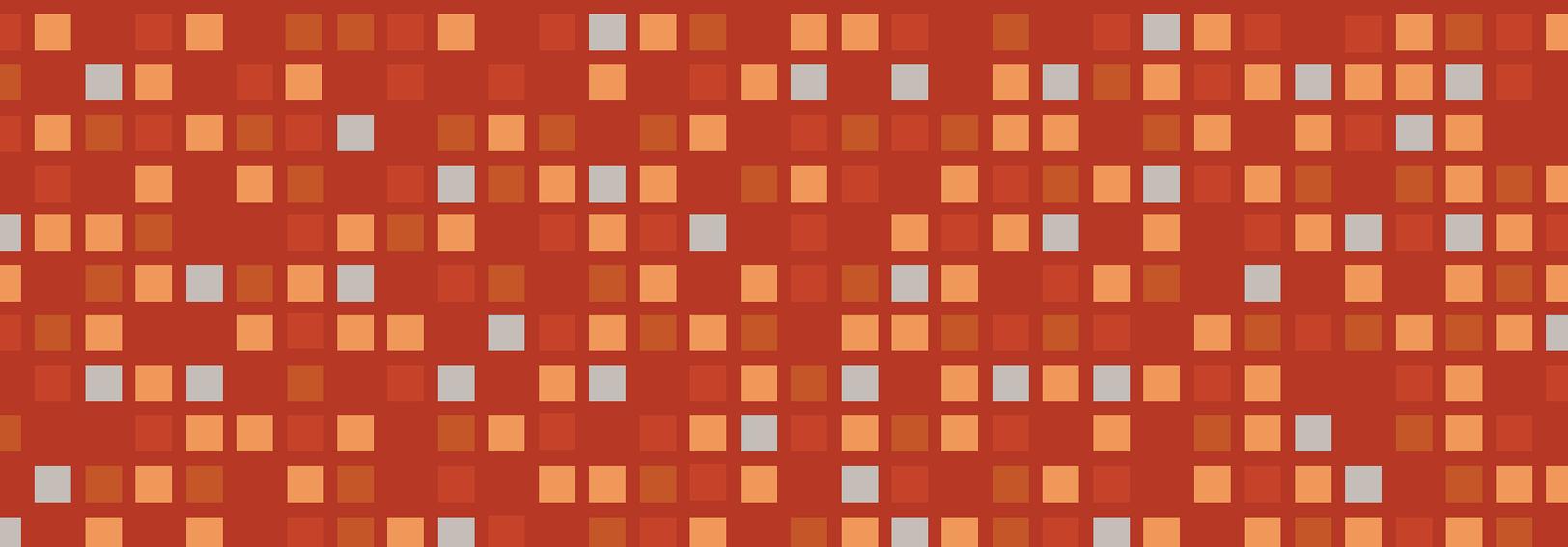


# SOCIAL DIFFERENCE ONLINE

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AT COLUMBIA UNIVERSITY**

# SOCIALDIFFERENCE-ONLINE

## EDITOR'S NOTE

Since we began this great adventure into the “critical analysis of social difference” in April 2008, we have nurtured five collaborative research projects. We have hosted dozens of international scholars, six visiting fellows, and countless other university faculty, artists and practitioners from Columbia and from neighboring institutions in New York City and beyond. We have partnered with arts institutions, foundations and universities across the globe and we have staged dozens of public events, conferences and roundtables. To date, five new graduate and undergraduate courses have evolved out of the collaborative research and thinking initiated here. Out of the synergy produced by dozens of creative, inquisitive and engaged people given the space to think and a community in which to develop an ongoing conversation, we have generated books, articles, podcasts, videos and now an online journal, SocialDifference-Online.

SocialDifference-Online is an attempt not just to further that conversation, but also to take it beyond the seminar room and the lecture hall. An advanced research center that promotes interdisciplinary scholarship on the global dynamics of gender, sexuality, ethnicity and race, CCASD is the research arm of five institutes and centers at Columbia: the Institute for Research in African-American Studies; the Center for the Study of Ethnicity and Race; the Institute for Research on Women and Gender; the Institute for Comparative Literature and Society and the Barnard Center for Research on Women. An essential part of our mission is to explore innovative ways to disseminate the work that we do and to open up the exchange of ideas, research, approaches and practices. This first issue of SocialDifference-Online makes available working papers originally presented at the CCASD Liberalism and Its Others conference “Religious Law, Local Practice, and Global Debates about Muslim Women’s Rights” at the Columbia University Global Center in Amman, Jordan. Many thanks in advance to our readers who will, we hope, continue to complicate and extend the urgent critical conversation begun there.

Laura E. Ciolkowski  
New York City 2011

## **Women's Rights, Muslim Family Law, and the Politics of Consent**

Working Papers

Guest Editors

**Lila Abu-Lughod and Anupama Rao**

The following working papers were delivered as part of the workshop “Religious Law, Local Practice, and Global Debates about Muslim Women’s Rights: The Politics of Consent,” organized by Professors Lila Abu-Lughod and Anupama Rao and held at Columbia University’s Global Center in Amman Jordan, April 9-10, 2011. This workshop was jointly sponsored by the Columbia University Center for the Critical Analysis of Social Difference (CCASD) and the School of International and Public Affairs’ initiative on Religion and International Affairs, through the Center for Democracy, Toleration and Religion, and with generous support from the Luce Foundation. Maya Mikdashi and Menna Khalil provided expert organization and editorial assistance. A workshop report and a full program are available on the CCASD website:

<http://www.socialdifference.org/events/womens-rights-muslim-family-law-and-politics-consent>

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# Interrogating “Consent” and “Agency” Across the Complex Terrain of Family Laws in India

Flavia Agnes

Interrogating competing legal frames for the adjudication of marriage – sacrament versus contract, the paper locates the trope of women’s rights within the politics of religion-based personal laws in colonial and post-colonial India. The comparative arc of the paper takes the focus away from the typical bifurcation of rights versus culture, and introduces important questions about the majority-minority political discourse, which impact discussions about women’s rights across time. The trend of confusing modernity with uniformity overshadows the post-colonial agenda of the nation-state and affects the ways in which women’s rights are projected. The paper problematizes the politics and discourses that influence the manner in which women’s rights are placed within a populist public domain.

The backdrop for this exploration is the theoretical premise that “contractual marriage” is firmly entrenched within modernity, while the “sacramental, status marriage” is associated with pre-modern feudalism in the context of European modernity. Within the new prescription for the legal order of marriage laid down by Henry Sumner Maine in 1861, “patriarchy” was perceived as synonymous with “status” and transformation of the old world into a new order was viewed as a movement from “status to contract.”<sup>1</sup>

While tracing the legal development of Hindu and Muslim marriage laws during the colonial period, the paper examines how the notion of the contractual marriage came to be firmly established as integral to the Islamic law or the *Sharia*, which invested Muslim women with an agency to negotiate their rights, both within marriage and for its dissolution, against the then prevailing notion of a “sacramental, status marriage” of Europe. However, as the Christian notion of the sacramental marriage reverberated with the ancient Hindu law or the *Smriti* law, it served to deprive upper caste Hindu women of their rights of negotiation. The colonial legal order failed to recognize the plurality of Hindu law and an element of agency within it, even while the English marriage laws were recast within the framework of “contract” in the latter half of nineteenth century. The attempt made by Hindu social reformers to “reform” Hindu marriage, basing it within the context of the developments in the English laws by introducing the notion of “age” to denote “consent,” an essential ingredient of the “contract,” failed to invest Hindu women with an “agency” to negotiate their rights within marriage. On the contrary, the new legal order introduced by the British served to strengthen local patriarchies by criminalizing the acts of Hindu women who strayed away from the Hindu fold, while at the same time recognizing the autonomy of

Muslim women to contract marriages of choice. Ironically, the contractual marriage under Muslim law, which invested Muslim women with autonomy, came to be devalued in the post-colonial period, with the assumption that Hindu law was more progressive, and that it was now Muslim women who needed protection. This set of associations serves to unsettle what we have come to expect about both – the “modernity” of Hindu law as well as tropes of cultural backwardness and gender inequality within the Muslim communities.

The distinctions between the two personal laws are further layered with another set of complications around the perceptions of female desire when it poses a challenge to the normative code of sexual expressions. While tracing the shifting ideologies around how Hindu and Islamic concepts of marriage came to be socially perceived, the paper implicates not only the state and community, but enters into a disconcerting zone by problematizing the hazards of feminist interventions. It foregrounds how in contemporary times, debates about age of and consent to marriage are located not merely within state and community controls but have also foreclosed questions of female desire and subjectivities for feminists in the context of marriages of choice of minors. It is within this backdrop that the paper examines how legal terms such as “age,” “consent,” and “agency” are rendered fluid and lend credence to prevailing social mores, thereby urging for a more nuanced framework of rights.

### **Contextualizing the “Personal Law” Regime in India**

The development of the personal law regime in India is intrinsically linked to the history of colonialism on the Indian subcontinent. In the early nineteenth century, community-based laws, which operated with some flexibility, were transformed into state-regulated “personal laws.” In order to apply “their” personal laws, the diverse and pluralistic communities had to be categorized along the religious binaries of “Hindu” and “Muslim.” A judicial system evolved on the model of English courts and English legal principles refashioned customary practices into linear and parallel systems of Hindu and Muslim personal law through a process of trial and error. The extent of legal interference in local practices depended on a variety of factors, both political and economic. Despite the assurance of non-interference in the religious beliefs of natives in the Queen’s Proclamation in 1858, when the administration shifted from the East India Company to the British Crown, the Hindu and Muslim family laws went through a great transformation during the later part of the colonial rule. The British interpretations of the ancient texts became binding legal principles and made the law certain, rigid, and uniform. The impact of the emerging judge-made law and its precedent-focused methodology as *stare decisis* was characterized by unprecedented rigidity.<sup>2</sup> The separate personal laws served to feed into the British policy of divide and rule by rendering Hindus and Muslims as separate and mutually hostile political constituencies. Ultimately, this resulted in partition of the country into two mutually antagonistic nations—India and Pakistan—at the time of independence.

The shadow of unprecedented violence and bloodshed clouded the debates in the Constituent Assembly in the post-independent period. The partition had brought in its wake an insecure and defensive Muslim minority that had to be reassured of their right to religious and cultural freedom within the new democracy that would be governed by the will of the majority. Hence the stipulation regarding enforcement of a uniform family law (Uniform Civil Code, or UCC for short) was placed in the section on Directive Principle of State Policy and not made into a fundamental and enforceable legal right. At the other end, the political impediment of the nation-building scheme necessitated reform of Hindu laws in order to bring the vast population of Hindus divided into castes, sects, and tribes under a uniform and state-regulated code that would inscribe upon them the authority of a secular state with power to legislate over family matters and interpret the sacred religious texts.<sup>3</sup> This political scheme, however, was mounted on the plank of women’s rights, while the sub-text of the reforms was nation building.<sup>4</sup>

Tensions between Hindu majority and Muslim minority continued to reverberate within the political

sphere in the post-independence period. While Hindu marriages were rendered monogamous through the process of codification during the first decade after independence, the continuation of Muslim Personal Law, which permitted polygamy and arbitrary *talaq*, along with the reluctance of successive Congress-led governments to enforce a UCC, came to be viewed by the Hindu majority as concrete evidence of the “Muslim appeasement” theory in both public perception, and judicial discourse. The 1985 *Shahbano* ruling,<sup>5</sup> which in the context of enforcing maintenance rights of a Muslim wife, made certain adverse comments against the Prophet and Islam while urging the government to enforce the UCC, resulted in a Muslim backlash. Within the communally vitiated political climate, the demand for UCC was used by Hindu right-wing politicians as a stick with which to beat the Muslim minority, and served to further fuel Hindu-Muslim tensions.

The demolition of a 450 year old mosque, the Babri Masjid, in 1992 by Hindu right-wing communal mobs, despite an assurance to the court to the contrary, and the country-wide riots that followed, caused a further rupture in Hindu-Muslim relationships. A decade later, the communal carnage in the State of Gujarat in 2002, which was symbolized by gruesome sexual violence against Muslim women, subsequently came to be marked as a moment of national shame causing a serious setback to the secular fabric of the country. Within this political climate, support for the UCC came to be construed as a betrayal of the cause of identity politics within minority communities and secular human rights groups.

It is against this backdrop of communal disharmony that I embark upon this journey of exploring the relationship between religious personal law, women’s rights within marriage, and the shifting meanings and uses of “consent.”

### Notions of “Consent” within Hindu and Muslim Marriage Codes

The ancient Hindu law (or *Smriti* law or the Brahminical law) of India viewed marriage as an essential *sanskara* (religious obligation). Marriage was mandatory to discharge the debt to one’s ancestors—the debt of begetting offspring. It was also essential for the performance of religious and spiritual duties. The sacrosanct marital bond was considered indissoluble and eternal. Consent of the parties was not an essential ingredient for the solemnization of marriage. As per the Brahminical traditions, a bedecked virgin bride was “gifted” to the bridegroom’s family. The act of gifting a bedecked bride to the groom along with gifts automatically relegates the bride giver to a lower social status as compared to the bride taker. Women were governed by a strict code of sexual purity. Virginity and chastity were valued possessions and in order to ensure the “purity” of the girl, child marriages became the norm.<sup>6</sup>

Drawing a comparison between Hindu and Muslim marriages, Paras Diwan comments that Hindus perfected the concept of *dan* (gift) and applied it to marriage alliances, symbolized by rituals such as *kanyadan* (*kanya* – virgin, *dan* - gift). Muslims, on the other hand, perfected the concept of sale and extended this concept to other social transactions including marriage.<sup>7</sup> Hence under the Muslim law, consent was pivotal, as reflected in the terms *ijab* (proposal) and *qabul* (acceptance), which were essential characteristics of a *nikahnama* (the contract of marriage). Minors were permitted to enter into these contracts with the consent of their guardians (*wali*), who had the authority to contract on their behalf. Conditions could be stipulated in the *nikahnama* as well as the pre-nuptial contract, *kabin-nama* to secure women’s rights.<sup>8</sup>

The next section illustrates how the premise of a contractual marriage enlarged the scope for protecting women’s rights, in contrast to the notion of *sanskara* under the Hindu law or even the feudal European/Christian notion of an indissoluble sacramental marriage.<sup>9</sup>

### Legal Precedents Emphasizing the Contractual Nature of Muslim Marriages

Some landmark rulings of the Privy Council and the various High Courts during the colonial period help

us to better comprehend the positive impact of the contractual nature of Muslim marriage and its divergences from the sacramental understanding of a Hindu marriage. These cases deal with a wide range of rights based on women's active agency such as validity of a pre-nuptial agreement, option of puberty, right to matrimonial residence, rights over separate property, enforceability of contractual obligations entered into for the benefit of a minor wife, validity of the delegated right of divorce, etc. These rulings not only safeguarded the rights of Muslim women, *but also served to expand the boundaries of matrimonial law in general.*

The *Moonshee Buzloor Ruheem v. Shumsoonisa Begum*<sup>10</sup> case, one of the earliest decided by the Privy Council, highlights the superior position of a Muslim wife over her property.<sup>11</sup> The wife had filed a suit to recover the properties misused by her husband. In retaliation, the husband filed for restitution of conjugal rights. The husband's suit was dismissed and the wife's suit regarding her claim to her property was decreed in her favor by the Calcutta High Court. Against this ruling, the husband appealed to the Privy Council. In 1867, while upholding the wife's claim, the Privy Council commented:

Distinction must be drawn between the rights of a Mohammedan and a Hindu woman. In all that concerns her power over her property, the former is, by law, far more independent, in fact even more independent than an English woman. There is no doubt that a Mussulman woman, when married, retains her dominion over her own property and is free from the control of her husband in its disposition. The Mohammedan law is more favourable than the Hindu law to women and their rights, and does not insist on their dependence upon and subjugation to the stronger sex.<sup>12</sup>

In *Badarannissa Bibi's case*, decided by the Calcutta High Court in 1871, the husband had entered into a pre-marriage agreement (*kabin-nama*) with his wife, authorizing her to divorce him if he remarried without her consent.<sup>13</sup> After a few years when the husband did remarry, the wife approached the court for redress. The trial court dismissed the wife's plea on the ground that Mohammedan law does not permit a wife to divorce herself upon a private agreement. At this juncture, an Islamic jurist, Moulvi Mahamat Hossein, represented the wife and pointed out the relevant sections from legal texts that specified the delegated power of the wife to divorce herself, and pleaded that such a provision is not repugnant to Mohammedan law. The court concurred with this view, reversed the trial court ruling and upheld the woman's right to divorce herself.

