetent to enter into any contract, therefore, contract by minor was void ab initio and not merely voidable. Such contract would have no existence in the eye of law and was incapable of satisfaction

or confirmation' (paragraph 13, page 847B). Therefore, the General Power of Attorney dated 8 February 1975 is void to the extent of a minor. This leads on to the question of limitation and 'whether the suit was belatedly filed. in Hamida Begum v. Murad Begum (above, a decision by four learned Judges) it was held that: `... where the deed or instrument is ab initio null and void, in which case it can be treated as a nullity without having to be cancelled or set aside. If on the other hand, the instrument is only voidable, then it would be necessary to have it set aside or cancelled in order to remove the impediment in the way of the plaintiff (at page 50E).

33. Section 3 of Majority Act, 1875, was challenged before the learned Federal Shariat Court in **Muhammad Fayyaz and another Vs. Islamic Republic of Pakistan through Secretary, Ministry of Religious Affairs, Islamabad and 4 others (PLD 2007 FSC 1)**, in which the said section was not found to be repugnant to the injunctions of Islam and in finding so the learned Federal Shariat Court also observed the following:

" It is also worth mentioning that mere manifestation of the physical symptoms of attaining puberty, as submitted by the learned petitioner, are not by themselves sufficient to hold that the concerned person has also attained the age of majority/maturity. Beside that, there are definitely other mental, emotional and psychological aspects also that form necessary basis for that purpose. The Holy Qur'an has, in certain matters, considered and referred to the same, as we may conveniently find in Verse No.6 of Surah Annisa and Verse No.59 of Surah Annoor. Moreover, it is noticeable that the ages in attaining physical puberty vary from place to place and from person to person and no definite criteria can be specified to exactly determine who attained puberty and on which date. This is the reasons why even the renowned Muslim Scholars are not unanimous on this point and have held divergent opinions in respect of age of puberty."

34. The argument that a female child who has attained puberty is legally competent to execute a contract of marriage makes no logical sense, apart from there being no settled principle within Islamic jurisprudence stating that puberty alone is the test for determining a female's competence to contract marriage. The question of reaching puberty has to do with physical aspects of the growth of a female child. Merely because a child has grown physically and biologically to an extent that she can endure sexual activity or intercourse does not automatically mean that she has the legal capacity to marry or the agency to contemplate the consequences that marriage entails i.e. that she has the mental and psychological maturity to reach such decision in her own best interest. Much research has been produced on factors that contribute to a female child reaching puberty. Children as young as ten or eleven years of age can possibly reach puberty as the timing of puberty has been found to be related to physical characteristics including height, weight and body mass, as well as the diet of the individual and her geography etc. If puberty is to be the applicable test, would we deem a 10-year-old to be competent to contract marriage and engage in sexual intercourse because she has attained puberty? Research suggests that early maturing "adolescents" are at a higher risk for psychological and behavioral problems because they are not emotionally or formatively ready for the major biological, social and emotional changes comprising puberty. Consider for example the following research:

"Individual Differences in Boys' and Girls' Timing and Tempo of Puberty: Modeling Development With

Nonlinear Growth Models.” By Kristine Marceau, Nilam Ram, Renate M. Houts, Kevin J. Grimm, and Elizabeth J. Susman. (Developmental Psychology, 47(5), 1389–1409.)

To date, the vast majority of literature relating puberty to psychological and physical development examines the relative timing of puberty compared with same-age and sex adolescents. Timing of puberty has been related to physical characteristics, including height (e.g., Belsky et al., 2007; Huang, Biro, & Dorn, 2009; Li et al., 2009; Llop-Viñolas et al., 2004), weight (e.g., Tanner-Smith, 2010), and body mass index (BMI; e.g., Davison, Susman, & Birch, 2003; He & Karlberg, 2001; Huang et al., 2009). In line with biological influences, earlier timing is generally associated with greater physical size and/or earlier physical growth.

There is strong and consistent evidence that deviations from normative timing (earlier or later timing) are related to psychological outcomes, including internalizing and externalizing problems (e.g., Ge, Brody, Conger, & Simons, 2006; Ge et al., 2002; Graber, Lewinsohn, Seeley, & Brooks-Gunn, 1997; Mendle, Turkheimer, & Emery, 2007). Two hypotheses that explain how timing relates to negative psychological sequelae have gained traction. The maturational deviance hypothesis posits that adolescents who develop either earlier or later relative to peers experience psychological distress and manifest behavior problems (Petersen & Taylor, 1980). The developmental readiness hypothesis posits that early maturing adolescents are at highest risk for psychological and behavioral problems because they are not emotionally or cognitively ready for the major physiological, social, and emotional changes comprising puberty (e.g., Ge et al., 2002).

