

KHYAR-UL-BULUGH UNDER MUSLIM LAW: A CRITICAL ANALYSIS

***SNEHA P. MANDAL**

Abstract:

The Personal Laws are laws in matters of family affairs that apply particularly to a group of people who have a common religious belief. These personal laws have sources derived from scriptures. There has been a great deal of debate on these personal laws being orthodox and outdated and one of such issue is the child marriage. Among the Muslims a person is allowed to marry at the age of puberty which is considered an age of majority. This paper adheres to a specific practice of repudiation of marriage at the option of minor in Muslim law. The right is available to the minor once they attain the age of puberty but the right comes with certain limitations that refrains them from availing the right. The study primarily focuses on analysing an age-old practise, and the researcher identifies the flaws that undermine the whole purpose of having the right available.

Keywords: Minority, personal laws, child marriage, option of puberty, Muslim law.

*Student, Symbiosis Law School Hyderabad, Symbiosis International (Deemed University), Pune.

Introduction:

In India, the legal system has been strategized in such a way that it balances laws both that governs the people as per their faith and believes as well as their territorial residence. These are known as personal laws and territorial laws respectively. Territorial laws apply to all people equally who reside in a pre-defined territory irrespective of any other factor but personal laws apply only to a certain group of people contingent on their religious believes and where their faith lies.¹ These personal laws governs with matters related specifically to family affairs such as marriage, divorce, adoption, inheritance, succession, guardianship, maintenance, conversion, wills, gifts, minority, etc². Each and every religion has their respective personal laws. In India there are four major personal laws namely Hindu Law, Muslim Law, Christian Law and Parsi Law. The roots of these personal law lies in religion for which their sources lie in their scriptures. Like as the Hindu Law is derived from the *Shrutis* and *Smritis*, the Muslim Law has its primary basis from the holy text of *Quran*. Quran is an Arabic term “Quaran” which means “to read”³. It is considered to be divine and the supreme authority by the Muslims as angel Gabriel has conveyed the God’s words to Prophet Mohammad.⁴ This Prophet has further acted and preached certain rules in forms of advices and guidelines which are followed by his followers and the other people who profess Islam as their religion. The acts and the behaviours of the Prophet are known as “*Sunnah*” whereas its narrations are known as “*Hadith*”.⁵

Marriage in normal terms is considered to be a sacred institution with includes union of a man and a woman leading to the foundation of a family and creation of a civilised society.⁶ Under Muslim law, from its very inception, marriage known as ‘*Nikah*’ is regarded as union of sexes⁷ in a contractual manner which is entered upon the purpose of ‘legalizing sexual intercourse and procreation of children’⁸. In Islam, marriage is no sacrament rather a contract in which the offer is made by a party and accepted by another in the presence of two witnesses along with the recitation of verses from the ‘*Quran*’.⁹ Here the marriage that is not

¹ Christa Rautenbach, *Phenomenon of Personal laws in India: some lessons for South Africa*, 39, COMP.INT’L.L.J.S., 243 (2006).

² Akolda M. Tier, *The evolution of personal laws in India and Sudan*, 26, J.IND.L.INST., 458 (1984).

³ DR. POONAM PRADHAN SAXSENA, FAMILY LAW LECTURES- FAMILY LAW II, 460, (4th ed. 2019).

⁴ *Ibid*.

⁵ *Ibid* at 460-461.

⁶ PROFESSOR KUSUM, FAMILY LAW LECTURES- FAMILY LAW I, 3, (3rd ed. 2011).

⁷ I. A. KHAN, MOHAMMEDAN LAW, 107, (23rd ed. 2010).

⁸ DR. PARAS DIWAN, FAMILY LAW, 25, (10th ed. 2013).

⁹ *Ibid* at 25-26.

'*Sahih*' which means 'valid' can either be '*Batil*' which means 'void' or '*Fasid*' which means 'irregular' but this is subjected to changes as per the different schools under the Muslim Law.¹⁰ For *Nikah* to be *Sahih* under the Muslim law, three conditions are to be satisfied. First being the 'proposal and acceptance' the second being, 'competent parties' and the third being 'absence of legal disability'¹¹. The contract of marriage under Muslim law is constituted by offer made by a party known as '*ijab*' and acceptance by other party known as '*qabool*.' The entire process of '*ijab-o-qabool*' has to be essentially made in a single meeting either in oral or in writing with free will and consent of the parties.¹² The capacity to enter into a valid marriage is determined by competencies of the parties and one of them being the "*Age of Marriage*". Muslim Laws conveys that, a person who has attained the age of puberty may enter into the contract of marriage.¹³ The life of a Muslim man and woman is divided into three stages. 'The very first stage, '*saghir*' is when the Muslim boy or girl is seven years of age or below where the marriage is void ab inito. '*Sariri*' is the second stage which consider the age of seven to fifteen and marriage is valid only if done by the guardian and not that child's free consent. '*Bulugh*' is the third stage where any Muslim above age of fifteen is major and is capable of having a valid marriage on his or her own consent.'¹⁴

