

## **Muslim Family Laws and Women's Consent to Marriage:**

### **Does the law mean what it says?**

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Hunter and Cowan open their introduction to a feminist collection of essays on consent with a reference to “the overarching status of choice and consent as defining attributes of the sovereign, self-interested, masculine, liberal subject.” In the jurisdictions with which their essays engage,<sup>1</sup> the “central problem” is that “the feminine subject does not conform to this liberal norm” and so a woman’s exercise of choice and consent is at the very least complicated. Furthermore, “[i]n operation,” they stress, “the ideals of consent are often undermined for reasons of expediency, or because of a lack of attention to inherent power imbalances.”<sup>2</sup>

The treatment of choice and consent in Arab state codifications of Muslim family law may be seen to resonate with some of these propositions, offered as critiques of the law’s liberal norm in mostly Western jurisdictions. This working paper, based on a workshop contribution,<sup>3</sup> explores the idea of giving consent in “Islamic law”<sup>4</sup> or more precisely the

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<sup>1</sup> Australia, Canada, England and Wales, Scotland and South Africa.

<sup>2</sup> Rosemary Hunter and Sharon Cowan, “Introduction”, in Hunter and Cowan. *Choice and Consent. Feminist engagements with law and subjectivity*, Abingdon: Routledge-Cavendish, 2007, p.1. Anitha and Gill, writing on the treatment of forced marriage in the UK with a specific focus on South Asian communities, add race to this: “the conceptualisation of the legal subject as an autonomous agent who is able to choose and act freely is not a gender-less, race-less being; this notion of the free self is predicated on the normative experience of a white man.” Sundari Anitha and Aisha Gil., “Coercion, Consent and the Forced Marriage Debate in the UK,” *Feminist Legal Studies*. Vol.17, 2009,pp. 165-184, at p.171

<sup>3</sup> ‘Women’s Rights, Muslim Family Law and the Politics of Consent,’ convened by the Center for the Critical Analysis of Social Practice (CCASD) of Columbia University, at Columbia’s Middle East Centre in Amman, 9<sup>th</sup>-10<sup>th</sup> April 2011.

dominant rulings of the schools of law as articulated by their leading jurists down the centuries. In this regard I refer to the (Sunni) Hanafi, Maliki and Zaydi schools of *fiqh* (jurisprudence), in light of the invocation of their continuing influence on the positions taken up in current day laws regulating marriage for Muslims in different Arab states. In the second part of the paper I look at the issue of a woman's consent to marriage in certain of these statutory laws, codifications that as of the 20<sup>th</sup> century asserted the dominance of the state in law-making and its aspiration to be the central actor in regulation of the family. My focus on laws of the Middle East/North Africa, and specifically states in the Arab League, is not intended to presume that this area presents or should present a "model" for Muslim individuals or states elsewhere (and it should be clear that there is sufficient heterogeneity among the laws and practice in different states in the region to work against any such 'model' in any case). It is simply a matter of where my own research endeavor lies.<sup>5</sup>

Both in older *fiqh* texts and in codifications of Muslim family law rulings in Arab states, the issue of 'consent' has arguably been treated mostly through the related issues of the marriage guardian<sup>6</sup> and the bride's legal capacity to give (or withhold) consent, as well as how that consent is to be given or may be understood.<sup>7</sup> The bride's capacity to give legally

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<sup>4</sup> I put this term in quotation marks here as acknowledgement of the difficulty of using the term given the multiple differences in opinion both historically and in contemporary discourse. This article does not seek to investigate the various angles of this question. See Kecia Ali), "Progressive Muslims and Islamic Jurisprudence: The Necessity for Critical Engagement with Marriage and Divorce Law," in Omid Safi ed. *Progressive Muslims on Justice, Gender and Pluralism*, Oxford: OneWorld, 2003, at p.167.

<sup>5</sup> My sense of a need for this clarification comes from Dina Siddiqi's paper for this Workshop, 'Blurred Boundaries: Laws of Seduction, Consent and Rape in Bangladesh' where she observes that "dominant frameworks implicitly take the Arab Middle East as emblematic of Muslim culture" (p.3).

<sup>6</sup> Drakapoulou notes that in early European antecedents (in Roman and Greek law) "the requirement for consent did not necessarily mean that of the bride and groom" but in "early Rome it was that of the pater familias" and in Greek law "the consent of the fathers of the bride and groom". Maria Drakapolou, "Feminism and consent: a genealogical inquiry", pp.11-38 in Hunter and Cowan, 2007:13-14 (footnote 4).

<sup>7</sup> The following discussion is of necessity a truncated explanation of an extremely intricate area of law with differences between the schools.

valid (and required) consent depended for the majority of the classical jurists on her personal status as either virgin or previously married as discussed further below. The Hanafi school however rendered consent dependent on her achievement of legal majority at the onset of puberty. Before the achievement of these statuses, the marriage guardian – normally the father, but for the Hanafis including a broader range of family guardians in the absence of the closer ones – could contract his ward in marriage in an exercise of *wilayat al-ijbar* (coercive guardianship) with the meaning that the bride's consent was not required although it was recommended that she be in agreement. For the Hanafis, the bride could choose to reject the marriage when she achieved majority on reaching puberty, exercising the 'option of puberty' (*khiyar al-bulugh*) unless the marriage had been contracted by her father or paternal grandfather. The other schools allowed the authority of *wilayat al-ijbar* only to the father and in some cases the grandfather or father's appointed agent; absent these, other guardians had to wait until the ward gave consent post-puberty. For guardians once a woman had been married once, her consent was needed, while for her part she needed her guardian's consent, often his presence and sometimes his physical conclusion of the marriage contract for her. Thus, the formal exchange of agreement by the two parties to the marriage contract, the *ijab* and *qubul*, might involve the bridegroom on the one part, and on the other the bride's guardian whom she has authorized to conclude the contract on her behalf – thus giving her consent. For the Hanafis, the major woman was in theory not subject to the consent of the guardian but could contract her own marriage; the guardian held the right to object should her choice fall on a man not fulfilling the requirements of *kifa'a* (suitability), measured in a range of qualities, or should she marry for less than the appropriate dower or should it transpire that her husband had deceived her in regard to his own financial position.

Scholars such as Amira Sonbol have examined court practice involving judges from different Sunni schools on guardianship and the marriage of their wards.<sup>8</sup> Annelies Moors has warned against assumptions made by earlier scholars in the Western academy writing on Islamic law in considering “family relations as the outcome of the provisions of Islamic law.”<sup>9</sup> For her part, Judith Tucker, looking at legal opinions of pre-modern Hanafi jurists in Syria and Palestine, notes that many of their *fatwas* “pitted the jurists against irregular social practices, especially those whereby a family attempted to arrange a marriage without taking proper account of legal procedure and a young woman’s rights.”<sup>10</sup> Since the advent of state-promulgated laws of Muslim family law in the twentieth century, the norm is one set of rules to govern all Muslim citizens, with the state explaining its choice of particular rules of guardianship and a woman’s marriage by reference to a jurisprudential and often social tradition. Statutory law now formally excludes a guardian’s “coercive” authority (*wilayat al-ijbar*) over his female ward in the matter of her marriage, but many states continue to require the consent (or allow the objection) of the family guardian (or if not, the judge as a proxy guardian) to a woman’s marriage either in general or in particular circumstances that do not apply to males. The judge can act as proxy guardian for a woman who is without, or if he finds the guardian’s refusal to consent to a particular marriage is unreasonable. Codifications of Muslim family law in the region may seek to socially situate a woman’s consent and choice in marriage, while at the same time paying increasing attention to the possibility of duress represented in particular socially (and legally) constructed situations.

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<sup>8</sup> Amira Sonbol (1996), ‘Adults and Minors in Ottoman *Shari`a* Courts and Modern Law,’ , in Amira Sonbol ed. *Women, the Family, and Divorce Laws in Islamic History*, Syracuse: Syracuse University Press, 1996, pp.236-256.