35. To use puberty as a test for legal competence for a female child to enter into marriage contract would be an unsure test in any event. Sections 375 and 377A of the PPC attach very serious criminal liability to engagement in sexual conduct with a

child under the age of 18. It has already been held above that a marriage exclusion cannot be read into sections 375 and 377A of PPC as that would fall foul of the principle of casus omissus. But even if it were possible to render such interpretation and hold the female child being when in a marriage contract is an exception to the liability that would otherwise flow from sections 375 and 377A of PPC, how would any individual be aware of the fact as to whether the female child has attained puberty or not prior to engaging in conduct which would attract liability under sections 375 and 377A of PPC? The consent of a female child is no excuse or justification where conduct qualifies as rape or sexual abuse. And it is only a female child who could know with certainty whether or not she has attained the age of puberty or not. How could such severe criminal penalty, as provided under sections 375 and 377A of PPC, be justifiable in a fair rule of law system if the accused had no basis for confirming in advance whether or not his conduct constituted an offence punishable by death or life imprisonment? As has been explained above, in any just and fair rule of law system, the law must provide clearly what conduct is proscribed and falls beyond the redline and what conduct is permissible. Sections 375 and 377A do so by providing a very clear redline that is not to be crossed even inadvertently. The suggestion that a female child having attained puberty becomes qualified to contract marriage and transform a crime, as defined in sections 375 or 377A of PPC, into a legitimate act, if acceded to, would make a mockery of the need for certainty within the penal justice system.

36. A review of our corpus of laws also suggests that we use the age of 18 as the trigger point for vesting various rights in citizens. A few examples are as follows:

National Database and Registration Authority Ordinance, 2000.

10. National Identity Cards. —(1) *The Authority shall issue or renew, or cause to be issued or renewed, in such manner and on terms and conditions, subject to every citizen who has attained the age of eighteen years and got himself registered under section 9, a card to be called National Identity Card in such form, with such period of validity upon payment of such fee in such form and manner as may be prescribed:*

Provided that all cards issued under section 5 of the National Registration Act, 1973, (LVI of 1973) to such citizens as stood registered under section 4 of the said Act immediately before the commencement of this Ordinance shall be deemed to have been issued under this Ordinance and shall, subject to sections 17, 18 and 30 remain valid till such period as the underlying registration of the citizens to whom such cards are issued remains valid in terms of the first proviso to subsection (1) of section 9:

Provided further that before issuing or renewing a card under this section, the Authority may require a person to surrender a National Identity Card earlier issued to him under this Ordinance or the National Registration Act, 1973, (LVI of 1973) or otherwise satisfy the Authority as to the factum of his having totally abandon the use of any such earlier card and, till such time as he surrenders such earlier card or otherwise satisfies the Authority as aforesaid, the Authority may not issue or renew a card.

(2) Notwithstanding anything contained in this Ordinance, all such National Identity Cards as are to be issued to a citizen under this Ordinance by means of a manual or computerized laser printing process (as applicable in the Districts of Islamabad and Rawalpindi) shall not be issued for a period of validity beyond two years after the commencement of this Ordinance, or such longer or shorter period as may be notified by the Federal Government with a view to promoting

uniformity, authenticity and technological advancement in the registration for and issuance of National Identity Cards.

19. Cards necessary for certain purposes.—(1) *No citizen who has attained the age of eighteen years but does not possess or produce a National Identity Card shall be granted a passport, permit or other travel document for going out of Pakistan.*

The Elections Act, 2017

2(xli) "voter" means—

(a) in relation to an Assembly or a local government, a person who is enrolled as a voter on the electoral roll of any electoral area in a constituency; and

(b) in relation to the Senate, a person who—

I. for election to a seat from a Province, is a Member of the Provincial Assembly;

II. for election to seats from the Islamabad Capital Territory, is a Member of the National Assembly; and

III. for election to a seat from the Federally Administered Tribal Areas, is a Member of the National Assembly elected from the Federally Administered Tribal Areas.

