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Analytical Study

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Child marriage and unborn child in Western and Muslim Laws: Analytical Study

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Abstract

This research is based on the premise that every member of the human family must be legally entitled to the preservation and protection of their human rights, whether it be a fully developed human being or a feeble, fragile, and seemingly lifeless fetus. The comparative analysis identifies the status of a fetus in Islamic and Western legal corpus with respect to core human rights such as ‘protection of dignity’ and ‘protection of life’. As the study will extrapolate, Islamic law profoundly bestows upon the fetus the full collection of rights as if it’s a fully developed human being. This research paper focuses on the analysis of contemporary laws regarding fetus in the western world and selective Muslim societies.

Keyword: Child marriage, unborn child, Fetus laws, CEDAW, Islamic jurisprudence

1. Introduction

It is not difficult to deduce that even before the creation of the fetus, Islam gave him/her the opportunity to be born in the home of physically fit and religiously noble parents. Here it is necessary to clarify the point that if Islam places so much emphasis on the physical health of the parents, is there any age limit for marriage in Islam?, in order to prevent the effects of early marriages¹ or late marriages² on future children.

In this regard, if the teachings of Islamic jurisprudence are examined, there is no age limit for marriage, but Islam has left it to the customs and traditions of every society.³ Undoubtedly, the legal guidelines are for human interests and social needs, and keeping in view this point, the opinion of

modern jurists according to the social needs of this age is that it is necessary to set a minimum age for marriage.⁴

Similarly, it is important to note that the jurists did not say that underage marriages should be performed unnecessarily. Rather, they suggest that if a man did a Marriage of his young daughter out of necessity and compulsion then what the ruling on him is. And, of course, if a person does this on the basis of an urgent need, then the justice, the need of the hour, the requirements of expediency, and the intent of the law are to justify it.⁵

However, similar to the transition of *šrī'ah* from Islamic teachings to domestic law regarding the unborn child's right to life, the modern Muslim

¹ Medically, there are also major concerns about girls getting married at young age. First, the risks of complications during pregnancy are high. Secondly, most adolescents are not familiar with methods of contraception or protection against sexually transmitted diseases. Third and most importantly, children can be severely traumatised by early sexual experiences, particularly when these are unwanted. Beyond this, it is a proven fact that minor girls tend to fall victim to domestic violence far more often than grown-up women. See: UNICEF Innocenti Research Centre, Early

Marriage. Child Spouses, 7 Innocenti Digest 1, at 6 (2001)

² Ruth C. Fretts, Julie Schmittdiel, et al, ". "Increased Maternal Age and the Risk of Fetal Death." *The New England journal of medicine* 333, no.15 (1995): 953-7. doi:10.1056/NEJM199510123331501

³ see Annex , heading 6.1

⁴ *ibid*

⁵ *ibid*

countries seldom ordain laws that subject parents to a certain standard for marriage. It is hardly fathomable that a country would legally dictate a standard of nobility for individuals to be eligible for marriage. However, if the research is directed toward the eligibility of two individuals for marriage in terms of age and maturity, the unborn child's right to noble parents can be legally studied. Evident by the traditions of the Prophet ﷺ mentioned above, *compatibility* and *character* are aspects one must consider before marriage. Taken in this regard, marriage laws specifically concerned with age and forced commitments can be studied. They would be relevant to this discussion since laws permitting child marriages, and laws excluding the female's consent to marriage, can be taken as violating the *shari'ah* in the sense that such laws not only

stand against Islamic marriage laws, but also fail to respect the unborn child's right to have born in a noble family.

2. The Western Position:

To popular belief, the issue of child marriages is common in non-Islamic jurisdictions as well.⁶ In the western context, there remains a consensus on eradicating child marriages as a whole. This expression is evident in various international legal documents enacted by western thinkers and lawmakers.⁷ The justification for this consensus lies in the debate that child marriages deprive said child of his/her opportunity to enjoy their childhood, as opposed to being married and assuming family duties.⁸ This justification also cites medical evidence in support. Young females are more susceptible to complications during pregnancy and childbirth alike

⁶ "How Come You Allow Little Girls to Get Married?" (Human Rights WatchApril 29, 2015)

<https://www.hrw.org/report/2011/12/07/ho w-come-you-allow-little-girls-get-married/child-marriage-yemen> accessed February 1, 2022

⁷ Universal Declaration of Human Rights, Article 16 (2), the Convention on the Rights of the Child (CRC), and the Convention on the

Elimination of All Forms of Discrimination against Women (CEDAW), Article 16.