A later case of 1938, *Joygun Nessa Bibi v. Mahammad Ali Biswas*,<sup>14</sup> emphasizes the importance of consent under Muslim law and deals with other avenues available to a Muslim wife to dissolve her marriage, such as the Islamic principle of "option of puberty."<sup>15</sup> In this case, the wife filed for a declaration that her marriage was null and void and did not confer on her husband the right to conjugal relationship. She pleaded that in the alternative, even if the marriage was not declared void *ab initio*, the nuptial tie was dissolved by her exercising the delegated right of *talaq* bestowed upon her by the *kabin-nama*. She pleaded that she was barely 10-11 years old at the time of marriage and had not attained the age of puberty, though in the marriage register her age was falsely recorded as 15 years. The husband had violated the terms of the *kabin-nama* and hence she had exercised the right of divorce as per the stipulated terms. The husband denied the *kabin-nama*, and pleaded further that even if it could be proved, the terms of the *kabin-nama* were illegal and opposed to public policy, and hence not binding on the parties. The trial court ruled in the wife's favor, but the court of first appeal reversed the ruling and held that Joygun Nessa Bibi had attained the age of discretion, though not the age of puberty since she was above seven years of age, and that her father's consent to the marriage rendered it valid. Ironically the court also upheld the husband's contention that the terms of the *kabin-nama*, which permitted the wife to divorce herself, were against public policy.

It was held that since the father had given his consent by approving the bridegroom and settling the terms of *kabin-nama*, his consent was implied. The court commented that the father did not act as a guardian to circumvent the provisions of the Child Marriage Restraint Act.<sup>16</sup> However, even while upholding the validity of the marriage and disregarding the delegated right of divorce in the *kabin-nama*, the court held that the woman is

entitled to exercise the option of puberty (or repudiation of marriage) under Islamic law, and the marriage could be dissolved on this ground and set her free.

Under the English law of contract, a person who is not a party to a contract cannot enforce it even when she/he is a beneficiary. However, the Privy Council ruling of 1910 in *Khwaja Mohammed v. Husseini Begum*<sup>17</sup> laid down a new principle for enforcing the contracts, which was a departure from the established norms of English law, and took into consideration the cultural reality of India. The Privy Council laid down a new precedent by upholding a minor girl's right to enforce a contract against her father-in-law, even though she was not a party to it. The facts of the case make for interesting reading. In 1877, on the occasion of the marriage of his son, the father-in-law executed an agreement that he would pay the daughter-in-law Rs.500/- per month as *kharch-i-pandan* (an allowance for personal expenses) in perpetuity. Thirteen years later when the couple was separated, the wife sued her father-in-law for arrears. The trial court refused to enforce the agreement and held that "It is unreasonable to suppose that the wife can enforce her contract against her father-in-law, even when she refuses to live with her husband. To hold so would be repulsive to conscience and common sense." Moreover, the Court also cast aspersions on the woman's character. In appeal, the Allahabad High Court decreed in the wife's favor and held that no condition had been attached to the payment of the annuity and the chastity of the wife was not an issue under the agreement.

While upholding this ruling, the Privy Council commented: "*Kharch-i-pandan*, which literally means "betel box expenses," is a personal allowance to the wife, customary among Mohammedan families of rank, fixed either before or after the marriage. When they are minors, as is frequently the case, the arrangement is made between the respective parents or guardians on behalf of minors. Hence serious injustice will be caused if the common law doctrine is applied to agreements entered into in connection with such contracts."

*Noor Bibi v. Pir Bux*<sup>18</sup> occurred at an important juncture of the political history of India. The *Sharia* had been established as the law of the Indian Muslims through the Application of the *Sharia Act of 1937*.<sup>19</sup> The right of a Muslim wife to dissolve her marriage was codified and she had obtained a statutory right to divorce through the enactment of the *Dissolution of Muslim Marriages Act of 1939*. Hindu law was yet to be codified, however, and the debate over codification was raging among the nationalist Congress leaders. The significance of this case also lies in the fact that it was decided by an Indian judge, the renowned Islamic jurist and the great modernizer, Justice Tyabji, who was Chief Justice of the High Court of Sindh in 1950, in post independent India, rather than during the Victorian era when colonial officers were struggling to come to terms with the principles of Islamic Family Law. Distinguishing the Islamic Family Law from the Hindu tradition of sacramental marriage, the court held:

The Muslim marriage differs from the Hindu marriage in that it is not a sacrament. A Muslim marriage is a covenant by which the parties enter the state of marriage. The parties are permitted to stipulate the conditions upon which they will do so, provided the conditions are not illegal according to Muslim law. The subsistence of the marriage confers certain essential rights and imposes certain duties upon the parties. When a husband and a wife have been living apart, and the wife is not being maintained by the husband, a dissolution is permitted not as a punishment for the husband who had failed to fulfill one of the obligations of marriage, or allowed, as a means of enforcing the wife's rights to maintenance. In the Muslim law of dissolution, the failure to maintain, when it continues for a prolonged period, is regarded as an instance where a cessation has occurred. It will be seen therefore that the wife's disobedience or refusal to live with her husband does not affect the principle on which the dissolution is allowed.

These judgments highlight the fact that under Muslim law, "consent" and "agency" of the woman while contracting the marriage and negotiating her rights appear to have been of great significance. The legal framework of contract enabled Muslim women to include several economic rights in the marriage contract. The British courts were constrained to give validity to these principles of contractual obligations in a marriage, despite

their being at odds with the established principles of both the Hindu and the English law of marriage, which did not recognize the notion of a “marriage contract.”<sup>20</sup> Conversely, the sacramental and indissoluble character of a Hindu marriage was invoked to deny Hindu women an agency, which placed them at a disadvantageous position as compared to Muslim women of the corresponding period.

### **Introducing “Age” as an Embodiment of “Consent” under the Hindu Law of Marriage**

If “consent” was being contested and redrawn in legal battles under the Muslim law, a similar set of challenges to Hindu family law was unleashed by Hindu social reformers of the nineteenth century who invoked “age” as an embodiment of a modernist and liberal theory of marriage.

The restraint upon child marriage appeared to be the symbolic space through which the notion of “consent” could be introduced into Hindu marriage using the premise of Western liberalism. Hence one of the earliest reforms introduced after the power of administration was transferred from the Company to the Crown in 1858 was the Age of Consent Act of 1860, which stipulated a minimum age of 10 years for sexual intercourse in order to prevent infant marriages. Sexual intercourse with a girl below this age could be construed as rape.

The inadequacy of this legislation was highlighted in the Phulmonee case, *Queen Empress v. Huree Mohan Mythee*,<sup>21</sup> where a child of 11 years died due to the injuries caused to her during forcible sexual intercourse by her husband. But the husband could not be convicted for rape since he had a legal right to sexual intercourse with his wife, who was above the age of 10. This incident became the focal point for galvanizing public opinion to demand raising the age of consent to sexual intercourse from 10 to 12 years. The conservative factions opposed this demand on the ground that it would violate the religious dictate of pre-puberty marriage, through which the chastity of the bride could be ensured. However, the public uproar against the verdict finally led to the enactment of the Age of Consent Act of 1891, which increased the age of consent from 10 to 12 years.

This was a significant victory that disrupted the sacrosanct space of Hindu marriage by symbolically equating “age” with “consent” as a means of ensuring equality between the spouses.<sup>22</sup> However, as Tanika Sarkar has argued, the definition of Hindu marriages as sacrament allowed the Hindu conjugality to remain a “family affair.”<sup>23</sup>

The ‘*Rukhmabai*’ case, which was decided by the Bombay High Court in 1885, brought Hindu conjugality (and the attendant contestations around “consent”) into the public domain. Questioning what was assumed to be natural, she offered a subversive model of assertion, as a desiring individual, in a terrain dominated by family, community, and imperial notions of justice and governance.<sup>24</sup> By refusing to acknowledge a husband’s “conjugal right,” she foregrounded questions of individual agency and desire. While increasingly, “age” was used as a substitute to the slippery question of female desire and “consent” through a convergence of Hindu and English legal principles, Rukhmabai was denied the options which a Muslim woman could avail herself of, such as the “option of puberty” within the notion of a contractual marriage of the Anglo-Muhammedan law.<sup>25</sup>

In a case for restitution of conjugal rights filed by her husband, in 1885 Justice Pinhey of the Bombay High Court had declined to pass a decree in his favor, declaring that since conjugality had not been instituted, the question of granting the relief of “restoring conjugality” did not arise.<sup>26</sup> The ruling met with opposition from the traditionalist lobby among the Hindu nationalists known as revivalists, who viewed the judgment as an interference in the sacrosanct arena of Hindu conjugality and as a breach of the assurance of non-interference given in the Queen’s Proclamation. For the modernist segment known as reformers, the intervention of the English courts and importing of western notions of liberalism was an armor in their campaign against archaic Brahminical traditions and a step towards modernizing Hindu family relations by foregrounding “age” as a symbol of “contract” and “consent.”

The litigation, the judgment, and the controversy that followed were each laden with ironies. The husband's case was trumpeted by the traditionalists and it is with their support that he had approached the English courts, rather than the traditional non-state adjudication fora such as the caste panchayat for the remedy of restoring his *Hindu* conjugality. Within both the traditional *Smriti* law governing the upper castes as well as the pluralistic customary law governing the lower castes, relief for the restoration of conjugality was non-existent and the husband could not obtain any relief in this sphere. In addition, the parties in the Rukhmabai case belonged to the lower caste (carpenter caste), which recognized the right of the wife to dissolve her marriage (a right denied upper-caste women). Most importantly, Justice Pinhey had declined the relief on the ground that it was an outdated medieval Christian remedy under the English law and argued that the Hindu law did not recognize such a barbaric custom!

However, in the highly politicized climate, these subtle legal points were made invisible. Succumbing to the political pressure, in the following year, the Appellate Bench presided over by Chief Justice Sir Charles Sergeant ruled in favor of the husband and rejected the argument that there was no authority for a decree for "institution" of conjugal rights under Hindu law, commenting: "The gist of the action for restitution of conjugal rights is that married persons are bound to live together. Whether the withdrawal is before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed."<sup>27</sup> The verdict served to subvert the element of consent and agency that Rukhmabai had introduced into the domain of Hindu conjugality.

Raising the age from 10 to 12 through the Age of Consent Act of 1891 did not resolve the issue of child marriage and the debate continued well into the twentieth century. The women's organizations that were formed around this time, with a focus on women's health and education, supported the demand raised by social reformers for a law restraining child marriage. Finally the Child Marriage Restraint Act (CMRA) was enacted in 1929, raising the minimum age of marriage to 14. The Act imposed a punishment on parents and husbands for arranging, contracting, performing, celebrating, and participating in child marriages, but did not invalidate child marriages performed without consent of the parties. The status of Hindu conjugality as a sacrament did not permit the young girls, who were married while they were minors, to repudiate their marriage upon attainment of puberty.<sup>28</sup> While the CMRA attempted to raise the age of marriage, it did not attempt to introduce an element of consent within the sacramental notion of a Hindu marriage. Hence while age became synonymous with sexual maturity, it did not foreground the active sexual agency of women within marriage. The concern was only to protect a young girl from the physical harm caused by sexual intercourse and pregnancy at an early age, not to alter the character of Hindu marriage from sacrament to consensual contract. This formulation viewed women as passive sexual partners. Hence, despite the reforms, the question of consent with regard to Hindu marriages remained unaddressed.

### **Conversions to Islam: An Illusory Escape Route**

In contrast, conversion cases help us to invest Hindu, and other women with active sexual agency, since they appear to have used conversion as an astute legal strategy to escape from the rigidity of status marriages and to contract marriages of choice.

Apart from the grounds for divorce discussed earlier, Muslim women could also use apostasy as a ground to dissolve their marriages. A change of religion automatically dissolved their previous marriage, hence when they married men from the new religion they could not be convicted for bigamy. Hindu women used this strategy on a mistaken assumption that conversion to Islam provided them the only escape route to rid themselves of an unwanted marriage. Since the Islamic law of marriage was based on the notion of consent, it appeared possible for women converting to Islam to also avail themselves of this option. They believed that apostasy *ipso facto* dissolved their previous marriages as was the case with Muslim women. The case law however, renders their

belief a fallacy. Colonial state power seemed to collude with native patriarchies to deny women their autonomy. The women became liable for criminal prosecution under the newly enacted Indian Penal Code of 1860 on the basis of complaints filed by their husbands from the previous marriage, and they were convicted.

In an early case of 1870 it was held that the fact that a woman believed that her marriage dissolved upon conversion was held to constitute insufficient defense. The court took this into account, however, and awarded her a lenient punishment by reducing the six months of rigorous imprisonment awarded by the trial court to three months of simple imprisonment. But later in 1895, in *Ram Kumari*<sup>29</sup> the Calcutta High Court upheld the conviction of a Hindu woman married according to Hindu rites who had converted to Islam and had married a Muslim man. The court explained that the proper course for the woman was to file a declaratory suit under the Mohammedan law, which was her personal law after conversion, give notice to her former husband, and obtain a declaratory decree from the court that her earlier marriage was dissolved upon conversion and that she was now competent to remarry. Since she had failed to adopt this course, her original marriage performed under the Hindu law remained valid and she became liable for prosecution under the provision of bigamy. In a subsequent case decided by the Madras High Court, the court went further and declared that the children of such unions are illegitimate.<sup>30</sup>

In 1919, in *Emperor v. Mt. Ruri*,<sup>31</sup> a Christian wife renounced Christianity, embraced Islam, and married a Muslim. The session's court acquitted the woman on charges of bigamy on the ground that on conversion, the first marriage was automatically dissolved. In Appeal, the High Court invoked the principle upheld in *Ram Kumari* and convicted the woman on the ground that conversion did not dissolve the first marriage solemnized as per the Christian law, and held the subsequent marriage bigamous. The sacramental status of her previous marriage continued even after conversion, and the woman was not free to contract another marriage of her choice as per Islamic principles.

In *Rabasa Khanum v. Khodadad Bomanji Irani*,<sup>32</sup> the same principle was applied to a Parsi woman who had converted to Islam. While the principles of English law of marriage could not be applied to a Parsi marriage, the Bombay High Court, in 1947 invoked principles of English common law—justice, equity and good conscience—in convicting the woman for bigamy. Thus it appeared that there was no escape route for women from other communities.

These complex and multiple contests over marriage and conversion draw our attention to the consistent efforts made by women to dissolve their status marriages through agentive action. However, these could effectively be countered by husbands aided by the newly enacted penal provisions of the criminal law. One can clearly see a convergence between indigenous and colonial law and the reworking of a new and modern patriarchy that endorsed and even perpetuated inequality in gender relations. For the women, conversions were a way of exercising consent in matrimonial relations, albeit in a convoluted manner. But the courts continued to view all marriages, other than Muslim marriages, as sacramental status marriages, and did not concede to women the agency to exercise the choice of conversion to dissolve their marriages.

### **“Consent” and “Agency” under the Codified Hindu Law**

The *Hindu Marriage Act* (HMA) enacted in 1955 was the culmination of a sustained struggle: its major outcome was that upper caste Hindu women acquired an equal right of divorce on the same footing as their husbands. Though the Act retained the sacramental aspects and recognized ritual solemnization of Hindu marriage, it rendered Hindu marriages contractual and dissoluble unions between two consenting adults, following the developments under the English law. It provided for dissolution of marriage under certain stipulated conditions through a judicial decree. Capacity to marry and essential ceremonies of marriage became necessary ingredients of a valid Hindu marriage. A marriage in contravention to these stipulations could be

declared as void, a clear departure from the sacramental character of the Brahminical Hindu marriage code.