26. Preparation of preliminary electoral rolls---

(2) A person shall be entitled to be enrolled as a voter in an electoral area if he—

(a) is a citizen of Pakistan;

(b) is not less than eighteen years of age;

(c) possesses a National Identity Card issued by the National Database and Registration Authority at any time till the last day fixed for inviting claims, objections and applications for preparation, revision or correction of electoral rolls;

(d) is not declared by a competent court to be of unsound mind; and

The Provincial Motor Vehicles Ordinance, 1965.

4. Age limit in connection with driving of motor vehicles.— (1) *No person shall drive in any public place—*

(i) a motor cycle or an invalid carriage, unless he has attained the age of eighteen years;

(ii) a motor car, otherwise than as a paid employee, unless he has attained the age of eighteen years;

(iii) a motor car as a paid employee or a transport vehicle, unless he has attained the age of twenty-one years;

(iv) a heavy transport vehicle, unless he has attained the age of twenty-two years.

37. For rule of law to make sense, the corpus of laws applicable within a jurisdiction must speak with one voice. In view of the provisions of the statues cited above, it is patent that our laws define a child as a person who has not reached the age of 18. We do not allow such child who has not reached the age of 18 to be issued a CNIC or be granted travel documents which would enable him/her to travel without the consent of his parents or guardians. We do not allow a citizen to exercise his right to vote guaranteed under the Constitution till the time that he/she reaches the age of 18. We do not allow children to drive motor vehicles till such time that they reach the age of 18. We do not trust children, till they have reached the age of 18, to be able to take care of their own day-to-day needs without being placed under the supervision of a parent, guardian or other caregiver. It would indeed be incredible if in face all these statutory provisions we were to conclude that while we do not find a child below the age of 18 to possess the agency, legal capacity and qualification to look after himself/herself, we find it perfectly normal for such child to be capable and competent to decide whether or not to execute a marriage contract and be responsible for his/her spouse and children and assume all responsibilities and burdens

that come with the relationship of marriage. And that we find such child to be qualified to engage in sexual intercourse and bring offspring into the world that such child would then be responsible for.

38. A key measure of civilization in a polity is how it treats the most vulnerable segments of the population. Children, and within children the female sex, constitute the most vulnerable segment of our populace. Guided by its obligation to protect the marriage, the family, the mother and the child, under Article 35 of the Constitution read together with Articles 9, 14 and 25, the Parliament has promulgated a string of laws to protect the life, liberty, dignity and equality of children and to give effect to their rights as articulated in the UNCRC that Pakistan is a signatory to. Under the Constitution, the judiciary is the machinery provided to uphold fundamental rights of citizens and breathe meaning into constitutional guarantees. Courts are thus obliged to protect children against being employed in any conduct that has been proscribed by Parliament by defining it as a crime, as has been done by Sections 375 and 377A of PPC.

39. In view of the above, this Court has come to the following conclusions:

- A. A child is defined as a person who has not attained the age of 18 years. A child is required to be placed in somebody's care whether it is a parent or guardian or other caregiver appointed on behalf of the state. Complete agency to grant informed consent for purposes of entering into contract, including, *inter alia*, a marriage contract cannot be attributed to such child.
- B. A female child below the age of 18 cannot be deemed competent to freely grant her consent to enter into a

marriage contract merely because she manifests the physical symptoms of having attained puberty. In view of provisions of the Muslim Family Laws Ordinance, 1961, Islamabad Capital Territory Child Protection Act, 2018 and PPC, when read together, while being guided by principles of Islamic jurisprudence and Principles of Policy enshrined in the Constitution, (including state's obligation to protect the woman, the child and the family), the test for legal agency and competence of a female child is her biological age and not her state of physical and biological growth.

- C. The provisions of sections 375 and 377A of PPC are mandatory provisions and any contract entered with the object of breaching such provisions or that has the effect of breaching such provisions cannot be treated as a valid contract. A marriage contract in which one of the parties is a child under the age of 18 is therefore a contract executed for an unlawful purpose and is *void ab initio*. Such marriage contract can neither be registered under the Muslim Family Laws Ordinance, 1961, nor can be given effect by a court, as that would tantamount to defeating provisions of law that have been promulgated to uphold rights of children guaranteed by Article 9 of the Constitution read together with the provisions of United Nations Convention on the Rights of the Child.
- D. A child under the age of 18 years is a dependent of an adult whether such adult is a parent or guardian or other caregiver appointed by the State. The State is under an obligation to uphold and guarantee the rights of such child, who cannot be deemed to have the competence or capacity to parent a child of his/her own and act as guardian endowed with the primary responsibility to provide for his/her child while being a child himself/herself.
- E. Sections 375 and 377A of PPC read together with Article 9 of the Constitution, Islamabad Capital Territory Child Protection Act, 2018, and provisions of United Nations Convention on the Rights of the Child unequivocally provide that no one can engage in sexual conduct in any form with a child and neither can any person invite or entice a child to engage in sexual conduct in any form, and any invitation or enticement provided to a child to engage in sexual conduct, even under

the cloak of marriage, would fall within the definition of sexual abuse in terms of section 377A.