⁸ Haberland, Nicole, Erica Chong, and Hillary J. Bracken. "Married adolescents: An overview," paper prepared for the WHO/UNFPA/Population Council Technical Consultation on Married Adolescents. New York: Population Council. 2004

since they themselves have not fully developed yet.⁹ This issue is further highlighted by the fact that young couples seldom possess the knowledge of contraceptives and sexually transmitted diseases – the absence of which may cause further complications in future.¹⁰

Alongwith, such strong arguments against the practice, the goal of preparing the best parents for the future children also indirectly comes to fruition. This confirms the UN's goals of ending child marriage, with a clear statement stating that the elimination of child marriage is necessary in order to protect future children.¹¹

Then again, some international documents have made more progress in this regard. For instance, article 11(4) of the Convention of Celebration and Recognition of the Validity of Marriages states that:

⁹ Laura Davids, "Female Subordination Starts at Home: Consequences of Young Marriage and Proposed Solutions"*Regent Journal of International Law* 5,(2007): 300

¹⁰ UNFPA, Married adolescents: no place of safety. World Health Organization 2006

¹¹ UNFPA, "Goal 4: Reduce child mortality Stillbirths and deaths during the first week of life are 50 per cent higher among babies born to

*"A Contracting State may refuse to recognize the validity of a marriage only where, at the time of the marriage, under the law of that State – one of the spouses did not have the mental capacity to consent"*¹²

In this sense, by emphasising on the mental capacity of the individual consenting to marriage, this provision makes sense. Contracting states to this convention may not legally recognize under-age marriage where the minor did not have the mental capacity to consent to their marriage themselves. If so, the marriage would be declared null, and the female would be free of the male. As a result, the unborn child's right to noble parents will be reserved and respected as he/she will not be born to a mother that was forced to marry his/her father, as opposed to finding a suitable partner as per Islamic law. This

adolescent mothers than among babies born to mothers in their twenties. 20 Children of adolescent mothers are more likely to be premature and have low birth weight."

https://www.unfpa.org/sites/default/files/jahia-publications/documents/publications/2012/ChildMarriage_2_chapter1.pdf

¹² Article 11(4) of this convention

position is also supported by Article 10 of the International Covenant on Economic, Social and Cultural Rights.¹³

3. Country Study of laws:

Almost all of the governments of the world have decided to accept steps to minimize the issues such as child marriage through the 1962 Convention on Consent to Marriage, Minimum Age for Marriage, and Marriage Registration, the 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the 1995 Beijing Platform and Declaration for Action.

These agreements encourage national governments to act by legislative enactment that establishes a minimum marriage age. In their first-ever combined General Recommendation, the CEDAW and CRC Committees reaffirmed and reinforced

governments' duty to prohibit and abolish harmful practices like child marriage.

Child, early, and forced marriage have also become more of a focus for regional organisations. Through its regional campaign to eliminate child marriage in 2014, the African Union has backed national campaigns and national action plans to end the practise.¹⁴

The Regional Action Plan to End Child Marriage in South Asia (2015-2018), was adopted in August 2014 by the South Asia Strategy to Prevent Violence Against Children, (an interstate executive authority of the South Asian Association for Regional Cooperation) The Regional Action Plan acknowledges child marriage as a regional human rights concern and declares its abolition a regional priority, with seven projected

¹³ Art 10(3): “Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal

development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

¹⁴ UNGA, “Child, early and forced marriage Report of the Secretary-General” A/71/253, 29 July 2016 para 11.

objectives.¹⁵ The Kathmandu Call for Action to Stop Child Marriage in South Asia was adopted by States participants of the Initiative in November 2014, in which they pledged to take 12 actions to end child marriage in South Asia.¹⁶

4. Analysis

If the laws on child marriage as a whole are examined, it can be seen that regardless of the practical situation¹⁷, only keep in view the specific legal documents, There are currently no restrictions on child marriage in only two Muslim countries in the world, Saudi Arabia and Yemen. While Iran and Sudan have a nine- to 13-year age limit, Chad is the only country to set a 14- to 15-year age limit. In the

rest of the world, the minimum age for marriage is set at 16 to 21 years.