<sup>9</sup> Annelies Moors, “Debating Islamic family law: legal texts and social practices,” in Margaret C. Meriwether and Judith E. Tucker eds. *A social history of gender in the modern Muslim Middle East*, Boulder:Westview Press, 1999, pp.141-175; at p.142.

<sup>10</sup> Judith Tucker. *In the House of the Law: Gender and Islamic Law in Syria and Palestine, 17<sup>th</sup> -18<sup>th</sup> Centuries*, Berkeley, Ca: University of California Press, 1998; at pp.50-51

As for the marriage itself, Ziba Mir-Hosseini observes that the classical jurists held the main purpose of the contract to be “to make sexual relations between a man and a woman licit.”<sup>11</sup> She argues that the jurists articulated the legal rights and obligations in a marriage as:

Revolv[ing] around the twin themes of sexual access and compensation, embodied in the two concepts *tamkin* (obedience; also *ta`a*) and *nafaqa* (maintenance). *Tamkin*, defined in terms of sexual submission, is a man's right and thus a woman's duty; whereas *nafaqa*, defined as shelter, food and clothing, became a woman's right and a man's duty.<sup>12</sup>

Abu-Odeh similarly describes the wife in the medieval marriage as the “provider of sexual pleasure (obedience) in return for her right to maintenance.”<sup>13</sup> Ali has noted that this formulation “is unthinkable today for the majority of Muslims.”<sup>14</sup> The link between a woman's consent to sexual relations and her consent to marriage is among the themes explored in some aspects below.

### ***Giving consent***

When the older *fiqh* texts considered consent to marriage in and of itself, they articulated different rules for the manner in which consent was to be validly expressed by a female according to her personal status. Mona Siddiqui explains the issue of female status in this regards as follows: “female status is discussed through female sexuality and female sexuality is approached via marriage.” Thus, “women who have not been married are known

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<sup>11</sup> Ziba Mir-Hosseini,, “Towards Gender Equality: Muslim Family Laws and the Shari`ah”, in Zainah Anwar ed. *Wanted: Equality and Justice in the Muslim Family*, Kuala Lumpur: Sisters in Islam and Musawah, 2009; at p.28.

<sup>12</sup> Ibid. P.31.

<sup>13</sup> Lama Abu-Odeh, “Modern Family Law, 1800 – Present. Arab States,” in Su`ad Joseph ed. *Encyclopedia of Women in Islamic Cultures* Vol. II, The Hague: Brill, 2005, pp.459-462; at p.459. See also Ali, 2003:165.

<sup>14</sup> Ali, 2003:170.

as *bikr* or virgins” (and she has an interesting gloss here on Abu Hanifa’s position of insisting that women who have had sexual intercourse outside marriage are still to be described as *bikr* although his two Companions disagreed). Women legally classified as *thayyibs* on the other hand are “those who have been married but whose marriage no longer subsists either through divorce or the husband’s death.”<sup>15</sup> This classification is crucial when it comes to determining the way in which the woman (or girl) can be judged to have given consent to her marriage. In summary, the *bikr*’s consent can be understood by her silence (the *fiqh* adage of *`alamat al-rida al-sukut*).<sup>16</sup> The *thayyib* by contrast is required to “provide a more demonstrative expression of her approval or rejection.”<sup>17</sup>

This was not the end of the matter. The jurists discussed other female manifestations of emotion, besides a lack of words that might support or undermine the assumption of consent from a *bikr*’s silence. Summarizing Hanafi *fiqh* in this regard in his commentary on the 1976 Jordanian law, Muhammad Samara explains:

The sign of the *bikr*’s consent may be other than silence but giving the same meaning by manifestations such as crying, so if consent is sought from the *bikr* on her marriage and she cries, then her weeping is consent, unless this weeping is accompanied by something that indicates refusal, so if she cries out screaming, or strikes her cheek or suchlike, this indicates lack of consent. Also, laughing or

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<sup>15</sup> Mona Siddiqui, “The Concept of Wilaya in Hanafi Law: Authority versus Consent in al-Fatawa al-`Alamgiri”, *Yearbook of Middle Eastern Law*, vol.5, 1998-1999, pp. 171-185, at page 179. She notes the counter position as based on the argument that “sexual intercourse has taken place and thus, she be allowed to speak out regarding her marriage.” The position taken by Abu Hanifa on the other hand she summarises (from Charles Hamilton) as reflecting “a desire to protect women in this situation and to ensure that an act of sexual intercourse, in whatever circumstance it should have taken place, does not injure a girl’s prospect of securing a good marriage” (p.180). Both juristic positions are thus presented as protective of consent and/or choice.

<sup>16</sup> ‘The sign of consent is silence’. Rajaa Maji El Mekkaoui invokes in this regard the Roman law rule “Qui ne dit mot consent” (‘Who says nothing consents.’) Rajaa Naji El Mekkaoui. *La Moudawanah. Le Référentiel et le Conventionnel en Harmonie*, Rabat: Editions & Impressions Bouregreg, 4<sup>th</sup> revised edition, 2010, Vol. I, p.94.

<sup>16</sup> Siddiqui, 1998-1999:180.

<sup>17</sup> Siddiqui, 1998-1999:180.

smiling is an indication of consent, and may be clearer than silence as an indication of agreement, unless the laughter is accompanied by that which makes this not consent or agreement, such as if the laughter is contemptuous... As for lack of agreement, or rejection, this must be articulated, because while shyness prevents the *bikr* from expressing consent, she will not be shy of refusing and objecting. Thus, if she is silent, the presumption is<sup>18</sup> that she agrees, and the proof of her consent is her silence. But if the *bikr* articulates permission, then this articulation is more serious and more complete than her silence.<sup>19</sup>

In such manner did jurists, in their own time and contexts, try to situate the issue of the expression of consent to her marriage for a girl or woman who might have been expected to be informed formally (whether or not she had had knowledge of family discussions in progress) of her first proposed marriage by her marriage guardian. How to interpret the reactions of the woman – particularly a young woman or girl – on this occasion? While the jurists obviously preferred the *bikr* as well as the *thayyib* to clearly (and, presumably, “rationally”) express consent to her marriage, the governing adage or legal maxim that ‘the sign of consent is silence was a significant base-line.

Similar rules governed the situation of a girl married as a minor who wished to reject a marriage into which she had been contracted by her guardian, at a time (before puberty) when she could not give legally valid consent. As noted above, under Hanafi rules concerning the “option of puberty” (*khiyar al-bulugh*), unless the marriage had been contracted by her father or paternal grandfather, a woman could reject the marriage when she became an adult – that is, on reaching puberty by commencing menstruation. Here again, if

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<sup>18</sup> Or: “it is most likely” (*ghalabat al-zhann*)

<sup>19</sup> Muhammad Samara. *Sharh Muqarin li-qanun al-ahwal al-shakhsiyya*. Jerusalem: Matba`a jama`iyya `amal al-matabi` al-ta`awaniyya, 1987, pp.109-110.

the *bikr* (who has not been living in matrimony with her husband, but knows of the marriage) remains silent, she loses her right to reject the marriage: she must articulate her rejection of the marriage by unequivocally declaring her position – preferably before witnesses – as soon as she reaches puberty by the onset of menstruation.<sup>20</sup> The *thayyib*, on achieving puberty, may remain silent without losing her right: she may consider the situation at greater length and if she doesn't reject it, "this situation remains until she shows an explicit approval of the marriage, i.e. asking for maintenance or having intercourse."<sup>21</sup> Thus in this framework, consenting to sexual relations after reaching puberty stood for consent to the continuation of the marriage contracted before.

