

CRIMINALISING CHILD MARRIAGES: WITH SPECIAL FOCUS ON MALAYSIA

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1. Introduction

Marriage is an important institution of human life regulating relations between the sexes and Islam makes it incumbent on every Muslim man to lead a married life as that can lead to a virtuous life free from immorality and emotional inhibition. The Holy Qur'an says: 'They (your wives) are as a garment to you, and you as a garment to them'.¹ The husband and wife are for mutual support, mutual comfort and mutual protection, fitting into each other as garments fit into each other. The Prophet (*s.a.w.*) said, "O ye young people, whoever can afford marriage should marry, for that will help him lover his gaze and guard his modesty. Whoever is not able to marry is recommended to fast, as fasting diminishes (his) sexual power".² In another version by Al-Bayhaqi, it reads: "When a man gets married, he gets one half of the religion. Thus, he should fear Allah in the other half". Abu Hurairah reported that the Prophet (*s.a.w.*) said: "There are three people whom Allah (*s.w.a*) will surely help: a warrior in the cause of Allah, a slave who wants to free himself by a payable contract and whoever seeks chastity by marriage".

As from the above, marriage is a means of safeguarding one from committing sinful act due to lust and desires (*nafs*). According to

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Imam Al-Ghazali, “the predominant destructive factors of one’s *Deen* (religion) are the private parts and the stomach. One of these are satiated by *nikah*, because in *nikah* lies chastity and morality. It is a fort from shaitaan and it saves one from the evil diseases of lust. It curbs lusts and desires, keeps one’s gaze in check and it safeguards one’s private parts.” Further, Mufti Abdul Jaleel Qasmi stated, “when a person makes *nikah*, he acquires a peaceful and serene disposition, then he will fulfill his natural desires in permissible avenues and means. He will understand it as his obligation to abstain from fornication, immorality and stray glances”.³

The marriage contract is entered into based on offer (*ijab*) and acceptance (*qabul*) between the parties in the presence of two competent adult male Muslim witnesses and the consent of the woman must be sought and given through her guardian (*wali*). According to the Shafi’i school, there are five requirements which are fundamental or essential for a valid Muslim marriage, namely: (i) a male who is a prospective husband; (ii) a female who is a prospective wife; (iii) There must be a *wali* or a guardian for marriage The *wali* is usually the father of the girl. He may also be the paternal grandfather, the brother or uncle. In the absence of these persons, the *Kadi* may step in on behalf of the Ruler of the state as *wali raja*; (iv) two witnesses, who have to be male, sane, adult and Muslims; and (v) the offer or the *ijab* of one contracting party and the acceptance or *qabul* of the other party. The acceptance must be declared in a clear and unequivocal manner and both witnesses must be satisfied before the acceptance is declared valid.

In relation to the age of marriage, Islamic Law generally provides that a person may marry if he has attained the age of puberty. The age of marriage and the age of maturity of intellect are identified with full age or the age of majority. The Holy Qur’an does speak of an age of marriage which it identifies with the age of majority. In Surah An-Nisa, verse 6: Allah (*s.w.t.*) says: ‘And go on observing and testing the orphans until they reach the marriageable age; if then you find them of sound judgment, deliver over unto them their property; and devour it not squandering and in haste lest they should grow up’. The term ‘marriageable age’ is employed to identify the underage orphan’s maturity.

Section 8 of the Islamic Family Law (Federal Territories) Act 1984 seems to follow the views of Imam Abu Hanifah, that in the absence of proof, a male is deemed to have attained puberty at the age of 18 years and a female at the age of 16 years. The above section provides: 'No marriage may be solemnized under this Act where either the man is under the age of eighteen or the woman is under the age of sixteen except where the Syariah Judge has granted his permission in writing in certain circumstances'. Section 18(1)(a) of the Act further provide that where either of the parties to the intended marriage is below the age specified in section 8 they will be required to seek and obtain the approval of the Syariah Judge. However, the disciples of Imam Abu Hanifah, Imam Abu Yusuf and Imam Muhammad Al Shaybani differed from the above and their view is shared by Imam Shafii that a boy and a girl will be considered to have attained the age of puberty if he gets night pollution or she begins to menstruate. In the absence of evidence of puberty, they will be considered to have attained puberty at the age of 15.

However, under the civil marriage, the Law Reform (Marriage and Divorce) Act 1976, section 10 provides: 'Any marriage purported to be solemnised in Malaysia shall be void if at the date of the marriage either party is under the age of eighteen years unless, for a female who has completed her sixteenth year, the solemnisation of such marriage was authorised by a licence granted by the Chief Minister under section 21 (2)'. The Chief Minister may in his discretion grant a licence under section 21 authorising the solemnisation of a marriage although the female party to the marriage is under the age of eighteen years, but not in any case before her completion of sixteen years.

Section 12(1) further requires that if the parties to the marriage are less than 21 years, the necessary consent to the marriage must be obtained. The consent must be in writing. In the normal circumstances, the father's consent is needed. If, however, the person is illegitimate or his or her father is dead, the consent of his or her mother may be accepted. Further, if the person is an adopted child, his or her adopted father would consent, but if the adopted father is dead, his or her adopted mother would have to consent. If both parents, natural or adopted, are dead, the consent moves to persons

standing in *loco parentis* to him or her before he or she attains 21 years. The court, on application, may also grant consent to any person for marriage and this consent shall have the same effect as if it had been given by the person whose consent was required pursuant to this section.⁴

It may be added that the explanation to section 375 of the Penal Code provides that sexual intercourse by a man with his own wife by a marriage which is valid under any written law for the time being in force, is recognized in the Federation is valid, is not rape. This explanation is an exception to the general rule provided in that section that sexual intercourse with a woman with her consent, when she is under 16 years of age, is rape. Having said the above, this article will address on child marriage with special focus on criminalisation of such act.

