



Child Marriage: Mahnaz Shujrah in conversation with Sara Malkani

Podcast Transcript

Mahnaz Shujrah (MS): The issue of child marriage has been at the forefront ever since the Dua Zehra case emerged in the news and everyone has been following it. You have been working with child marriage in Karachi as an advocate, a lawyer, and an activist; I want to ask how your experience has been, what your work has been like and if you could layout the context surrounding child marriage in Sindh.

Sara Malkani (SM): My name is Sarah Malkani, I'm a lawyer, I practice primarily in Karachi in the District Court, as well as the High Court. I'm also an advisor for a human rights organization called the Centre for Reproductive Rights. Much of my work focuses on issues related to human rights, specifically women's rights and child rights. I've done some work, both as a lawyer, as well as an advocate, on adolescent sexual and reproductive health and rights, and of course child marriage is an important aspect of that. Child marriages are still quite prevalent all over Pakistan, and even though you know it is the case that rates of child marriage have been steadily declining over the years, we're still seeing that these cases are quite prevalent. Now how those cases are manifesting themselves, but their root causes are quite varied and complex.

MS: Although child marriage cases are declining, there's a bit of nuance regarding what age brackets are in decline. You've written about the impact of societal context and socioeconomic dimensions that come into play, and specifically your article mentioned "self-arranged child marriages". That's a very interesting point, because when you look at the law, when you look at the news, generally girl's agency or the girl's consent is not emphasized. So, can you talk about this, what does that entail and why it's important to look at consent, especially keeping in mind Pakistan's social landscape?

SM: Ending child marriage has been a priority for human rights and women's rights activists in Pakistan for decades. The first law criminalizing child marriages was actually passed in the colonial era, in 1929. Of course, the minimum age then was lower than (16 years) it is now (18 years in Sindh), and then the law was amended subsequently. The current legal framework is such that Sindh is the only province in Pakistan where the minimum legal age of marriage is 18 years for both boys and girls. Hence, marriage of anybody involving any party under the age of 18 years would be deemed a child marriage and it is criminally prohibited. For the rest of the country the minimum age is 16 years for girls and 18 years for boys. The advocacy around child marriage, until very recently, had this very singular kind of notion, of how child marriages take place, and the idea was that they are often forced or arranged by parents of the of the minors and by their community members. In majority of the cases, the minor happens to be the girl and the family is motivated by cultural and traditional norms to arrange this marriage. It leads to a range of human rights violations, especially for the girls, so the girl's education is discontinued when she's married and she often forced to become sexually active before she reaches the age of 18, she is likely to get pregnant, she's likely to have a child before she reaches the age of 18. There's also medical evidence to show that it's unhealthy to have a child at a younger age so she's also exposed to reproductive health violations as a result of the child marriage. Also, because of her young age, she is more vulnerable to domestic violence in her marital home at the hands of her husband or her family. So, the claim here is that child marriage triggers a



whole continuum of human rights violations, and of course then it impacts the ability of the child to become financially independent at any stage in her life because her education has been discontinued.

Child marriage has been a root cause of a range of human rights violations and that's why it has, for the right reasons, been a priority for human, women and child rights advocates to put an end to it. Internationally also with the Sustainable Development Goals, putting an end to child marriage has also been prioritized. So, even the international human rights community has put a lot of time and resources into curbing this practice, which is to this day more prevalent in developing countries, and across South Asia the rates are quite high.

However, one important fact to acknowledge about more recent trends in child marriage is that overall, the rates are declining, and it's not the case that they are declining because of strict enforcement of criminal prohibitions against child marriage. For example, across South Asia, there's little to no evidence to suggest that it is actually criminal enforcement and criminal penalties that are leading to this decline. Instead, it's a range of social factors that are leading to a reduction in invasive child marriage, as more families are realizing that it is important to invest in girl's education and so on, and because cultural and traditional norms are changing, we are seeing that decline.

It's obviously not as steep as we would like it to be and it's not consistent across the board; In poorer communities in rural communities, and in conflict ridden communities, it's disproportionately higher. So, obviously we're not where we want to be, but it is important to realize that the decline is happening and especially when you look at the at the rates of child marriage across South Asia, there is a significant decline in child marriages where the girl is under the age of 15 years. So, now 15 years to 18 years is where you're seeing a majority of the child marriages. So, the changes in society norms have led to a reduction in the rate of child marriage of very young children. So, I think that's one trend to keep in mind.