Despite this, the Hindu Marriage Act could not rid itself from the premise of male patriarchal privileges as the courts continued to embed the “Lord and Master” theory within contractual Hindu law, undermining a woman’s right to determine the choice of her marital home, or even retain a job against her husband’s wishes. The courts validated the husband’s rights to conjugality by introducing feudal concepts of obedience into the modernized and codified Hindu law. If the woman was employed at a place away from the matrimonial home, the husband could claim restitution of conjugal rights against the wife. For decades after its enactment, in a series of decisions, the courts held that Hindu marriage was a sacrament and it was the sacred duty of the wife to follow her husband and reside with him wherever he chose to reside, even when the wife was gainfully employed at a place away from the matrimonial residence and contributing to the family income. Husbands often used the legal ploy of “restoring conjugality” in order to spite the women.

The 1977 Full Bench ruling of the Punjab and Haryana High Court in *Kailash Wati v. Ayodhia Parkash*,<sup>33</sup> which followed several other similar rulings of the sixties and seventies, exemplifies this trend. The wife was employed prior to the marriage but after seven years of marriage, the husband asked the wife to resign her job. Upon her refusal to do so, he filed for restitution of conjugal rights. The wife pleaded that while prepared to honor her matrimonial obligations, she was not prepared to resign her job. Granting the decree in the husband’s favor, the High Court held that “According to Hindu Law, marriage is a holy union for the performance of marital duties with her husband wherever he may choose to reside and to fulfill her duties in her husband’s home. The wife’s refusal to resign her job amounts to withdrawal from the husband’s society.”

In a subsequent case, where the wife had challenged the decree of restitution granted to the husband, the Delhi High Court upheld the constitutional validity of the provision and held: “Introduction of constitutional law within the home is most inappropriate. It is like introducing a bull in a china shop. It will prove to be a ruthless destroyer of the marriage institution. In the privacy of the home neither Article 21 (Right to Life) nor Article 14 (Right to Equality) have any place. In a sensitive sphere which is most intimate and delicate, the introduction of the cold principles of constitutional law will have the effect of weakening the marriage bond.”<sup>34</sup>

Through this ruling the court deprived Hindu women the right to both equality and dignity, by denying them the agency to withhold their consent to forced sexual intercourse within marriage.

During the debate over reforms in Hindu Family Laws, opposition to reforms from conservative forces was effectively countered by foregrounding the urgency of granting rights to Hindu women who lacked basic rights to divorce and property, as compared to women from other minority communities. At this juncture, the Muslim law, which granted women these rights, was perceived as modern, progressive and pro-women. The contractual nature of Muslim law characterized by the notion of consent became the defining feature of post-colonial Hindu law reforms. Ironically, in later decades during the Hindu right wing onslaught against Muslims, the Muslim personal law came to be projected as pre-modern, obscurantist and anti- women.<sup>35</sup> It is against this background of stereotyping Muslim women as legally disempowered that one must examine the contest between “age” and “consent” within the codified Hindu Marriage Act.

Despite consent being integral to both Hindu and Muslim marriage laws, the common practice followed by communities in India continues to be arranged marriages<sup>36</sup> within the confines of caste, class, and religion.<sup>37</sup> The consent of the contracting individuals is more implied than explicit.

While child marriages continue to prevail, the concerns raised during the nineteenth century reformist movement are no longer valid. A shift in perspectives must take place and the contemporary concern over child marriage ought to be located within socio-economic factors such as extreme poverty among the urban and rural poor, lack of resources and access to education of girl children, the fear of rape and sexual abuse of young unmarried girls within urban slums, etc. rather than merely as a dictate of Brahminical patriarchy.

This paradigm shift enables us to examine this social evil in a nuanced manner, rather than branding it merely as a product of patriarchy. Examining child marriages within the prism of Brahminical patriarchy constrains us to view the malaise merely as a social evil based on feudal traditions and obviates the class equations, which underlie these practices. Though these communities were not the focus of attention at the time when the debate over the age of consent was first initiated in the nineteenth century, it is the Dalits and other backward castes, tribes and poor Muslims who are the target of the contemporary anxiety over child marriage. Among the lower castes, adult marriages of women were the norm and remarriage of widows was also accepted. However such progressive practices succumbed to the pressures of imitating upper castes.<sup>38</sup> Penalizing the poverty stricken families for performing child marriages appears to be a travesty of justice. Given these complexities, increasing the socio-economic standards and providing better educational and health care facilities to these families seems to be the only way through which the problem of child marriage can be tackled.<sup>39</sup>

The denial of agency becomes even more evident while examining the issue of marriages of minors. Though the prescribed age of marriage under HMA in 1955 was 15 for girls and 18 for boys, minority did not provide a defense against a suit for restitution of conjugal rights. Neither could a marriage solemnized against the wishes of the girl while she was a minor be dissolved upon her attaining majority. This discrepancy within the law denied women the agency to contest the validity of the marriage contracted when they were minors. This was evident in *Premi v. Daya Ram*<sup>40</sup> a suit for restitution of conjugal rights filed by a husband.<sup>41</sup> Even when the husband was much older than the girl, as in *Naumi v. Narotam*,<sup>42</sup> the courts declined to invalidate the marriage. These cases confirm that even after codification, Hindu law could not rid itself of the association of marriage as sacrament, thus denying to women essential features of a marriage – contract, consent, and agency.

It is only after the 1978 amendment to the Hindu Marriage Act in 1978 that we can discern “consent” being incorporated into the Hindu law through adoption of the Islamic concept of “option of puberty” according to which a girl who was married while she was a minor under 15 could repudiate her marriage upon majority. The remedy of a divorce by mutual consent was also introduced at this juncture and grounds of obtaining divorce were liberalized to include cruelty and desertion. Since age was perceived to be synonymous with consent, the age of marriage was increased from 15 to 18 for girls and from 18 to 21 for boys, and the CMRA was accordingly amended.

While superficially this may appear to be beneficial to women, the flipside of this amendment was to criminalize an even larger number of marriages by bringing them within the ambit of child marriage, resulting in a skewed statistical profile. Thus the premise that “age” is synonymous with “consent” needs to be problematized, since raising age of consent has ironically resulted in criminalizing a large number of marriages of choice and in exerting greater family, community, and state control over young women, a point I will return to later.

At another level, in cases where a young wife is abandoned and approaches the courts for maintenance, the plea of “minority” is advanced by husbands to invalidate marriages and to escape the liability of paying women maintenance. Here the courts have been firm and have ruled that minority does not invalidate the marriage.<sup>43</sup>

### **Interrogating “Consent” and “Agency” within Juridical and Feminist Discourses over “Elopement Marriages”**

In this concluding section, I examine how “age” is pitted against “agency” in the context of elopement marriages within the current political climate of religious and caste hostilities, in a complete turn-about from the manner in which child marriage was first articulated by nineteenth century reformers.

The term “elopement marriages” is used for marriages contracted without the consent of the respective parents. At times the girls are below the permissible age of marriage, and at other times they are projected as minors by their parents in order to invoke the state power by using the provisions of the Child Marriage

Restraint Act (CMRA). The discussion on elopement marriages brings to the fore ways in which multiple social subordinations—caste, region, religion—intersect with patriarchy in order to hone in the sexual choices of defiant young women within established social mores. It appears that choice, or desire, as expressed by a woman is somehow intrinsically illicit when it is against parental diktat and caste or community norms, and therefore needs to be contained and controlled.<sup>44</sup>

From conversion marriages to elopement marriages, women who exercise active agency to defy convention pose a threat to the established social order and hence need to be confined by reframing consent itself. In this discourse, “consent” assumes a different dimension and gets embedded in assumptions about rational choice and parental authority, rather than choices made by women themselves. While this is problematic, even more problematic is the way in which feminist discourse engages with notions of age, agency and consent when there is a rupture between these terms.

The situation becomes precarious when an upper caste girl elopes with a lower caste boy or when a Hindu girl falls in love with a Muslim boy, transgressing the boundaries of Hindu upper caste dictates of purity and pollution. In a strictly stratified society, ridden with prejudices against lower castes and minorities, a young couple who dares to cross the boundaries is severely punished. At times the price for choosing a partner would be public humiliation or a gruesome murder. The notion of women as sexual property of their communities is deeply ingrained.<sup>45</sup>

The *Rizwanur-Priyanka* case of Kolkata in 2007, where the police played an active role in separating the legally married upper class Hindu girl from a Muslim boy belonging to the lower social strata, is one such glaring instance. Priyanka’s rich and influential family was able to draw the police into an active alliance. Rizwanur’s subsequent death is officially a suicide, but believed by many to be a murder carried out in collusion between Priyanka’s father and the police. The then Police Commissioner of the city justified the involvement of the police in separating the couple as a normal and routine affair! A complex network of connections among the state, political parties, public institutions, business and the underworld were implicated in this regulative mechanism. Thus, marriage as a means of crossing community boundaries—by conversion or interfaith marriages – remains a volatile political issue.<sup>46</sup>

One way of regulating such defiant behavior by young women is to invoke the provisions of the seemingly progressive statute, the CMRA. Its provisions are invoked more often to prevent voluntary marriages and augment patriarchal power than to pose a challenge to it. Hence, when child marriages are performed by families and communities, the provisions of this statute are seldom invoked. The patriarchal bastions are too strong and well fortified for a modernist feminist discourse to enter and change social mores through legal dictates. The only sphere in which these provisions come into play is when “elopement” marriages contracted against the wishes of the respective family members and defying norms of endogamy and exogamy bring into sharp focus the vagaries of the term, “consent.” For the authorities, lack of age becomes synonymous with lack of agency to express sexual desire and bodily pleasure.

This raises some new and challenging questions for a feminist discourse. Firstly, is it possible to place “consent” on a superior plane when there is a disjuncture between “age” and “consent” invoking the notion of “agency” which gets operational during elopement marriages? Secondly, does the response of a conservative institution such as the judiciary tend to be more nuanced and pro-women than the feminist demand for declaring elopement marriages as void when such marriages contravene the stipulation of age despite a visible display of consent and agency? And thirdly, will invoking the Islamic notion of “age of discretion” rather than merely “age of majority” aids the defiant young women who challenge patriarchal authority, while exercising unconventional sexual choices?<sup>47</sup>

Usually, an eloped couple is tracked and taken into custody by the police under parental pressure. The provisions of CMRA are invoked to exert pressure on the girl and a criminal case of rape and kidnap is foisted

upon the boy since sexual intercourse, even with the consent of a minor girl under the age of 16, constitutes statutory rape. In order to criminalize the choice, even major girls are projected as minors, lacking the agency to consent to marriage or the sexual act. Despite being aware of the fact that it is a marriage of choice and voluntary elopement, the police collude with the fathers to protect patriarchal interests and community “honor.” Only if the girl is able to provide clear and unequivocal proof of her majority is she allowed to accompany her husband and cohabit with him. Or else, the father’s word regarding her age is accepted and she is reverted back to his custody. In cases where the girls vehemently refuse to return to their parental home, they are placed in protection homes until they are majors. Even thereafter the girls are not automatically released and the husbands are compelled to initiate costly and protracted litigation to release them from state custody. The state authorities decline to examine the element of “consent” and merely adhere to the prescription of “age” when determining the legal status of these marriages.

These cases come to the notice of the higher judiciary when the remedy of *habeas corpus* meant to curb abuse of state (police) power against innocent citizens is invoked by husbands for production of their wives in court, retained illegally by parents. Sensitive judges have viewed these petitions as symptomatic of a changing social order, and have advised the parties to avail of counseling to resolve the dispute rather than applying the stringent provisions of criminal law.<sup>48</sup> In some cases, upholding the wishes of the minor, the courts have permitted the girl to accompany her husband, even against the parental wishes as the following cases reveal.

In *Manish Singh v. State (NCT Delhi)*,<sup>49</sup> in a *habeas corpus* writ petition filed by the husband of a minor girl, the Delhi High Court held that marriages solemnized in contravention of the age are not void. The court commented that the legislature was conscious of the fact that if such marriages are rendered void, it could lead to serious consequences and exploitation of women. The girl had deposed that she had married out of her own will and was desirous of living with her husband. The court ruled that once a girl or a boy attains the age of discretion and chooses a life partner, the marriage cannot be nullified on the ground of minority and that it is not an offence if a minor girl elopes and gets married against the wishes of her parents.

In *Sunil Kumar v. State (NCT Delhi)*,<sup>50</sup> wherein the father had confined the girl illegally, it was held: “If a girl of around 17 years runs away from her parents’ house to save herself from their onslaught and joins her lover or runs away with him, it is no offence either on the part of the girl or on the part of the boy.” The girl was not willing to return to her parents, who were not amenable to any reconciliation and wished to sever all relationship with her.

In *Kokkula Suresh v. State of Andhra Pradesh*,<sup>51</sup> the Andhra Pradesh High Court reaffirmed that the marriage of a minor girl below 18 years is not a nullity and the father cannot claim her custody. In *Ashok Kumar v. State*,<sup>52</sup> the Punjab and Haryana High Court commented that couples performing love marriage are chased by police and the relatives, often accompanied by musclemen and cases of rape and abduction are registered against the boy. At times the couple faces the threat of being killed and such killings are termed as honor killings.

These judgments, which restrain the police from performing arbitrary actions such as forcing women into the protective custody of the state, serve as a benchmark for a liberal interpretation of constitutional safeguards of personal liberty and individual freedom. For instance, in *Payal Sharma alias Kamla Sharma v. Superintendent, Nari Niketan, Agra*,<sup>53</sup> the Allahabad High Court rejected the father’s contention that the girl was a minor and instead accepted the woman’s own contention that she was a major, declaring that she has a right to go anywhere and live with anyone. The court commented: “In our opinion a man and a woman, even without getting married can live together, if they wish. This can be regarded as immoral by society but it is not illegal. There is a difference between law and morality.”

These judicial pronouncements have been criticized by some women’s organizations on the ground that such a lax attitude towards child marriage on the part of the judiciary would be instrumental in increasing the incidents of child marriage in the country. This led to a renewed campaign to render child marriages void and

for compulsory registration of marriages to curb the malaise of child marriage. In response to these demands, the CMRA was amended in 2006, but once again, the state in its wisdom, declined to render them “void” but merely voidable at the option of a contracting party. Challenging this, Writ Petitions were filed by statutory bodies such as the National Commission for Women for declaration of a uniform age of marriage (which is 18) and sexual intercourse (which is 16) and for declaring all under-age marriages as void. These are pending before the Supreme Court.

The feminist argument that “the institution of patriarchy operates in the name of culture for justifying child marriage of young girls” is put into question when we examine the agency that a young girl expresses in an elopement marriage.<sup>54</sup> Here the legal provision becomes a weapon to control sexuality and curb marriages of choice. Even though the criminal provisions regarding kidnapping and statutory rape appear to be protecting minor girls, these provisions are aimed at augmenting the patriarchal parental power over the minor girl. There are no exceptions in the laws on abduction and kidnapping that allow a minor to opt out of guardianship, or to leave her parental home on grounds of domestic abuse and neglect.<sup>55</sup> The use and abuse of police power, at the instance of parents with regard to marriages of choice, works in direct contrast to women’s autonomy, agency, and free will.

These developments raise complex legal questions— since the girls were minors, were they juridical persons invested with the agency to exercise free choice and would the consent given by them to the marriage be deemed as legally valid? At times, judges, with a concern for social justice, have resolved the issue by resorting to basic principles of human rights in order to save the minor girls from the wrath of their parents and from institutionalization in state-run protective homes. The only way they could do so was by upholding the validity of these marriages by bestowing on the minor girls an agency and by distancing the notion of “age” from “consent.”

