

ANALYSIS OF MAJORITY AGE UNDER MUSLIM LAW FOR MARRIAGE: A STUDY WITH REFERENCE TO POCSO ACT

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Abstract

The Personal Laws are familial laws that apply specifically to a group of individuals who shares a shared religious conviction. These personal laws are taken from religious texts. The problem of child marriage has been the subject of a great deal of controversy regarding these conventional and outmoded personal regulations. A Muslim is permitted to marry at the age of puberty, which is regarded as the age of majority. This research focuses on the concept of Khayar – Ul – Bulugh which is a right available to the minor once they reach the age of puberty, but it is subject to restrictions that prevent them from exercising it. The majority of the study is devoted to analysing an age-old practise, and the researcher reveals the defects that undermine the very purpose of having the right available. Main focus of this research is on age and puberty factors in Muslim marriage with reference to the POCSO act and the marriage prohibition act. The researcher has also made an effort to emphasise that just passing laws and enforcing them does not solve all problems. The law must be fairly applied to ensure that no action is taken against the person's will or under duress. This is because, although protecting many Muslim married women from the outdated idea of the choice of puberty, the Dissolution of Muslim Marriages Act, 1939, nevertheless does not offer a remedy for those women who choose to end their marriage against the wishes of their family members.

Keywords: Minority, Personal laws, Child marriage, Option of puberty, Muslim law

Introduction

Typically, marriage is regarded as a holy institution consisting of the union of a man and a woman, which leads to the formation of a family and the development of a civilised society. Under Muslim law, marriage known as 'Nikah' is viewed from its start as a contractual union of sexes entered into for the goal of 'legalising sexual intercourse and reproduction of children' In Islam, marriage is not a sacrament, but rather a contract wherein an offer is made by one party and accepted by another in the presence of two witnesses and the recital of passages from the Quran.¹ Here, a marriage that is not 'Sahih,' which means 'legal,' may be 'Batil,' which

¹ Shivali Singh, *Analysing the concept of Khayar – Ul – Bulugh*, RMNLU 4, (2015)

means 'invalid,' or 'Fasid,' which means 'irregular,' but this is subject to change according to the many schools of Islamic law. For Nikah to be considered Sahih in Muslim law, three requirements must be met. The first is proposal and acceptance, followed by competent parties, and then lack of legal incapacity. Under Muslim law, the marriage contract is formed by an offer made by a party known as *ijab* and acceptance by another party known as *qabool*. The full '*ijab-o-qabool*' procedure must be completed in a single meeting, either orally or in writing, with the parties' free consent. The capacity to join a lawful marriage is defined by the competences of the parties, with Age of Marriage being one of them. According to Muslim law, a person who has reached the age of puberty may engage into a marriage contract. There are three phases in the life of every Muslim man and woman. 'The very first stage, '*saghir*,' occurs when the Muslim boy or girl is seven years old or younger and the marriage is null and invalid from the start. *Sariri* is the second stage, which considers the ages of seven to fifteen, and marriage is only recognised if performed by the child's guardian, not with the child's agreement. '*Bulugh*' is the third stage in which any Muslim over the age of 15 is considered an adult and is legally capable of entering into a legitimate marriage with his or her own permission.²

In accordance with Hanafi legislation, a person must be at least fifteen years old to be considered an adult and reach puberty.³ In girls, puberty begins with the onset of menstruation, whereas in boys, it begins with the first nocturnal seminal emission. This indicates that puberty is the age at which a person is capable of engaging in sexual activity and having children. However, the age of majority varies across the various Muslim sects.' If evidence is shown to support the claim, puberty may occur before this age. If the minor is married under the guardianship of his or her father or grandfather, he or she may only repudiate the marriage under certain exceptional circumstances. However, if the minor is married under the guardianship of any other person, he or she may repudiate the marriage upon attaining majority without providing any justification. However, after the enactment of "The Dissolution of Muslim Marriage Act, 1939"⁴ if a woman is married under Muslim law" when she is a minor by her father or any other guardian, she is permitted to repudiate or dissolve her marriage after she reaches puberty and before she reaches the age of eighteen, as long as the marriage was not consummated against her will. Previously, it could only be revoked if the father or grandfather

² 23rd, I.A. Khan, *Mohammedan Law* 114-120 (2010).