It is undisputable fact that child marriage practice remains widespread in many least developing countries particularly among the rural and indigenous communities. Child marriage is a human right violation as it threatens girls' lives and health, and it limits their future prospects. In 2010, it was reported that in Malaysia nearly 15,000 girls below the age of 15 were in a marriage.⁵ In 2014, the National Fatwa Council published a fatwa declaring that child marriage was not obligatory and that it was not a "healthy" practice. To curb child marriage, recently, Malaysian authorities have proposed harsh penalties for the offenders by amending the existing law with a view to criminalise the act.

2. Child: The Definition

'Child' refers to a person below the age of 18 and this is in line with the United Nations Convention on the Rights of the Child. The Interpretation Acts 1948 and 1967 states that 'infant' has the same meaning as minor and a 'minor' is defined as a person who has not attained the age of majority prescribed by the law applicable to him. Section 2 of the Age of Majority Act 1971 (Act 21) provides that the minority of all males and females shall cease and determine within Malaysia at the age of eighteen years and every such male and female attaining that age shall be of the age of majority. Section 2 of the

Child Act 2001 defines a child as a person under the age of eighteen years. The Children and Young Persons (Employment) Act 1966 (Act 350) describes a child as being below the age of 14 years. Order 76 rule 1 of the Rules of Court 2012 provides that person under disability means a person who is a minor or a patient.

Section 53 Interpretation Acts 1948 and 1967 (Act 388) provides: 'In computing years of age for the purposes of any written law, a person shall be regarded as having completed a year of age on the expiration of the day preceding the anniversary of his birth, reckoned according to the Gregorian calendar: Provided that for the purposes of this section the anniversary of the birth of a person born on 29th February shall, in a year which is not a leap year, be taken as 1st March'.⁶ In the same vein, the Age of Majority Act 1971 (Act 21), section 3, provides that: '(1) All computations of age under this Act shall be reckoned according to the Gregorian calendar. (2) In computing the age of any person the day on which he was born shall be included as a whole day, and he shall be deemed to have attained the age of eighteen years at the beginning of the eighteenth anniversary of that day'. Having said the above, it must be noted that the above special provisions on child have been drawn up as they are very susceptible and can be affected emotionally by their surroundings.

It is also noteworthy that purposes of criminal liability, a child means a person who has attained the age of criminal responsibility as prescribed in section 82 of the penal Code [Act 574].⁷ Section 82 of the Penal Code provides: "Nothing is an offence which is done by a child under ten years of age".⁸ The child below ten years is immune from any criminal prosecution based on English doctrine of *doli incapax*. The rationale is that the child below ten is incapable of understanding the nature and consequences of his acts and thus incapable of committing a crime.

Section 83 of the Penal Code further provides: "Nothing is an offence which is done by a child above ten years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequence of his conduct on that occasion"⁹. In other words, a child above ten and below twelve is *doli capax* provided that he has attained sufficient maturity of understanding

to judge of the nature and consequence of his conduct on that occasion. Thus, unlike section 82, *doli incapax* presumption in section 83 can be rebutted if it can be proven that the child understands the nature and consequences of his act.

The burden is on child to prove that he/she did not attain sufficient maturity of understanding to be able to know the nature and consequences of his/her acts.¹⁰ The court is also placed with a difficult job of making the decision as to whether the child above ten years of age and below twelve attained the sufficient maturity of understanding to judge the nature and consequence of his acts. In coming to its decision the court will take into consideration child's action, character or expression prior to and immediately after the commission of an offence.¹¹

Further, section 113 of the Evidence Act 1950 provides that it shall be an "irrebuttable presumption of law that a boy below the age of thirteen is incapable of committing rape".¹² This effectively means that a boy below thirteen is incapable of committing rape because he is incapable of performing sexual intercourse. The above irrebuttable presumption of law has been subject to scholarly debates in the past. In fact, in many jurisdictions the presumption has been abolished for example, section 1 of the Sexual Offences Act 1993 abolished the presumption in England and South Wales. In some other jurisdictions, the age limit has been lowered for example, section 13 of the Tasmania Criminal Code Act which states: "a male person under 7 years of age is conclusively presumed to be incapable of having sexual intercourse".¹³ However, the South Africa's Law of Evidence and Criminal Procedure Act (Amendment Act) 1987 provides that the presumption that a boy under 14 is incapable of sexual intercourse to be rebutted and the evidence to prove otherwise is admissible. The Law Reform Commission of Hong Kong had in their report entitled, "The Common Law Presumption that a Boy under 14 is Incapable of Sexual Intercourse", which was submitted to the Hong Kong authority in December 2010, recommended the abolishment of the common law presumption that a boy under 14 is incapable of performing sexual intercourse.

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Reverting back to the application of Child Act 2001, if the accused person falls into the definition of a 'child' under section 2 of the Child Act 2001, which in general is between the ages of 10 to 18, he will be tried for the sexual offence under Penal Code in accordance with Child Act 2001. It effectively means that the procedure and punishment for an offence committed by a child would be different from the criminal procedure and punishment applicable to an adult. The Child Act 2001 acknowledges: "that a child, by reason of his physical, mental and emotional immaturity, is in need of special safeguards, care and assistance, after birth, to enable him to participate in and contribute positively towards the attainment of the ideals of a civil Malaysian society."¹⁴