Brinkley Messick gives us an arresting picture of how these rules and assumptions played out in "the last decades of Shari`a law application under an indigenous Islamic state" in mid-20<sup>th</sup> century Yemen, when the ruling Zaydi imam was "a qualified jurist at the head of an Islamic state."<sup>22</sup> The case – reconstructed from a series of *shari`a* court records – began with the marriage (later contested) of the then minor Arwa with her paternal cousin, also a minor, along with a later question as to the validity of this contract; the renewal of this (contested) contract over a decade later by Arwa's paternal uncle, in whose household she was now living following the death of her father, which involved both the assertion that she was now legally mature and Arwa's appointment of this uncle as her agent in the matter of

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<sup>20</sup> Interestingly, Siddiqui (1998-1999: 181) also points up the jurists' accommodation of a degree of deception by a woman in this situation, citing a passage in Nizam, *al-Fatawa al-'Alamgiri* as follows: "If she sees blood at night and says 'I cancel the marriage', she may bring forward two witnesses in the morning and say, 'I have only just now seen the blood.' [This is because] she would not be believed if she were to say that she saw the blood at night and cancelled the marriage."

<sup>21</sup> Siddiqui, 1998-1999:180. She notes a reversal of the burden of proof in this situation: if the woman denies having given her consent to the marriage contracted without her knowledge by her guardian, the supposed husband would have to prove that she was silent or otherwise agreed at the time she was informed; on the issue of exercising the option of puberty, where she claims that she rejected the marriage as soon as she reached menstruation but the husband denies this, then (presumably absent witnesses, see previous note) the husband's claim is accepted. Siddiqui 1998-1999:181.

<sup>22</sup> Brinkley Messick, "Interpreting Tears: A Marriage Case from Imamic Yemen", in Asifa Quraishi and Frank e. Vogel eds. *The Islamic Marriage Contract. Case Studies in Islamic Family Law*, Cambridge, Mass.: Harvard University Press, 2008, pp.156-179, respectively at pages 160, 177.



her marriage to his son; Arwa's subsequent flight to the house of her maternal uncle; a claim against the maternal by the paternal uncle demanding "the return of the wife of his son"; allegations of poisoning and indications of specific financial interest in Arwa's inheritance on the part of her paternal uncle; evidence of duress in her appointment of her paternal uncle in the matter of her marriage; and, in the end, an appearance by Arwa "behind a barrier" to declare "before a group of men" that she had reached puberty and in this capacity (as a legal major) that she dissolved the contract of marriage made on her behalf by her paternal uncle to his son.

For those who haven't read the article but want to know what happened, I should note that eventually the court supported Arwa's dissolution of her marriage in exercise of her "option of puberty." The particular point of relevance here however is Messick's discussion of *Zaydi fiqh* regarding silence and tears as indicators of consent. Arwa's refusal (and the subsequent beating meted out to her by her paternal uncle) were reported by a male neighbour who had been asked to act as witness to her appointment of her paternal uncle as her agent in her marriage to his son. As Messick observes: "While Arwa was not the sort of young woman who would remain silent such that her tears needed legal interpretation, this 1958 Shari'a judgment does preserve a poignant witnessed account of her crying."<sup>23</sup> Messick explains that the *thayyib* must be explicit in her assent, such as by receiving the dower – but "only then if such evidence is not undermined by indications of the woman's shyness towards, or fear of her *wali*".<sup>24</sup> This is perhaps a particularly interesting indication of the jurists' attempts to situate the context in which consent might be given. For the *bikr*, "while an explicit statement of consent is preferable, the jurists also anticipate instances of shyness, intimidation, and silence. Silence alone can constitute consent for a virgin women, so long as

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<sup>23</sup> Messick, 2008:177.

<sup>24</sup> Messick, 2008:163.

she understands that she can refuse.”<sup>25</sup> Quoting a Zaydi commentator, Messick explains that supporting factors to her consent would include laughing or “if she fled from room to room in the house”; but “if [the situation] is ambiguous, the reference is to the basic circumstance (*al-asl*), which is silence” and therefore, presumably, consent. Circumstances indicating lack of consent would include striking her face in despair “or tearing at her breast, pleading woe, and fleeing from house to house”. Messick comments that such “suggested legal readings of the nonverbal signs of the female inner state” illustrate “the assumption of separate spaces and knowledge of men and women.”<sup>26</sup>

Messick also observes that Arwa “must have had good legal advice” enabling her to take action immediately upon commencing menstruation and thus to exercise her “option of puberty.”<sup>27</sup> The Yemeni judiciary’s familiarity with these rules was to reappear in the 1990s, after the 1992 Personal Status Law of the unified Yemen was promulgated to replace the previous statutory laws of the Yemen Arab Republic (1978) and People’s Democratic Republic of the Yemen (1974). The 1978 YAR law had included the option of puberty; the 1992 unified law removed this provision, while invalidating a guardian’s marriage of his wards before the age of 15. However, the 1992 law provided no enforcement measures for the provision on the minimum age of marriage, and Anna Wurth notes that judges therefore relied on the residual reference of “the strongest proofs in the Islamic *shari`a*” to continue to allow the dissolution of marriages through *khiyar* on the achievement of puberty.<sup>28</sup> The

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<sup>25</sup> Ibid 163-64.

<sup>26</sup> Ibid p.164. The Zaydi commentator to whom he refers is Al-`Ansi.

<sup>27</sup> Messick, 2008:175. Harald Motzki notes that the option of puberty was “commonly invoked” in 17<sup>th</sup>-century Palestine, suggesting widespread awareness of this rule. Harald Motzki, “Child Marriage in Seventeenth Century Palestine”, in K. Masud, B. Messick and D. Powers eds. *Islamic Legal Interpretation – Muftis and their Fatwas*, Cambridge, Mass.: Harvard University Press, 1996, pp.129-140, at p.139. See also Judith Tucker, 1998:46-47.

<sup>28</sup> Anna Wurth, “Stalled Reform: Family Law in Post-Unification Yemen”, *Islamic Law and Society* Vol.10, No.1, 2003, pp.12-33, at p.21. The 1992 law did not stipulate penal or other sanctions for violation of the minimum

rules of traditional law thus supplemented state statute when the state failed to follow through on its own legislation apparently aimed at protecting young girls against unwelcome and early marriage.

### ***Enter the State: Dealing with duress***

The legislative interventions the Yemeni state might have made are those that have been adopted – to various degrees – in other Arab states to address the possibility of duress being used to procure consent to marriage. Here we come to the codification moment, what Judith Tucker refers to as “the epistemological break in the law of the late nineteenth century and the entrance of the state as a central figure in modern legal systems; this was a watershed period that had far-reaching effects, for better and worse, on women and gender issues.”<sup>29</sup> In the nineteenth century, towards the end of its encounter (sometimes military) with imperial Western powers, the Ottomans embarked on an extensive re-structuring of the legal system and the introduction, in the newly established “regular” state courts (differentiated from the pre-existing *shari`a* courts) of codes inspired by European models, and in some areas reproducing substantive law from those models. The first state-issued codification of *fiqh* rulings as a law, in the particular sense in which such codifications came to be recognized, came in the *Majalla*, the collection of civil law principles and directives that had a lasting impact in several of the Arab states that had been under Ottoman rule. The *Majalla* included rulings drawn from minority as well as majority Hanafi opinions in the process of selection (*takhayyur*) that came to constitute the principal methodological approach of legislators in the Arab states approaching Muslim family law codification. The *Majalla* set the scene and gave the justification for the intervention of the state in this manner. In 1917, practically at the end

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age requirement, and set no registration requirements for marriage. Later amendments in 1998 reintroduced specific reference to dissolution at puberty.

<sup>29</sup> Judith Tucker. *Women, Family and Gender in Islamic Law*, Cambridge: Cambridge University Press, 2008; at pp.36-7.

of their empire, the Ottoman legislators issued the Law of Family Rights (OLFR 1917) in which they expanded their approach to include rules from outside the Hanafi school. The binding of the *qadis*, within the reduced jurisdiction of the *shari'a* courts, by a particular juristic opinion, across the wide range of family law matters of concern to Ottoman subjects, was a qualitatively and politically-enhanced leap from the occasional centrally-issued circulars on particular issues that had previously constituted state intervention in the administration of family law.

