

Minor Marriages in Islam and Bangladesh: Harmonising God's Law with State Law in the Quest for Reform

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In today's modern world, controversy has become a corollary to Islamic law with the issue of minor marriage being but one example of that. The relative dearth of material explicitly addressing the legality of minor marriages within the primary sources (Quran and Hadith) never thwarted minor marriages taking place in the Muslim world. Over time, the culmination of unjust results in Muslim-majority states stemming from minor marriages turned it into an increasingly objectionable one. Consequentially, the widespread contention and the heated global pressure paved the way for legislation abolishing or at least restricting minor marriages in these states by setting a minimum age of marriage. This then gave rise to the related controversy of whether such reforms had any justifiable Islamic legal basis or were merely adherent to 'western' norms. This article seeks to elucidate the sharia's position on minor marriages in the classical period by closely examining the interrelated Islamic legal concepts that delimit the practice of minor marriages. It then examines existing state laws on minor marriage in Muslim majority countries, with a particular focus on Bangladesh and its Child Marriage Restraint Acts 1929 and 2017. It concludes that minor marriages, as it is currently practiced, stands in stark contrast to the type of marriage which gained permissibility in the classical period and infringes what the esteemed jurist Al-Ghazali's considered the five cardinal values of Islam vis-a-vis the maqassid al sharia (objectives of the sharia) on all five counts.

Introduction

In the modern world, controversy has become a corollary to Islamic law. The issue of minor marriages is but one illustration of this contemporary phenomenon. The relative dearth of material explicitly addressing the legality of minor marriages within the primary sources (Qur'an and Hadith) never thwarted the practice from taking place in the Muslim world. The widespread contention and heated global pressure have since paved the way for legislation abolishing, or at least restricting, minor marriages in these states by setting a minimum age of marriage. This has then given rise to the related controversy of whether such reforms were in fact legally justifiable in Islam, or were merely adherent to 'western' norms. This essay will begin by elucidating the Sharia's position on minor marriages in the classical period by closely examining the primary sources of law and the interrelated Islamic legal concepts that delimit the practice of minor marriages. The paper will go on to examine existing state laws on minor marriage in Muslim majority states, with a particular focus on Bangladesh, specifically the Child Marriage Restraint Acts 1929 and 2017. It will be shown that minor marriages, as they are currently practiced, stand in stark contrast to the type which gained permissibility in the classical period, and infringe on what the esteemed jurist, Al-Ghazali, considered to be the five cardinal values of Islam vis-à-vis the maqassid al Sharia (objectives of the Sharia) on all five counts. As such, it will be argued that *fiqh* (Islamic jurisprudence) is embedded with an array of legal tools, such as *maslahah* (consideration of public interest), which can be used to justify outlawing minor marriages; not doing so is certainly contrary to *Sharia*.

Minor Marriages in Classical Fiqh

I. Defining the Age of Minority

A minor in classical law ranges from the new born child to anyone who has not yet attained *bulugh* (puberty).¹ The primary determinant of puberty in classical law lay in the physical and biological signs of development, noting semen emission for males and the onset of menstruation for females.² This can be contrasted with the modern notion of minors under legislation in Muslim states, whereby anyone below a specified age is held to be a minor. For instance, the age of minority for both males and females is set below 18 in Morocco, Jordan and Egypt, whereas Bangladesh has set the age at 18 for females and 21 for males.³ This contemporary shift in the determination of a minor from biological markers to a standardised legal age is not wholly irreconcilable with classical jurisprudence, as age was still a secondary means by which early jurists determined puberty, and hence minority.⁴

All *madhhabs* (schools of jurisprudence) agreed that the minimum age below which there is an irrefutable legal presumption against puberty is 9 for females and 12 for males.⁵ In the absence of physical signs of development, a maximum age was set, following which an irrefutable legal presumption of puberty was placed. As with many areas of law, the four major schools not only differed with one another in setting this age, but there were disagreements within the schools themselves. The majority of the Hanafi school presumes puberty upon reaching the age of 17 for 18 and eighteen for males.⁶ The majority of Shafi'i and Hanbali schools set the maximum age of puberty at 15 years for both sexes, whereas the majority of Maliki school puts it at 17.⁷ The Ja'fari school of the Shi'ites place it at 9 for girls (the lowest) and 15 for boys.⁸

In examining the legal presumptions for and against puberty operating within specified age brackets in classical law, the minimum age of marriage found in modern Muslim family codes and legislation can hardly be seen as an innovation. However, we should not go so far as Buchler and Schlatter in equating the maximum age of puberty found in classical law with that of 'marriageable age', which is, with respect, an exaggeration as there was no minimum age of marriage in classical law.⁹ Rather, it should be viewed as the adoption of an idea that was present within classical *fiqh* itself, and hence concede that it is most certainly not a departure from it.