The 'Court for Children' has been established pursuant to the Child Act 2001. This is a special court constituted to decide criminal cases involving a child.¹⁵ This Court is conferred jurisdiction to try all offences committed by a child except offences punishable with death.¹⁶ Even if a child is tried and found guilty for offences punishable with death, High Court which has jurisdiction to try such offence, cannot impose such penalty on the child.¹⁷ Instead, the child will be imprisoned during the pleasure of the Yang di-Pertuan Agong.¹⁸ In *PP v Kok Wah Kuan*,¹⁹ the accused, a child at the time of the commission of an offence punishable with death, was imposed with an alternative order namely, a detention during the pleasure of the Yang di-Pertuan Agong pursuant to section 97(2) of the Child Act 2001. The child's case must be reviewed at least once a year by the Board of Visiting Justices for that prison and the Board may recommend the child's further detention or early release.²⁰

It must be added that the main purpose of punishing a child is not to inflict pain but rather to rehabilitate the child. Section 91(1) of the Child Act 2001 provides that if a Court For Children is satisfied that an offence has been proved the Court shall, in addition to any other powers exercisable by virtue of this Act, have power to - (a) admonish and discharge the child; (b) discharge the child upon his executing a bond to be of good behaviour and to comply with such conditions as may be imposed by the Court; (c) order the child to be placed in the care of a relative or other fit and proper person—(i) for

such period to be specified by the Court; and (ii) with such conditions as may be imposed by the Court; (d) order the child to pay a fine, compensation or costs; (e) make a probation order under section 98; (f) order the child to be sent to an approved school or a Henry Gurney School; (g) order the child, if a male, to be whipped with not more than ten strokes of a light cane— (i) within the Court premises; and (ii) in the presence, if he desires to be present, of the parent or guardian of the child; (h) impose on the child, if he is aged fourteen years and above and the offence is punishable with imprisonment and subject to subsection 96(2), any term of imprisonment which could be awarded by a Sessions Court²¹. As from the above, imprisonment will be considered only as the last resort.

It is also worthwhile adding that a children's rights have been recognised internationally some 91 years ago when the Declaration of the Rights of the Child (1924 Declaration) was adopted by the League of Nations in November 1924. The Declaration, also known as Declaration of Geneva, highlighted the social and economic entitlements of the child and also laid the foundation for setting future international standards for children's rights²². The rights of children were again emphasised in the 1959 Declaration of the Rights of the Child (1959 Declaration)²³ where it reiterated the rights of children to special care and assistance as canvassed in the previous 1924 Declaration.

The 1959 Declaration subsequently led to the drafting of the United Nations Convention on the Rights of the Child 1989 (UNCRC).²⁴ This Convention is known as the first legally binding international instrument to incorporate a complete range of human rights for children, including civil, cultural, economic, political and social rights. It promoted inter alia, basic human rights of children such as the right to protection from economic exploitation and the right to education. The 1989 convention which came into force less than 10 months after its adoption is the most widely ratified treaty in the world.²⁵ The Convention was introduced to ensure full and harmonious development of child's personality who should grow up in a family environment and in an atmosphere of happiness, love and understanding.

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'Child' is defined article 1 of the Convention as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.' The Convention has listed down the rights of the child specifically in labour matters. Protection of child against economic exploitation is contained in article 32(1). The above article provides that 'States Parties recognise 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.' To ensure the implementation of the above article, clause 2 provides that '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'.

In July 1990, the African Union (AU) adopted the African Charter on the Rights and Welfare of the Child 1990 (ACRWC) and came into force in November 1999. Child is defined in article 2 as 'every human being below the age of 18 years'. Child labour is specifically mentioned in article 15 where it provides that '(1) Every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development'.

The ILO Convention No. 138 which emphasised on the minimum age for admission to employment came into force on 19th June, 1976. Its adoption has been held in Geneva during the 58th International Labour Conference (ILC) Session on 26th day of June, 1973. The Convention No. 138 shall be construed side-by-side with the Minimum Age Recommendation 1973 (Recommendation No. 146). The Convention provides inter alia, that Member States should: (i) pursue a national policy to ensure the effective abolition of child labour; and (ii) progressively raise the minimum age for employment or work to a level consistent with the fullest physical and mental development of young persons.

The core obligation imposed by the above Convention is found in Article 2 which states that each Member State must specify a minimum age for admission to work, which should not be lower than the age for the completion of compulsory education which must not be less than 15 years. The above article does not make a link with primary education but refers to compulsory schooling in general. The employment of children below the age of fifteen years is thereby considered to be illegal.

Having discussed the definition of child from various national and international instruments in connection with criminal responsibility and child's engagement in labour force, the following discussion will focus on child marriage with special reference to the juristic views on marriageable age for a child, the criminalization of child marriage in selected Muslim countries and the rationale for this approach with special focus of Malaysia.

3. Classical and Modern Islamic Juristic Views on Marriageable Age

Unlike international and national legislation, the Islamic law has not fixed specific age for marriage.²⁶ However, the Qur'an identifies with age of majority to enter a marriage contract. In surah an-Nisa verse 6, the Qur'an referred to age of puberty or majority when it says: "And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgement, release their property to them".²⁷ From the verse, there is no specific age mentioned. Thus, it is pertinent to examine the views of classical and modern Muslim jurist on marriageable age for a child as mentioned in the Qur'an. Classical jurist including Abu Hanifah, Imam Malik and Shafii are unanimous on the incapacity of a child to enter a marriage for not attaining the majority age.²⁸ In other words, a child is not competent to contract a marriage with some exceptions for a child who is considered a minor.

In the discussion on marriageable age, early jurists have emphasized more on the capacity to contract a marriage and guardianship for marriage (*wilayat al-nikah*).²⁹ Thus where the child has attained maturity or majority, marriageable age is not a contention

among jurists. Both classical and modern jurist agree that free consent, *ijbar* (safety) is essential in marriage contract. According to classical jurist marriageable age is determined by maturity i.e. must be adult, possess capacity to enter a contract, and act freely without compulsion.³⁰

Jurists are unanimous on the view that the parties must give consent to the marriage contract. Imam Malik, opined that the father of the bride has an overruling power of *ijbar* over the bride and may impose the status of marriage upon the minor. This position is different from Imam Shafi'i who opined that the marriage contract cannot be done for a minor by her guardian. This opinion is strengthened by the fact that the minor lacks the capacity to understand the realities of marriage contract.