³ Sneha P. Mandal, *Khyar-Ul-Bulugh Under Muslim Law: A Critical Analysis*, 1(1) *Journal of Women Law and Policy* 37, 39 (2021).

⁴ *Dissolution of Muslim Marriages Act, 1939*, No. 8, Acts of British India, 1939 (India).

acted intentionally, falsely, or to the minor's detriment. Khayar- ul- Bulugh refers to the provision in Muslim law that allows a minor to dissolve a marriage at the 'option of puberty'.⁵

Concept Of Khayar – Ul – Bulugh

According to the requirements of a lawful marriage in Muslim law, children are not legally permitted to engage into a marriage contract. This minority age is decided by whether or not a male or girl has reached puberty. As puberty is a biological component that varies from person to person, a defined norm of fifteen years is assumed to define a minor's attainment of puberty, which is susceptible to alter according to different schools of Muslim law. If there is evidence that puberty may be reached at a younger age, the individual claiming this must prove it beyond a reasonable doubt.⁶ According to Mohammedan law, in order to have a 'sahih nikah,' both parties must concur. Both spouses have the right to dissolve a marriage that was formed before they entered puberty.⁷ This privilege is called Khayar- ul- Bulugh. In contrast, the rights of a male minor and a female minor to break their marriage at the onset of puberty varies.

A male minor can annul a marriage that has been certified by his father or paternal grandparents only when he reaches puberty and does not have to provide a genuine reason for the dissolution, such as a stated statement, payment of dower, or cohabitation. This male minor can also reject the marriage if his guardian acts fraudulently, irresponsibly, negligently, maliciously, or to the minor's detriment.⁸ Prior to the passage of the Dissolution of Muslim Marriage Act in 1939, a female juvenile was unable to reject a marriage arranged by her father or grandfather, even after reaching puberty. She was subject to Shia and Sunni law.⁹ In circumstances of weddings solemnised by guardians other than the minor's father or paternal grandpa, only repudiation was permitted. In rare instances, the minor girl was permitted to terminate the marriage solemnised by her father or grandfather.¹⁰ But even this dissolution had to be approved by the appropriate legal authority.¹¹ Currently, female minors can dissolve their marriage after gaining puberty if it was contracted against their will, providing they are aware of their marriage and have not engaged into a cohabitation agreement with their spouse after attaining puberty. Consumption with permission before the age of eighteen and after the age of fifteen ratifies such marriages, and the ability to choose puberty is forfeited. Consequently, the previous rule

⁵ *Supra* note 3 at 40.

⁶ 2nd, Manzar Saeed, *Commentary on Muslim Law in India* 265, Orient Publishing Company (2015)

⁷ *Supra* note 3 at 43

⁸ *Id.*

⁹ *Id.*

¹⁰ *Aziz Bano v. Muhammed Ibrahim Husain*, AIR 1925 All 720.

¹¹ *Pirmohammad Kukaji v. State of Madhya Pradesh*, AIR 1960 MP 212.

regarding the option of puberty has been replaced by Section 2(7) of the Muslim Marriages Dissolution Act of 1939.

This power to dissolve a marriage of minors in Muslim law varies somewhat across the various schools of Muslim law based on the criterion of whose guardian acted on behalf of the minor to create a valid marriage contract. According to Islamic some jurists, a Qazi's order is required to validate the exercise of puberty choice. However, neither the holy text of the Qur'an nor compilations of Ahadis have any evidence to support this claim.

Under Muslim law, the right of Khayar- ul- Bulugh is accessible in cases of child marriage. The guardian's approval is required to solemnise the marriage of minors in this case. The Muslim personal laws permit child marriage, but in the modern Indian context, despite the fact that the personal laws permit the marriage of children, all Indian citizens are subject to uniform laws, and such marriages are forbidden by the Prohibition of Child Marriage Act, 2006. If she is unable to obtain relief under the statute of 1939, a Muslim girl who was married before she reached the age of eighteen may seek a dissolution of her marriage at any time until she reaches the age of twenty under this act. Such weddings continue to be legitimate until either party repudiates the marriage contract, but the guardian solemnising the marriage will be held accountable.¹²

Analysis Of Khayar – Ul – Bulugh And Approach Of The Indian Judiciary

a. Critical Analysis:

First, the puberty option is only available if the marriage has not been consummated after the age of 15. This is quite confusing, as the permission gained in this manner may be forced, and demonstrating this can be very difficult for the kid. "Therefore, despite the fact that the minor has the option of dissolving the marriage after reaching maturity, she would be unable to do so due to a lack of evidence, since the Indian Justice System requires proof beyond reasonable doubt from the party alleging any rationale or exception to the law"¹³.