Among other things, the OLFR introduced as “state law” for the first time minimum ages of marriage and also required puberty to have been reached for any marriage before the age of full legal majority (*rushd*) at 18 for the male and 17 for the female. Marriage below puberty was thus prohibited in law, and there was no mention of *wilayat al-ijbar*. The guardian still had a role, in that his agreement was needed for the marriage of a female ward between reaching puberty and the statutory age of legal majority; and for a first marriage thereafter, if he did not consent, the *qadi* was empowered to over-rule him. The word “consent” was used in regard to the requirement of *kifa'a*, whether the woman’s consent or the guardian’s.<sup>30</sup> Other than this, ‘consent’ was not mentioned in relation to the woman entering the marriage, perhaps indicating the assumption that the formal exchanges of the marriage contract, the constraint on the role of the *wali*, and the requirement of puberty combined to cover this issue. The Ottomans also issued registration requirements with associated penal sanctions for non-compliance.<sup>31</sup>

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<sup>30</sup> OLFR arts. 47 and 48.

<sup>31</sup> The British carried these enforcement provisions over into the then Mandatory territories of Palestine and Transjordan, and they also remained in force under the French Mandate in Syria.

The OLFRR included duress<sup>32</sup> in the list of circumstances rendering a contract of marriage irregular (*fasid*), along with other contracts concluded in violation of the requirements of statutory law, such as below the minimum age of capacity for marriage; it was “absolutely forbidden” for the parties to remain in such a marriage. Later provisions modelled on the OLFRR modified this position somewhat, as will be seen below. The Ottoman classification was a departure from the classical Hanafi rules, which held certain types of disposals such as marriage and divorce as valid even in the circumstance of duress. Hanafi *fiqh* differentiates two forms of duress, major and minor, with the first vitiating consent and invalidating choice, and the second vitiating consent but not invalidating choice. The choice here may involve “choosing between suffering what is threatened and making a contract which [the person] does not want.”<sup>33</sup> A commentator on Appeal Court decisions in Jordan (where the same text on duress appears) holds that the fact that Jordanian law does not specify which type of duress must be involved to render a contract of marriage irregular is confirmation that both types have the effect of making the contract invalid.<sup>34</sup> More recent commentators find that whichever kind of duress is involved, “duress does not abolish consent entirely.”<sup>35</sup> The Jordanian Civil Code provides that in the case of either kind of duress, the contract “shall not be enforceable” unless the victim of duress permits it, explicitly or implicitly, after the cessation of the duress, in which case “the contract shall become valid.”<sup>36</sup> A claim for a marriage contract to be held irregular would likely be defeated by evidence of permission in a previous court claim for maintenance, for example, since the

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<sup>32</sup> OLFRR (1917) art. 57. In the Arabic text ‘duress’ is *karh*, although later Arab statutes use *ikrah*.

<sup>33</sup> A.W. El-Hassan, “The Doctrine of Duress (*Ikrah*) in *Shari`a*, Sudan and English Law”, *Arab Law Quarterly* Vol.1 No.2,1985, pp. 231-236, p.231.

<sup>34</sup> A.M.A. Dawud, *al-qararat al-isti'nafiyya fi al-ahwal al-shakhsiyya*, Amman: Dar al-Thiqafa li'l-Nashr wa't-Tawzi` Vol. 2, 1999, p.386.

<sup>35</sup> Ahmad Ali Owaidi and Qais Ali Mahafzah, “Different Legal Implications of Consent Defects under Jordan Civil Code: An Attempt of Unification”, *European Journal of Social Sciences* Vol.19, No.2, 2011,pp.218-226, at p.219.

<sup>36</sup> Jordanian Civil Code art.141. Owaidi and Mahfazah (2011:219) thus prefer to classify the contract as suspended: valid, but not enforceable unless permitted by the party that was subject to duress, and if not permitted then it “shall be as if it did not exist.”

latter involves claim for a right under a valid contract of marriage, and would therefore be treated as acknowledgement of the latter.<sup>37</sup>

Jordanian law is interesting here as it also follows the Ottoman example in not being particularly explicit about the consent of the two contracting parties to a regular contract of marriage. Noting this, Samara observes that since marriage under duress is held to be irregular, the consent of both parties is clearly required; nor does the law deal explicitly with how consent is to be articulated “because it provides that the court *ma'dhun* (marriage notary) shall carry out the contract (and in special circumstances the judge himself) and the court would not carry out a contract if there were any duress involved...”<sup>38</sup> Instructions to the marriage notaries from the nineties require them to “ascertain the capacity and consent” of the two parties.<sup>39</sup> These officials – local to their jurisdiction –are the front line of the state system in reading the particular situation as lacking duress and demonstrating consent. So much so that in the early 1980s the Appeal Court was ruling that the record (*mahdar*) drawn up by the *ma'dhun* and signed by all involved came under the terms of Article 75 of the Law of *Shar'i* Procedure which provides that “official documents which public employees draw up within the sphere of their competence .. are considered absolute proof for that for which they were drawn up” and may therefore be challenged only on grounds of forgery. A statement in the *mahdar* by the female party to the effect that she had appointed her father as her *wakil* in carrying out her marriage “without force or duress” would therefore invalidate a later claim of duress.<sup>40</sup>

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<sup>37</sup> See Lynn Welchman. *Beyond the Code. Muslim Family Law and the Shar'i Judiciary in the Palestinian West Bank*, The Hague: Kluwer, 2000, pp.316-318; Dawud Vol. 1 1999:388-399.

<sup>38</sup> Samara, 1987:111.

<sup>39</sup> Instructions Regulating the Functions of *Shar'i Ma'dhuns*, no.1/1990 *Official Gazette* no. 3672, 1 December 1990, as amended 1997; art. 15(b). In Morocco the same function is assigned to the *'adul*.

<sup>40</sup> Dawud 1999:388.

The most direct legislative statement on the protection of consent through explicit prohibition and indeed criminalization of duress in this matter came in Iraq's 1978 amendments to its 1959 law. In three separate clauses it details the prohibition of forcing a person to marry and the criminal penalties to which those doing so are liable, beginning as follows:

Nobody, whether a relative or anyone else, is allowed to coerce any person, male or female, into marriage without their consent; a contract of marriage by coercion is voided provided consummation has not occurred. Nor may any relative or other person prevent someone of capacity from getting married, in accordance with the terms of this law.<sup>41</sup>

Thus, "forced marriage" is prohibited, and so is the deliberate obstruction of the exercise of choice in marriage - a more positive idea. Algeria's 1984 law also explicitly forbade the *wali* from forcing his ward into marriage or marrying her to someone without her consent, although without referring to penalties; the 2005 amendments to this law clarified that this now refers only to minor wards – that is, for those marrying with the requisite court permission under the age of full legal majority.<sup>42</sup> This leads us to a consideration of the various situations that have been clearly considered by different Arab states to constitute a particular threat to the principle of consent, and the ways in which they have sought to control against undue constraint on the exercise of choice.

### ***Consent in Arab State codifications of Muslim family law***

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<sup>41</sup> Iraqi Law of Personal Status 1959 as amended 1978, article 9(1). Penalties for relatives of the first degree are a fine and/or prison for up to three years, while for others the maximum is ten years in prison. If consummation has occurred, the law provides for judicial divorce on grounds of coercion (art. 40(4)).

<sup>42</sup> Algerian Law of the Family 1984 art.13, as amended 2005. In the UK, Anitha and Gill (2009:168) note NGO criticism of "[h]astily composed [...] and superficial" legislation drafted in 2005 to "treat forced marriage as a specific criminal offence." The NGOs' criticism was based on the arguments that such legislation "would be ineffective, would reinforce racist stereotypes and would fragment laws pertaining to violence against women."