However, the Hanafis jurists are of the view that any person who has attained the age of majority is capable of contracting a marriage.³¹ They added that the guardian cannot dispose the child or any person under his guardianship in marriage without her consent.³² Further, the Hanafis school opined that majority age is presumed for female where there is evidence of puberty or upon completion of fifteenth years of age. The Hanafis also added that puberty in female is determined through the occurrence of menses and nocturnal emission while for male; it is the advent of natural emission. In the absence of puberty in male, Imam Abu Hanifah fixed the age of marriage at eighteen for boys.

Imam Shafii, Abu Yusuf and Al-Auza'I are of the opinion that puberty is attained at the age of fifteen for male and that the earliest age for a girl to have her menses is nine years.³³ The four Sunni schools agree that the guardian have the right to marry off a minor who has not attained puberty without her consent. However, such marriage shall not be consummated until the minor attains puberty or age of majority.

According to Hanafi jurist, the child also has the right to either ratify or annul the marriage through the "option of puberty" or *khiyar-al-bulugh* which can only be exercised after attaining puberty.³⁴ *Khiyar* literally means option in contract of sales which may be exercised within a given time. Accordingly, this option is applicable to male

and female minor whose marriages were contracted by their guardian while they were minors. Upon attaining puberty or '*bulugh*' such minor may either ratify the marriage contract or rescind it. According to Hanafi, the option of puberty is not applicable where the marriage was contracted by the father or grandfather of the minor.

Among the modern jurist, Muhammad Iqbal Siddiqi has attempted to interpret the verse with respect to marriageable age. He opined that: "A man or woman who has not attained puberty is unable to exercise his or her choice in matters of sexual matters and is unable to decide whether he or she will like or dislike a certain woman or man as wife or husband."³⁵ From the above, persons who have not attained puberty should not enter into marriage as he or she is unable to determine the implications and commitments of marriage. This view is closely related to the classical opinion on maturity and age of majority. Jamal Badawi - another modern jurist, is of the view that consent of a child is a pre-requisite and the child reserves the right either to reject or accept the proposal. According to Badawi, if arranged marriage means forced marriage, the female has the right to annul the marriage if she so wishes. The fluid nature of marriageable age in Islamic law is an opportunity for modern jurist to raise the hitherto low marriageable age and support criminal sanctions for any breach.

4. Criminalisation of Child Marriage in Selected Muslim Countries

For the purpose of discussing the criminalisation of child marriages in selected Muslim countries, authors focus three Muslim countries, i.e., Bangladesh, Pakistan and Maldives, from the Southern Asia as this region appears to be one of the hottest spots for child marriages globally.

4.1. Bangladesh

Bangladesh has the highest number of child marriage not only in Southern Asia but worldwide.³⁶ According to the United Nations Children's Fund (UNICEF), while the eradication of child marriage is picking up its momentum in Bangladesh, 66% of girls are married

before the age of eighteen and almost one third of girls are married before the age of fifteen.³⁷ In view of that, Bangladesh enacted a new legislation called the Child Marriage Restraint Act 2017 after repealing the old Child Marriage Restraint Act 1929 introduced during the British rule. The Child Marriage Restraint Act 2017 uses the term “minor” instead of the word “child”. Under this Act, for the purpose of marriage, a minor is a person who has not completed twenty-one years of age for a male and has not completed eighteen years of age for a female.³⁸ It further defines the word “adult” as a person who has completed twenty-one years of age for a male and has completed eighteen years of age for a female.³⁹ “Child marriage” is defined as a marriage in which both contracting parties are minor.⁴⁰

The Act prescribes several harsh penalties for various parties involved in a child marriage. An adult, either male or female, who enter into a child marriage is punishable with imprisonment up to two years, or fine up to one hundred thousand Bangladeshi Taka or with both. If the offender could not effort to pay the fine, the imprisonment may be extended up to three more months.⁴¹ A minor, either male or female, who enter into a child marriage is punishable with imprisonment up to one month, or fine up to fifty thousand Bangladeshi Taka, or with both.⁴² The minor is not punishable if the marriage takes place due to arrangement made by the parent or guardian. In such a situation, a parent or a guardian who promotes the child marriage, allows it to be solemnised, or fails to prevent it from being solemnised is punishable with imprisonment up to two years but not less than six months, or fine up to fifth thousand Bangladeshi Taka, or with both. If the offender could not effort to pay the fine, the imprisonment may be extended up to three more months.⁴³

The Act makes solemnising a child marriage an offence and anyone who solemnises such a marriage is punishable with imprisonment up to two years but not less than six months, or fine up to fifth thousand Bangladeshi Taka, or with both. If the offender could not effort to pay the fine, the imprisonment may be extended up to three more months.⁴⁴ In the same vein, a Marriage Registrar who registers a child marriage is also punishable with imprisonment

up to two years but not less than six months, or fine up to fifth thousand Bangladeshi Taka, or with both. If the offender could not effort to pay the fine, the imprisonment may be extended up to three more months. In addition, the license or appointment of the Marriage Registrar will be cancelled accordingly.⁴⁵

The Act further provides measures to prevent child marriages. The Court is authorised to issue an injunction against solemnisation of the child marriage if it receives any complaint or information of such arrangement.⁴⁶ Any person who violates such an injunction is punishable with imprisonment up to six months, or fine up to ten thousand Bangladeshi Taka, or with both. If the offender could not effort to pay the fine, the imprisonment may be extended up to one more month.⁴⁷ Besides, it imposes penalties for making a false complaint and a person making a false complaint is punishable with imprisonment up to six months, or fine up to thirty thousand Bangladeshi Taka, or with both. If the offender could not effort to pay the fine, the imprisonment may be extended up to one more month.⁴⁸ Despite the fact that Bangladesh has a bit more comprehensive law in restraining child marriages, the rates of child marriage is very high not only at the regional level but also globally. Thus, it is proposed that more effective enforcement measures are necessary in order to reduce and thereby eradicate child marriages.