On examining these judgments through the prism of women’s rights, could these judicial interventions in aid of minor girls be termed as regressive and the demand by women’s groups to declare these marriages as null and void be termed progressive? Could the curbing of the freedom of these minor girls to express their sexual choices by their natal families with the aid of the mighty power of the state within a sexually repressive society be termed as a progressive intervention and a challenge to patriarchy?

It is important that contemporary feminist discourse become far more nuanced than what one can discern through the recent campaign against child marriages. Rather than blindly advocating a universally accepted position framed by a First-world feminist discourse, women’s rights groups need to advance a position rooted within Third-world realities, contextualized within the urban-rural divide, and responsive to other social realities such as caste prejudices and communal conflicts. In conclusion, I urge that feminist voices lend credence to the claims of the weak against the might of *status quo*-ist institutional authorities. The agency exercised by a young teenaged girl and her voice of protest against the dictates of patriarchy would need articulation and support. The claims of feminist jurisprudence lie within this complex tapestry.

## Acknowledgments

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## Notes

- 1 Several western feminist legal scholars have questioned whether marriages were ever transformed into “pure” contracts between equals, as earlier vestiges of servitude lingered on and marriages continued to be patriarchal strongholds reinforcing male power. See Carole Pateman. *The Sexual Contract*, Stanford: Stanford University Press, 1988; Martha, Albertson Fineman. *Illusion of Equality*, Chicago: The University of Chicago, 1991; Susan Moller Okin. *Justice, Gender And The Family*, New York: Basic Books, 1989. This change from feudalism to capitalism and from “status” to “contract” took place at the height of colonialism, and was transported into the colonies through the newly established legal order. This was meant to usher in “modernity” and pave the way for capitalist economies. But the patriarchal biases framed within unequal marriage “partnerships” of the colonial legal order served to strengthen local patriarchies as the *Rukhmabai* case discussed later reveals.
- 2 Lucy Carroll has argued, the linear mould into which fluid customary practices were recast as per the Brahminical norm resulted in loss of rights of lower caste widows to property inheritance after remarriage. Lucy Carroll, “Law, Custom and Statutory Social Reform: The Hindu Widow’s Remarriage Act of 1856,” in *Women in Colonial India: Essays on Survival, Work and State*, ed. J. Krishnamurthy, Delhi: Oxford University Press, 1989.
- 3 D.J.M. Derrett. *Religion, Law and the State in India*, New Delhi: Oxford University Press, 1999.
- 4 Archana Parashar. *Women and Family Law Reform in India*, New Delhi: Sage Publications, 1992.
- 5 *Mohd Ahmed Khan v. Shahbano Begam*, All India Reporter 1985 Supreme Court 945.
- 6 The lower castes, which did not follow the Brahminical law, were not governed by this dictates and hence marriages among them were more egalitarian as the communities did not practice child marriage and the custom of dowry. They followed the tradition of ‘bride price’ and women had the right to divorce and remarriage.
- 7 Paras Diwan. *Muslim Law in Modern India*, Allahabad: Allahabad Law Agency, 1993, 6<sup>th</sup> Ed., 52-3.
- 8 A.A.A. Fyzee. *Outlines of Muslim Law*, New Delhi: Oxford University Press, 1974, 4<sup>th</sup> Ed., 125.
- 9 Flavia Agnes, “Women, Marriage, and the Subordination of Rights” in *Community, Gender and Violence, Subaltern Studies Volume XI*, eds. Partha Chatterjee and Pradeep Jeganathan, New Delhi: Permanent Black, 2000.
- 10 11 Moore’s Indian Appeals 551 (1867).
- 11 After the new legal order was introduced in 1860 when the power to administer India was placed under the direct rule of the British Parliament and Privy Council became the final authority of adjudication with its decisions binding on the High Courts in India.
- 12 Ibid.
- 13 *Badarannissa Bibi v. Mafiattala*, (1871), 7 Bengal Law Reporter 442.
- 14 All India Reporter 1938 Calcutta 71.
- 15 This provision was subsequently incorporated into the Hindu law through an amendment in 1976.
- 16 This Act will be discussed later.
- 17 (1910) 37 Indian Appeals 152.
- 18 All India Reporter 1950 Sindh 8.
- 19 While there is continuity between this judgment and the principles upheld in the earlier judgments, Justice Tyabji draws a clear distinction between Hindu and Muslim Family Law jurisprudence, placing Muslim law on a higher plank.
- 20 For instance, under the marriage law then prevailing in England, under the Blackstonian principle of covertures, a woman lost her right over property upon marriage and she had no right to contract. In fact after marriage, she lost her right to be a “person.”

- 21 (1891) Indian Law Reporter 17 Calcutta 49.
- 22 Even as Hindu law was reified as traditional, thereby reducing the flexibility of local custom and modes of adjudication, the act of colonial codification staged a conflict between reformers and revivalists, who responded to the efforts to modernize/codify Hindu law very differently.
- 23 Tanika Sarkar, "Rhetoric Against Age of Consent," *Economic and Political Weekly*, Vol. 28, No. 36, 1993:1869-78.
- 24 Sudhir Chandra. *Enslaved Daughters*, New Delhi: Oxford University Press, 1998, 1.
- 25 See *Joygun Nessa Bibi* discussed in the preceding section.
- 26 *Dadaji Bhikaji v. Rukmabai*, (1885) Indian Law Reporter 9 Bombay 529.
- 27 *Dadaji Bhikaji v. Rukmabai*, (1886) Indian Law Reporter 10 Bombay 301.
- 28 This option was made available to Hindu women only in 1978 through an amendment to the Hindu Marriage Act of 1955.
- 29 (1895) Indian Law Reporter 18 Calcutta 264.
- 30 *Budansa Rowther v. Fatima Bibi*, All India Reporter 1914 Madras 192.
- 31 All India Reporter 1919 Lahore 389.
- 32 All India Reporter 1947 Bombay 272.
- 33 (1977) Indian Law Reporter 1, Punjab & Haryana, 642 Full Bench.
- 34 *Harvinder Kaur v. Harminder Singh*, All India Reporter 1984 Delhi 66.
- 35 See the comments in the *Shah Bano* ruling in 1985 discussed earlier.
- 36 Marriage proposals would be settled by elders of the respective families.
- 37 In modern times dowry has become an integral part of marriage negotiations both among Hindus and Muslims. The constant demand for dowry even after marriage and the subsequent murder or suicide by married women has become a cause of deep concern, leading to introduction of penal provisions to curb this evil practice.
- 38 Due to the process of sanskritization and Hinduization in the intervening years, many communities have started adopting upper caste Hindu practices. M.N. Srinivas. *Caste in Modern India and Other Essays*, Bombay: Media Promoters & Publishers, 1962, Republished 1986.
- 39 S. Singh, Nikhil Dey, and Aruna Roy, "Child Marriage, Government and NGOs," *Economic and Political Weekly*, Vol. 29, No. 23, 1994:1377-9.
- 40 All India Reporter 1965 Himachal Pradesh 15.
- 41 The wife contested the validity of her marriage on the grounds that she was under the prescribed age of marriage. But the court rejected her plea on the ground that a marriage contracted when a girl is minor is not void. The court explained that though such marriages are discouraged by society and law, the evil of child marriage was deep-rooted, and declaring such marriages void would result in unfortunate consequences and unnecessary hardship to the parties.
- 42 All India Reporter 1963 Himachal Pradesh 15. In this case, a thirteen year old girl pleaded that she had been forcibly married to a man of sixty.
- 43 See *V. Mallikarjunaiah v. H.C. Gowramma*, All India Reporter 1997 Karnataka 77, in this context.

- 44 Uma Chakravarthi, "From fathers to husbands: of love, death and marriage in North India," in *Honour Crimes, Paradigms, and Violence Against Women*, eds. Lynn Welchman and Sara Hossain, London: Zed Press, 2005, 308-33.
- 45 Prem Chowdhry, "Private Lives, State Intervention: Cases of Runaway Marriage in Rural North India," *Modern Asian Studies*, Vol. 38, 2004:55.
- 46 S. Sen, "Crossing Communities: Religious Conversion, Rights in Marriage and Personal Law," in *Negotiating Spaces: Legal Domains, Gender Concerns and Community Constructs*, eds. F. Agnes and Shoba Ghosh, London: Oxford University Press, forthcoming.
- 47 It needs to be mentioned here that parents have also wielded their power when young women have made the unconventional choice of same sex relationships. I have not dwelt on this, since the issue is not the focus of this paper.
- 48 See *Ajit Ranjan v. State*, II (2007) Divorce and Matrimonial Cases 136, where the Delhi High Court commented that the changing social scenario in the country was leading to a situation where there were more inter-caste and inter-religious marriages, which meet with societal and familial resistance and advised the state administration to view these cases as a social problem than a criminal offence.
- 49 I (2006) Divorce and Matrimonial Cases 1: All India Reporter 2006 Delhi 37.
- 50 I (2007) Divorce and Matrimonial Cases 786.
- 51 I (2009) Divorce and Matrimonial Cases 646.
- 52 I (2009) Divorce and Matrimonial Cases 120.
- 53 All India Reporter 2001 Allahabad 254.
- 54 J. Sagade. *Child Marriage in India*, New Delhi: Oxford University Press, 2005.
- 55 P. Baxi. "Till honour does us apart:" *Legislating Women's Right to Marry*, New Delhi: Centre for Law and Governance, Jawaharlal Nehru University, 2009.

# Shari'a Moral Policing and the Politics of Consent in Aceh

Jacqueline Aquino Siapno

This paper examines the complex manner in which Shari'a implementation becomes a proxy for "tradition and custom" but also for the institution of a "new patriarchy" (with the active collusion of Acehnese male leaders together with the Indonesian state). The distinctiveness of this paradigm is related to the specificity of Acehnese society where other family forms (including matrifocality), women's power, economic independence and leadership (as with the Acehnese female heads of state who ruled for 60 years, including the daughter of Iskandar Muda Taj al-Alam Safiyat al-Din Shah (1641-75), have predominated, and produced more fluid ways of understanding female space and intimacy in rural villages. The paper thus investigates how a practice of neo-colonial domination (of Aceh by Jakarta/Indonesia) has itself come to be "naturalized" and justified by discourses of global governance and human rights. Thus global governance and human rights discourses reproduce the idea of Shari'a as denying women their rights, even as human rights practice tries to "save women" from Shari'a police. I look at how the so-called "social and cultural facts" that are assumed by global governance and human rights organizations and their discourses—a good representative of this genre is the Human Rights Watch Report on policing morality<sup>1</sup>--are themselves manufactured by drawing upon and redirecting a contentious political history of internal colonization and occupation. (This is an issue that resonates with the concerns of Palestinian women as outlined by Nadera Shahloub-Kevorkian in her essay). My paper examines the new forms of productive misrecognition in Aceh, and offers an alternative in the deep historical and ethnographic studies on indigenous belief systems and practices that might alter our understanding of gender and tradition, and help us understand the brutality that accompanies the "fragility of patriarchy."

My critique of rights-based discourses is premised on analyses that take a longer-term historical and ethnographic approach, within the context of the ongoing political conflict in Aceh and what some Acehnese would refer to as "occupation." Unlike in the past, the current occupation works not through overt extraction of natural resources, coercion, and overwhelming military domination, but through consensual association, compliance, and consent to Aceh's "special autonomy." "Special autonomy" has authorized the ever-expansive reach of the Jakarta-sponsored Shari'a bureaucracy into the private, intimate lives of Acehnese.<sup>2</sup> I use "the politics of consent" to refer to the consent of the Acehnese to their subjection and domination by Jakarta.

I argue that the focus on Shari'a (both local and international) is a distraction from what is really going on, which is the continuing control over resources by the Indonesian state and its Acehese elite allies. This does not mean Shari'a law is unimportant, for it is a new mode of social control that has replaced earlier forms of surveillance that were anxious about political subversion. Instead, social control now uses the language of morality, and its target is distinctive, not merely its language: a) it is pushed by the Acehese leaders, men in particular (in collusion with Jakarta) and b) it focuses on women because of the psychological fragility of men traumatized by years of fighting (in a brutal armed conflict which has claimed millions of lives).<sup>3</sup> Ironically, this time around, it seems that Acehese men also participate in seeking to keep women down, though women have, until the recent past, been equal partners in anti-colonial struggles as well as in the family, and in household management.

I am particularly interested in examining the lack of serious in-depth political-economic analysis of greed, corruption, and state extraction of this province rich in oil, gas and other natural resources from so many of the human rights and truth and reconciliation paradigms currently circulating in Aceh. Why has political economy analysis disappeared in the discourse of rights? To what extent is Shari'a Law in Aceh a "distraction," a new kind of "busy-ness" (or business) that leads to failures to remember or pay attention to the wastage of billions of dollars of post-tsunami aid, and the emergence of new forms of social inequalities (including the transformation of Gerakan Aceh Merdeka combatants and current leaders into wealthy contractors, with no accountability).<sup>4</sup>

My analysis of the politics of consent will explore the social processes associated with enforcing Shari'a law at the level of individual agency and subjectivity, e.g. "compliance with dress code," "submitting to virginity exams," "conditioning the release of suspects upon their agreement to marry," "providing confessions that are fiction" during "seclusion trials," and so forth. These are mostly directed at women, but I read Shari'a imposition against the grain of Acehese rural villagers' extensive and expansive experiences in "the art of not being governed"—not only vis-à-vis their own independence leaders (ex-GAM) and civil society human rights activists, but also, the central Jakarta state that is "squeezing them" (*dalam keadaan dijebak*) through new methods of domination, surveillance and control via so-called consent.<sup>5</sup> Drawing from ethnographic fieldwork in several visits to Aceh from 1992-2008 in villages in Lhokseumawe, Sigli, Langsa, Banda Aceh, and with Acehese communities in Medan, Jakarta, Kuala Lumpur, Singapore, and New York, I argue that Acehese women are not as "helpless" as global rights and development discourses in the business of "saving women" represent them to be. On the contrary, we have a lot to learn from Acehese women in the fields of resilience and non-governability; from their capacity not only to evade but survive, and heal that which has been broken by state violence and patriarchy imposed from outside.

## Historical Context of the Aceh-Jakarta Relationship

The construction of the Indonesian "nation" has always been fragile and contested, with the Indonesian state (in particular the previous New Order government of Suharto obsessed with national integration with the dominance of Javanese culture) having to use its military power to suppress and terrorize independence movements in Aceh, Timor Leste, and West Papua for decades after Indonesian independence from the Dutch in 1945. In spite of all these efforts to promote nationalist cohesion (*Bhinneka Tunggal Ika*), the Acehese somehow continued to imagine themselves and their "nation" as different. Aceh had virtually no connection with Java before 1873, but many connections with the larger Malay world, the Indian Ocean, international powers such as Portugal, Britain, France, Turkey, the Middle East, the larger Muslim world and Islamic community. The Acehese clashed brutally with the Indonesian state in its efforts to integrate them. Previously, Aceh had also waged a long anti-colonial resistance to incorporation into the Netherlands Indies (Dutch)/Indonesia- state project, which was far more violent than that of any other region. Several Acehese women, including Tjoet Nya Dhien, Tjoet Meutia, Pocut Bahren, and others led the resistance. Military occupation over the last 135

years formed strong and powerful Acehese women who have honed exemplary skills to resist militarized male dominance, suppression, and brutality.