II. Minor Marriages in the Holy Sources

¹ Mashood A. Baderin, 'Age of Marriage, Option of Puberty and Marriage Equality' (Lecture at SOAS, University of London, February 2015).

² Andrea Buchler and Christina Schlatter, 'Marriage Age in Islamic and Contemporary Muslim Family Law: A Comparative Study' [2013] 1(1) Electronic Journal of Islamic and Middle Eastern Law 37, 40.

³ Child Marriage Restraint Act 1929, s 2(a).

⁴ Baderin (n 1).

⁵ Abd-al 'Ati *The Family Structure in Islam* (ATP 1977), Ch 3.

⁶ *ibid*

⁷ *ibid*.

⁸ *ibid*.

⁹ Buchler (n 2).

Qur'an

In classical law, many, if not all, of the major schools have sought to derive the permissibility of minor marriages from the primary sources. The Qur'an does not explicitly address the notion of a marriageable age, save for one verse which commands: 'And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them'¹⁰. This verse seems to clearly indicate that there is proximity between the age at which an individual becomes marriageable and the age at which he or she is able to exercise rational judgment.¹¹ However, this is somewhat at odds with the Qur'anic verse 65:4, which most jurists use to justify the lawfulness of minor marriages. The verse mentions that 'for those who have no menstruation' when prescribing the requisite *iddah* (waiting period for a divorced or widowed woman before she can remarry) to women in differing circumstances. Thus, the verse is held to imply that it is lawful for a female minor to marry since there would be no need to prescribe her an *iddah* period if she was not in a valid marriage in the first place.¹²

Hadith

Due to the *Qur'an's* relative silence on the matter, most jurists have found the *Hadith* to be more authoritative on the issue of minor marriages. The Sahih Bukhari collection, which is considered to be the most authentic of the six canonical *Hadith* compilations, evinces the contracting of marriage between the Prophet Muhammad and Aisha when she was a minor¹³. This, along with the minor marriages subsequently undertaken by the *sahabah* (companions of the Prophet), are largely used to justify its permissibility. Therefore, the legal status of minor marriages in *Sharia* is merely *mubah* (permissible) since it was not derived from or forbidden by a strict *shari'i* ruling.

III. Islamic Legal Concepts and Principles Delimiting Minor Marriages

The desirability of minor marriages in the classical period and its corresponding permissibility in Islam may be best understood in light of the desire to draw families together and facilitate social integration.¹⁴ Given the low racial plurality in Islam in its early days, it becomes understandable why it may have viewed such alliances as beneficial.¹⁵ The use of minor marriages to secure a wider socio-familial benefit is certainly not peculiar against the backdrop of the classical Islamic period. Certain aristocracies in other cultures, such that in the European feudal era, used them as a means to cement political and/or financial ties.

Unfortunately, much of the contemporary discussion on minor marriages in classical Islam is entirely devoid of context and is instead had in deliberately sensationalist and inflammatory terms. It must be made clear that minor marriages in the classical period would usually entail a

¹⁰ Qur'an Chapter 4, Verse 6.

¹¹ Jeremiah J. Bowden, 'Marriageable Age In Islam: A Study On Marriageable Age Laws And Reforms In Islamic Law' (2013) 2 LUX.

¹² Buchler (n 2).

¹³ *ibid.*

¹⁴ *Ati* (n 4) 76.

¹⁵ *ibid.*

betrothal or a type of formal agreement, which would defer final consummation to a later date.¹⁶ This is because Islam prescribes that, irrespective of the age at which betrothal may take place, 'final consummation *must* be postponed until both parties are ready for marital relations'.¹⁷ This condition was usually determined by puberty, which in turn marked the transition from minority to majority. Cohabitation would also usually begin at that later date, and the minor (or minors, if both parties were prepubescent) would remain in their guardians' home in the interim period. As such, it seems minor marriages in classical *fiqh* was allowed as a contract to secure a future, rather than an immediate interest or performance, lest an opportunity to do so 'may be lost'.¹⁸ It will be shown that the law requires that all marriage arrangements be made in good faith and in the best interest of the minor who is a party to it. It is simply unlawful for guardians to act purely out of self-interest or put the minors in a disadvantageous situation.¹⁹