F. Neither a child under the age of 18 can consent to engage in sexual conduct in any form, nor can a parent or guardian of a child, contract a child out to engage in sexual conduct. A child is not a chattel that can be contracted out by a trustee or guardian to engage in conduct that the child himself/herself cannot grant consent for. No consent can be granted on behalf of a child by a parent or guardian involving discharge of personal service by the child or engagement in conduct that is unlawful and prohibited, such as that required to be performed under a marriage contract. While a parent or guardian can deal with a child's property in his/her best interest, the parent or guardian is not at liberty to contract out the child to engage in a contract of personal service or conduct otherwise prohibited by law.

G. Sections 375 and 377A of PPC do not provide for any exceptions or exclusions to conduct that otherwise qualifies as rape or sexual abuse as defined therein, and the said sections would be attracted even where the offence is made out against a person who seeks to defend himself on the basis that such conduct was pursuant to a marriage contract executed by a child under the age of 18 years or his/her parent or guardian on his/her behest.

40. Once this Court has come to the conclusion that a marriage contract involving a child under the age of 18 years is a contract prohibited by law, which, even if executed by a child, is *void ab initio*, the question of treating the purported nikah-nama between respondent No.1 and the Minor as a basis to release her in the custody of respondent No.1 does not arise. This Court has not however determined the age of the Minor definitively, nor has it made any observations as regard the liability of respondent No.1 under provisions of PPC. Doing so in writ jurisdiction could fetter the rights of the parties involved to due process and fair trial as guaranteed by Article 10A of the Constitution. The

determination of such questions is left to the court of competent jurisdiction before which such questions are raised.

41. For reasons stated above, the instant petition is **allowed** and respondent No.5 is directed to ensure that the Minor is released from Dar-ul-Aman into the custody of the petitioner, who is her mother, and the petitioner along with her husband (i.e. the father of the minor) are responsible to provide for the safety and wellbeing of the Minor in accordance with the provisions of Islamabad Capital Territory Child Protection Act, 2018. Respondent No.1 shall pay the petitioner cost of litigation in the amount of Rs.20,000/- under section 35 of Civil Procedure Code, 1908 within a period of thirty days and the learned counsel for the respondent will file a certificate with the Deputy Registrar (Judicial) of this Court confirming that the order as to costs has been complied with.

42. The office is directed to send a copy of this judgment to the Secretary, Cabinet Division, and Secretary, Ministry of Parliamentary Affairs, to bring to the attention of the Cabinet and the Parliament, respectively, (i) the absence of a clear statutory provision in the Muslim Family Laws Ordinance, 1961, stating the permissible age for marriage in Pakistan, (ii) section 21 of the Guardians and Wards Act, 1890, which is in conflict with provisions of Islamabad Capital Territory Child Protection Act, 2018, read together with provisions of the United Nations Convention on the Rights of Child, and capable of creating the false impression that children in Pakistan under the age of 18 are still deemed capable of being guardians in select circumstances,

and (iii) provisions of statutory instruments dating back to colonial times, including the Majority Act, 1975, Child Marriage Restraint Act, 1929, and the Dissolution of Muslim Marriages Act, 1939, provisions of which, if read on a stand-alone basis, could be vulnerable to interpretations in conflict with provisions of Sections 375 and 377A of PPC read together with Islamabad Capital Territory Child Protection Act, 2018, and provisions of the United Nations Convention on the Rights of Child. The office is also directed to send a copy of this judgment to Chief Commissioner, ICT, for information and compliance for purposes of registration of marriages under the Muslim Family Laws Ordinance, 1961, within Islamabad Capital Territory. This Court would like to express its appreciation and gratitude to Mr. Shazeb Nawaz Khan, the learned State Counsel, for his assistance.

(BABAR SATTAR)
JUDGE

Announced in the open Court on 09.02.2022.

JUDGE

Approved for reporting.

Saeed.