'The age limit of minimum *fifteen* years is presumed to become major as well as attain puberty in *Hanafi* law. The phase of puberty can be defined as commencement of menstruation in case of a girl and first nocturnal seminal emission in case of boys. That means puberty is the age at which a person is capable of performing sexual intercourse and procreating children. But the age of attaining majority differs among the different sects of Muslim.'¹⁵ Puberty is attained earlier this age only if any evidence can be shown to prove it. If the minor is married under the guardianship of father or grandfather, he or she can repudiate (revoke) the marriage only under certain exceptional circumstances but if married under guardianship of any other person then the minor has the right to repudiate the marriage on attaining majority with providing any justification for the same.¹⁶ But after the introduction of 'The Dissolution of Muslim Marriage Act, 1939'¹⁷ if a woman is married under Muslim law when she is minor, by her father or any other guardian, she shall be

¹⁰ PROFESSOR KUSUM, *Supra Note 6*, at 15.

¹¹ I. A. KHAN, *MOHAMMEDAN LAW*, 114, (23rd ed. 2010).

¹² *Ibid* at 114-115.

¹³ *Ibid* at 117.

¹⁴ *Ibid* at 120.

¹⁵ *Supra note 13*, at 117.

¹⁶ DR. RAKESH KUMAR SINGH, *TEXTBOOK ON MUSLIM LAW*, 159, (2nd ed. 2015).

¹⁷ Dissolution of Muslim Marriages Act, 1939, No. 8, Acts of British India, 1939 (India).

allowed to repudiate or dissolve her marriage after she enters the puberty and before she attains the age of eighteen provided that the marriage has not been consummated against her will.¹⁸ Earlier it could only be repudiated if the father or grandfather has acted maliciously, fraudulently or at the disadvantage of the minor.¹⁹ The facility of dissolving the marriage under Muslim law by a minor at the ‘option of puberty’ is known as “*Khyar- ul- Bulugh*”.

The current research paper is an analytical study of “*Khyar- ul- Bulugh*” that is a benefit available to Muslim minor to revoke his or her marriage under Muslim law at the option of Puberty. The paper is further divided into three chapters. The first chapter discusses the concept of *Khyar- ul- Bulugh* in details and it’s evolution over time. The second chapter criticizes this option of dissolution of marriage of minors due to lack of the sensibility in the law that sojourns a lot of minors from availing this option. The third chapter deals with few major judicial pronouncements where this option of puberty has been interpreted circumstantially from time to time.

Methodology:

The researcher in this current research paper has adopted doctrinal research methodology. Secondary sources such as text books, research papers, journal articles and dynamic articles have been referred to, to get a proper understanding of the concepts and collect information to produce a quality analysis. Also as this is a legal research, the researcher has referred to quite a number of case laws so as to collect the judicial stand on the same and have a personal interpret to perform analysis.

Research Objective:

- I. To explore the rights of a Muslim minor married under the Muslim Law
- II. To understand the role of guardianship in the marriage of minor
- III. To analyse the limitations of a minor from repudiating his or her marriage

Research Questions:

- 1) What is the validity of marriage where minor Muslim child enters into the contract of marriage by his or her own will?

¹⁸ Dissolution of Muslim Marriages Act, 1939, §2 cl. 7, No. 8, Acts of British India, 1939 (India).

¹⁹ DR. RAKESH KUMAR SINGH, *Supra Note* 14, at 158.

- 2) Is the minor Muslim child bound under the contract of marriage if it was decided by his patrilineal guardian?
- 3) What are the resultant consequences that a minor child might probably suffer if he or she revokes the marriage at the option of puberty?

Literature Review:

1. ‘Family Law Lectures, Family Law II’ by Dr. Poonam Pradhan Saxena²⁰

The book is inclusive of only Hindu and Muslim laws among all other personal Laws. As the researcher in this current study is only concerned with the Muslim law, so it hasn't been any limitation in her study. Though the book is informative about jurisprudential knowledge related to Muslim law that has assisted the researcher to introduce the sources of Muslim law in her paper but the book lacks information related to marriages and the options to the parties available after marriage which is the core subject for the researcher to research upon.