Nikah, Ahliyah and Wilayah

Most jurists concur that nikah (marriage) in Islam is essentially a contract, usually understood as a means to legitimise sexual intercourse and procreation. Thus, all the requirements of forming a valid contract must be met, such as legal capacity and consent. The literal meaning of *ahliyah* (legal capacity) is 'competence' and it has been defined as 'the eligibility of a person to acquire rights and enter into obligations' by Islamic jurists.²⁰ These jurists have adopted an expansive understanding of *ahliyah*, stating that it can be of two types: receptive and active, which in turn can either be complete or incomplete.²¹ The transition from receptive to active *ahliyah*, and the corresponding transition from incomplete to complete *ahliyah*, occur gradually over time as the individual ages. For instance, a foetus, which is considered a legal person in *Sharia*, has incomplete passive capacity, as it can only receive rights (for example, inheritance) but cannot owe any obligations.²² Every individual acquires complete receptive capacity upon birth, enabling them to receive obligations (such as maintenance and liability for loss) in addition to rights, albeit through their *wali*, or guardian.²³ This *wali*, who need only be a sane adult Muslim, can conduct affairs on the minor's behalf.²⁴ Upon reaching the age of seven, the person is said to have an incomplete active capacity, as they have a partial sense of intellect which is higher than that of an insane person or a child below seven years of age. However, their intellect is still lower than a sane adult and as such their active capacity is yet to become complete. They are now fully able to conclude certain transactions on their own and even without their guardians, such as transactions which are wholly to their benefit, like the receipt of gifts or charity. It is only after gaining puberty and *rushd* (maturity of mind) that the minor is said to have acquired complete active capacity, and becomes an adult in the eyes of the law.

¹⁶ Mahdi Zahraa, 'The Legal Capacity of Women In Islamic Law' (1996) 11 Arab Law Quarterly.

¹⁷ *ibid.*

¹⁸ Charles Hamilton, *The Hedaya* (Kitab Bhavan 1985).

¹⁹ 'Ati (n 5) 77.

²⁰ Baderin (n 1).

²¹ Hashim Kamali, 'Principles Of Islamic Jurisprudence' (2009) 3 The Islamic Texts Society, 304-7.

²² *ibid.*

²³ *ibid.*

²⁴ Shaheen Sardar Ali, 'Is an Adult Muslim Woman Sui Juris? Some Reflections On the Concept of "Consent in Marriage" Without A Wali (With Particular Reference To The Saima Waheed Case)' (1996) 3 Yearbook of Islamic and Middle Eastern Law Online, 156, 170.

Based on these detailed rules of *ahliyah*, the jurists held that a *wali* can enter into a marriage contract on behalf of the minor (i.e. anyone who has complete receptive or incomplete active capacity), provided it is in good faith and in the best interests of the minor. Due to the minor having insufficient legal capacity, they are incapable of determining what is in their own best interest.²⁵ As such the guardians could contract them into marriage without their knowledge, rendering their consent to be unnecessary.²⁶ This concept of guardianship is by no means exclusive to Islamic law, and can even be said to have origins in archaic or Roman jurisprudence.²⁷ One type of guardianship under Roman law known as *Patria potestas*, was defined in the following terms:

The people within our authority are our children, the offspring of a Roman law marriage [...] Our authority over our children is a right which only Roman citizens have. Nobody has such extreme control over children. Any child born to your wife is in your authority. The same is true of one born to your son and his wife, as in when your grandchildren are equally within your authority.²⁸

Similarly, minor marriage is by no stretch of the imagination, a practice that is exclusive to Islam as it was prevalent across different faiths and regions during the early days. For instance, in 6th century Abyssinia a law was passed necessitating forcible intermarriage between Christians and baptized Jews.²⁹ Consequently, no male or female over 13 years of age was to remain unmarried, because these early marriages 'would lead to speedy amalgamation of the communities'.³⁰ Minor marriages were also common among the Jews, whereby 'the 'bridegroom' was frequently not more than 10 years old and the bride was younger still'.³¹ Some authors have even argued that child marriages were so common; 'it was virtually the norm'³². Even today, the practice of minor marriages, although concentrated in South Asian and Sub-Saharan African regions, is not exclusive to Muslim countries. Christian majority countries such as the Central African Republic, Ethiopia, and Mozambique, along with Hindu majority countries such as India and Nepal are all on the list of countries most affected by child marriage.³³

Wilayatul Ijbar and Khiyar al Bulugh

The right of natural guardians with respect to contracting their minor ward into marriage goes even deeper than that of non-natural guardians as most jurists held that they are able to do so not

²⁵ Mona Siddiqui, 'The Concept of Wilaya in Hanafi Law: Authority versus Consent in al-Fatawa al-'Alamgiti' (1998) 5 Yearbook of Islamic and Middle Eastern Law Online, 171, 177..