When you look at that 15 to 18 age group, when you look at the trends, and when compare with countries where there has been significant research on it, such as India, you see that in these cases we're seeing that where the girl is an older adolescent in that age group, that the marriage is not necessarily being arranged by her parents and her community, countering that paradigmatic notion of what a child marriage is, where the parents and the community are forcing it to happen. What we're seeing is that those marriages are not being arranged (by parents) and those marriages are being arranged by the minors, or the minor girl and the slightly older young adult male, and they are happening in contravention of what the parents and the community members want. So, when you asked about the article that I wrote on "self-arranged child marriages" this is the trend that I was referring to.

There should be a distinction between forced child marriages, where it's pretty clear that there is a strong element of coercion of the girl by her parents and by the community members, and those cases where it is the older girl who has entered or decided to marry, for and there can be a range of reasons for that. Like I said, where we have data, there are clear trends that this happening. In Pakistan, I can tell from my experience, anecdotally, or cases that I've also observed happening in courts, as well as in the media, where you are seeing more cases involving minor girls where the girls have actually arranged the marriage themselves often by eloping with the boy or the young man, and it's happening in contravention of the parents and community members' wishes.



MS: You are saying that there's a certain sort of agency being practiced by the girl, I just want to quickly bring up...do you think social media has an impact on this trend? That young girls and boys are being connected more often or are in contact which is why this might be rising, as opposed to previously when they weren't, there was no avenue for connection?

SM: I think access to mobile phones, it plays a big role in terms of how young people get to know each other and get into contact with each other. In some cases that I have encountered, phones have been the primary means of communication and I think that that has kind of facilitated means of interaction among young people.

MS: So, between 15 to 18 years the trend is rising, but cases which are more vulnerable, which is under the age of 15 years, girls at the age of 10 years or 12 years are being married, those are in decline. So, that's a good positive change to look at as in terms of the struggle and the movement, but moving forward, do you think the law can cater to this nuance? How can the legal system address this, the girl's agency, or her context? How can one know if she's doing it out of her own will or is it because she's looking at some sort of ideal utopia which doesn't exist?

SM: If you look at how the child marriage law is being enforced, if you look at FIRs that are being registered in Sindh, and cases that are making their way to court, very few of them are involving cases where the parents have forced the marriage. You are seeing in Sindh that the cases are often being initiated by the parent against the male, or against the male's family members as well. The idea behind the law was to penalize and prohibit parents and family members forcing a minor for marriage, you don't see the law very effective at dealing with those cases; you don't see those FIRs being registered. It kind of makes sense why that would be the case, because it's very difficult for a girl to go and complain to the police or go to the magistrate and say my parents are forcing me into a marriage. You also don't see community members notifying the police or telling them that in this household there's an underage marriage; those cases are very rare. But parents have access to the police, so in those cases it is seen that the girl has eloped, then they make use of the law (to their advantage). If you look at how the criminal law is being used and who the FIRs are being lodged against the man or the man's family members, and rarely against parents and family members who are forcing the marriage to take place. It's an important aspect to note how criminal law is being enforced.

Now, the question of how we make that distinction and how do we know if the girl... I mean I think that it's important to recognize that as children grow older their maturity levels evolve, the concept is known as "evolving capacities of adolescents" and that's something that's even recognized in international human rights law. The Convention on the Rights of the Child, which is the most significant international human rights treaty, specifically states that laws protecting children should be cognizant of the fact that as children grow older, they develop more maturity, and their decision-making capacities increase. One obvious way of knowing to what extent a young person exercises agency in this case is asking them - is this something that happened, did you choose to elope, did you enter this union out of your free will, out of your choice? That's one important factor to consider. We should also keep in mind that we're still dealing with young people, and they are far more vulnerable than adults. In that case it's important for law enforcement or the Child Protection Authorities when they're encountering such a case, to do some of their own investigation to determine there could be some coercion, whether they could be some pressure on the minor to be saying this. That can only happen if the young person is given a safe space and qualified counselors who are able to assess that. That's what is most



important to give the safe space to young people, and where they're feeling comfortable and secure, they'll be able to express themselves.