2. ‘Family law lectures, Family Law I’ by Professor Kusum²¹

This book is a well-defined compilation of all the required basic concepts of marriage under Muslim Law. The book has been specially designed for the students to get an easy understanding of the concepts in family law. The researcher from this book has gained assistance in understanding the concept of Muslim marriage and its kinds. The book limits the option of dissolution of marriage available to a minor only to the girl child and doesn't discuss the rights of a male minor.

3. ‘Family Law’ by Dr. Paras Diwan²²

The researcher has referred to the definition of marriage in context of Muslim Law. Also the point of capacity of marriage for a valid marriage in Muslim law is also extracted from here. But the explanation is very limited, limiting the scope of research and that pushes the researcher to search for more literary works.

4. ‘Textbook on Muslim Law’ by Dr. Rakesh Kumar Singh²³

²⁰ DR. POONAM PRADHAN SAXSENA, FAMILY LAW LECTURES- FAMILY LAW II (4th ed. 2019).

²¹ PROFESSOR KUSUM, FAMILY LAW LECTURES- FAMILY LAW I (3rd ed. 2011).

²² DR. PARAS DIWAN, FAMILY LAW (10th ed. 2013).

²³ DR. RAKESH KUMAR SINGH, TEXTBOOK ON MUSILM LAW (2nd ed. 2015).

This book is entirely devoted to the concepts of Muslim Law hence came out to be one of the most enriching source for this entire research paper. The book has also thrown light upon the option of Puberty as a whole without just excluding the right of either male or female minor. Also the book has help in getting relevant case laws where decisions were relevant to the core concept of this research paper.

5. ‘Dissolution of Marriage: Practices, Laws and Islamic Teachings’ by Shagufta Omar²⁴

The article is a comprehensive study of different laws and practices in regards to the dissolution of Marriage under the Islamic teachings. It talks about the rights that are available to the individual spouses when they enter the contract of marriage. But as the practices are specific to the ones prevalent in the country of Pakistan, the Researcher could not completely rely on the article’s information.

6. ‘Commentary on Muslim Law’ in India by Manzar Saeed²⁵

This book contains legislations related particularly to the marriage, its dissolution, maintenance, conversion, succession and the application in preview of Muslim Law. It also includes landmark judgements. The book has not only helped the reviewer to understand the concepts in detailed manner but also get relevance case laws to understand the applicability of these laws.

7. Muslim Law In India And Abroad by Tahir Mahmood²⁶

The book has a very wide scope as it deals with Muslim laws in India as well as in Abroad. For this reason, only selective texts are relevant that are extracted by the researcher in the course of her research.

²⁴ Shagufta Omar, *Dissolution of Marriage: Practices, Laws and Islamic Teachings*, 4, PLUTO J., 91 (2007).

²⁵ MANZAR SAEED, COMMENTRY ON MUSLIM LAW IN INDIA, (2nd ed. 2015).

²⁶ TAHIR MAHMOOD, MUSLIM LAW IN INDIA AND ABROAD, 76 (2nd ed. 2016).

Old Concept of 'Khyar – ul – Bulugh' and The New Rule:

As per the essentials of a valid marriage under Muslim Law, minors are not legally entitled to enter upon the contract of Marriage. This minority of age is determined by whether a boy or a girl has attained his/ her puberty. As puberty is a biological factor, and is subjected to differ from individual to individual, a set standard of fifteen years is being presumed to demarcate a minor attaining puberty which is subjected to change as per different schools of Muslim law. If there is contrary evidence of puberty being attained at an earlier age, the person pleading so shall prove it beyond all reasonable doubts.²⁷ 'The Mohammedan law provides that it is mandatory to have the consent of both the parties in order to have a 'sahih nikah'. Both the spouse is entitled to terminate their marriage that was contracted before they reached their puberty. This right is known as *Khyar- ul- Bulugh*.²⁸ But the position of a male minor and a female minor regarding the exercise of the right to dissolve their marriage at the potion of puberty is different.

A male minor can repudiate his marriage that has been confirmed by his father or paternal grandfather, only after he reaches the puberty without showing any actual cause of such dissolution²⁹ which is expressed declaration, or payment of dower or cohabitation.³⁰ Also this male minor can repudiate the marriage if his guardian has acted either fraudulently, carelessly, negligently, wickedly or for the disadvantage of that minor.³¹ Whereas the female minor earlier before the enactment of Dissolution of Muslim Marriage Act, 1939,³² had no option to repudiate a marriage even after she has attained puberty, if it was decided by her father or grandfather. She was bound by both Shia and Sunni laws. Only repudiation was allowed in cases of marriages solemnized by guardians other than the father or paternal grandfather of that minor.³³ Only in exceptional cases was the minor female allowed to dissolve the marriage solemnized by either her father or her Grandfather.³⁴ But even that dissolution had to be confirmed by the competent court of law.³⁵ Presently, female minors can dissolve their marriage after they attain puberty if the marriage was contracted against her

²⁷ MANZAR SAEED, COMMENTRY ON MUSLIM LAW IN INDIA, 265, (2nd ed. 2015).