4.2. Pakistan

Pakistan has relatively lower percentage of child marriages than Bangladesh. However, it is still one of the most serious concerns nationwide as approximately 30 percent of girls fall into child marriages.⁴⁹ The Child Marriage Restraint Act 1929 introduced during British rule is still applicable with some slight amendments in Pakistan at the national level. The Act defines “child” as a person who is under eighteen years of age for a male and under sixteen years of age for a female.⁵⁰ This age limit is solely for the purpose of marriage and any gender under the age of eighteen is considered as “minor” for all other purposes.⁵¹ It further defines “child marriage” as “a marriage to which either of the contracting parties is a child”.⁵²

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Child marriage is criminalised under the Act and a wide range of sentences are imposed on parties involved in a child marriage. A person who marries a child is punishable with imprisonment up to one month, or with fine which may extend to one thousand Pakistani rupees, or with both.⁵³ Likewise, whoever solemnises, performs, conducts or directs a marriage involving a child is punishable with imprisonment up to one month, or with fine which may extend to one thousand Pakistani rupees, or with both. Such a person would not be subjected to the prescribed punishments if “he had reason to believe that the marriage was not a child marriage”.⁵⁴

Furthermore, a parent or a guardian who promotes or permits the marriage of a child who is under their guardianship; or fails to prevent such a marriage is also punishable with imprisonment up to one month, or with fine which may extend to one thousand Pakistani rupees, or with both. Nonetheless, a woman is punishable only with fine if she commits any of the offences under the Act and she will not be subjected to imprisonment.⁵⁵

It also provides preventive measures before a child marriage takes place. The Court is authorised to issue an injunction prohibiting a child marriage against a person who is preparing to marry a child; a person who is arranging to solemnise a child marriage; or, a parent or a guardian of a child who is allowing such a marriage.⁵⁶ Any person from the above categories knowingly ignores an injunction issued against him and continues to perform what he is prohibited will be punishable with imprisonment up to three months, or with fine which may extend to one thousand Pakistani rupees, or with both. Nevertheless, a woman will not be punishable with imprisonment as the Act only provides fine for violating such an injunction.⁵⁷ Apart from that, child marriages are also covered by the Pakistan Penal Code 1860 and offenders are punishable with imprisonment up to a term of seven years but not less than three years and liable to a fine of five hundred thousand Pakistani rupees.⁵⁸

It can be observed from the above mentioned provisions that penalties imposed under the Act are very minimal and are not sufficient enough to be effective deterrence in eradicating child marriages across the country. Therefore, child marriage remains a

widespread practice and estimated that about 21% of Pakistani girls marry before the age of eighteen.⁵⁹ Since the existing law was enacted almost a century ago, numerous efforts are being made to amend the law at both provincial and national level respectively.

In April 2014, the Provincial Assembly of Sindh unanimously adopted the Sindh Child Marriage Restraint Act 2013 in which the minimum age of marriage is equalised to eighteen for both males and females.⁶⁰ The Sindh Child Marriage Restraint Act 2013 criminalised any marriage of a minor who is below the age of eighteen and increased the punishment. Male contracting party who enters into a child marriage is punishable with rigorous imprisonment which may extend up to three years but not be less than two years and liable to fine.⁶¹ Anyone who solemnise a child marriage is punishable with rigorous imprisonment which may extend up to three years but not be less than two years and liable to fine.⁶² A parent or a guardian who does any act to promote the child marriage or permits it to be solemnised is also punishable with rigorous imprisonment which may extend up to three years but not be less than two years and liable to fine.⁶³ Any person who from the above categories knowingly ignores an injunction prohibiting a child marriage issued by the competent court will also be punishable with imprisonment which may extend up to one year or fine or with both.⁶⁴ Although the terms of imprisonment for respective offender are extended, this Act does not specify an exact amount of fine payable.

In the same year, at the national level, a bill to increase the age of marriage up to eighteen for both genders and penalties from “one month, or with fine which may extend to one thousand Pakistani rupees, or with both” to “two years, or with fine which may extend to one hundred thousand Pakistani rupees, or with both” was introduced but it did not manage to pass the National Assembly of Pakistan.⁶⁵

In the same vein, Provincial Assembly of Punjab amended the Punjab Child Marriage Restraint (Amendment) Act 2015 to increase the penalties for those engage, solemnise, or allow child marriage from “one month, or with fine which may extend to one thousand Pakistani rupees, or with both” to “six months, or with fine which

may extend to fifty thousand Pakistani rupees, or with both”.⁶⁶ Nevertheless, it maintains the age of marriage as sixteen for a female.⁶⁷ Again in May 2017, another bill proposing to increase the legal age of marriage for a girl from sixteen to eighteen on a national scale was defeated at the National Assembly of Pakistan.⁶⁸ Accordingly, it is proposed that Pakistan, at the national level, should consider amending the minimum age of marriage for females to be eighteen and increasing the degree of punishment for parties involved in a child marriage with the intention to offer adequate deterrence from practising it.