MS: The law caters to the girls who are eloping by their own free will, and those cases end up as kidnapping cases or other cases of elopement. They're not even registered as child marriage cases. So, in that situation, someone could argue that it doesn't matter which side of the coin you look at, if someone is under 18 years then they still come under the child marriage law, regardless of whether they're doing it by their agency or by their parents. There are a lot of issues that stem from child marriage - maybe at the age of even 17 or 18 years, a minor is not able to look after another child or does not have the mental maturity to provide for his or her household. Do you think it's a good way to have a blanket adherence to the law, the age of 18? Or do you think the law should, in legal terms, cater to the 16 – 18 age brackets more carefully? Because there are arguments that 18 years is a uniform global standard now for child marriage and 18 years has become a benchmark for criminal law and justice systems. So, how do we cater to that nuance within our system?

SM: One important thing is to understand in our social context is why young people especially girls may want to marry at this age. It's important to look at these trends from the actual pressures and constraints that young people are facing. I think that it's important to recognize that in Pakistan sexual activity outside marriage is a huge taboo. If a young girl is caught engaged in it, she's at serious threat of violence. It's a huge taboo and it is illegal, it is criminalized. Pakistan unlike other countries in South Asia, such as Bangladesh or India, has criminalized any sex outside marriage as fornication. We need to consider that for many young people, especially young girls, the only way in which they can pursue romantic relationships as adolescents, is by entering into a marriage. If they get caught in a romantic relationship the only way that they can legitimize it or maybe even escape backlash from their parents, or community members, is to marry the person who they are in a relationship with. In many cases, if you talk to the girls who have entered a “self-arranged marriage” they will tell you that it's because their parents were forcing them to marry somebody that they did not want to marry. It's important to understand what other constraints are motivating these cases.

Now it's true that under international human rights standards, 18 years is seen to be acceptable minimum age marriage, but it's most important to remember that that international human rights law also emphasizes that young people under the age of 18 years may be deemed capable of consenting to sexual activity depending on their maturity levels. In fact, the general comment interpreting the Convention on the Rights of the Child clearly stated that consensual sexual activity amongst adolescents under the age of 18 years should not be criminalized because they recognized that consent is possible. So, we must understand that we are living in cultural and legal contexts, where the right of a young person to be able to engage in a romantic activity without criminal consequences does not exist. Also, important to keep in mind that any legislative advocacy to remove the prohibition on fornication in our Penal Code, or to decriminalize sexual activity for adolescents, is not feasible given our social context. It's important to keep that in mind when we're talking about child marriage criminal legislation; Even under the existing framework that we have here, in Sindh the minimum age is 18 years for both boys and girls, the marriage is illegal, but it is not null and void. That is seemingly contradictory, because it's illegal, it's criminal, but if it happens it's valid. The rationale that courts have given behind this interpretation is that they've relied on Muslim Personal Law to say the Supreme Court of Pakistan and Sindh High Court has applied that precedent, applying Muslim Personal Law stating that when a person reaches puberty that marriage is seen to be valid. Practically,



there are some good reasons for reaching that conclusion because we must realize that once the marriage takes place, for it to be declared void could have grave social consequences. For example, a child born from that marriage, what is the status of the child if the marriage is deemed invalid, then presumably the sexual activity that she engaged in would be deemed illegal, with legal consequences. Those are the considerations that went into that. Our courts have allowed the marriages to remain in place keeping these realities in mind.

MS: Legally, where do you think the law should be vigilant? Is 14 years a sufficient age, for example Dua Zehra's age was ambiguous, she might have been 14 or 15 years, that's what the medical report was saying. So, 14 years or 15 years a safe enough to let them decide? Or is 16 years or 17 years a better age? Where do you draw the line for that?