The second critique of Khayar- ul- Bulugh's right is that it is inherently prejudiced towards women. The puberty options accessible to juvenile males were less limiting than those provided to minor girls. The guys might use this freedom without providing any rationale, however the girls are subject to various constraints, such as whether or not 'consummation of marriage' had

¹² 2nd, Tahir Mahmood, *Muslim Law in India and Abroad* 76, Universal Law Publishing, 2016

¹³ *Id.*

occurred. If it has been done, the resulting consent is up to judgement as to whether it was earned by free choice or coercion.¹⁴

Thirdly, in Khayar- ul- Bulugh's practise of right, patrilineal authority is overemphasised. When a kid is produced from the union of the husband and wife, only the father and paternal grandfather's authority is recognised at the marriage ceremony. The matrilineal side and family members are seen as significant in the Jabr stage of the Guardianship in marriage hierarchy.¹⁵

Fourthly, even if the minor, against the wishes of her family members, chooses the option of puberty for dissolving her marriage, the Dissolution of Muslim Marriages Act of 1939 does not give any support or maintenance for that individual following her annulment. The objective of adopting this right as a statute is therefore compromised when its continuation is in dispute. The fifteen-year-old girl who renounced her marriage against her family's wishes will have no assurances regarding her financial and educational support. Fear of survival will thus discourage a minor from breaking her marriage.¹⁶

b. Judicial Approach towards Khayar – Ul – Bulugh:

The option of puberty is one very important principle observed in Muslim marriage. To determine the same, there are various judicial pronouncements which analyse the option of puberty in the Indian context. Judicial pronouncements of various High Courts are listed below:

Any actions taken by the minor while still a minor would not affect the right, which could only develop after puberty. The possibility to dissolve the marriage after puberty would therefore not be eliminated by the cohabitation of a juvenile girl. For the simple reason that a minor cannot enter into a contract before puberty, neither the consummation nor the assent should have occurred without her agreement.¹⁷

Nawab Sadiq Ali Khan v. Jaya Kishori:¹⁸ The Privy Council determined that the age of majority is nine and that the approval of a guardian is necessary for the annulment of a marriage by a minor.

¹⁴ *Supra* note 12 at 77

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Ghulam Lakina v. Falak Sha Allah Baksh, AIR 1950 Lah 45

¹⁸ Nawab Sadiq Ali Khan v. Jaya Kishori, (1928) 30 BOMLR 1346

Jaspreet Kaur v. State of Punjab:¹⁹ The Muslim Jaspreet Kaur married the Muslim Azim Khan. The girl was older than 18 and the male was of legal age according to Muslim Personal Laws. The marriage was performed against the respondents' wishes. It was determined that, despite the fact that personal laws permit the marriage of children, all Indian citizens are subject to uniform laws and such marriages are forbidden under the Prohibition of Child Marriage Act of 2006. Therefore, the marriage was not recognised.

Mrs. Tahra Begum v. State of Delhi:²⁰ The Delhi High Court ruled that a teenage girl who has married at the age of 15 has the right to reside in her matrimonial home and that such a marriage is lawful.

Abdul Khader & Ors. v. K. Pechiammal:²¹ It was determined that the Prohibition of Child Marriages Act does not conflict with the Muslim personal laws.

Smt. Khatiaza Tul Qubra v. Iqbal Mohd:²² When the wife was a minor at the time of her marriage to the plaintiff, she repudiated the union and thereafter remarried. Before the trial court, it was proved that the option to delay puberty had been removed. The court found that the wife was exempt from obtaining a divorce order. The appellant is not need to approach the civil court in order to get a separate verdict, as Islamic law states that repudiation must be by the court. Consequently, her second marriage would be valid.