The first to consider is the setting of minimum ages of capacity for marriage (at first usually lower for females than for males) in statutory law, alongside the achievement of puberty, as criteria for capacity for marriage. This meant that a minor (under puberty, and now also under the statutory age of majority) could not be married under state law – this is directly linked to the idea of legally valid consent, which can only be given by a person of sound mind and legal majority. At the same time, there are echoes of the former Hanafi doctrine of *khiyar al-bulugh* in some texts – notably Jordanian law – that stipulate that claims will not be heard for the dissolution of a marriage on grounds that one or both of the parties were underage – and therefore the contract was irregular at its formation - if by the time the claim comes to court both parties are of age, or if the wife is or has been pregnant.<sup>43</sup> The latter position echoes the *khiyar al-bulugh* doctrine by assuming that post-puberty sexual relations (as evidenced by pregnancy) are a sign of the wife's assent to her marriage; Siddiqui notes in her commentary on pre-modern jurisprudence that although in principle the woman could still reject the marriage if the sexual relations had taken place without her consent, the evidential challenges of proving this meant that “in most cases where the couple are found to have had sexual intercourse, it will be presumed that it was with the woman's permission, and thus consent to the marriage is established.”<sup>44</sup> This in turn raises two issues: that of consent to sexual intercourse, a major concern of the criminal law and jurisprudence of various countries, and the fact that in states in the region, criminal laws rarely criminalize rape within marriage as such. If the young woman's consent to sexual intercourse establishes her consent to marriage, consent to marriage in turn establishes a presumption of consent to

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<sup>43</sup> See Lynn Welchman, “Jordan: capacity, consent and under-age marriage in Muslim family law”, *International Survey of Family Law* 2001 edition, pp.243-265, at p.256.

<sup>44</sup> Siddiqui, 1998-1999:182-3.



sexual intercourse, and the question is whether it may be withdrawn (in law) and with what consequence.<sup>45</sup>

The former position – on being of age by the time the case for irregularity of marriage is heard by the court – refuses to transfer to state-identified statutory ages the choices that followed the assumptions of rationality and adulthood ascribed to puberty in *fiqh*: if the minimum age of marriage is 15 and a girl married (against the law) below that age were to come to court and declare, I am now 15 and I reject my marriage, the court may say you are 15 and the contract is therefore regularized.<sup>46</sup> And this of course concerns exactly the sort of situation that the statutory law is apparently trying to prevent (including by criminalizing the actions involved) – the marriage of an under-age girl (that is, under the ages set by the state) away from any external scrutiny and in circumstances where her consent would likely be most vulnerable to being given under duress.<sup>47</sup>

The question of scrutiny is a second focus of statutory law. Scrutiny begins with the state requiring that all marriage contracts are registered and stipulating procedures that marrying couples must follow to comply with the law. This enables the state to oversee enforcement of its other objectives such as the minimum age of capacity for marriage, and the consent of the parties.<sup>48</sup> Particular attention is paid to the consent of a young woman under the age of full legal majority but past puberty and above the minimum age of marriage: in all, three "consents" or approvals may be needed here – that of the young woman, her guardian, and

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<sup>45</sup> This presumption – possibly constructed as irrebuttable - has of course been common to different legal systems.

<sup>46</sup> Assuming of course that the contract otherwise fulfilled the lawful (shar'i) requirements under the law.

<sup>47</sup> It should be noted here that such a case is not the same as those considered by Siddiqi and by Favia Agnes in their papers for this workshop, as in the example given it would be the young woman seeking dissolution of her marriage, rather than the guardian. See further below. Flavia Agnes (2011) "'Consent, 'Agency', and Gender Concerns with the Complex Legal Terrain of Family Laws in India", workshop paper 2011.

<sup>48</sup> See Hasso's interesting discussion of "The Marriage Contract as a Technology of Governance" – focussing on Egypt. ~Frances Hasso, *Consuming Desires. Family Crisis and the State in the Middle East*, Stanford: Stanford University Press, 2011; at pp.45-48.

the judge. Jordanian law introduced an innovation (in its first family law of 1951) in requiring extra attention to the consent of any party (usually the woman) marrying someone more than twenty years their senior – the judge was to assure himself that the younger party “consents to the marriage without force or coercion.”<sup>49</sup> However, by 1957, the Amman *Shari`a* Court of Appeal had established that this was to be constrained by the ages of capacity, and that the *qadi*’s permission for the age difference was needed only where one of the spouses was under the age of full legal majority (*rushd*) and so in any case needed the *qadi*’s permission to marry. In 1976 the new personal status law confirmed the Appeal Court’s interpretation of the previous text, limiting the extra scrutiny to women under 18 and requiring the judge to “ascertain her consent and choice.”<sup>50</sup> It is interesting to note that the latest personal status law goes back to the earlier text in not constraining to those under 18 the need for the judge to investigate the woman’s consent and choice.<sup>51</sup> This article is not textually constrained by the previous one on capacity. Such provisions (also taken up elsewhere)<sup>52</sup> may be officially justified in terms of ensuring spousal compatibility, but they are clearly provoked also by concerns over the joint issues of early and forced marriage; a 2006 Yemeni study on early marriage reported huge age gaps between the spouses, and the press noted that among the reasons behind early marriage is that “parents are lured into marrying their daughters at a young age by rich men proposing to marry their daughters.”<sup>53</sup> This situation can be seen to complicate consent and constrain choice; or more specifically, in context, the bride might feel that she has no choice but to consent. In Jordan ten years before, a commentator had similarly noted: “there might be duress or pressure on the girl, especially if she is young and not fully

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<sup>49</sup> Jordanian Law of Family Rights 1951 art.6.

<sup>50</sup> Jordanian Law of Personal Status 1976 art.7.

<sup>51</sup> Jordanian Law of Personal Status 2010 (*Official Gazette* no. 5061 of 17 October 2010 p. 5809), art.11.

<sup>52</sup> Syria 1953; UAE 2005 article 21(2) (where the fiancé is twice as old or more than the fiancée); and previously the PDRY disallowed marriages where there was an age difference of more than twenty years unless the woman was aged 35 or above (article 9).

<sup>53</sup> Al-Ghabri, “Early marriage among girls on the rise”, *Yemen Times* 4 May 2006.

empowered with giving her opinion; she could be forced to marry a man because there is a family interest in him, or he is an older, wealthy man, and in such circumstances what they think may be different from what she wants.”<sup>54</sup> After later amendments to the 1976 law, the Directive of the *Qadi al-Qudah* (2002) required the judge *inter alia* to “ascertain the fiancée’s consent and choice and that the marriage is in her interest” in the event of a marriage under the age of 18.

The guardian is the third element that has been considered in and is critical to the concept of consent. The only remaining reference in statutory law in the region to the legality, in particular circumstances, of the guardian exercising *wilayat al-ijbar* was removed in Morocco in 1993, but other issues remain – specifically, the guardian’s role in marrying an under-age ward, discussed above, and also, whether a woman of full legal majority needs her guardian’s consent to her marriage, either in general or for a first marriage. In law, this issue may turn now on the originally Hanafi doctrine of *kifa’ a*, which allows the guardian in certain circumstances to withhold his consent on the grounds that the proposed husband of his female ward is not an appropriate match in accordance with certain defined criteria. While the woman may petition the judge to over-ride the guardian’s decision, the fact that he in turn may agree with the guardian means that while a woman’s consent is not in issue, her choice may be constrained in law and not only in practice.<sup>55</sup>

Jordanian law is again an interesting example here. In the new (2010) personal status law, the same text from previous laws is reproduced regarding the need for the guardian’s consent to the marriage of a woman of full legal majority: “The agreement of the *wali* is not a

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<sup>54</sup> A. Al-Ma`ayata ed., “Overview of Laws Affecting Women” in *dalil al-mar’a al-urduniyya*, Amman: Konrad Adenauer Stiftung and al-Kutba Institute for Human Development Forum, pp.58-78; p.59.