Ultimately the conflict—now, as well as in New Order Indonesia—had to do with claims over oil, gas, and natural resources in which Aceh is enormously rich. Tragically, Aceh has barely benefited from these resources, with Acehese in the rural areas continuing to be impoverished. In fact, the Acehese nationalist movement has some parallels with the Moro nationalist movement in the Southern Philippines. Lhokseumawe (formerly the kingdom of Pasai), which holds most of the oil and gas reserves, where several multinational oil corporations have operated in collaboration with the Indonesian state, is, ironically, also one of the poorest regions in all of Aceh, and the site of some of the most violent conflicts and human rights violations by the Indonesian military. M. Isa Sulaiman writes, “between the mid-1980s and the mid-1990s, the gas export from Aceh reached more than US\$2 billion per annum;” and that “in 1975 alone, 20 HPH companies obtained permits for tree felling from the Ministry of Forestry, in an area covering 1,095,500 ha. The total number of enterprises and the area of felling rose steadily, from the mid-1970s to early 1990s, until Aceh’s timber export reached US\$450 million per year.”<sup>6</sup>

In effect, M. Isa Sulaiman is arguing that capitalist companies in collusion with state enclosure and extraction of natural resources, supported by the security forces, impoverished, terrorized, and brutalized the Acehese. Analysts argue that the oil, gas, and control of natural resources are the primary reasons why the Indonesian state and military refuse to let go of Aceh and West Papua.<sup>7</sup> Control of natural resources was one of the main sticking points of previous negotiations over Aceh’s “special autonomy” and “self-government,” as Jakarta insisted on continuing control not only of financial governance and resources, but also of Acehese local political government (through support of dominant political parties and control of the religious bureaucracy.) If it hadn’t been for the 26 December 2004 tsunami, which brought both the Indonesian military and Gerakan Aceh Merdeka (GAM) to its knees, led to colossal losses to all sides in the conflict, and profound soul-searching in all sectors of Acehese society and amongst the Jakarta leadership about the meaning of the tsunami, the Helsinki Peace Process and intensive negotiations for peace in Aceh might never have materialized.<sup>8</sup> Before the tsunami, efforts at a long-term peace process and negotiations on “regional autonomy” in 1950, 1959, and “special autonomy” in 2001 continuously failed, especially during the period and environment of “Daerah Operasi Militer” (Military Operations Special Region) beginning in the late 1980s up to early 2000 when Indonesian military domination and massive human rights violations occurred.<sup>9</sup> The irony is that even in the “Era of Reform” under President Habibie in 1998 to early years of 2000, Acehese human rights and environmental rights lawyers and activists continued to be kidnapped and killed, making political negotiation and political violence two sides of the same coin. The most important development of this longer-term conflict between Jakarta and Aceh was that recognition of Aceh’s special autonomy in 1999 came with the passage of Law 44, which allowed Aceh to “implement Islamic law in all aspects of life.”<sup>10</sup>

## **The Importance of Ethnographic Studies**

With the passing of Laws No. 25, No.22, and No. 44 in 1999, Shari’a Law was implemented. But in the years following, a number of human rights reports about Aceh were published by Amnesty International, International Crisis Group, and Human Rights Watch, in addition to local and national organizations in Aceh and Jakarta, including KOMNAS HAM, LBH APIK-Lhokseumawe, and others.<sup>11</sup> As I was reading these reports, I reflected back on my ethnographic fieldwork in different regions of Aceh. My interest in studying Aceh began with my Ph.D. research fieldwork and dissertation which became a book on Acehese and Malay hikayats, oral histories, and manuscript literature on the traditional kingdoms since the 15<sup>th</sup> century.

So it is striking to me that one of the things missing in the human rights reports is a long-term historical perspective on Acehese families, the imposition of Muslim family law, and Acehese women's oral histories. For one, there is no engagement at all with the anthropological studies on masculinities or men and boys in Acehese families, such as by scholar James Siegel in his book, *The Rope of God*.<sup>12</sup> And before that, of careful studies by Dutch scholar-administrators like Snouck Hurgronje, who wrote extensively about Acehese life.<sup>13</sup> Though Hurgronje's text was written with a view to "reforming the Acehese family" to suit the needs of colonial taxation, it nonetheless makes for fascinating reading on pre-colonial gender systems in Aceh. The scholar Chandra Jayawardena writes:

In Aceh the word for maskawin is djinamee, a word which, Snouck Hurgronje observed, derives from the word djamee, meaning guest. He points out, '...it can only be construed to mean, in its original sense, the gift or recompense given by a guest to him to extend his hospitality towards him. In spite of the great change wrought by Islam in the Acehese conception of marriage, there still remains, as we have seen, much that is based upon the idea of a husband as a guest in the house of his wife.'<sup>14</sup>

Nor is there any reading or reference to the works of other scholars such as Nancy Tanner on "matrifocality" and matrilineal societies; Daniel Lev on Islamic courts; and many other studies and forms of knowledge production that are not framed in the "development" and "human rights" languages currently so trendy in Aceh.<sup>15</sup> Interestingly, in analyzing the circulation of these discourses, I came across some development reports on Aceh citing my work and that of the late anthropologist Nancy Tanner. However these reports only refer to these studies, but conduct few in-depth studies of Acehese history, culture, and politics of their own. This is quite common with foreign advisers and "rule of experts" who tend to rely on English-language materials without taking the trouble to learn more about local knowledges in local languages. There are some reports that refer to ethnography and historical studies, but only as "references," with little in-depth analysis nor the ability to convert, translate, wed, or integrate these ethnographic research into global governance policies that respect Acehese culture and gender systems. Between global governance paradigms and Acehese cultures, there is a dis-connection. Serious attention to ethnography and history can bridge the gaps.

Tanner describes the following distinctive features of matrifocality in Aceh and Sumatra more generally: "1) kinship systems in which a) the role of the mother is structurally, culturally, and affectively central and b) this multidimensional centrality is legitimate; 2) the societies in which these features coexist, where a) the relationships between the sexes is relatively egalitarian and b) both women and men are important actors in the economic and ritual spheres."<sup>16</sup>

Anthony Reid, citing James Siegel's ethnographic work, writes:

Inheritance is bilateral, but houses are exclusively passed to daughters, so that the wife is "the one who owns the house" (njang po rumah). Parents often pass the family house to the eldest daughter at her marriage, and build another house for themselves nearby. Hence villages often comprise clusters of houses owned by sisters and nieces. Rice-fields near the house are also passed to daughters. Hence it is mothers who provide for household and children through the revenue of their rice-fields and other household activities. After puberty sons do not sleep in their maternal house but in the communal hall and religious school (meunasah) of the village. The house is therefore female space in large measure, and men feel like "guests in the houses of their wives." Young men and adolescents often leave home for religious studies, and mature men are frequently away trading, growing cash-crops in more distant and sparsely-settled areas, or in modern times serving in war or in government. The Islamic commitment, that all Acehese feel is part of their identity, has never reduced the economic independence of women, and in turn their relative autonomy.<sup>17</sup>

This last sentence is especially enlightening with regard to the current situation in Aceh where Shari'a police

are enforcing constraints on Acehese women's mobility, independence, and autonomy in the name of "Islamic commitment."

It may be too much to ask for women's and human's rights reports to become in-depth ethnographic and historical studies, as they tend to have short-term deadlines. But any human rights, women's rights, and development worker in Aceh must at least make the minimal effort to be aware of this literature that outlines the complexity (and fluidity) of Aceh's sex/gender system instead of ignoring it, and pretending it doesn't exist.

Furthermore, if we ignore this scholarly knowledge based on years of ethnographic fieldwork, we end up writing reports that represent panic and crisis, with hardly any reference to the resilience and agency of individual women, men, and children, or of community resilience and cohesion in spite of the long years of living with armed conflict, and the devastation of the tsunami.<sup>18</sup> After reading the reports, I did an informal survey with Acehese friends and social networks regarding the gap between the reports and everyday life. I was told that while the abuses in the reports are accurate, they present a bleak and extreme picture of life in Aceh. In fact Acehese, and women in particular, are able to go about independently despite the domination of the Sharia police, and Aceh's ambivalent relationship with Jakarta. I also spoke with Acehese women scholars, political leaders, and human rights advocates who said that Acehese women continue to organize in large groups in the rural areas, even during the Duet Pakat Inong Aceh and other public events just this year.

This is an aspect of Acehese society that human rights and women's rights report absolutely miss: that the Acehese are a lot more experienced and resilient in dealing with fragile yet brutal patriarchal institutions, and have more reserves of "muslihat" (sometimes translated as cunning, though this does not cover the full significance of the term), than Human Rights Watch, International Crisis Group, International Center for Transitional Justice, or Amnesty International are led to believe. Of course the people stress the abuses because at one level they feel it is still necessary to have "internationals" intervening on their behalf when Jakarta refuses to listen and continues to infringe on their rights. In the past, especially in the 1990s, they strategically transcended the local and national when it came to seeking international solidarity and allies. International organizations are useful for certain purposes. Different groups of Acehese can also be very instrumental in the way they engage with external actors but the usefulness of outsiders has its limits. The central government in Jakarta has always been suspicious of foreign researchers, international solidarity networks, foreign NGOs, and the kinds of possible friendships and ideational influences they may be making with the Acehese. To this day the government tends to restrict visas for researchers conducting fieldwork on sensitive topics, including human rights violations and political justice.

Another point that the HRW report misses is that long-term ethnographic research shows Acehese men have been feminized, emasculated, infantilized, and colonized too. Their "consent" as partners/conspirators in Jakarta's rule is a more subtle recent innovation in a long process. Thus the Acehese leadership is hampered within the context of this symbolic violence and consensual relationship while they are living with the aftermath of the psychosocial problems associated with armed conflict that have never been acknowledged or given the space to heal.<sup>19</sup> The trauma and psychosocial needs report written by UNSYIAH/HARVARD/IOM contain very detailed research interviews on the psychological problems experienced by Acehese who have been tortured, imprisoned, forcibly displaced, or had witnessed violent serious crimes. Until now, none of these issues have been addressed.

Thus as I read through the HRW *Policing Morality* report, it struck me that the methods of surveillance, monitoring and punishment are eerily similar to former methods of *intel* (military and police spies), except this time, it is the Wilayatul Hisbah who is in charge. I wonder what the same group who wrote the trauma report would make of the current implementation of Shari'a and the methods of violence and shaming they use. For

it is highly possible (as is the case in Timor Leste) that the men are “taking it out on the women.” And local Acehnese are taking it out on migrant communities (especially Javanese). That is what prolonged occupation can do to a people: pitting them against each other, without the colonizer even having to be directly present in their midst.

A comparison would find that in Timor Leste, even after the Indonesian occupation had left (very violently, and lashing out in a brutal way by burning 90% of the infrastructure in Dili and other towns), what happened afterwards was a near civil war--amongst the Timorese themselves. This time the conflict was over: Who suffered more? Who has more credibility? (And in this case, it is the guerrillas who fought in the anti-colonial war in the jungles.) Who deserves more for their suffering and sacrifices during the anti-colonial resistance? This is similar to the current situation in Aceh, but with a twist: In Aceh today, it is “Who is more moral?” “Who is more virtuous?”

And yet, despite the colonization and violence, Acehnese and Timorese societies are actually virtuosos in “the art of not being governed.” James Scott’s argument allows us to articulate an alternate history of Aceh that begins from a different, more pluralistic perspective, where we would find that it is the Acehnese who are in control and are taking advantage of the central state for their own benefit, and for their own purposes.<sup>20</sup> The politics of consent amongst those who are virtuosos in the art of not being governed would then be a very different story. It may well be the case that Acehnese women, who may seem, superficially, to be “victimized” and in “need of saving” by international women’s and human’s rights organizations, are actually a lot more strategic in negotiating power dynamics between the local, national, and international spheres than it would appear. They may be taking on flexible and shifting identities, depending on the context.

## **Manufacturing Social and Cultural Facts**

Recently in Aceh, Indonesia and the neighboring countries in the Southeast Asian region, there have been a series of articles and discussions around the controversial issue of the application of Shari’a Law in Aceh. Although the discussions and debates are circulating around different groups for different purposes, here I wish to focus on global human rights reports, especially the aforementioned HRW report, *Policing Morality*.

The language of human rights and crisis reports tends to be limited to panic and disaster, compelled by political immediacy and advocacy. This rhetoric tends to frame a war or post-war/conflict or post-conflict situation as requiring external actors and international organizations to come in and save “poor women” or “poor men” from themselves and their violent culture/s and traditions. But this language hardly ever includes an un-packing and ethnography of these powerful international organizations themselves (including the UN, WB, USAID, HRW, ICG, and others). They not only have more resources than their local counterparts, but also reproduce the inequalities in knowledge-production. One must keep in mind how these reports are produced: usually by “experts” who come in for two weeks to two months, interviewing their “local subjects” mostly on very narrow topics: i.e. violations, inventories of victims, suffering, trauma, and the like. But what if people in this post-war environments “speak beyond trauma” as Sylvia Tiwon suggests?<sup>21</sup> What do they do with subjects who refuse to occupy the space of “trauma” and “victim,” but speak as survivors, visionaries, and re-constructors?

One of the social and cultural “facts” manufactured yet not interrogated closely by human rights and women’s rights groups is the depiction of Acehnese Islam as “traditional” and “extremist.” Yet, if we go back to the ethnography of the Dutch scholar-colonial administrator Snouck Hurgronje and to the work of scholars like James Siegel, Chandra Jayawardena, Nancy Tanner, and John Bowen, we learn that Acehnese Islam was relaxed,

flexible, and syncretic (it incorporated indigenous belief systems and practices, including allowing females to be heads-of-state and heads of households). So much so that Muslim leaders in the Middle East had to send a letter during the reign of the Acehese female heads of state in the 17<sup>th</sup> century saying something like: “No, no... women are not supposed to be heads of state.”

One would presume that the research and writing process for human rights and women’s rights reports goes through a rigorous independent peer review process as with academic scholarship. However, having done ethnographic research for a human rights group, Amnesty International, in 1992, for their report on Aceh called “Shock Therapy: Restoring Order in Aceh,” which came out in 1993, it occurs to me upon hindsight and reflection, that human rights groups are not as transparent, rigorous and thorough on accountability for their methodology as political anthropologists, sociologists, and historians are required to be.

When international human rights organizations such as HRW or ICG, or even the IOM/Harvard/Unsyiah report on psychosocial needs, make “Recommendations” are they listened to, and followed? How are they perceived by policy makers and those in power? Is there any sense of accountability? Should it be “Recommendations for your consideration” so as not to be perceived as neo-colonial, in a context where foreign intervention has not always been one on equal terms? What are the strategies that researchers in these fields use to improve their influence on policy making processes? As Sunil Bastian from ICES Sri Lanka writes, “... traditionally the link between research and policy has been viewed as a linear process...but...it is a more complex and dynamic process shaped by `multiple relations and reservoirs of knowledge’.”<sup>22</sup> He suggests that one question we should be asking is: “Is there political interest in change? Is there room for maneuver?” And as for the external environment: “What are their agendas? And do they influence political context?”

What I found surprising about this recent report by Human Rights Watch, and the series of articles that discussed the report in the following months, is the focus on the infringement of women’s rights in Aceh by the Shari’a police (Wilayatul Hisbah or WH), with hardly any reference to the broader context and long-standing historical conflict of central Jakarta state/ Indonesian “occupation” of Aceh, and continuing extraction of its natural resources. I suppose the closest comparison would be something like a human rights watch report on Palestine that focused exclusively on infringement of women’s rights, without taking into account the broader problems, the historical, political, and economic context of the Israeli occupation. It is as if the censorship, including self-censorship or the culture of silence /s, has become so widespread, including amongst international organizations who are meant to be independent and neutral, that nobody dares be critical. Some Acehese and the government in Jakarta may quarrel with my representation of the political situation: after all Aceh is no longer under “occupation.” It consented to be “re-integrated.” But what about the rest of the population of Aceh, especially in the rural areas, who continue to live in limbo about their loved ones and families who were killed? What about disadvantaged and marginalized groups who are not on the same page with ex-GAM leadership, and who are not the beneficiaries of post-tsunami civil society?<sup>23</sup> How are they imagining this “consent” to police their morality, sexuality, mobility, dress code, and family? And were they even consulted in the first place?