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ *ibid.*

²⁹ 'Ati (n 5).

³⁰ *ibid.*

³¹ Edvard Alexander Westermarck, *A Short History of Marriage* (New York: The Macmillan Co, 1926), 40.

³² Ruth Lamdan, *A Separate People: Jewish Women in Palestine, Syria, and Egypt in the Sixteenth Century* (Leiden 2000), 47.

³³ UNICEF, 'The State Of The World's Children' (2016)

<https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf> accessed 18 June 2017.

only without the minor's consent but by force.³⁴ They would argue that in a string legal sense, the child as a minor has no (legal) consent to give in the first place.³⁵ This authority is known as *wilayatul ijbar* (coercive guardianship), and interestingly, is not derived from the primary sources (*Qur'an* or *Hadith*). Rather, it is a right that was derived through *qiyas* (deductive analogy), and from the *wali's* right of guardianship over the minor's property.³⁶ This right was given to different 'natural' guardians in different *madhhabs*. On the one hand, the Shafi'is and Shi'ites only give the right to the father and paternal grandfather, whereas the Hanafis give it to all male agnates. The Malikis and Hanbalis give it to the father and his *wasi* (executor), who usually remains within the domain of male agnates. Again, this is similar to *Patrias Protestas* which also channeled through the male line as an inherent right.³⁷ The significant right of the guardians to contract minors into marriage is supposedly limited by a corresponding right given to the minors known as the *khiyar al bulugh* (option of puberty), a primarily Hanafi doctrine which was later adopted by non-Hanafi majority countries through the doctrine of *takhayyur* (eclectic choice). The option allows the minor ward to annul a marriage that had been contracted by a non-natural guardian whilst they were a minor upon reaching puberty. This power is only really relevant to minor girls because a minor boy, upon reaching puberty, will earn the right to *talaq* (divorce or repudiation by the husband) which can unilaterally be pronounced to opt out of marriage.³⁸

It is unsurprising that the practice of minor marriages has been labelled as being discriminatory against minor girls.³⁹ The minor (girl) has to exercise her right immediately after her first menstruation, through a court.⁴⁰ This must be preceded by public declarations of the onset of menstruation as a means to garner surrounding persons as witnesses on her behalf.⁴¹ This procedure is indeed quite burdensome on a young girl, who only just underwent the rather traumatic and painful experience of her first period. The option of puberty may appear to be very significant, but upon closer inspection it becomes severely restricted as it is only exercisable against non-natural guardians. The jurists unambiguously ruled that this right has no application against a natural guardian who had contracted the minor marriage.⁴² This is based on the assumption that natural guardians, such as the father and grandfather, would normally do what is best for his ward. As such, some have argued it is possibly not so much an assertion of the natural guardian's authority over the minor as a securement of the latter's welfare, even if it effectively nullifies the *khiyar al bulugh*. The minor would then have to prove to the satisfaction of the court that the guardian had acted in bad faith and against her best interest. This usually proves to be an exceptionally onerous task in a *de facto* patriarchal society, not only due to the strong presumption that a natural guardian would normally do what is best for his child but also because of the tenacious legal culture that is ever-present in these courtrooms.

The Case for Reform

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ Kamali (n 21) 183.

³⁷ Siddiqui (n 19) 172.

³⁸ Mahmoud Yazbak, 'Minor Marriages And Khiyar Al Bulugh In Ottoman Palestine: A Note Of Women'S Strategies In A Patriarchal Society' (2002) 9 *Islamic Law and Society* 386.

³⁹ *ibid.*

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² *ibid.*

I. Current Law

While minor marriages remained permissible in classical law, the opposite applies today in numerous Muslim states where minor marriages are generally impermissible. However, these countries have been rather hesitant to categorically outlaw minor marriages due to its prevalence in Islamic history. At the furthest extreme, marriage to girls under 12 is considered a rape crime under the Egyptian Penal Code. It even sets a maximum age gap of 25 years between parties contracting to marriage.⁴³ Reforms in Morocco have been less stern. Despite the minimum age being set at 18, marriages below that age can be allowed through judicial permission and makes the consent of the minor essential, should such a marriage take place.⁴⁴ Article 400 of the Moroccan Family Code refers back any novel legal issue to classical Maliki jurisprudence thereby allows plenty of judicial discretion which in turn increases the scope of minor marriages especially when conducted by the father.⁴⁵ Jordan too, allows marriages to be contracted three years below the minimum age of 18 through judicial agreement with the Chief Justice in 'special circumstances'⁴⁶. As such, while the setting of a minimum age has made minor marriages *prima facie* impermissible, it is evident they can still take place through certain procedures and under certain circumstances.