<sup>55</sup> For a consideration of how this doctrine is asserted in relation to the value placed on tribal lineage, see Khalid Al-Azri, “Change and Conflict in Contemporary Omani Society: The Case of Kafa’a in Oman”, *British Journal of Middle Eastern Studies*, Vol.37, No.2, pp.121-137. A Muslim woman’s choice is also of course constrained by the prohibition on her marrying a non-Muslim man.

requirement in the marriage of a *thayyib* woman of sound mind who is above eighteen years of age.”<sup>56</sup> It will be recalled that the majority Hanafi view holds that a woman of legal majority, whatever her “personal status” (*bikr* or *thayyib* in this case), could contract her own marriage without the need for the prior consent of her guardian. The new law, like its predecessors, maintains reference to the dominant opinions of the Hanafi school as its immediate residual reference – that is, in the event of a matter not being explicitly covered in the text of the law.<sup>57</sup> Nevertheless, the law deliberately qualifies a woman of full legal majority - both in terms of her age and of her mental capacity - with the additional status of having been previously married (*thayyib*) in order unequivocally to define those women who do *not* need their guardian’s consent to their marriage. The law clearly means this; and at the same time, nowhere does it state that, by contrast, a woman fulfilling all those qualities except for having already been married stands in need of her guardian’s consent to her marriage. But this last position, Hanafi opinion aside, is clearly strongly implied in what the law doesn’t say.

In certain contexts at least, the situation is even clearer in practice. In my own fieldwork in Palestine in the late 20<sup>th</sup> century, in the overwhelming majority of marriage contracts in my sample the bride was represented by her delegated representative (*wakil*), usually also identified as her guardian, although this was not a legal requirement.<sup>58</sup> Apart from a very few exceptions, women did not conclude their own contracts; let alone adult *bikrs*, most divorcées and widows (*thayyibs*) conformed to this practice, registering the consent of a *wali* to their contract, no matter what their age. The sample included for example

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<sup>56</sup> Jordanian Law of Personal Status 2010, art. 19.

<sup>57</sup> JLPS 2010 art.325.

<sup>58</sup> Welchman,(2000: 96. In a sample of 857 marriage contracts (10% of the total registered in three *shari`a* courts in 1965, 1975 and 1985), in 843 the bride was represented by her *wakil*, usually also identified as her guardian, although this was not a legal requirement. In most of the contracts, the woman appointed her *wakil* at the beginning of the contract session, sometimes also signing the contract together with her *wakil* at the end of proceedings. The groom represented himself in 840 of the contracts.

the contract of a divorcée of 75 who registered the consent of her paternal cousin to her new marriage; and that of a 60-year old widow entering into a polygynous union, who brought in a man described as her neighbour and landlord to act as her delegated representative (*wakil*) in the contract and whose consent to her marriage was registered in the contract.<sup>59</sup> This tells us something different about this issue of consent when the legal and constitutive status of a woman's own consent is not legally in dispute, nor socially (individually) disputed; this may have to do *inter alia* with the attitude of the notaries and judges, with social attitudes, and/or with women wishing, in their own lived reality, to bring with them at the point of their entry into this marriage the support of their own family and/or friends. In such cases, this makes the issue of the third party consent (that of the putative guardian) auxiliary to that of the woman's, but regarded as no less significant.

On the other hand, some laws continue to require by law that a woman's guardian concludes the contract on her behalf, rather than the woman doing it in person.<sup>60</sup> Where this is the case, clearly the woman's marriage is dependent upon the consent of the guardian required to conclude the contract. Furthermore, it is a situation where the process in procuring the woman's consent, and her absence from the contract session, has been abused by guardians – Arwa's story is one such. The UAE law of 2005 maintains the requirement for the woman's guardian to conclude her contract; the “two contracting parties” to the marriage contract are “the husband and the *wali*.”<sup>61</sup> However, the Explanatory Memorandum stresses that the wife's consent is necessary:

The fact that the law requires the *wali's* permission and that he carry out the contract does not mean a lack of consideration for the consent of the girl (*bint*);

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<sup>59</sup> Welchman, 2000:131.

<sup>60</sup> Kuwait article 30; Oman article 19; UAE 2005 article 39; Yemen article 7(2) as amended in 1998. Also included in the Qatari law article 28. This is also implied by the text of the Sudanese code of 1991 (article 34).

<sup>61</sup> Article 28.

rather the agreement of the *wali* and the consent of the wife and her agreement are (both) necessary, taking into consideration the consent of the *bikr* who has passed puberty and the *thayyib* all the more so – and no-one may force her into marriage, and thus it is with regard to the mature (*baligha*) young woman, as the law stipulates her consent and acceptance. [...] As for the sign of consent and agreement, this is open declaration (*ifsah*) and announcement of consent by words or silence, and in all cases the *ma'dhun* must have the wife sign the contract.<sup>62</sup>

The Explanatory Memorandum justifies this position on the majority *fiqh* view and in light of the "potential hazards" of a woman undertaking her own marriage. This last reference invokes the common wisdom of the protective intention behind the institution of guardianship, which may go beyond the legal constraints of *kifa'a* through which statutory laws seek to regulate the authority of guardian in controlling choice, having already forbidden him from forcing consent.

Having previously required the guardian to represent his female ward (with her consent), the 2004 Moroccan law allows any woman of legal majority to conclude her own contract of marriage.<sup>63</sup> The statutory requirements for the documentation of the contract include a record that the *ijab* and *qubul*—the formal exchanges that constitute the contract—are uttered by the two contracting parties "enjoying capacity, discrimination/reason (*tamyiz*) and choice".<sup>64</sup> Again we see the inclusion of choice, along with the assumption of consent as articulated in the formalities of the *ijab-qubul* exchange. The Ministry of Justice's *Practical Guide* to the new law emphasizes that "one of the most important things that women have

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<sup>62</sup> UAE 2005 Explanatory memorandum to article 39, p.162. The UAE law does not list the elements that would render a contract irregular, so duress is not specifically mentioned in this regard, nor is it listed as grounds for divorce.

<sup>63</sup> Article 12(2) 1957, as amended 1993 (article 12(4)), allowing a woman to conclude her own contract if her father was dead), and article 24 2004.

<sup>64</sup> Moroccan Law of the Family (Mudawwana) 2004 art.67

gained from the new law is that guardianship is her right; [...] like the man, she exercises it according to her choice and her interests without being subjected to any supervision or consent.” The woman is entitled to conclude her own contract, continues the Guide, or to delegate this function; delegation requires the physical presence of the woman<sup>65</sup> and the person she is delegating in the session during which the contract is made and signed. In explaining the law’s continuing provision for a woman to delegate her father or other relative to conclude her marriage contract, the Guide invokes some of the same societal and familial expectations that make the removal of guardianship from an adult woman contentious in some quarters: it is ”out of consideration for what is customarily done, and in preservation of traditions that are known in the cohesion of the family.”<sup>66</sup> For her part, in a commentary on the law, Moroccan jurist Rabaa Naji El Makkaoui celebrates what she considers the “resuscitation of a principle intrinsic to Islamic law, [...] that the will of a woman is to be respected like that of a man.”<sup>67</sup> She points to the “exchange of consent” (the *ijab* and *qubul*) as the “sole constitutive element of marriage,” and refers to customs that came to exclude women from the formal conclusion of their own contract of marriage, with the ultimate effect that “the exchange of consent become identified in the public memory with guardianship.”<sup>68</sup> Silence can no longer be interpreted as a sign of consent, she continues,<sup>69</sup> and the formalities around applying for a marriage contract and the subsequent conclusion by the notaries are there to ensure that the two spouses exercise their “free choice” to engage in a lifetime

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<sup>65</sup> Except in certain particular situations that have to be authorised by the judge and are hedged around with rules of the procedure for the authorisation of the third party who will undertake the contract (art.17).