Analysis of the age and puberty factor in Muslim marriage with reference to POCSO Act and Marriage Prohibition Act

As I have observed the option of puberty is one very important principle observed in Muslim marriage. Now it is time to analyse the age and puberty factor with other legislations of this nations specifically the POCSO²³ and Marriage Prohibition Act²⁴.

The main question here arise is whether the option of puberty calls for some action under the POCSO act and Marriage Prohibition Act or not?

To answer the same, there are various judicial pronouncements in the Indian context. Some of them are observed below:

¹⁹ *Jaspreet Kaur v. State of Punjab*, C.W.P. No. 18162 of 2008.

²⁰ *Mrs. Tahra Begum v. State of Delhi*, 2013 (1) RCR (Civil) 798.

²¹ *Abdul Khader & Ors. v. K. Pechiammal*, 2015-1- L.W. (CrI) 525.

²² *Smt. Khatiaza Tul Qubra v. Iqbal Mohd*, AIR 2009 Raj 82.

²³ The Protection of Children from Sexual Offences Act, 2012, No. 32, Acts of Parliament, 2012 (India).

²⁴ The Prohibition of Child Marriage Act, 2006, No. 6, Acts of Parliament, 2007 (India).

- a. Whether Muslim minor girl who has attained puberty can wilfully marry without consent of her parents or not and do POCSO charges stand in this situation?

To answer the above questions, I will analyse the case of *Fija v. State Govt NCT of Delhi*:²⁵

The petitioners, who are both Muslims by religion, fell in love and were wed by Maulana Imtiyaz of Jokihat Masjid in the Bihar district of Aauriya in accordance with Muslim customs and rituals. The girl's parents, respondents 4 and 5, have filed a FIR against petitioner 2 under Sections 363 of the IPC and 6 of the POCSO because they oppose the couple's marriage. In the current petition, protection is demanded for the petitioners. Petitioner 1 claimed that her parents frequently mistreated her at home and tried to push her to wed someone else. Furthermore, it was claimed that petitioner 1 is expecting a kid with petitioner 2, and the two of them are expecting a child together. The prosecution contended that the petitioner's age at the time of the marriage, which was just 15 years and 5 months, supported the claims. The court emphasised that a girl who had attained puberty may marry without parental consent and had the right to live with her spouse even if she was under 18 and therefore a minor, in accordance with Mohammedan law. *Imran v. State of Delhi*,²⁶ was cited that Muslim law would apply to the POCSO, an Act protecting adolescents under the age of 18 from sexual abuse and exploitation. However, the Court emphasised that, given the facts of the current case, this case cannot be relied upon.

The court explained, adding, The defendant and the prosecutor never wed. In this case, there were sexual encounters before the marriage. After they were intimately involved, the defendant declined to wed the prosecutor. This served as the basis for adapting POCSO to the facts of that instance. The POCSO Act was created to protect children from abuse and exploitation during their formative years and adolescence. Although it is not specific to customary law, it serves to safeguard adolescents under 18 against sexual assault. The petitioners were in love, got married in accordance with Muslim law, and subsequently had physical contact, the Court further emphasised, negating the POCSO's assertions that this was an instance of exploitation.

According to petitioner 1's complaints, the court found that the environment in petitioner 1's home is hostile to her and her spouse in the current case. Therefore, the petitioners cannot be denied the companionship of each other, which is the core of their marriage, as they are legally married. If the petitioners be separated, petitioner 1 and her unborn child would endure

²⁵ *Fija v. State Govt NCT of Delhi*, 2022 SCC OnLine Del 2527

²⁶ *Imran v. State of Delhi*, (2011) 10 SCC 192

additional anguish. The Court ordered respondents 1 to 3 to assure the petitioners' safety and protection.

- b.** Whether Muslim girl marrying at the age of 15 violates the provisions of Prohibition of Child Marriage Act:

To answer the above question, I will analyse the case of *Javed v. State of Haryana*:²⁷

The P&H HC has reaffirmed that a 15-year-old Muslim girl is free to marry anyone she wishes without violating the PCM Act. Notably, the age of puberty onset is 15 according to the Islamic personal laws (Sharia). The High Court has also ruled that Muslim girls would continue to be subject to Islamic personal law. According to Section 12 of the Prohibition of Child Marriage Act of 2006, such a marriage would not be void, Justice Vikas Bahl said in his decision. A 16-year-old woman asked her day-care provider for permission to see her 26-year-old spouse again. During the hearing of Javed's habeas corpus case, in which he fought his 16-year-old wife's "imprisonment" in a children's home, the remark was made.