Law Regulating Minor Marriages in Bangladesh

The situation in Bangladesh is slightly different. The Child Marriage (Restraint) Act 1929 is often wrongly understood as outlawing child marriages in Bangladesh. However, this is simply untrue as the Act only sets the aforementioned minimum ages of marriage for both sexes, and itself states it is 'an Act to restrain the solemnization of child marriages'.⁴⁷ It does so by prescribing punishments for all categories of persons who may be involved in the child marriage process. This includes the male or female adult person who marries a minor, any person who 'performs, conducts or directs any child marriage', and any parent or guardian (lawful or unlawful) who acts in any way to either promote or permit the child marriage to occur or 'negligently fails to prevent it' from taking place.⁴⁸ These provisions are indeed quite far-reaching, especially for the guardians, and essentially curb the right of *wilayatul ijbar* afforded to them in classical *fiqh*. However, the punishments are not as severe, and can either be simple imprisonment extending to one month or a fine extending to one thousand taka (roughly \$13). The Act also gives power to the Court to issue injunctions prohibiting marriages in contravention of this Act from taking place. Wilful disobedience of any such injunction has the same punishment as above, but the imprisonment may now extend to three months. Crucially, the Act remains silent on the legal status of child marriages, solemnised in contravention of the Act. Thus, whilst persons involved in solemnising the marriage are acting illegally, the Act does not nullify or void the *nikah* contract; hence; the marriage itself remains legal.

⁴³ Egypt Child Act 2008, s 126.

⁴⁴ Moroccan Family Code 2004, s19-21.

⁴⁵ Moroccan Family Code 2004, s400

⁴⁶ Jordanian Personal Status Law 2010, s10.

⁴⁷ Child Marriage Restraint Act 1929.

⁴⁸ *ibid*.

One may wonder why the Act chose to severely restrain the solemnisation of child marriages instead of categorically invalidating the marriages that involve children, or why it was not followed by a subsequent Act of Parliament to that effect. Certain legal thinkers have suggested that the government's reluctance must be understood in light of its desire to not risk tampering with the divine *Sharia* law and creating a conflict of laws scenario.⁴⁹ The supremacy of *Sharia* law in family law matters is evinced by The Muslim Personal Law (*Shariat*) Application Act 1937, which states:

Notwithstanding any custom or usage to the contrary, in all questions [...] regarding [...] marriage [...] the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*).⁵⁰

Whether it is an anomaly in the law or a deliberate omission, empirical evidence clearly exposes the futility of the 1929 Act in restraining child marriages. As per UNICEF, Bangladesh has the highest rate of marriage comprising girls below the age of 15 and the second-highest rate of child marriage in the world, behind only Niger.⁵¹ This translates to one in every three girls being married off before 15, and two in three girls being married off before they reach 18, the ostensibly legal age of marriage. Far from tackling this epidemic, on 15 September 2014 the Cabinet of Bangladesh had accepted the language in the draft Child Marriage Restraint Act 2014 which sought to lower the minimum age of marriage from 18 to 16 years for females. The State Minister explained that the change was to accommodate 'special circumstances' such as 'when a [minor] girl elopes with a man and refuses to return or becomes pregnant before marriage'.⁵² Notwithstanding the minister's reasoning, the proposal was met with huge outcries and protests by activists, human rights organisations, and the international community, and the matter was (momentarily) set aside as a result.

At the time of writing, the Cabinet of Bangladesh has just accepted the draft bill of Child Marriage Restraint Act 2017. Welcomed changes in the Act include a necessary increase in the prison sentences and fines found in the 1929 Act for those facilitating or solemnising child marriages. The Act even introduces punitive punishments for minors willingly engaging in marriage, which include detention and fines. While the age of marriage remains unchanged, crucially the Act allows girls under 18 to be married under 'special circumstances' with parental and judicial consent.⁵³ The Cabinet Secretary explained that the minimum age would be relaxed in special cases 'for the sake of honour – in case of a girl getting accidentally or illegally pregnant'.⁵⁴ This reasoning is clearly echoing the logic previously used by the State Minister in support of the failed 2014 Act.

⁴⁹ Interview with Sigma Huda, U.N. Special Rapporteur in Trafficking in Persons, (1929 Middle Eastern Law Online, Texts Soct Act 1929).

⁵⁰ Muslim Personal Law (Shariat) Application Act 1937, s 2.