<sup>66</sup> *Practical Guide* 2004 31.

<sup>67</sup> El Mekkaoui, 2010:93.

<sup>68</sup> El Mekkaoui, 2010:92.

<sup>69</sup> El Mekkaoui, 2010:94.

relationship, and to exclude “a bond that is refused from the start or ‘approved’ with a will that is vitiated or not free.”<sup>70</sup>

This position is pointed up in a public education booklet – with brightly coloured illustrative cartoons accompanying each part of the sequence of stories told about the new law – produced in Rabat in 2005 under the auspices of the department of state charged with informal education and combating illiteracy.<sup>71</sup> The sequences follow Ahmad and Fatima as their daily lives bring them into contact with different parts of the new law. The first three sequences deal with the age of marriage for their daughter and Ahmad’s role as guardian for his brother’s daughter. Ahmad returns home one day to tell Fatima that his friend `Abd al-Salam and his wife and their son are coming to visit, and Ahmad has surmised it is to ask for the hand of their daughter Fatiha for the son. Fatima tells her husband that Fatiha is too young, she is still studying, and things are not as they used to be: now girls like boys will share in building the future of the country while in Fatima’s day girls thought only of becoming mothers and raising their children. Fatiha cannot marry until she is eighteen, unless there are exceptional circumstances, and her parents cannot force her. If Ahmad is unsure of this, Fatima suggests they visit the family judge; for her part, Fatima knows all about this from the television promotions about the new law. The couple go and see the family judge, who confirms what Fatima has told her husband. On their return home they find Ahmad’s niece, Nadia, waiting for them, and they tease her about when she is going to make them happy by getting married. That, says Nadia, is what she has come to see them about. It turns out that `Abd al-Salam is coming to visit about his son’s wish to marry Nadia, not Fatiha. Fatima points out that Nadia is an adult, she is 18 and can do her own marriage contract if she

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<sup>70</sup> El Mekkaoui, 2010:97.

<sup>71</sup> Zuhur Rashiq (project coordinator) et al, “*Qadi al-’usra: huquqi wa wajibati fi ’usrati*”, Department for Informal Education and Literacy, Rabat: 2005.



chooses; “what if she doesn’t choose that?” asks Ahmad. Then, says Fatima, she can choose to appoint you, her paternal uncle, as her *wakil*. Nadia explains that “this is why I am here, to ask you to do that for me, not because I feel lacking in myself or for fear of what people might say, but so that all of us in this family stay close and loving.”<sup>72</sup>

This cameo sequence invokes a number of issues in Moroccan life and in the family law, and with Nadia’s statement appears to reassure the reader that the family still has a role. Here is a fourth and final issue of interest with specific regard to consent and to choice. In 2005, one year after the new law came into force, the Moroccan Ministry of Justice announced statistics showing that 14.5% of adult women had represented themselves in their contract of marriage since the new law was passed. The Minister commented that this “demonstrates that the Moroccan woman, despite the right given her [to conclude her own contract] continues to adhere to the appropriate traditions that govern the Moroccan family; and that is also her right.”<sup>73</sup> Later statistics on this particular subject are not included in those published on line by the Ministry.

In Palestine, Rema Hammami reflected that the outcome of a 1995 survey that had found “a high level of support for women’s right to choose their spouse” might have been affected by how the question had been put, and that “[t]he right to choose may simply mean for many people the right of women to refuse someone imposed on them by their parents.” In support of this she cites an earlier (1992) survey that found that “less than 10 per cent of men

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<sup>72</sup> Ibid pages 1-13. In my research in the Palestinian West Bank, in a sample of 857 marriage contracts (10% of the total registered in three *shari`a* courts in 1965, 1975 and 1985), in 843 the bride was represented by her *wakil*, usually also identified as her guardian, although this was not a legal requirement. In most of the contracts, the woman appointed her *wakil* at the beginning of the contract session, sometimes also signing the contract together with her *wakil* at the end of proceedings. The groom represented himself in 840 of the contract. Welchman, 2000:96.

<sup>73</sup> Opening speech of the Minister of Justice to launch the study day on the passing of one year on the promulgation of the Mudawwana, Supreme Judicial Council, 14 February 2005. Available at: <http://www.justice.gov.ma/ar/documentation/documentation.aspx?ty=0>

and women thought that choice of spouse should be the daughter's choice alone, while the majority asserted that a decision should be made collectively with the young woman's parents." Also of relevance is the finding – in a survey of 1999 – that 43% of women and 28% of men said “they did not choose their spouse by themselves.”<sup>74</sup> In its own survey in 2000, the Birzeit Institute of Women's Studies set itself to try to:

invoke directly the contradiction between the minimum legal marriage age and the decision-making power in the marriage process. In specific, did respondents feel that a person might be mature enough to get married but simultaneously not mature enough to decide on whom they married? [...] [The findings show] the dominant trend in which choice of a marriage partner continues to be seen as an issue in which parents should be involved [...] neither men nor women are considered at those ages [men under 18, women under 17] capable of making their own decisions regarding a marriage partner.<sup>75</sup>

The issue of specific ages returns as something of a problematic here, but the general problem is whether the state's law can and should accommodate or somehow make space for the family in the marriage choices of their female members – especially young ones. Looking towards a future codification, in Palestine again, Asma Khadr proposed a text making a limited space for the views of parents: essentially, she proposed that “either or both parents may object to a contract of marriage” and should the judge agree with the objection the

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<sup>74</sup> Rema Hammami, “Attitudes towards legal reform of personal status law in Palestine”, pp.125-143 in Lynn Welchman ed. *Women's Rights and Islamic Family Law. Perspectives on Reform*, London: Zed Books, 2004, p.137.

<sup>75</sup> Hammami, 2004:138. Both sexes overwhelmingly supported a minimum age of marriage of 18 for males and females.

spouses (or would-be spouses) could “insist on concluding” their marriage after two years have passed.<sup>76</sup>

The social expectation of the family's role is further highlighted in debates around *`urfi* marriage that focus on the prospect of young women marrying “secretly” without the involvement or knowledge of their families, and so beyond parental control. As Frances Hasso aptly puts it, “one person's solution to a problem – such as marrying secretly to avoid difficult-to-acquire guardianship approval or to assuage desire – is often another person's crisis.”<sup>77</sup> She makes the important difference between earlier (and continuing) practice of *`urfi* marriages that for a variety of reasons were and are not registered with the state, and the more recent type that are “also kept secret from parents and other family members.”<sup>78</sup> According to Sami Zubaida, in its more recent manifestation in Egypt, this type of marriage is “practised by university students and other young people, away from home and unknown to their families, getting over the expensive formalities and the parental involvement in proper marriage.”<sup>79</sup> It is this model described by Zubaida is that produces what he refers to as “cries of indignation [that] echo in the press”, and is also the one presented as the exercise by youth of consent and choice away from family pressure and in an act of subversion of that order. Hasso notes that they occur “in all socioeconomic classes.”<sup>80</sup> The adverse reactions appear to mesh concern at the risks that such marriages pose, particularly to young women (particularly if the male partner subsequently denies the marriage) with discomfort at the loss of involvement in and supervision of choice. On the other hand, another manifestation of *`urfi* marriage engages consent in a quite different way. This is when the family guardian marries a young woman or girl to an older, wealthy man, as evoked in the Yemeni press

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<sup>76</sup> Asma Khadr. *al-qanun wa mustaqbil al-mar'a al-filastiniya*, Jerusalem: WCLAC, 1998, pp.134-135.

<sup>77</sup> Hasso, 2011:61.

<sup>78</sup> Hasso, 2011:82. See her discussion pp.80-98.

<sup>79</sup> Sami Zubaida. *Law and Power in the Islamic World*, London, I.B.Tauris, 2003, p.180.