4.3. Maldives

In Southern Asia, Maldives has the lowest percentage of child marriages.⁶⁹ Maldives does not have the specific law catered for the child marriage restraint or prohibition. The Family Act 2000 governs all the family and personal matters in Maldives. It sets the minimum age for marriage to be eighteen for both male and female contracting party.⁷⁰ However, there is an exception to this provision as the Family Act 2000 allows a person who has not reached eighteen years of age to make an application to marry to the Registrar of Marriages. The Registrar of Marriages has the discretion to grant approval for the solemnisation of such a marriage after considering the following facts such as whether the person seeking permission has attained puberty, the person’s physical well-being, competence to maintain a livelihood, and reasons for contracting the marriage.⁷¹

Therefore, although the legal age of marriage is eighteen for both parties, the Registrar of Marriages can still permit underage marriages. In most cases, girls between the ages of sixteen to eighteen sought for such permission.⁷² Albeit there are not many underage marriages approved in Maldives, it is not desirable to grant such a wide and subjective discretionary power to the Registrar of Marriages as it may open the door for abuse to a child. Hence, there should be a statutory age limit for exceptional cases of underage marriages. The United Nations Committee on the Elimination of Discrimination against Women recommended that the minimum age for allowing to engage in exceptional circumstances should be sixteen for a female.⁷³

In September 2016, the Supreme Court of the Maldives amended the rules in which the subordinate courts require its approval in writing for the registration of underage marriages.⁷⁴ Due to these legal hassles, many underage marriages are not registered properly as required by the Family Act 2000. It is a mandatory legal requirement for all Maldivians to register their marriages regardless whether it is solemnised in Maldives or abroad.⁷⁵ Any marriage solemnised inconsistent with the Family Act 2000 will not be able to register officially.⁷⁶ The Family Act 2000 further makes failure to register a marriage an offence and the offender will be subject to a fine up to one thousand Maldivian Rufiyaa.⁷⁷

Moreover, a marriage with an underage partner without the prior approval from the Supreme Court of the Maldives as well as the Registrar of Marriages can be treated as a conduct in contravention of a directive or prohibitive provision of the Family Act 2000. In this case, the offender is punishable with “a fine not exceeding one thousand Maldivian Rufiyaa or exile for a period not exceeding six months”.⁷⁸ Under the Family Act 2000, failure to notify commission of offence is also considered as a separate offence from the original offence committed and the offender is punishable with “a fine not exceeding one thousand Maldivian Rufiyaa or exile or house detention for a period not exceeding three months”.⁷⁹

It can be observed from the above provisions that there is no specific penalty prescribed for the parties involved in child marriages, per se. The offender can only be punished either due to the failure to register a marriage, conducts in contravention of the Family Act 2000, or failure to notify commission of such offences. Therefore, for the purpose of eradicating child marriages in Maldives, it is proposed that the existing law should be amended by introducing higher degree of punishment for all parties involved in a child marriage (i.e., a person who marries a child; a person who solemnises a child marriage, or a parent or a guardian of a child who allows or fails to prevent such a marriage) regardless whether the marriage is registered or unregistered officially.

5. Rational for Criminalisation of Child Marriage: with Special Focus on Malaysia

Malaysia has a dual legal system namely the common law system and Islamic legal system, which means that the minimum age of marriage can be determined by either civil law or Syariah (Islamic law). Non-Muslims may only marry upon attaining the age of 18, but girls can be married as early as 16 provided they or their parents have the permission of the State Chief Minister, while for Muslims, Islamic law sets a 16-year minimum age for girls and permits even earlier marriages, with no apparent minimum, with the permission of a Syariah court. The Malaysian Child Act 2001⁸⁰ does not ban, let alone criminalise, all marriage by girls and boys under the age of 18, even though child marriage may cause real and lasting damage especially to girls.

The most widely accepted definition of a child marriage is the marriage between two people in which one or both parties are younger than 18 years of age.⁸¹ Neither the Malaysian civil laws nor the Syria (Islamic) law, strictly speaking, prohibits child marriage, let alone criminalizing it, even though there is overwhelming evidence that such a marriage has devastating consequences on the child. An analysis of Malaysian laws, both civil and Syria (Islamic) law, clearly shows that child marriage is not strictly banned in this country. Although Malaysian civil law sets the minimum age of marriage at 18, the law is riddled with exceptions, as female child age 16 and older can marry with permission of their state's chief minister. The minimum age for a Muslim female child sets by Islamic law is 16 and the law permits even earlier marriages, with no apparent minimum, with the permission of a Syariah court.

Child marriage, does happen especially among the many low and middle income countries, is a harmful practice that affects child's education, economic standing and more likely the married child may become the victim of domestic violence. It is most likely result in early pregnancy, which carries serious health risks including death for both girls and their babies. There is scientific evidence to suggest that the death rate involving children that ages 15 to 18 are twice likely to die during delivery than women ages 20 to 24. Babies born

to mothers under 18 years of age in low- and middle-income countries face a 50 percent higher risk of stillbirth or dying in the first few weeks, compared to babies born to mothers aged 20 to 29. Doctors warn about devastating effect of child marriage. For instance, Dr Sajjad Ahmed, manager of the NGO, Pakistan National Forum on Women Health (PNFWH), insisted that underage marriage increases the risk of obstetric fistula, a dangerous injury that occurs during childbirth. He insisted that the matter requires immediate attention as nearly 5,000 cases of obstetric fistula surface every year in Pakistan.

In addition to health risks, child marriage “affects child’s education since child brides usually drop out of school and are denied the opportunity to complete their education, significantly reducing their ability to earn income and lift themselves and their children out of poverty”.⁸² Depriving a child to attain education may amount not only to a violation of his or her human rights but also tantamount to economic deprivation and this in turn also amount to a violation of the economic right of the child. These violations and a deprivation will have a devastating effect on the child making him or her dependent on others and vulnerable to abuse.

Child marriage, in spite of its devastating effects, has been reported in Malaysia. Recently, the marriage of an 11-year-old girl to a 41-year-old man alarmed Malaysians who showed their concern over the matter. It is time to put an end to this harmful practice by amending the existing laws by not only prohibiting such practice but also possibly criminalise the child marriage. The prohibition of child marriage is one of the United Nations Sustainable Development Goals.⁸³ In fact, the Malaysian Human Rights Commission (Suhakam) has urged the government to amend the relevant domestic legislations to raise the legal age of marriage to 18.