²⁸ Shagufta Omar, *Dissolution of Marriage: Practices, Laws and Islamic Teachings*, 4, PLUTO J., 91, 106 (2007).

²⁹ *Abdul Karim v. Aminabai*, AIR 1935 Bom 308.

³⁰ I.A. KHAN, MOHAMMEDAN LAW, 121, (23rd ed. 2010).

³¹ DR. RAKESH KUMAR SINGH, TEXTBOOK ON MUSILM LAW, 158 (2nd ed. 2015).

³² Dissolution of Muslim Marriages Act, 1939, §2(7) No. 8, Acts of British India, 1939 (India).

³³ DR. RAKESH KUMAR SINGH, *Supra Note 28* at 159.

³⁴ *Aziz Bano v. Muhammed Ibrahim Husain*, AIR 1925 All 720.

³⁵ *Pirmohammad Kukaji v. State of Madhya Pradesh*, AIR 1960 MP 212.

will, provided she has the knowledge of her marriage while exercising the right and has not entered into a consensual co-habitation with her spouse after attaining Puberty.³⁶ Consummation with the consent before the age of eighteen and after the age of fifteen give ratification to such marriages and the right at the option of puberty is lost.³⁷ Hence the old law of the option of puberty has been superseded by the S. 2(7) of the Dissolution of Muslim Marriages Act, 1939.

This right of dissolving a marriage of minors under Muslim Law differs slightly among the different schools of Muslim Law on the parameter that who was the guardian that has acted on behalf of the minors to make a competent contract of marriage of the minor.³⁸ As per the *soma jurisconsults* of Islam, order of a *Qazi* is a mandate to confirm an exercise of the option of puberty. But the same has nowhere been authenticated in the holy text of *Quran* or collections of *Ahadis*.³⁹

The right of *Khyar- ul- Bulug* is available in case of child marriage in Muslim Law. There the consent of the guardian is necessary in order to solemnize the marriage of minors. The Muslim personal laws grant the permission for child marriage but in the current Indian scenario, even though the personal laws allow the marriage of minors, being an Indian citizen, all are governed by the uniform laws and such marriage is prohibited under the Prohibition of Child Marriage Act, 2006.⁴⁰ Under this said act, a Muslim girl married before attaining the age of eighteen years can seek termination of marriage at any time till she completes the age of twenty years if she is unable to seek any relief under the act of 1939.⁴¹ Such marriages continue to remain valid until repudiated by either parties to the contract of marriage but the guardian so solemnizing the said marriage will be liable.

³⁶ MANZAR SAEED, *Supra Note 25* at 265.

³⁷ DR. RAKESH KUMAR SINGH, *Supra Note 28* at 160.

³⁸ *Ibid* at 266.

³⁹ *Ibid*.

⁴⁰ Prohibition of Child Marriage Act, 2006, No. 6, Acts of Indian Parliament, 2007 (India).

⁴¹ TAHIR MAHMOOD, *MUSLIM LAW IN INDIA AND ABROAD*, 76 (2nd ed. 2016); Prohibition of Child Marriage Act, 2006, S. 3(3) No. 6, Acts of Indian Parliament, 2007 (India).

Analysis of ‘*Khyar – ul – Bulugh*’:

This chapter of the paper criticizes this option of dissolution of marriage of minors due to lack of the sensibility in the law that sojourns a lot of minors from availing this option. Firstly the option of puberty can be availed only if the marriage has not been consummated after attaining the age of 15. This is very ambiguous in itself as the consent so obtained might be coercive in nature and proving which can become very difficult for the minor. Hence even though the minor has the option of dissolving the marriage after reaching puberty, she will not be able to utilize that for the lack of evidence as Indian Justice System demands for evidence beyond all reasonable doubts from the party pleading any justification or exception of law.

The second instance where right of *Khyar- ul- Bulug* is subjected to criticism is it is gender biased in nature. The option of puberty that was available for minor boys was less restrictive in comparison to that of minor girl child. The boys could avail the right without requiring any justification but the girls are subjected to certain restrictions like ‘consummation of marriage’ has been done or not. If it has been done the consent so obtained is exposed to interpretation that whether it is free will or coercive.