No mention is made in these reports either of the way rights offered women by Islamic courts throughout Indonesia in the past are now being foreclosed. Spaces and roles in the public sphere that women used to occupy, without much protest from anyone, are also now being limited. I quote Daniel Lev’s analysis below at length because it is so telling and instructive on the importance of paying attention to *longue durée* historical analysis and in-depth sociological and ethnographic studies in illuminating our understanding of our human condition. Daniel Lev writes:

The Indonesian family law regime has long been one of the most liberal in the Muslim universe. Contracts of marriage are elaborate and flexible, partly because of pressure and advice by women’s organizations

in recent decades. In addition, the religious offices and courts have been quietly sympathetic to women in bad marriages. In my own research on the Islamic judiciary, to which initially I brought a few common preconceptions, it gradually dawned on me that in reality the courts were by and large oriented to women, their primary clientele. ...The relatively liberal treatment of women's concerns in the religious courts is itself evidence of the standing and influence of women in much of Indonesia...It may be an Indonesian first that women have served as Islamic judges [hakim agama].<sup>24</sup>

Lev provides a fascinating analysis of women's mobility in the Indonesian public sphere that goes against the grain of the arguments we are seeing today about how Indonesian culture "constrains women's power and mobility:"

The more relevant point is that the Islamic mainstream in Indonesia has also not produced a campaign to veil women, to keep them at home, or to deny them substantial gains already made. When the parliamentary system was still in place, during the years 1950-57, women were active in Islamic parties, often influential, and represented them in and out of parliament when doing so meant something. Devout Muslim women remain active now in other ways...<sup>25</sup>

In sharp contrast to the current movement throughout Indonesia to constrain women's mobility and participation in the public sphere (e.g. arresting an un-accompanied woman in Tangerang on suspicion of "being a prostitute" – broadly defined – under restrictive Shari'a laws), historical and ethnographic studies illustrate that women had a good deal of freedom and space to maneuver during the struggle for independence and the years after, largely because the leaders were open-minded, non-militaristic people, who saw female power as a kindred spirit, rather than as a threat to national stability and order.

Lev argues that the "demonology of women" and the restriction of their roles to define them essentially as domesticized and subordinated "wives and mothers" began with Suharto's New Order regime through ideologies such as the "Family Welfare Guidance" (*Pembinaan Kesejahteraan Keluarga* [PKK]) and the "Five Responsibilities of Women," (*Panca Dharma Wanita*). The New Order posture and reversal of women's rights:

have less to do with cultural underlay than with the political and ideological determinants of women's chances...A comparison of Indonesian regimes since independence suggests that public ideology and the structure of a political system, the character of its elite and institutions, make as much difference to women as to other groups...If party leaders were disinclined to take feminist issues all that seriously, they nevertheless recruited women and created women's auxiliary organizations whose influence in the parties could not be entirely ignored. Moreover, women organized independently, nationally, and locally, for their own purposes, which they pursued as effectively as most other organizations. Even had the parliamentary elite been hostile, the political system then still made it possible for enfranchised women to mobilize and bargain within it.<sup>26</sup>

Further on in the article, Lev argues that the main difference between Sukarno's early post-independence leadership and that of Suharto's New Order leadership has to do with the fact that during the Sukarno years the leaders were better educated intellectuals who saw women like Kartini as "their own kind, an earlier kindred soul" whereas the Suharto leadership was composed of the military, with a military ethos. "Less well-educated, less well-read, less influenced by the ideals of reform and change...their conservatism may be rooted socially in their lower-middle-class origins and nouveau riche achievements, but politically also in a suspicion of popular movements and social mobilization, as inevitable sources of 'instability'."

In this light alone, who bears more responsibility for being "traditional" than women, and what could be

more uncomfortable, even destabilizing, than women re-defining themselves as something other than the wives and mothers they had been made to seem?<sup>27</sup>

**Shari'a as a New Mode of Social Control:** *"Shari'a is theirs, and they ought to be governed by it."*

Shari'a Islam, enforced by the morality police, is represented in human rights reports and by the central state in Jakarta as part of "Acehnese tradition." If Islam in Aceh is not traditionally "extremist" and if the "facts" about the current constraints on women are not due to culture but recent national history, how can we explain why new controls are being placed on women and family in Aceh? I would argue that the central state in Jakarta is anxious to prevent Acehnese from having social intimacy freed from the presence of the Sharia police and the ever-invisible, yet present, state surveillance police, who have the right to monitor people in the privacy of their family homes. The Acehnese family has not always exactly been on good terms with the central Jakarta/Indonesian state. On the contrary. And Acehnese women, in particular, have a long history of rebellion against colonial regimes and the central state demanding their independence and mobility. We already know what the consequences are when this happens: women leaders took over and became heads-of-states against the wishes of the Muslim leaders in the Middle East; women joined the anti-colonial revolutionary forces to kick out the Dutch colonial regime; Acehnese women in civil society, students, and the rural areas supported GAM and the independence movement, and became thorns in the side of the Indonesian military and police occupying forces.

So if one were to be like the fictive surveillance police director in Pramoedya Ananta Toer's Foucauldian novel *Rumah Kaca* [House of Glass] one would strategically ensure that Acehnese women's mobility would be the first to be crippled. And what better way to do that than through making sure they can't move around? Any mechanism of subordination would do. In the current moment, Shari'a Islam, as implemented by the Shari'a police in Aceh, is a convenient instrument. It is even better if you can get Acehnese men and women to "consent" to police themselves directly (via their own political and religious leaders), with Jakarta only indirectly facilitating, so that the conflict becomes horizontal (Acehnese vs. Acehnese) instead of vertical (Acehnese vs. the central Jakarta state).

Today's HRW *Policing Morality* report is not so different from the Amnesty International Report for which I conducted research in 1992, entitled *Shock Therapy: Restoring Order in Aceh*. The only difference is that in 1993, it was the Indonesian military and police who were doing the shock therapy. Today it is the Shari'a police, manned by Acehnese, supported and some say "sponsored" by the central state based in Jakarta, and with the "consent" of the ex-GAM Acehnese leadership in government and Parliament. The statements of the Acehnese officials on the implementation of Shari'a Islam in Aceh seem to be ambivalent and ambiguous. They say, we don't support it, we won't sign the Qanuns...but at the same time: "we can't do anything much" because "there continues to be mistrust and distrust" between Aceh and the central Jakarta state. In spite of their new-found "local autonomy" and "peace" Acehnese leaders continue to be ambivalent, pointing out that they continue to have very little power vis-à-vis the Indonesian state and military.<sup>28</sup>

## The Obsession with Control and Order

Upon reading these reports when set against in-depth ethnographies of Aceh, including its political economy<sup>29</sup> the constant obsession with control, order, and surveillance becomes even more clear. This time it targets sexuality and "immoral behavior"; last time, before "special autonomy" and the post-tsunami Helsinki

Agreement, it was going after “subversion” and “subversives” (broadly defined). The central state and the current regime just can’t allow too large an area of Acehese life (the family) to escape its control. If it is too unpopular for the central state to be the “protector and director of family life,” then there must be a way to get the Islamic bureaucracy to do it, and the Acehese government and Parliament to agree to it.

The relationship between the Acehese family, Islam, and the Indonesian state has not been a happy one for a long time. The Acehese family as an institution (pillar of learning and education, support and social networks) would be the last realm of which the Indonesian state would want to let go. If it can no longer impose direct political authority, it will do so through “moral authority” (you are immoral and therefore you need to be reformed, especially you women).

Yet as Daniel Lev writes about Islamic courts in “On the Other Hand,” Islamic courts in Aceh and Indonesia, historically have always been fairly liberal and supportive of women’s rights, and in particular in family law, when it comes to granting women divorce and inheritance rights.<sup>30</sup> If, historically, Islamic law and courts, and Muslim family laws are supportive and liberal towards women and women’s rights, why is this being reversed? In the particular case of Aceh, the only “province” of Indonesia “allowed” to implement Shari’a law (with its own consent), perhaps it is the central state that feels the need to continue to control the institutions of marriage, the family, and the spaces of women’s mobility. What is the relationship now between the central state and the Islamic courts? Between the central state and expanding Shari’a police bureaucracy in Aceh? And finally, what is the relationship between secular international human and women’s rights organizations and the Islamic centers of learning in rural areas in Aceh? These are the questions that should be addressed in the human rights reports. But they are not.

Perhaps the idea of having a lot of mobile, independent Acehese women choosing how to lead their lives, demanding political justice, economic equality, development without domination and oppression, and demanding accountability from the leaders in whom they placed so much trust, and a political vision for which they sacrificed so much unsettles not only the central Jakarta state, but the ex-GAM leadership, and conservative religious leaders. I have tried to show that the so-called “tradition” of patriarchy is actually a fairly modern and very fragile invention in Aceh. Any cursory look at ethnographic studies of Acehese sexuality (especially in oral traditions, songs, pantun), family, uxorilocal patterns, bilateral family arrangements, shows that on the contrary, the “tradition” in Aceh is that of a long-term matrifocal society of female power and agency, not so far off from the general Sumatran tradition, including in Minangkabau, of matrilineality. In Aceh, women have traditionally worn pants, called *luwee tham asee*, [dog-chasing trousers] and have traditionally owned land (passed on through inheritance laws that divide land equally between sons and daughters) and owned the home (the term is *po rumoh* or, owner of the house, as opposed to the Dutch, *huisvrouw*, or housewife). As Siegel discovered in the 1960s, men were akin to “temporary guests” who could outlive their welcome, liable to being thrown out of the house if they didn’t contribute economically.

So why is it that this (enabling) “tradition” is now being replaced with the modern concept of subordinating women’s mobility, space, sexuality, and participation through Shari’a law? Is it possible that this kind of patriarchy is so fragile and out of place in *adat* [local custom] that it has to be implemented with force, brutality, and determination? Perhaps the Acehese who are so difficult to “reform” may revert back to their “traditions,” which are so much more relaxed, cosmopolitan, outward-looking, inclusive, participatory, and open-minded.

Here are some questions to ponder: Is Shari’a Islam being used as the new proxy for “tradition and custom” because the central state wants to continue to control Aceh, and the most strategic way of doing so is by controlling and monitoring the institution of the Acehese family (which historically and ethnographically has

always seen the central state in Jakarta as “an outsider”), and targeting Acehese women who have a long history of offering spirited resistance to domination and colonization? Is Shari’a law being implemented to foreclose new sites of resistance that might emerge if the state doesn’t control and monitor every aspect of Acehese’ private lives and intimate relationships? Is *khalwat* [close proximity] a convenient excuse to intervene in people’s (especially influential politician’s) lives continually? In the past, under the Indonesian special operations period, Acehese were banned from meeting together in groups of more than five, always under suspicion that they may be meeting to discuss subversion. Now, they are banned from having intimate conversations and friendships, at least across gender lines. What is the difference?

What are the differences and similarities between post-tsunami Aceh, with the horizontal conflict amongst Acehese, indirectly supported by Jakarta replacing the vertical conflict between Acehese and the Jakarta state, and earlier forms of domination? Are the victims and perpetrators still the same? Or is it that now some of the victims have also become perpetrators, and “reconstructors” at the same time? Is it still possible to speak of a center-periphery divide and a black and white relationship differentiating Aceh and Jakarta? Hendro Sangkoyo of the School of Democratic Economics argues that when it comes to gender equality, not all women are the same: some rural women continue to be impoverished and marginalized while elite women (in both Aceh and Jakarta) go shopping together in Singapore. It would be impossible for the central state in Jakarta to dominate and subjugate the Acehese without the consent and complicity of the Acehese elite who also benefit from and are complicit in this kind of relationship.

All the fuss about Shari’a, both local and international, is a distraction from what is really going on, which is the continuing control over resources by the Indonesian state. Shari’a Law is a new mode of social control that has replaced the earlier forms of surveillance that spoke the language of political subversion and anti-colonial resistance. I argue that this new mode uses the language of morality and restricts women’s power and mobility through new forms of surveillance and control which is distinctive because: a) it is pushed by the Acehese leaders, men in particular (in collusion with Jakarta), who stand to benefit from not having to compete with potentially powerful women in terms of allocation of resources; and b) it targets women because of the psychological fragility of traumatized men who are seeking to keep women down or do not know what to do, having not much of a support system and no framework in a post-conflict process for opening up a critical dialogue on these transitional political, economic, and security issues. The women they are seeking to keep down through Shari’a Islam are the very ones who had, until recently, been powerful and equal partners in the home and the public sphere.

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## Notes

- 1 Human Rights Watch, *Policing Morality: Abuses in the Application of Sharia in Aceh, Indonesia*, November 30, 2010. Available at: <http://www.hrw.org/en/reports/2010/12/01/policing-morality-0>.
- 2 For an excellent historical and ethnographic analysis of constructed “tradition,” see for example the work of M. Isa Sulaiman, one of Aceh’s most respected organic intellectuals and historians who wrote primarily about remote rural regions in Aceh and the lives of the marginalized. M. Isa Sulaiman. *Sejarah Aceh: Sebuah Gugatan Terhadap Tradisi (1942-1962)*, [History of Aceh: Intergroup Conflict of Aceh 1942-1962], Jakarta: Pustaka Sinar Harapan, 1997; as well as M. Isa Sulaiman. *Aceh Merdeka: Ideologi, Kepemimpinan dan Gerakan*, [The Free Aceh Movement: Its Ideology, Leadership and Struggle], Jakarta: Pustaka al Kausar, 2000.
- 3 For an excellent research report on the impact of armed conflict on Acehnese in rural areas, see for example, Byron Good, Mary-Jo Del Vecchio Good, et.al. in collaboration with Harvard Medical School, IOM, and UNSYIAH, “Psychosocial Needs Assessments of Communities Affected by the Conflict in the Districts of Pidie, Bireuen and Aceh Utara” Cambridge MA: Harvard Medical School; IOM, Universitas Syiah Kuala, and Bakti Husada, 2006.
- 4 See for example, Edward Aspinall, “From Combatants to Contractors: The Political Economy of Peace in Aceh,” *Indonesia* [Cornell Modern Indonesia Project], Vol. 87, 2009:1-34.
- 5 James Scott. *The Art of Not Being Governed*, New Haven: Yale University Press, 2009.
- 6 See M. Isa Sulaiman, “From Autonomy to Periphery: A Critical Evaluation of the Acehnese Nationalist Movement,” in *Verandah of Violence: The Background to the Aceh Problem*, ed. Anthony Reid, Singapore: University Press in association with University of Washington Press, 2006, 125.
- 7 They were forced to let go of Timor Leste until 1999 when it gained independence after a brutal military occupation of 27 years.
- 8 The Helsinki Peace Process was a set of peace talks supported by the former Finnish President Martti Ahtisaari that led to the signing of an agreement in Helsinki on 15 August 2005.
- 9 For an in-depth discussion of the historical roots of the rebellion and a background to the Jakarta-Aceh relationship, see Anthony Reid, ed., *Verandah of Violence: The Background to the Aceh Problem*, Singapore: University Press in association with University of Washington Press, 2006.
- 10 Some of the conditions of “special autonomy” that were put forth in the past, going back to 1959 during the Daud Beureueh rebellion and the “Daerah Istimewa” negotiations, up to former President Habibie’s reforms in 1998 included: Acehnese control of their own natural resources (Law No. 25, 1999, on “Fiscal Balance Between the Central Government and the Regions”); decentralization of state power and structural changes in local political leadership (Law No. 22, 1999 on “Regional Government”); Acehnese autonomy and control over their own religious, cultural and educational affairs within guidelines set by the national government (Law No. 44, 1999), which would allow Aceh to “implement Islamic law in all aspects of life.” The most significant contentions that were put aside are: 1) For Acehnese to give up the idea of “independence” East Timor style; and 2) Social justice for victims of state violence and serious human rights violations (the idea for a “truth and reconciliation commission” similar to the one in East Timor may never see the light of day.)
- 11 See for example, M.M. Billah, ed., *Laporan Tim Ad Hoc Aceh*, Jakarta: Komisi Nasional Hak Asasi Manusia, Indonesia (Komnas Ham), 2004; Samsidar, ed., “Perjalanan Perempuan Indonesia Menghadapi Kekerasan: Konsultasi Nasional Organisasi Perempuan Indonesia dengan Pelapor Khusus PBB tentang Kekerasan Terhadap Perempuan.” Jakarta: Kerjasama Komisi Nasional Anti-Kekerasan Terhadap Perempuan, Asia Pacific Forum on Women, Law, and Development, dan FORUM Asia, Komnas Perempuan, Jakarta, 2004; Samsidar, ed., “Sebagai Korban, Juga Survivor: Rangkaian Pengalaman dan Suara Perempuan Pengungsi Terhadap Kekerasan dan Diskriminasi,” Lhokseumawe, Banda Aceh, Jakarta: Komisi Nasional Anti-Kekerasan Terhadap Perempuan (Komnas Perempuan), 2006.
- 12 James Siegel. *The Rope of God*, Berkeley: University of California Press, 1978.
- 13 C. Snouck Hurgronje. *Aceh Rakyat dan Adat Istiadatnya*, Jakarta: Indonesian–Netherlands Cooperation in Islamic Studies, 1996; C. Snouck Hurgronje. *Gayo Masyarakat dan Kebudayaannya*, Jakarta: Balai Pustaka, 1996.
- 14 Chandra Jayawardena, “Acehnese Marriage Customs,” *Indonesia*, Vol. 23, 1977:157-174. [Citing Snouck Hurgronje,

at 164.]