SM: As far as the minimum age for marriage is concerned, I don't see a problem with it being 18 years; there are some good reasons for keeping it to be 18 years. What I see a problem with is declaring marriages under that age to be null and void from the outset, because, and here I agree with our courts interpretation that this could have very negative consequences especially disproportionately for the girl. However, when determining whether that marriage is valid, we need more clarity and just relying on Muslim Personal Law that puberty is sufficient. Instead of making puberty the standard, which is also very different, some people some people reach puberty at 10 years whereas some people don't reach puberty until they're 14 years old. So, I think the standard should be determining whether in this case consent was freely given, whether there was the capability to consent, whether that level of maturity exists, whether the coercion came from the male who was involved. Even looking at the age difference between the girl and her partner is a big consideration; if there's a small age difference then the likelihood of question is less, but if there's a significant age difference then the likelihood of coercion is more. It is important to look at these factors to make that determination, while keeping in mind the most important principle, which is the best interest of the child. Now, to expect that out of a legal system is difficult, because of the inherent weaknesses in it, but we have a law for Child Protection Authorities at the provincial and federal levels, and (on paper) we have child protection mechanisms. So, activating those and having experts can also play a role in helping the courts decide how these cases should go.

MS: You mentioned specifically the Child Protection Authority and how that plays a role in this factor, in this child marriage cases especially, and I think you've also mentioned in your article that in such cases it is difficult to send the girl back home, and it's difficult to keep them shelter homes, both places they are stuck because they face backlash and cannot really ensure their safety or safeguard their agency. How do you cater to that? What other options do we have for these girls to ensure they are not blackmailed into giving a false consent. How do we ensure that?

SM: We should have trained, competent counselors; they should be given an opportunity to meet with the minor separately. What happens now is that the judge is asking this young person questions in an open courtroom, with many other people, and even if the judge takes the young person separately to their chambers, they are not always asking these questions with the degree of sensitivity that is needed. Additionally, sending the girl to her parents' house is not a safe option and the shelter homes that we have are meant for mature women. In some cases, it might work but in many it's not a suitable option. We need to activate our child protection centers and they should be safe facilities where young people are able to stay and have access to education or vocational training; these services need to be activated.



MS: There also seems to be a trend which is on the rise, of gang related cases that happen, this also came in the Dua Zehra debate, that there are mafias involved in human and sexual trafficking and these girls could fall in the wrong hands. It could be a love affair, it could be through her own agency, but at the back end there is something larger at play. Oftentimes, because the girl gives her consent and she's willing to go with the with her partner, the parents, or the victim's parents, take away these cases, they resolve them informally. Do you think these cases should still be pursued, because this is a crime against the state not just the family of the victim?

SM: If there are these criminal gangs and mafias involved, and claims are often made that – and I think this is not just in the Dua Zehra case - there are these gangs who are using these girls. These claims are made but I have yet to see any evidence for them. I think that people who are making these claims should bring forth the evidence. If this is the case, then there is something very serious that needs to be investigated, but in the absence of any evidence, we cannot presume that the man involved is part of a criminal gang or is related to human traffickers; we cannot assume that that's something that you need evidence for. If there is evidence, then that needs to be investigated and criminal laws exist to cater to that.

MS: As a lawyer who's been dealing with these cases, are there any specific things you would want to highlight or bring up that the public might not see on the media?

SM: Just to emphasize that it's important to know that how vulnerable young people are, especially young girls, when they are put in these situations. The fact that criminal case, which is being registered by the girl's family or the girl's parents, creates a lot of pressure on the girl also; criminal cases create a lot of pressure on both parties. We need to, not in a knee jerking way, resort to enforcement of the of the of the criminal law, and insist that the police be involved, and insist that every FIR registered must go to trial, which is what we see happening in many of these cases regardless of the negative emotional and physical on young people. What is unfortunate is that in many of these cases that have recently become very high profile in the media, there has been this presumption that what the parents want is what is best for the minor. That is a very dangerous way of looking at cases because we need to have an awareness that often parents do not have the best interest of the child in mind. Just because the parents want an end to this marriage and the parents want criminal penalties against the people who they claim are responsible for misguiding their daughter, we don't have to, from a human rights perspective, pursue that. The best interest of the young person, the young the girl need to be considered.

MS: I think you mentioned this, like generally you can say that a marriage at 17 years which takes place with the consent of the girl is better than a marriage at 19 years which is forced upon her. Thank you for highlighting these kinds of issues. It's been a pleasure speaking to you about this.