⁵¹ United Nations Children's Fund, 'Ending Child Marriage: Progress And Prospects,' (UNICEF 2014) <https://www.unicef.org/media/files/Child_Marriage_Report_7_17_LR..pdf> accessed 18 June 2017.

⁵² Bangladesh News 24, 'Legal Age for Girls Proposed at 16 Years Under Special Circumstances' <<http://bdnews24.com/bangladesh/2015/10/19/legal-marriage-age-for-girls-proposed-at-16-years-under-special-circumstances>> accessed 28 November 2016.

⁵³ Dhaka Tribune, 'Child Marriage Restraint Act Gets Final Nod' <<http://www.dhakatribune.com/bangladesh/2016/11/24/child-marriage-restraint-act-2016-gets-final-nod>> accessed 28 November 2016.

⁵⁴ *ibid*.

Bangladesh enacting such a law marks a historic step backwards in the fight to eradicate child marriage – something its government has repeatedly pledged to do. Explicit non-recognition of child marriages in conjunction with the existing provisions in the 1929 Act would arguably have been the strongest and most effective restraint. Despite staunch opposition from most, this new law has been well received by 'Islamist' organisations and figures, such as the increasingly influential leader Hefazat-e-Islam, who went as far as to say 'in the eyes of Islam, this is the correct decision'.⁵⁵ Thus, it will be argued in the following paragraphs that legislation finally outlawing minor marriages will certainly not be an affront to Islamic law, rather, justifications for reform can be found well within the rubric of *Sharia*.

II. Reform based on Maqasid Al Sharia and Maslahah

Again, it must be stressed that minor marriages are merely *mubah*, which is religiously value neutral. Hence, this crucially renders the scope for reform to be substantially higher in comparison to issues which are *fardh* (e.g. prescribed shares of inheritance), *mandub* (e.g. charity), *makrooh* (e.g. divorce), or *haram* (e.g. murder). While the *maqassid al sharia* is the philosophy on which the justifications for reform can be based, *ijtihad* (exertion of juristic effort) is the methodology encompassing the different legal tools that can be used to implement these reforms, and hence, fulfill the *maqassid*. The law has to prohibit that which promotes harm and protect that which procures benefit for Muslims in this world and the hereafter. Plainly speaking, these are the *maqassid al sharia*.⁵⁶ *Maslahah* literally means public benefit or interest.⁵⁷ It qualifies as *maslahah mursalah* (*considerations of public interest*) when it is not regulated or restricted by the *Qur'an*, *Hadith*, or *ijma* (universal consensus).⁵⁸ That *maslahah* changes over time and the enactment of the same rule may be beneficial at one point in time but harmful at another is perhaps best understood with the issue of minor marriages. At least since the 11th century, Islamic jurists consider *maslahah* to be the embodiment of the *maqassid*.⁵⁹ To Al-Ghazali, the *maqassid* comprise of protecting the five cardinal values: religion, life, intellect, lineage, and property. Hence, any action which secures these values falls within the scope of *maslahah*, and any measure which infringes them is *mafsadah* (evil). Islam abolished certain types of marriages that went against the *maqassid* such as marriage by purchase, marriage by exchange, marriage by inheritance, and wife-lending, all of which were derogatory to the status of women.⁶⁰ Minor marriages remained permissible as they posed no such threat towards the *maqassid*, instead producing the aforementioned social benefits.

Today, this otherwise permissible form of marriage produced serious harm for the females, the kind of harm Islam strove to eradicate upon its advent. Serious health issues as direct results of child-marriages include, but are certainly not limited to, 'gynecological problems due to early childbirth, a higher risk of cervical cancer, and a higher risk of suicide and other mental problems

⁵⁵ The New York Times, 'Bangladesh Weakens Long Standing Law Against Underage Marriage' <https://www.nytimes.com/2017/02/27/world/asia/bangladesh-underage-marriage-law.html?_r=0>accessed 18 March 2017.

⁵⁶ Wael B. Hallaq, 'A History Of Islamic Legal Theories:' (1999) 17 CUP, 112, 113.

⁵⁷ *ibid*.

⁵⁸ *ibid*.

⁵⁹ Felicitas Opwis, 'Maslaha In Contemporary Islamic Legal Theory' (2005) 12 Islamic Law and Society.