- 15 Nancy Tanner, "Matrifocality in Indonesia, in Africa, and among Black Americans," in *Woman, Culture and Society*, eds. Michelle Zimbalist Rosaldo and Louise Lamphere, Stanford: Stanford University Press, 1974; Daniel Lev. *Islamic Courts in Indonesia: A Study in the Political Bases of Legal Institutions*, Berkeley: University of California Press, 1972.
- 16 Müller, Claudia. *Factors Affecting Women Entrepreneurs in Establishing and Expanding their Businesses in NAD Province, Jakarta: International Labour Office, 2006. [Citing J. Siapno, citing Nancy Tanner.]*
- 17 Reid, 2006:9.
- 18 For repertoires of resilience in Aceh, see for example, Jacqueline Siapno, "Living through Terror: Everyday Resilience in East Timor and Aceh," *Social Identities*, Vol. 15, No. 1, 2009:43-64.
- 19 This was certainly among the findings of the UNSYIAH, IOM and Harvard Medical School Report. See Good et. al. "Psychosocial Needs Assessment in Aceh", 2007. For a more extended discussion of the politics of demobilization, disarmament and reintegration in Aceh and the "re-construction of selves," see for example, Jacqueline Siapno, "The Politics of Reconstruction, Gender, and Re-integration in Post-Tsunami Aceh," in *Tsunami in a Time of War: The Politics of Reconstruction in Sri Lanka and Aceh*, eds. Malathi de Alwis and Eva Lotta-Hedman, Columbo: ICES, 2009. See also Aspinall, 2009; and Geoffrey Robinson, "Rawan is as Rawan Does: The Origins of Disorder in New Order Aceh," *Indonesia*, Vol. 66, 1998:127-157.
- 20 Scott, 2009.
- 21 See Sylvia Tiwon, "Narrating Women Speaking Beyond Trauma," paper presented to conference on "The Aceh Peace Process," Harvard University, 2007.
- 22 Sunil Bastian, "From Research to Policy – Some Issues for Discussion," Workshop on Comparative Study of Aceh and Sri Lanka, Post-tsunami, Banda Aceh, 2008.
- 23 To give a sense of the figures, according to BRR, [Badan Rehabilitasi dan Rekonstruksi Aceh-Nias] the chief government body charged with coordinating and distributing post-tsunami reconstruction aid (both from government and international donors), there are three sources for funding to improve the human condition in Aceh, including on gender and development. These are: Granting the province a greater share of its own oil and gas revenues than before; US\$5.2 billion (Rupiah 57.2 trillion) received by end of 2007 – (US\$2.3 billion or 25.5 trillion Rupiah of that coming from the national budget and most of the rest from international donors.); as a result of "Special Autonomy" Aceh's ordinary development budget rose: from US\$2.7 million in 1999 (or 1.4% of total revenue) to US\$421 million in 2004 (40% of total revenue).
- 24 Daniel Lev, "On the Other Hand?" in *Fantasizing the Feminine in Indonesia*, ed. Laurie Sears, Durham, N.C.: Duke University Press, 1996, 193-194.
- 25 Lev, 1996:195.
- 26 Lev, 1996:196.
- 27 Lev 2006: 198.
- 28 For an analysis of this entrenched and complicit relationship between Acehnese ex-GAM leaders and the Indonesian state and military, see for example Aspinall, 2009, and Robinson, 1998.
- 29 See Aspinall, 2009.
- 30 Lev, 2006.

# “It is up to her”: Rape and the Re-victimization of Palestinian Women in Multiple Legal Systems

Nadera Shalhoub-Kevorkian

Rape and sexual abuse are paradigmatic forms of the violation of consent in women’s lives and in modern liberal law. The pursuit of justice in the wake of such violations of consent is filled with obstacles. Even in states with so-called “Western” or “modern” legal systems, victims of rape and sexual abuse face significant barriers when they seek assistance in redressing grievances. They are often re-victimized in the process. Yet these legal systems are commonly assumed to be capable of and effective in punishing rapists. Legal action against offenders is often framed as a decision on the part of the victim of whether to pursue a case or not. This deeply embedded assumption elides the significant deficiencies – such as low conviction rates and the prevalence of powerful rape myths and victim-blaming – that prevent the conviction and punishment of offenders and in turn further traumatize the victim as she navigates the legal system. Studies have shown that the insufficiencies of modern legal systems encourage victims not to report the crimes committed against them and instead to seek redress via unofficial channels, which may or may not provide a satisfactory resolution. Thus, legal action and resolution in the wake of rape and sexual abuse are not really “up to her.” It is never a clear-cut decision for the victim to pursue legal action or not; the assumption that it is “up to her” actually complicates the position of the victim and damages her.

In a situation like that of the Palestinians living in Israel, such barriers to legal redress are compounded by the realities of being a homeland minority living under the rule of a settler-colonial state. We need to ask whether the law, and which kind of law, is available to rape victims in these circumstances and what happens when they appeal to the law. Palestinian women can turn to parallel institutions alongside the Israeli state legal system for assistance. These include customary / tribal, familial, and religious institutions of justice and dispute resolution. Where do Palestinian women who are citizens of Israel turn in cases of rape? What happens to them in each of these systems? Can one judge which of these are more satisfying to women? Or do all of these systems, different as they are, re-victimize rape victims?

## Searching for Legal Solutions

My work on law and society began in the 1990's when I was a lecturer at Bethlehem University in the West Bank. I had noticed that violence against women was often addressed and resolved by internal familial or societal powers. If they failed, it was tribal/customary law that took the lead. My students repeatedly stressed the lack of resources and support available to them within the "traditional" and "tribal/customary" systems of intervention. Together with students, human rights workers, and various women activists, we struggled to develop and institutionalize a more culturally sensitive "advanced" and "modern" legal and criminal justice system to assist abused women. In 1994 we started the first hotline for women in crisis (that I personally ran for almost ten years) in order to engage with and support female victims of violence, and to look for ways to decrease the frequency of such abuses.<sup>1</sup> As a Palestinian who was born in Haifa and is a citizen of Israel, I had noticed that many of the same difficulties women faced in the West Bank were experienced by Palestinian women citizens of Israel. This prompted me to shift my focus to examine the way in which Israeli state law assisted abused women. Israeli legal codes and its criminal justice system are defined, presented, and perceived as "advanced" and "modern" and thus contrasted to the supposedly "backward" and "traditional" Palestinian institutions that we had been trying to change in the West Bank.<sup>2</sup> By working with and exchanging knowledge with Palestinian women in Israel, I sought to discover what sorts of interventions might assist us in decreasing women's suffering and controlling such crimes. My question was: In what contexts and forms might a modern, clear, and gender sensitive criminal code be constructed and implemented in order to reduce violence against women?<sup>3</sup>

Given my position as a scholar-activist in the West Bank, I struggled to develop a clear and gender-sensitive law while simultaneously refusing to reify or denounce the modes of dealing with abuses that characterized traditional, religious, and customary/tribal law. I studied the way abused Palestinian women in the PA engaged (or refused to engage) Western/state law. I refrained from promoting one model over the other, focusing instead on a critical examination of the complex impact of these parallel systems on abused women and how they navigated them. I struggled with the confident assertion made by many that a "modern" law – as applied in Israel - is a "victim sensitive" law.<sup>4</sup>

This paper will reflect on some of the complex issues I uncovered during my fieldwork on sexual abuse, particularly rape. The wider question this paper grapples with is whether one type of law (state, religious, customary/tribal, familial) can be the answer for abused women seeking redress. How, when, whether, and in what way do such socio-legal interventions contribute to lessening raped women's suffering? And how do deeply embedded assumptions about the efficacy of secular modern legal institutions in assisting abused women operate within the context of a settler-colonial state when victims are members of a homeland minority? To address these questions, I examine the ordeals and listen to the voices of Palestinian women who sought the help of the Israeli police in the aftermath of rape. Can Israeli state law assist, secure, and deliver justice for rape victims who are Palestinian women citizens of Israel? And can religious or customary socio-legal interventions offer helpful venues and alternatives?

I look at two women's first encounters with state law -- when a raped woman meets with police while filing a complaint -- and then trace their journeys to and from customary/religious/tribal socio-legal interventions and state-centered interventions. Interviewing women who not only went to the police but also sought assistance from parallel legal systems such as the religious local one and/or tribal ones can assist us in understanding the complexities of such parallel systems and in uncovering their limitations.

## Background on Palestinian Homeland Minority in Israel

Unlike Palestinians living under occupation in the West Bank and Gaza Strip, Palestinians within the

1948 green line are “full-fledged” citizens of the state of Israel, and therefore theoretically enjoy the same rights as Jewish citizens of Israel. However, reality has shown this to be far from true. The definition of Israel as a Jewish State ensures that the exclusion of Palestinians underpins its central political projects. The 1.2 million Palestinian citizens of Israel constitute nearly 20% of the country’s population. However, since the state’s founding in 1948, this community has been subject to institutionalized discrimination and legal subjugation. In spite of the fact that Palestinians who were not expelled beyond the green line have been formally declared citizens of the state of Israel, they have been viewed with suspicion and treated as a hostile community in their own homeland. Palestinian citizens were forced to live under military rule until 1966, a period when they were subjected to strict controls over all aspects of life including restrictions on movement, censorship, prohibitions on political organization, and limited economic and educational opportunities. The nascent state legally institutionalized its settler-colonial project, expropriating massive amounts of Palestinian-owned lands. Prior to 1948, the Jewish community owned between six and seven percent of the land. Within four decades this figure increased to 80%. Land expropriation efforts continue to this day, and currently 93% of all land in Israel is under direct state control.<sup>5</sup>

Today the Palestinian minority continues to face distrust and hostility: demonstrations against their presence in Jewish neighborhoods and towns are widespread, and a report published by the Israel Democracy Institute found that 53% of Jewish citizens believed that the central government should encourage Arab emigration from Israel.<sup>6</sup> Palestinians face discrimination in education, are overrepresented among the poor, and are excluded from many opportunities in the workforce via direct and indirect discrimination, such as through the use of the military-service criterion as a condition for employment even when military experience is irrelevant to the nature of many positions.<sup>7</sup>

Legal institutions are a key component of the Israeli state’s strategy. A variety of laws on the books and pending legislative measures are aimed at furthering the sociopolitical exclusion of this homeland minority. Palestinians in Israel are afforded differential and unequal citizenship rights, and key immigration and nationality laws privilege Jews and Jewish immigration.<sup>8</sup> Arab towns and villages are overcrowded, yet not a single new Arab city, town, or village has been approved for construction since the state’s founding in 1948. In contrast, over 600 new Jewish municipalities have been built.<sup>9</sup> Pushed to live in unrecognized villages and towns, Palestinians routinely face home evictions and demolitions for living in “illegal” settlements.<sup>10</sup>

Palestinian citizens of Israel contest their unequal treatment and often assert their rights via legal channels. For example, in 2010 Adalah, the Legal Center for Minority Rights in Israel, achieved 18 new impact litigations, 40 new legal interventions, and followed up on 35 pending cases before Israeli courts and other state authorities.<sup>11</sup> However even though Palestinian citizens of Israel use the Israeli legal system in their attempt to “dismantle the master’s house,” state-sanctioned legal discrimination persists, and colonialism continues legally.

Additionally, the existence of official legal institutions has not erased other socio-legal institutions (formal and informal legal systems such as religious, tribal and customary law). The various parallel legal systems are used in different ways in Palestinian localities. Such parallel legal systems and laws have developed historically and been used in various ways by the local community. They may be found in written material that was gathered and documented by community members; they may also be passed from one generation to the other through individuals and/or families that were considered the keepers of rights, entitlements and community obligations, were experienced in dispute resolution, and understood the meanings and means of preserving rights. The leading members of the community who participate in resolving social problems are called mashayekh (plural of shaykh—respected or religious men, learned authorities) makhatir (plural of mukhtar—village or clan head), and members of sulha (reconciliation) or jaha (distinguished men) committees. In some communities they could also be called ‘asha’iriyin (members or heads of tribes).

Women's experiences and reactions to rape must be understood within the context of both, the existing parallel legal systems and the discriminatory policies and politics I have described above. Studying the reactions to rape crimes against female Palestinian citizens of the state of Israel is complicated by the fact that these are embedded within the broader context of political conflict and colonial violence of the Jewish state, as well as the complex assertions of community these produce among Palestinian men. The following ordeals I describe of two young women who went to the Israeli police after they had been raped will clarify the differences between the Israeli state's criminal justice system and the parallel Palestinian systems that deal with and purport to assist women victims of sexual abuse.

## Layali

Layali was a first-year student at one of the local community colleges in her area and would take two buses to reach her classes. During her commute, she met a young man who claimed to be a teacher in one of the local elementary schools and they began talking on the phone. They would also converse while they waited for the bus. He would tell her about the school where he worked and the children he taught, and he would ask her about her family and her studies, among other things. Later he asked Layali to get him an argileh (hookah), as he claimed that he had heard that they were sold in her village at a better price. She bought him the argileh and many other things. He became accustomed to her bringing him items from her village. One day, he waited for her at the bus station. He claimed that he needed to get something he'd promised his mother from her village and invited Layali to drive there in his brother's car. When she joined him in the car he began telling her how much he respected the fact that she veiled and behaved like a proper Muslim. He then confessed that he liked her and that he wanted to spend some time together without worrying that people would see them. Shortly after, he drove to a forest and raped her.

After the rape, Layali asked her mother for help. However she only told her that he had tried to abuse her and that he was stalking her. Her mother refused to tell her father but she shared the problem with her aunt who in turn informed her uncle. Eventually word reached her father and brother. The family responded by prohibiting Layali from continuing to attend school and blamed her for not "protecting" herself from men's harassment. During the three months following the rape, Layali was in touch with Linda, a Palestinian social worker from Israel, who supported her psychologically and helped her understand that she was not to be blamed and that she could file a complaint if she wished. Layali stressed that Linda defined his abuse as "rape" according to Israeli law. Layali's family was very worried and continued to search for ways to apprehend and discipline the abuser. Her uncle, being a clergyman, decided to consult with someone in the Islamic movement in the village. They all thought that the attacker could be punished and re-educated with the help of the Islamic movement and other key people among the mashayekh (a group of notable and respected Muslim men from the community).

Layali was reluctant to seek assistance from the members of the local Islamic movement. Because of her belief that the Israeli system would uphold the rule of law and punish her abuser, she ultimately decided to go to the Israeli police. As Layali explained:

I was 18 years old when I stepped into the police station. I really tried to get help from my family, but my mother said that the jaha lajneh [the committee of the distinguished men] and the harakeh [the committee of the Islamic movement] are the only ones that could help women if someone harasses them. I was afraid to tell her all of the details. I was afraid to tell her that I was raped. I refused to allow the mashayekh and sulha people to interfere....I did not want anything from the lajneh or harakeh. I wanted him to be punished, like they punish rapists in Israel, like we read in newspapers and see on TV.