But despite these restrictions, some countries¹⁸, agree with

country	What is the minimum age of marriage for girls?	What is the minimum age of marriage for girls with parental consent?	Is there a gender disparity in the minimum legal age of marriage?	Under what circumstances can 13-year-old girls marry?	What is the minimum age of marriage for boys with parental consent?	Under what circumstances can 13-year-old girls marry under religious or customary law?	Is there an exception to the general minimum age of marriage for girls who marry under religious or customary law?
Pakistan	16 years old	16 years old	Girls can be married 2 years younger than boys	Marriage legally prohibited	18 years old	Marriage legally prohibited	No exceptions to minimum age legislation for religious or customary law
Turkey	18 years old	17 years old	No difference in minimum age	Marriage legally prohibited	17 years old	Marriage legally prohibited	No exceptions to minimum age legislation for religious or customary law
Malaysia	21 years old	18 years old	No difference in minimum age	Can marry with parental consent and/or under religious or customary law	18 years old	Can marry with parental consent and/or under religious or customary law	Yes, earlier marriage is legal under religious or customary law
United Kingdom	16 years old	16 years old	No difference in minimum age	Marriage legally prohibited	16 years old	Marriage legally prohibited	No exceptions to minimum age legislation for religious or customary law
United States of America	18 years old	16 years old	No difference in minimum age	Only permitted with court approval	16 years old	Only permitted with court approval and/or pregnancy	No exceptions to minimum age legislation for religious or customary law

parental consent, and/or under religious or traditional law, considered sufficient, as an exceptional case of getting married at the age of thirteen. Similarly some more countries add permission to marry a girl at the age

¹⁵ UNGA, “Child, early and forced marriage Report of the Secretary-General” A/71/253, 29 July 2016 para 12.

¹⁶ Afghanistan, Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

¹⁷ According to UNICEF, although the practice of child marriage has declined in the last decade, the total number of child marriages globally is estimated at 3 million annually. The highest numbers are in South Asian countries, followed by sub-Saharan Africa.

see:“Fast Facts: 10 facts illustrating why we must #EndChildMarriage” 2019

<https://www.unicef.org/press-releases/fast-facts-10-facts-illustrating-why-we-must-endchildmarriage#>

¹⁸ Such as: South Africa, Zimbabwe, Zambia, Nigeria, Uganda, Sri Lanka, Malaysia, and Columbia.

Only permitted with court approval and/or pregnancy: Canada, United States of America, Brazil, Argentina, Somalia, and Libya, Algeria, Morocco, Tunisia, Finland, France, Thailand, Bangladesh, Madgasker.

of thirteen only with court approval and / or pregnancy.¹⁹

Table 1: Domestic application of child marriage laws of selected Muslim and western countries²⁰

However, In the case of Muslim Countries, if this law is further viewed from an Islamic perspective, another important point is that despite setting a minimum age for marriage. If one marries before this age, then the marriage is maintained in law.²¹ In that sense, it is compatible with the *śrīta h Law*.

5. Conclusion

Conclusively, we can say that it is to note here is that Islamic teachings which very clearly refer to various aspects including moral preparation, good health, and decent guidance of future parents of an unborn child. Nevertheless, in order to formulate strategies and

plans in Muslim countries, it has been preferred to base its policies on internationally stated policies. Due to which the religious views of the people of Muslim countries view these policies in a negative light, as Noura et al articulates that many Muslim women have poor knowledge of SRH, and negative attitudes that affect their access and use of SRH services.

¹⁹ Canada, United States of America, Brazil, Argentina, Somalia, Libya, Algeria, Morocco, Tunisia, Finland, France, Thailand, Bangladesh, Madgasker.

²⁰ This data is taken from the worldpolicycenter website in accordance with the laws of 2019.

<https://www.worldpolicycenter.org/compare-policies>

²¹ In the case of *Mushtaq Ahmed v. Mirza Muhammad Amin*, the Karachi High Court has said that the purpose of the Child Marriage Act is to discourage child marriages and despite punishing those responsible, the marriage is not void. see: PLD 1962 Karachi, 442

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