⁶⁰ 'Ati (n 5).

such as depression and anxiety' (life).⁶¹ Underage pregnancy consistently ranks among the main causes of death for girls in the developing world, where child marriage is especially prevalent.⁶² Furthermore, these young girls are usually met with the burdensome duties of an adult wife and homemaker imposed upon them, which often results in their being deprived of a proper education.⁶³ This in turn 'reduces girls' employment options to cooking, cleaning, and having babies' (intellect).⁶⁴ Underage motherhood can go on to jeopardise the lives of the minors' own offspring (lineage), for how can a child suffering from demonstrable harm be expected to look after *another* child as a *mother*?⁶⁵ Child brides, by virtue of their underdeveloped pelvises being more prone to obstructed labour, tend to contract obstetric fistula. This is a health complication which causes the reproductive organs, rectum, and bladder to split, jeopardising the life of both mother and child.⁶⁶ The injustice does not end there. Yazbak highlights instances where minor girls are given into marriage so the father can use her dower to pay off a debt, to arrange a son's marriage or simply 'pocket the money himself' can and have happened.⁶⁷ Such practices are plainly misusing the dower of the bride (property), a portion of wealth that should rightfully have been for her *own* exclusive use. Additionally, Bowden identifies the much larger problem of repressive regimes like Taliban universalising and misconstruing a particular action (marriage to Aisha) of the Prophet for the purposes of 'islamising' their unjust policies, such as, *inter alia*, the commodification of child brides.⁶⁸ As the author ingeniously goes on to suggest, the Prophet's marriage to Aisha (with consummation being delayed until she turned nine and reached puberty) should be used to promote the underlying rationale behind it: that of setting a minimum age for licit sexual intercourse.⁶⁹ Taken together, the unjustified suffering by these minor girls and potential for corruption on part of the guardians and repressive regimes, severely endangers the inherent spirit of justice that is embedded within Islamic law (religion).

The continued practice of minor marriages without any restriction arguably passes on all five counts laid by Al-Ghazali as to constituting a *mafsadah*, and these reforms are an essential step towards *maslahah* by ensuring these threats are averted and these archetypal Islamic values secured. This is why one of the greatest Caliphs of all time, Umar like Al Ghazali, was such a staunch advocate of focusing on the spirit of the law rather than the letter itself. His suspension of the theft penalty during a period of famine based on *darurah* (necessity) and modification of the punishment for conspiracy of murder based on *maslahah* are too well known in the realm of Islamic scholarship to need further elaboration. They were fully cognisant of the fact that while the *maqassid* are timeless, the rules and practices that facilitate their attainment are not. If we trick ourselves into obsessing over the letter of the law rather than its spirit, not only do we risk reducing the inherently evolutionary nature of Islamic law to monolithic rigidity, but we also allow it to obscure our notion of the very purpose of the *Sharia* itself.

⁶¹ Bowden (n 11).

⁶² UNICEF(n 33).

⁶³ *ibid*.

⁶⁴ *ibid* 5.

⁶⁵ *ibid* 6.

⁶⁶ UNICEF(n 33) 39.

⁶⁷ Mahmoud Yazbak, 'Minor Marriages and Khiyar Al Bulugh In Ottoman Palestine: A Note Of Womens' Strategies In A Patriarchal Society' (2002) 9 Islamic Law and Society.

⁶⁸ Bowden (n 11) 4-7.

⁶⁹ *ibid*.

III. Other Tools for Reform

Even if minor marriages produced any benefit to society today, the general principle of *Sharia* is such that the prevention of harm takes precedence over the procurement of benefit.⁷⁰ Thus, plausibly, not only are these reforms well within the scope of being justifiably abolished under Islamic law, but to not abolish them and allow for the resulting harm to persist would be tantamount to being contrary to Islamic law. The legislators adopting these reforms themselves proudly claim to be doing so in the name of Islam, and rightly so. For example, the *Moudawanna* very aptly asserts that it 'eliminates discrimination against women, protects the rights of children and preserves men's dignity'. Moreover, 'Abd al-Wahhab Khallaf considered the stipulation of a minimum age of marriage to be an example of a ruling based on *maslahah mursalah*, as no textual authority can be found on a minimum age of marriage.⁷¹

Sadd al-dhara'i is a tool of interpretation that is harmonious with *maslahah* and can also be used to endorse our justification. This tool entails the prevention of an expected illegal result (for example, harms resulting from minor marriages) which can possibly arise if the legal means (minor marriages) towards it is not also not prevented. Moreover, it must be stated that there is no *ijma* on the permissibility of minor marriages even within classical *fiqh* as a significant minority considered it to be impermissible.⁷² This can then be arguably seen as an issue of *ikhtilaf* (disagreement). Johansen argues that, as long as the deductions of the scholars differ, their *ikhtilaf* warrants the derivation of legal norms (and hence, legislation) on the basis of each scholar's respective *ijtihad*.⁷³