Thirdly, in the practice of right of *Khyar- ul- Bulug*, the patrilineal authority is too much enhanced. Where a child is born out of union of the husband and wife, when it comes to the solemnization of marriage, only the authority of father and paternal grandfather is accepted. The matrilineal side and members of a family are considered to be important at the later stage of hierarchy of Guardianship in marriage known as *Jabr*.

Fourthly, even if the minor against the wish of her family members adopts the option of puberty for dissolving her marriage, there are no provisions provided under the Dissolution of Muslim Marriages Act, 1939 that aims to provide some assistance or maintains that person after her calling off the marriage. Hence when the survival comes to question, the very purpose of enacting this right as a law is defeated. The child at the age of fifteen who has repudiated her marriage against the will of her family members will have no certainty about her financial and educational backing. Therefore, the fear of survival will demotivate a minor from dissolving her marriage.

Judicial Stand on the Practice of ‘Khyar- ul- Bulugh’:

As per the general laws, the majority is gained by a person at the age of 18 for girls and age of 21 for boys in case of marriages but as per the Muslim Law, the prescribed age is *fifteen* (puberty).

In the case of *Nawab Sadiq Ali Khan v. Jaya Kishori*⁴², the Privy Council stated that the age of majority is nine and that the consent of a guardian is required when it comes to repudiation of their marriage.

Lately in the case of *Jaspreet Kaur and Another v. State of Punjab & Others*⁴³, the girl named Jaspreet Kaur married a man named Azim Khan who was Muslim. The girl was above the age of 18 and the boy was major but only as per the Muslim Personal Laws. The marriage was done against the will of the respondents. It was considered that even though the personal laws allow the marriage of minors, being an Indian citizen, all are governed by the uniform laws and such marriage is prohibited under the Prohibition of Child Marriage Act, 2006. Hence the marriage was not validated.

In the case of *Mrs. Tahra Begum v. State of Delhi and Ors.*⁴⁴, it was held by the Delhi High Court that a minor girl who has married at the age of 15 is entitled to stay in her matrimonial house and such marriage is valid.

The Prohibition of Child Marriages Act is not in contravention to that of the Muslim personal Laws and the same was held in the case of *Abdul Khader & Ors. v. K. Pechiammal Child Marriage Prohibition Officer.*⁴⁵

In *Smt. Khatiaza Tul Qubra v. Iqbal Mohd*⁴⁶ where wife was minor at the time of marriage with of plaintiff, she repudiated said marriage after attaining the puberty and remarried with other person. The factum of revocation of exercise of option of puberty was proved before trial court. The court held that wife need not obtain decree of dissolution of marriage. Muslim law stipulates only that repudiation must be by the court and the requirement to obtain independent decree by appellant by approaching civil court is not the sine qua non of law. So her second marriage would be valid.

⁴² (1928) 30 BOMLR 1346.

⁴³ C.W.P. No. 18162 of 2008.

⁴⁴ 2013 (1) RCR (Civil) 798.

⁴⁵ 2015-1- L.W. (CrI) 525.

⁴⁶ AIR 2009 Raj 82.

Conclusion:

India being a secular country, respects the personal laws of each and every religion but there are a few religious practices that are overruled by the statutes later enacted by the Indian Parliament considering the unreasonable practices in the old laws. Similarly, in the Muslim Law, narrowing down to the practise of dissolving marriage by option of puberty, though it seems to be an entitlement to the minors available at prima facie, but the consequences if seriously thought about are severe and uncertain. Also the practice involves a lot of biasness based on gender leading the practice to be a gender bias practice. The practice is half hearted and not a real escape for the dissolution of marriage due to which it attracts several criticisms as well. The simple act of exercising the right of repudiation does not result in the dissolution of the marriage. The Court has to affirm the repudiation. The marriage shall continue till then, and if one partner dies, the other will inherit him or from her, as the case may be. In the case of a minor male, the previous legislation still prevails. In the case of male, the right to cohabit continues until he has expressly or implicitly acknowledged the marriage, such as by payment of dower or cohabitation.

In the current research paper, the researcher has also attempted to highlight that always making a law and applying it is not the end of everything. The law has to be reasonably applicable so that the performance of any act is not done under coercion or against the will. This is because even though the Dissolution of Muslim Marriages Act, 1939 has been benefitting many Muslim married women and shielding them from old concept of option of puberty still fails to provide a resolution for those women who dissolve their marriage against the will of their family members.