The girl told the court that she had left her house to find a husband and live with him. But her family had forced her to marry her maternal uncle against her will. The girl and the 26-year-old man had Nikah on July 27, 2022, according to the young woman's attorney, Uday Chauhan, who testified on her behalf. The court decided that their marriage was permissible under Islamic law and that the petitioner had legal custody of the inmate based on *Yunus Khan v. State of Haryana & Ors.*²⁸ Even though the detainee was a minor and under the age of 18, the petitioner's marriage to his wife was free and deemed as legal because both parties were Muslims. She was released from the day-care centre and custody was given to the petitioner after the single bench of Justice Vikas Bahl considered the pertinent information, legal arguments, and the detainee's statement submitted in accordance with Section 164 of the CrPC.

A High Court ruling that a Muslim girl above the age of 15 is competent to enter into a marriage contract with the partner of her choice is being appealed by NCPCR in the Supreme Court based on the outcome of the Yunus Khan case. The NCPCR said in its appeal that the decision violated the PCM Act and the POCSO Act by effectively allowing child marriage and sexual activity with minors. Rajshekhar Rao, a senior attorney, has been named by the SC as an amicus curiae in the case.

²⁷ *Javed v. State of Haryana and Others*, CRWP No. 7426 of 2022

²⁸ *Yunus Khan v. State of Haryana & Ors*, 2014 (3) RCR (Criminal) 518

c. How POCSO Act overrides Personal Law?

To answer the above question, I will analyse the case of **Aleem Pasha v. State** where the Karnataka HC annuls marriage of minor Muslim girl and states that POCSO Act overrides personal law:²⁹

The Karnataka High Court dissolved the "marriage of a juvenile Muslim girl due to the invalidity of the religion's personal law", which breaches the POCSO Act. The High Court was considering the bail application of a man who was married to a Muslim girl when it rejected the contention that her marriage under personal law beyond the age of 15 does not violate the PCM Act of 2006. Justice Rajendra Badamikar further said that the POCSO Act is a unique statute and that it supersedes individual laws. Under the POCSO Act, the legal age for women to engage in sexual activity is 18. However, the individual has been granted bail. During a routine medical examination at the Primary Health Centre in Karnataka, a 17-year-old girl was discovered to be pregnant. Since the girl was not an adult, the health official notified the police, who then filed a POCSO Act complaint against the girl's spouse. The lawsuit said that he married and fathered a child. However, the High Court determined that the girl was a willing participant because there was no indication that she opposed her marriage. In his bail application, the petitioner asserted that under Mohammedan law, puberty is the determining factor for marriage, and the average age of puberty is considered to be 15 years. The petition said that the POCSO Act was not violated since the girl had reached puberty at the time of her marriage under personal law. Admittedly, the petitioner is the victim's spouse, and based on these facts and circumstances, there is no substantial issue over the marriage, since the petitioner himself has presented the required documents in court, Badamikar stated.

Conclusion

Marriage is one of the most significant institutions in our culture, regardless of whether it is Islamic or Hindu. Today, however, the significance and purity of marriage have diminished. Without their consent, parents are marrying their children at such a young age for financial gain. Inappropriately, they sometimes marry their offspring before the age of puberty.

Even though Islamic law permits marriage at a young age, parents should not marry their children at age 5. The age of puberty corresponds to maturity. When females reach puberty, they are allowed to marry anybody with their permission. This is also consistent with the Sunni

²⁹ Aleem Pasha v. State and another, Criminal Petition No. 7295 of 2022

sayings in which Lady Aisha's example is cited. Girls and boys should not marry until they are grown enough to comprehend everything and able to select the ideal partner for themselves. Occasionally, the age of puberty and the age of maturity differ. It is not always the case that a person attains maturity upon reaching puberty. Some can reach adulthood as early as 5 or as late as 30. However, there are various High Court judgments considering puberty as a factor to determine the maturity age under Muslim Law. In the end, our decision to wed falls only on ourselves. Even under Islamic law, it is time for parents to let their children to marry when they choose, not when they reach puberty.