Notwithstanding all the arguments in favour of abolishing minor marriages using Islamic law principles, the doctrine of *siyasa shar'iyyah* (administrative and policy regulations) allows us to go even further. This is because the doctrine itself admits the need for, and the validity of, extra-*shari'a* rules which cannot themselves be subsequently regarded as a departure from any established paradigm.⁷⁴ Interestingly, *siyasa shar'iyyah* is seen as being largely contemporaneous with the dictates of *maslahah*, as it widens the discretion of judges and lawmakers. As Ibn Qayyim stated "*siyasa shar'iyyah* comprises all measures that bring people close to beneficence and move them further away from corruption even if no authority is found for them in Divine revelation".⁷⁵

Conclusion

Over the course of this essay, several things have become clear. Minor marriages have generally been permissible under classical Islamic law. However, minor marriages as they are currently practiced in Muslim countries stands in stark contrast to the type which gained permissibility from classical *Sharia* and transgresses the *maqassid al Sharia*. While the *maqassid* remain the same across time, laws that facilitate their fulfilment are susceptible to change. Through utilising the pluralistic richness of *fiqh*, minor marriages must be categorically abolished in Bangladesh to truly adhere to

⁷⁰ Kamali (n 21).

⁷¹ Opwis (n 58).

⁷² Baderin (n 1).

⁷³ Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill 1999).

⁷⁴ Noel J. Coulson, *Conflicts and Tensions in Islamic Jurisprudence* (IBT 2007).

⁷⁵ Kamali (n 21) 291.

the everlasting spirit of the *Sharia*, or that 'God does not wish to impose any hardship' upon people.

Bibliography

Legislation

Child Marriage (Restraint) Act 1929
 Child Marriage Restraint Act 2014
 Child Marriage Restraint Act 2017
 Muslim Personal Law (Shariat) Application Act 1937

Books

'Ati A, *The Family Structure in Islam* (ATP 1977)
 Coulson N J, *A History of Islamic Law* (EUP 1964)
 Gerber H, *Islamic Law and Culture 1600-1840* (Brill 1999)
 Hallaq W B, *Authority, Continuity and Change in Islamic Law* (CUP 2001)
 Hallaq W B, *A History of Islamic Legal Theories* (CUP 1997)
 Kamali M H, *Principles of Islamic Jurisprudence* (3rd edn, The Islamic Texts Society 2009)
 Weiss B G, *Studies in Islamic Legal Theory* (Brill Academy Publisher 2002)

Chapters in Edited Book

Motzki, 'Child Marriage in Seventeenth-Century Palestine' in Masud, et al. (eds), *Islamic Legal Interpretation* (HUP 1996) 129

Articles

Ali S, 'Is an Adult Muslim Woman Sui Juris?' [1996] 3 Yearbook of Islamic and Middle Eastern Law 156

Baderin M, 'Understanding Islamic Law in Theory and Practice' [2009] 9(3) Legal Information Management 186-190

Bowden J J, 'Marriageable Age in Islam: A Study on Marriageable Age Laws and Reforms in Islamic Law' [2013] 2 LUX

Buchler A and Schlatter C, 'Marriage Age in Islamic and Contemporary Muslim Family Law' [2013] EJIMEL 37

Carroll L, 'Marriage-Guardianship and Minor's Marriage at Islamic Law' [1987] 7 *Islamic and Comparative Law Quarterly* 249

Goolam N M, 'Ijtihad and its Legal Significance For Islamic Legal Interpretation' [2006] *MSLR* 1448

Kamali M H, 'Have We Neglected the Shari'ah-law Doctrine of Maslahah?' [1988] *Islamic Studies* 27(4) 287

Opwis F, 'Maslaha in Contemporary Islamic Legal Theory' [2005] 12(2) *Islamic Law and Society* 182

Shaham R, 'Custom, Islamic Law and Statutory Legislation: Marriage Registration and Minimum Age at Marriage in the Egyptian Shari'a Courts' [1995] 2 *Islamic Law and Society* 258

Siddiqui S, 'The Concept of Wilāya in Hanafi Law' [1998/9] 5 *Yearbook of Islamic and Middle Eastern Law* 171

Weiss B, 'Interpretation in Islamic Law' [1978] 26(2) *AJCL* 199

Yazbak M, 'Minor Marriages and Khiyār al-Bulūgh in Ottoman Palestine' [2002] 9(3) *Islamic Law and Society* 386

Ziadeh F, 'Equality (Kafā'ah) in the Muslim Law of Marriage' [1957] 6(4) *AJCL*. 503