It is therefore submitted that by criminalising any marriage below 18, would be able to deter such practice if not possible to eliminate fully the child marriage. Hence, taking a lead from other jurisdictions with similar practice, the various parties listed below who indulges or participates in child marriage should be subject to criminal sanctions: (i) an adult, either male or female, who enter into a child marriage; (ii) a parent or a guardian who promotes the child marriage, either by

allowing it to be solemnised, or fails to prevent it from being solemnised; (iii) the authorised officer who solemnise the child marriage, and (iv) the Marriage registrar who registers a child marriage, among others.

6. Conclusion

The phenomenon of child marriage with a view to criminalise such act under Malaysian Law forms the theme of this paper. The study has identified legal provisions in Malaysia which are intended to guide against exploitation of children and minors for the purpose of marriage. The provisions including the Islamic Family Law (Federal Territories) Act 1984, Law Reform (Marriage and Divorce) Act 1976 and other Muslim juristic opinion which have not fixed specific age for marriage. There is growing concern among modern scholars towards fixing a particular age for marriage to avoid exploitation of children. The paper also highlighted the definition of a child under the international legal regimes on labour and employment. Children of certain age are presumed to be incapable of entering into a contract of employment by virtue of the United Nations Convention on the Rights of the Child 1989 (UNCRC). This goes to say that marriage contract which is more demanding should also meant only for persons who are not less than a certain age, and in this case, 18 years.

Therefore, this paper argues and provides legal and sociological rationale for increasing marriageable age in Malaysia to 18 years and on that basis propose amendment to domestic legislation to criminalize child marriage. This is in line with the practices in other Muslim countries such as Bangladesh and Pakistan which has criminalized such practice. Bangladesh passed the Child Marriage Restraint Act in 2017 while Pakistan amended the Child Marriage Restraint Act 1929 and the Pakistan Penal Code 1860. Under the Pakistani Penal Code, offenders will be liable up to 7 years imprisonment. In Maldives, the Family Act 2000 regulates the solemnisation and registration of marriage and mandates the permission of the Supreme Court for marriages involving underage parties. The attempts by Muslim countries mentioned above are a basis for criminalisation of child marriage which can be transplanted into Malaysian family law legislations.

Notes

1. Surah Al-Baqarah, verse 187.
2. Sahih Al-Bukhari and Muslim.
3. See *The Complete System of Divorce (Talaah)*, (New Delhi, Adam Publishers and Distributions, 2003) p 23.
4. See Mimi Kamariah Majid, Family Law in Malaysia, MLJ, 1999, p. 93.
5. The Malay Mail Online, “*Child marriages not rare in Malaysia with 15,000 underage brides, activists say*”, 2 October 2015.
6. Further section 106 of the Interpretation Acts 1948 And 1967 provides: ‘In computing age for the purposes of any Act, Ordinance, Enactment or subsidiary legislation a person shall be treated as having reached a specified age at the beginning of the corresponding anniversary of his birth, reckoned according to the Gregorian calendar’.
7. See section 2 of the Child Act 2001, Act 611.
8. See section 82 of the Penal Code.
9. See section 83 of the Penal Code.
10. See Nasimah Hussin, “Juvenile Delinquencies in Malaysia: Legal Provisions and Prospects for Reforms”, a paper presented at the 4th World Congress on Family Law and Children’s Rights, Cape Town, South Africa, 20-30 March 2005. However, in England, the burden of proof is on prosecution.
11. *Ibid.*
12. See section 113 of the Evidence Act, Act 56.
13. See paragraph 18(3) of section 13 of the Tasmanian Criminal Code Act 1924. (No. 69 of 1924).
14. See Child Act 2001.
15. See section 11(1) of the Child Act 2001.
16. See section 11(5) of the Child Act 2001.
17. See section 97(1) of the Child Act 2001.
18. See section 97(2) of the Child Act 2001.
19. [2007] 6 CLJ 341.

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20. See section 97(4) of the Child Act 2001.
21. See section 91(1) of the Child Act 2001.
22. Ekunday, O. (2015) Does the African Charter on the Rights and Welfare of the Child (ACRWC) only Underlines and Repeats the Convention on the Rights of the Child (CRC)'s Provisions?: Examining the Similarities and the Differences between the ACRWC and the CRC. *International Journal of Humanities and Social Science Vol. 5, No. 7(1)*, p.145.
23. Declaration of the Rights of the Child which was the first major international consensus on the fundamental principles of children's rights adopted by all 78 Member States of the United Nations General Assembly in Resolution 1386 (XIV) in 1959.
24. Detrick, S., Doek, J. E., & Cantwell, N. (Eds.). (1992). *The United Nations Convention on the Rights of the Child: a guide to the "Travaux Préparatoires"*. Martinus Nijhoff Publishers, p.34.
25. Arts, K. C. (1993). International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child, *The Afr. J. Int'l & Comp. L.*, 5, 139, p. 140.
26. Tanzil-ur-Rahman, 1980. *A Code of Muslim Personal Law*, Islamic Publishers.
27. Surah Nisa vs 6. Sahih International English Translation.
28. Rahim A. The Principles of Muhammadan Jurisprudence: according to the Hanafi, Maliki, Shafi'i and Hanbali Schools, London, Luzac. 1911.
29. Carroll, Lucy, Alhaji Ma'aji Isa Shani, and Mohd Altaf Hussain Ahangar. "Marriage-Guardianship and Minor's Marriage at Islamic Law" *Studies in Islamic Law, Religion, and Society* (1989): 366.
30. Ali, Syed Ameer, and Said Akbar Khan. *Mohammedan Law*. All Pakistan Legal Decisions, 1965.
31. Rahim A. The Principles of Muhammadan Jurisprudence: according to the Hanafi, Maliki, Shafi'i and Hanbali Schools, London, Luzac. 1911.
32. *Id*, at 330.
33. al-Nawawī, M.A.D.A. and ibn Sharaf, Z.Y., Minhaj al-Talibin. *Eng. trans. E. C. Howard. Lahore: Law Publishing Company, nd.*