<sup>80</sup> Hasso, 2011:84.

report cited earlier, in circumstances that challenge the assumption of freely given consent and the exercise of choice in *`urfi* marriage. Hasso notes “Egyptian adolescent girls” from poor parts of Cairo being “pimped by their parents through middlemen to wealthy men on vacation from the Arab Gulf countries.”<sup>81</sup> Then again, the law itself may accommodate circumstances that might be read as acknowledging the constraint on choice of the woman – and vitiation of consent - when it provides for the suspension of proceedings against or penalty imposed on a rapist if he marries his victim.<sup>82</sup> There is some suggestion in different court records that husbands in such marriages have considered themselves – rather than their wives - the victim of duress in consenting to the marriage contract; for the girl or woman and, importantly, her family, the marriage may be viewed by the family as a solution – as indeed it is envisaged in the law.<sup>83</sup> For her part, Nadera Shalhoub-Kevorkian includes such a marriage as a “forced marriage” within her definition of femicide.<sup>84</sup>

The criminal law, presented as protective of a woman’s choice and consent (to marriage and to sexual relations) may produce results that may or may not have been anticipated by the legislators (who may date from colonial times in different states). In her paper for this workshop, Flavia Agnes considers court cases around “elopement” marriages in the Hindu community in India and the efforts of parents to recover control over their offspring who have undertaken choice marriages under the statutory minimum age of marriage. She finds

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<sup>81</sup> Hasso, 2011:85.

<sup>82</sup> These kind of legal provisions are or have been common to penal codes in Europe (the original text was in French law) and Latin America as well as the Middle East. See Lynn Welchman and Sara Hossain, “‘Honour’, Rights and Wrongs”, pp.1-21 in Lynn Welchman and Sara Hossain, eds. *‘Honour’: Crimes, Paradigms and Violence Against Women*, London: Zed Books 2005, at p.17. On the provision’s origins in French law, and the repeal of its descendent in Egyptian law, see Baudouin Dupret, “Normality, Responsibility, Morality: Virginité and Rape in a Egyptian Legal context”, in A. Salvatore, ed. *Muslim Traditions and Modern Techniques of Power, Yearbook of the Sociology of Islam* Vol.3, 2001.

<sup>83</sup> Welchman, 2000:317-8; and Dawud, 1999:389. On this subject see Nadera Shalhoub-Kevorkian, “Towards a Cultural Definition of Rape: Dilemmas in Dealing with Rape Victims in Palestinian Society,” *Women Studies International Forum* Vol.22, No.2, 1999; and “Femicide and the Palestinian Criminal Justice System: Seeds of change in the Context of State Building?”, *Law and Society Review* Vol.36 No.3, (2002).

<sup>84</sup> Shalhoub-Kervorkian, 2002.

that “even though the criminal provisions regarding kidnapping and statutory rape appear to be protecting minor girls, these provisions are aimed at securing parental power over the minor girl and her lover or husband.”<sup>85</sup> These days, Agnes finds that the provisions of the Child Marriage Restraint Act “appear to be invoked more often to prevent voluntary marriages and augment patriarchal power than to pose a challenge to it.” Certain judges have responded “by bestowing on the minor girls an agency and by distancing the notion of ‘age’ from ‘consent’” to hold a marriage valid.<sup>86</sup>

Consent and choice are situated concepts. Commenting on the “entanglement of consent with liberal individualism’s notion of self”—which she describes as “pervasive within feminism”—Maria Drakapoulou observes that:

Put simply, consent and female subjectivity are bound together by issues of power: the power men exercise over women, women’s power over themselves and their own lives, and the belief in the need to further empower women. [...] [T]he solutions, strategies and measures that feminist considerations of consent have to offer are designed to reduce and redress systemic power imbalances between the sexes, both as a whole and within the particularity of individual circumstances.<sup>87</sup>

How much of this can and should be done through the law? In the situations she examines in rural Bangladesh in her paper for this workshop, Dina Siddiqi finds that “the law itself is an enormously powerful and not necessarily liberatory regime.” Nor, as we have seen in the examples considered here, does it always say what it means – or perhaps mean what it says. Scholars of “Islamic law” such as Amira Sonbol and Judith Tucker have raised

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<sup>85</sup> Agnes, 2011:18.

<sup>86</sup> Agnes, 2011:19.

<sup>87</sup> Drakapoulou, 2007:12.

questions about the intent and effect (on differently situated women) of the state's interventions in regulating the Muslim family in different states, compared to the relative discretion and flexibility enjoyed by individual judges in a differently structured legal system prior to codification; Sonbol refers to this as state patriarchy and in relation to the OLF, Tucker has noted that "we are predisposed to think of reform in general as a good thing, as the key to correcting past abuses and undermining the forces of reaction."<sup>88</sup> Questioning the extent to which the drafters of the OLF in fact reformed existing practice unsettles assumptions of a uniform "progress" for all women in the promulgation of every code. In Bahrain, on the other hand, one of the main arguments of women's rights activists advocating early this century for a state-promulgated code of family law was what they presented as the arbitrariness and lack of predictability in the courts due to the absence of such a law.<sup>89</sup>

In a different (UK) context, on the particular question of the politics of consent, Anitha and Gill raise concerns as to the nature of the attention being paid to "forced marriage" among the South Asian communities with which they work, noting that "media and policy-related discourses continue to frame the problem of forced marriage in cultural terms, rather than as a specific manifestation of a wider problem of violence against women,"<sup>90</sup> which feeds into "othering" particular communities and, among other things, possibly complicating strategies of resistance by individual women. They argue that:

Consent and coercion in relation to marriage can be better understood as two ends of a continuum, between which lie degrees of socio-cultural expectation, control,

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<sup>88</sup> Judith Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917", *Arab Studies Journal* Vol.1, pp. 4-17; at p.3.

<sup>89</sup> Ghada Jamshir, ed. *Al-jallad wa al-dahiya fi al-mahakim al-shar'iyya*, Beirut:2005, at p.19. See Lynn Welchman. *Women and Muslim Family Laws in Arab States: A Comparative Overview of Textual Development and Advocacy*, Amsterdam: Amsterdam University Press, 2007, pp.22-26.

<sup>90</sup> Anitha and Gill, 2009:166.

persuasion, pressure, threat and force. Women who face these constraints exercise their agency in complex and contradictory ways that are not always recognised by the existing exit-centred state initiatives designed to tackle this problem.<sup>91</sup>

Anitha and Gill's examination is not confined to Muslim women and they consider only the UK legal framework. Nevertheless their findings might be seen to chime (in the UK context) with Lila Abu-Lughod's conclusion that "[w]hen we treat 'Muslim women's rights' as a social fact rather than a rallying cry, we can begin to use them to better understand the complex dynamics of gendered power, global, national, and local."<sup>92</sup> Campaigns in different Arab states to further raise the minimum age of capacity for marriage – a key though not the only factor, as we have seen, in qualifying a woman's consent to marriage under at least some statutory formulations of Muslim family law considered here – have provoked responses from constituencies that invoke local and national traditions and norms of *fiqh* as well as differences among women, and that may invoke the idea of agency in opposition to what they pose as unwarranted (and elite-focused) constraints on the same. "The West" features in these discourses as "the other," only one of the indicators that at least some of these responses are as much about drawing larger political lines as about the issue of age (and consent). On the ground, there is a role for both activists and academics in exploring how individuals understand and give consent; how agency can be supported; and how the politics around the debates assist or frustrate those attempts to understand.

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<sup>91</sup> Ibid p.165.

<sup>92</sup> Lila Abu-Lughod, "The Active Social Life of "Muslim Women's Rights". A Plea for Ethnography, not Polemic, with Cases from Egypt and Palestine", *Journal of Middle Eastern Women's Studies* Vol. 6 No. 1, pp.1-45, at p.34.