34. Ali, Syed Ameer, and Said Akbar Khan. *Mohammedan Law*. All Pakistan Legal Decisions, 1965.
35. Siddiqui, Muhammad Iqbal. *The family laws of Islam*. Adam Publishers, 2010.
36. International Center for Research on Women, “Child Marriage in Southern Asia: Policy Options for Action”, (11 October 2012) <<https://reliefweb.int/report/afghanistan/child-marriage-southern-asia-%E2%80%93-policy-options-action>> (accessed on 20 July 2018).
37. The UNICEF, “Early marriage”, <https://www.unicef.org/bangladesh/children_4866.html> (accessed on 21 July 2018).
38. Section 2(1), the Child Marriage Restraint Act 2017.
39. Section 2(3), the Child Marriage Restraint Act 2017.
40. Section 2(4), the Child Marriage Restraint Act 2017.
41. Section 7(1), the Child Marriage Restraint Act 2017.
42. Section 7(2), the Child Marriage Restraint Act 2017.
43. Section 8, the Child Marriage Restraint Act 2017.
44. Section 9, the Child Marriage Restraint Act 2017.
45. Section 11, the Child Marriage Restraint Act 2017.
46. Section 5(1), the Child Marriage Restraint Act 2017.
47. Section 5(2), the Child Marriage Restraint Act 2017.
48. Section 6, the Child Marriage Restraint Act 2017.
49. International Center for Research on Women, “Child Marriage in Southern Asia: Policy Options for Action”, (11 October 2012) <<https://reliefweb.int/report/afghanistan/child-marriage-southern-asia-%E2%80%93-policy-options-action>> (accessed on 20 July 2018).
50. Section 2(a), the Child Marriage Restraint Act 1929.
51. Section 2(d), the Child Marriage Restraint Act 1929.
52. Section 2(b), the Child Marriage Restraint Act 1929.
53. Section 4, the Child Marriage Restraint Act 1929.
54. Section 5, the Child Marriage Restraint Act 1929.
55. Section 6(1), the Child Marriage Restraint Act 1929.

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56. Section 12, the Child Marriage Restraint Act 1929.
57. Section 12(5), the Child Marriage Restraint Act 1929.
58. Section 310A, the Pakistan Penal Code 1860 as amended by the Anti-Women Practices (Criminal Law Amendment) Act 2011.
59. UNFPA, “Child Marriage” <<https://pakistan.unfpa.org/en/topics/child-marriage-4>> (accessed on 19 July 2018); The Idea Bureau, “Girls not brides” <<https://www.girlsnotbrides.org/child-marriage/pakistan/>> (accessed on 19 July 2018).
60. Section 2(a), the Sindh Child Marriage Restraint Act 2013.
61. Section 3, the Sindh Child Marriage Restraint Act 2013.
62. Section 4, the Sindh Child Marriage Restraint Act 2013.
63. Section 5(1), the Sindh Child Marriage Restraint Act 2013.
64. Section 7(5), the Sindh Child Marriage Restraint Act 2013.
65. The Bill to amend the Child Marriage Restraint Act 1929.
66. Sections 4, 5, and 6, the Punjab Child Marriage Restraint (Amendment) Act 2015.
67. Section 2(a), the Punjab Child Marriage Restraint (Amendment) Act 2015.
68. The Idea Bureau, “Girls not brides” <<https://www.girlsnotbrides.org/child-marriage/pakistan/>> (accessed on 19 July 2018).
69. International Center for Research on Women, “Child Marriage in Southern Asia: Policy Options for Action”, (11 October 2012) <<https://reliefweb.int/report/afghanistan/child-marriage-southern-asia-%E2%80%93-policy-options-action>> (accessed on 20 July 2018).
70. Section 4(a), the Family Act 2000.
71. Section 4(b), the Family Act 2000.
72. International Center for Research on Women, “Child Marriage in Southern Asia: Policy Options for Action”, (11 October 2012) <<https://reliefweb.int/report/afghanistan/child-marriage-southern-asia-%E2%80%93-policy-options-action>> (accessed on 20 July 2018).
73. Maldives Independent, “Supreme court approval required for underage marriage”, (21 September 2016) <<https://maldivesindependent.com/society/supreme-court-approval-required-for-underage-marriage-126645>> (accessed on 20 July 2018).

74. International Center for Research on Women, “Child Marriage in Southern Asia: Policy Options for Action”, (11 October 2012) <<https://reliefweb.int/report/afghanistan/child-marriage-southern-asia-%E2%80%93-policy-options-action>> (accessed on 20 July 2018).
75. Section 19(a), the Family Act 2000.
76. Section 19(b), the Family Act 2000.
77. Section 62, the Family Act 2000.
78. Section 70, the Family Act 2000.
79. Section 68, the Family Act 2000.
80. Child Act 2001, Act 611.
81. In accordance with the African Committee of Experts on the Rights and Welfare of the Child, ACERWC, child Marriage is defined as the marriage of boys and girls before the age of 18. The United Nations Children’s Fund (UNICEF) defines it as “a formal marriage or informal union before 18” (UNICEF 2011).
82. African Committee of Experts on the Rights and Welfare of the Child, ACERWC, <http://iac-ciaf.net/child-marriage-cm/>
83. UN Sustainable Development Goal 5.