However, rather than meeting Layali's expectations (informed and shaped by the stories she had seen in the

media depicting the execution of justice in cases of rape), her encounter with the Israeli police only exacerbated her suffering. During my interview with her, Layali read a copy of her testimony at the police station in which she was quoted as saying: "I am afraid, and I came to ask the police to protect me." At this sentence, she stopped reading and told me:

...What kind of protection are you talking about? I feel disgusted with myself when I remember that trash station [referring to the police station]. I was there answering his questions: "What happened? Where were you? Why? What did you wear? How many times? Do you have a report from the doctor? You should be examined. Did you drink alcohol before? Did you meet him alone? Are you sure? Are you sure? Be more precise...Are you sure?" Believe me, in the police station I felt like I was the criminal, that I was to be blamed, that I was the liar. I felt like I was on trial...a trial that started but never ended.

Layali had sought protection. However not only was she questioned as though she had committed a crime and her case not taken seriously, but she was made to feel less protected and more vulnerable and violated. As she explained:

...fearing the police is the most horrible and scary thing that a human could experience. Remember, I was 18 when I stepped into the police station. I hated myself but I had no other choice. I told the investigator that I was afraid, that I might die in a minute if he doesn't protect me. He looked at me - and I will never forget what happened that day - and he told me: "How come someone like you came here? Someone like you...Arab, with such a sexy looking figure....Listen to me, drop your charges, filing a complaint is not going to help you out, you will be humiliated by the system. After all, you are an Arab woman. They will look for ways to dig your grave, and you will be in much more danger. You just come to me and I will take care of you, I will protect you." He was right. I should have never filed a complaint. But the ones that are able to dig my grave are the police, and the ones that are able to keep me scared are the police....

The people with whom Layali sought refuge treated her case dismissively, made inappropriate and suggestive comments, and in the end only heightened her fear and anxiety when she was already traumatized and vulnerable. Instead of handling Layali's complaint discreetly and sensitively, five hours after she had filed her complaint the police called her parents – she had explicitly stated she did not want to disclose the rape to them— two community leaders, the abuser and his parents. The police's intervention caused a great panic in the community as Layali's assault became widely known and subject to ridicule and speculation. The public revelation of her rape increased the threat of violence against her as it dishonored her and shamed her family within the community. Some called upon family members to kill her in order to save face, restore honor, and recuperate their social standing. The welfare department feared that her family would murder her because of perceived "honor crimes," so they decided to move Layali to a distant shelter for abused young women. Meanwhile, her attacker was never arrested or jailed. The police's reaction, the public revelation of her assault, and their inability to move forward with their investigation aggravated an already difficult situation. Layali recalls:

They did not arrest him, not even for one night. They saw me as a cheap woman who didn't deserve their serious treatment.... Every time I asked them to help me, to protect me, they told me, "We will do our best, but it is up to you to proceed with your complaints. It is up to you to decide what should be done." Even when my uncle intervened they turned him away, stating, "It is up to her, everything is up to her." Is it so? Is it up to me? Is anything up to me when instead of being helped and feeling protected, I felt like a naked woman, I felt like a slaughtered sheep, and I felt that every passerby was capable of stabbing me, of attacking my honor, my family?

All the above difficulties, compounded by the sense of being ostracized by her family and community and the weight of the trauma, which Layali shared with me while living in the shelter, drove her call to her parents and promise them everything they wanted--all it would take just to regain their protection so she could go back

home. Her father went to the village's Committee (belonging to the Islamic movement) and sought the help of some other local respected figures. With the help of her uncle (who is a cleric), he asked for their help to protect his daughter. A special local committee was established to work on Layali's case. The committee, including a professional woman who worked for them (she was an educator), took Layali to a clinic where a doctor reconstructed her hymen, or as Layali stated: "He did what he needed to do (sawwa illi lazim)." Three months after that, the village Committee introduced Layali to a young man who was an ex-convict and former drug addict. They did not tell him about her prior abuse. They assisted them financially to find a small room at the end of the village and they were married.

Layali has now been married for three years but she remains anxious that one day her husband will discover her complaint and divorce her – or perhaps worse. Whereas the special local committee addressed her rape with discretion via personal connections and social channels and with the help of the professional woman that Layali trusted, the fact that she (Layali) had initially gone to the police and received assistance from the Israeli state welfare department made her rape a matter of official record. She concluded:

You know, I could always say that the woman from the committee is a liar (although I like her a lot, I trust her, and she is still in touch with me, she looks after us and helps us). I could always deny that I had a hymen reconstruction. But how could I deny that I filed a complaint and was in the shelter for three months, when they have my story, my information, my signature? They could ruin my life. The police and the people from the shelter can never help Arab women. The police can't even speak my language...I am very involved now with some women from the mosque and I try with all of my might to tell people not to use the Israeli system, because this system chokes us all of our lives.

Layali's experience with the Israeli system stands in stark contrast to the images that had shaped her perceptions of it prior to her encounter at the police station. She initially avoided seeking assistance from informal communal and religious institutions and instead went to the police station because she felt encouraged by media depictions of the competency of the Israeli system in punishing rapists. However, as Layali's experience illustrates, in spite of how such systems are depicted, they are problematic.

A review of the literature on sexual abuse and rape in the West- as Israel followed western models in dealing with such abuses- shows that over the past two decades, there have been many initiatives aimed at improving police intervention and other legally oriented treatment of sexually abused women. Programs were developed to assist women victims of rape, and to give them emotional support and counsel when addressing the legal system. Police officers were trained and educated to provide help to rape victims; medical caregivers, rape crisis centers, and other forensic evidence professionals were supported in offering around-the-clock support to abused women. In Canada, for example, the criminal code was amended to broaden the definition of what was deemed a sexual offense to include rape, attempted rape, indecent assault and more. The aim of such amendments was to increase the proportion of women reporting sexual assaults. However, evaluation studies show mixed results and sexual crimes remain among the most under-reported.<sup>12</sup> Still, in spite of the prevalence of under-reporting, women in many countries, like Layali in Israel, report their rape to solicit help, official acknowledgement of their rape, and regain a sense of justice when punishing the rapists.

However, Layali's testimony calls into question the ability of the criminal justice system, in particular the police, to intervene in a victim-sensitive manner and to attend to the needs of victims of sexual abuse. Her encounter with the first point of contact with the Israeli system – the police – did not provide her with redress and it perhaps even compounded her trauma. Layali not only experienced the deficiencies present in Western legal systems, but her position as Palestinian woman – or, "Arab, with such a sexy looking figure" according to the interviewing officer -- further complicated her encounter and distressed her. Layali's identity was acutely present when she sought aid from the police. It impacted how she was seen, heard, and treated.

The behavior of her interviewing officer, who, in addition to lacking sensitivity and interrogating her

as though she had committed a crime, went so far as to make sexually suggestive comments and make a pass at her, aggravated Layali's suffering rather than lessening it. Layali's account reinforces previous findings both in Israel and elsewhere, of the failure of the official-state system to follow its own procedures for addressing sexual abuse, compounded by victims' negative and traumatic experiences with the medical and legal system.<sup>13</sup> It is rare that personnel meet the state's requirement to investigate and prosecute criminals, let alone attend to victim's needs.<sup>14</sup> It is not known whether the Israeli police or legal system has taken on the new paradigm for thinking about and treating rape that has emerged in the last decade or two.<sup>15</sup>

Layali's voice also reveals the manner in which Israeli police officers, like police in many countries, are affected by the misconception that only rape by a stranger is "real rape."<sup>16</sup> This view constructs expectations about how a "real raped woman" should act and react. The fact that Layali was raped by an acquaintance likely influenced the behavior of the officials she encountered at the police station; they may not have considered her case to be "real rape."

Additionally, Layali's status as a Palestinian woman from the Arab minority may have complicated how the Jewish Israeli officers viewed her. Perceptions and expectations of her may have been distorted by negative stereotypes about the Palestinian community. Linguistic barriers agitated Layali in her encounter with the police. She explained to me her inability to fully express herself in Hebrew, or as she described it, "to translate my emotions into Hebrew." Many rape victims struggle to express themselves and find it difficult to discuss their trauma at all, let alone "translate" their emotions in order to make them comprehensible to those who have not undergone sexual violence. As Layali said, "If my own family, that knows me well and knows my language and my behavior, did not understand, how do you expect the Israeli police to understand? They did not put forth any effort. Quite the opposite...they looked down on me."

Layali was convinced that the police's lack of interest in her rape was apparent from the way they treated her and her case, and that many of their questions verged on the voyeuristic. She explained the way the police asked her about the color of the dress she was wearing, how much he pulled it up, and whether by pulling it up he was able to see her legs and underwear. She was asked whether she saw his sexual organ and whether it was the first time she had seen a man's sexual organ and more. The police officer's gender (male), his invasive and tactless questions purportedly to "collect proper evidence," his behavior in dealing with her abuse, and his condescension towards her as an Arab-Palestinian woman, placed additional strain on the interview. This in turn added to her inability to understand him well or explain herself in Hebrew, thus creating great embarrassment. She insisted to me that his intention was to humiliate her because she was an Arab woman. Her words reveal that her identity as an Arab was not absent from her treatment as a raped woman. As Razack argues when discussing the rape of Black and Aboriginal women, their rape is considered "less inherently worthy than White women."<sup>17</sup>

Layali had come up against the discrepancy between the traumatological discourse on rape and the legal one. Layali contrasted her experiences with the police to those with the social worker with whom she first met, a woman who was attentive to her emotions and supportive of her feelings, fears, and need to punish the rapist. Layali said:

Linda, the social worker, asked me about my feelings. She insisted on knowing whether I could sleep at night, whether I was having nightmares, whether I had changed my lifestyle since my rape. She really wanted me to feel safe in sharing my hardships, and even my anger about my parents' lack of support. She told me that the law is clear, and that this was a clear case of rape, and explained that I could choose to file a complaint with the police, and that it was up to me. I wanted him to be punished...I went to the police, but they are not Linda...

Layali's experience with the social worker stands in stark contrast to her encounter with the police. While Linda – and note that Layali feels comfortable and close enough to her to call her by her name – provided her

with emotional support and made her feel as though she could successfully pursue a case against her attacker, this hope was dashed almost immediately upon entering the police station. The police did not hesitate to call upon the parallel legal system (family and other key people from the local community) to assist them, even though Layali had not given her consent. In fact, they went against her clear refusal.

Stepping into the police station changed Layali's life completely. Her identity as an Arab-Palestinian, her age, her socio-economic background, her association with her village, her appearance, her sexuality, her relationship with the rapist -- all of these factors revealed the way in which nothing that was done was "up to her."

## Jana

Layali's case demonstrates that a multitude of factors shape how a victim is viewed by and interacts with legal institutions. Our second case study, of Jana, further underscores this point as her assault and subsequent encounters with the Israeli police and parallel legal systems took place shortly after the outset of the Second Intifada. It was a period of heightened tensions and distrust between the Israeli state and the Palestinian homeland minority that stood in solidarity with those struggling in uprisings in the West Bank and Gaza. In the first eight days of October 2000, thirteen unarmed Arab Palestinian demonstrators were killed by Israeli police and security forces, dozens were wounded, and hundreds were arrested. In spite of the findings of an Israeli commission of inquiry (the Or Commission), which confirmed the illegality of use of lethal force to disperse crowds and recommended a criminal investigation, no indictments were ever filed against the policemen involved.<sup>18</sup> The incident remains a painful wound among the Palestinian minority. One cannot divorce this fraught sociopolitical context from Jana's efforts to cope with her assault—from her interactions with the official state system, to the treatment meted to her by parallel institutions during that difficult political period.

Jana was less than nineteen years old when she was raped by Fuad, her neighbor and boyfriend. They grew up in the same town, went to the same school, and would meet up at social events, in school, and in the neighborhood. They exchanged text messages and emails and would chat online for hours. On the day she was raped, they'd had a long conversation on Skype, during which they talked about their future together, the names of their future children, their work plans and more. At around 7:00 p.m., Jana finished baking her favorite chocolate cake and invited him over to try some of it. He dressed up to come over, but found out that his mother had taken his keys so he couldn't lock the house. He asked Jana to bring him the cake, and she did. Her visit was longer than expected, and they were both happy to be alone, talk, and hug. However, Fuad kept going further in spite of Jana's protestations. He took her by force and raped her. As Jana explained:

I was happy I went to see him, but I did not know how to stop him...I really did not. He kissed me and called me "my wife." He was so loving, so attached, so heavy, so violent, I felt choked...when I left, I was bruised, bleeding, in pain, and very scared. He raped me...I asked him not to rape me...I asked him not to do so...[but] he did not stop.

Initially, Jana did not tell anyone about her rape. Still, her mother noticed her bruises and the way Jana was excluding herself from family gatherings, was depressed, and refused to leave home or even talk to her friends. Her mother then learned from her sister that she had gone to the neighbors' house. Knowing the long friendship between Jana and the neighbor, she realized that something bad had happened. Twenty-four days passed before Jana disclosed her ordeal to her parents. She explained that she was expecting her parents to stand by her, to go to his family and, as she stated, "request back their honor." However she was let down. Rather than supporting her, her parents blamed her for being abused, punished her for visiting him, and insisting that she "shut up." She felt that her parents were treating her with lack of love and respect so she

turned to her close girlfriends and called the rape crisis center hotline. Through a friend of hers she met with a social worker from the state welfare department, who advised her to go to police in spite of her deep distrust and fear of the state, which was acute in the wake of the deaths of the demonstrators in October 2000. She explained:

When they [her girlfriends, the helper on the hotline for rape victims, and the social worker at the welfare department] told me that I have no other choice and that I must inform the police, I begged them not to do so. It was so important not to call the police - I fear them, they hate us. You saw how they [Israeli police forces] killed those thirteen men. Their murders affected me so much and I was confused for a long time. I stayed at home fearing everything, I stopped trusting anyone...

Whereas Layali had gone to the Israeli system because she believed it to be capable of aiding her and punishing her attacker, Jana was deeply distrustful and fearful of the police and instead first turned to her family and friends. In addition to coping with Fuad's violation of her love and trust, Jana was further constrained by a feeling of having nowhere to turn:

All of the doors were closed, no one wanted to help me. Fuad was behaving as if nothing happened, and this killed me from the inside. My parents – even after hearing the entire story - did not believe me, blamed me, and refused to acknowledge that I was abused. They wanted me to keep living my life and promised they would find someone to marry me if he doesn't. But I was hurt, deeply hurt and broken. I wanted him to be imprisoned; I wanted him to pay the price for taking me by force.

During our interview Jana was looking up the emails she had exchanged with Fuad to show me how much she trusted him, and how convinced she was that they had loved each other. She wanted me to understand what an incredible shock it was that this crime had occurred. Her sense of hurt was deep, but so was her conviction that Fuad should be punished for talking advantage of her love and kindness. She tried to convince her parents and grandparents that he should pay for his crime but their preferred route of action was going to the sulha, which Jana did not find suitable. As she explained, "my grandfather was from the old generation and he said he could ask the sulha people to help me - but just to teach him a lesson, [since] the sulha people can't put him in prison. I wanted him in prison."

Her family's inaction and their failure to provide the kind of support she sought pushed Jana to reconsider going to the police in spite of her anxieties about the state. It seemed the only avenue capable of punishing her attacker in the manner she saw fit. Eventually, Jana's grandfather – but not her parents - decided to support her in going to the police. Given the political climate of that time, in which distrust of Israeli authorities was at a high, the mere fact that Jana and her grandfather ever went to the police station suggests the extent of her desperation and the lack of faith she had in alternative pathways to justice (i.e. the parallel legal systems). She said:

I was depressed for a long time, over seven months. So my grandfather felt sorry for me, and felt that putting him in prison was the just punishment for someone that took advantage of a young woman who trusted and loved him. So he came with me, he really decided to escort me to the police station.

When Jana finally stepped into the police station after months of conflicted deliberation, she found herself in an environment that did little to provide a sense of comfort:

The place...the police station is horrible. The rooms, the open doors and spaces, people coming in and going out...the policemen are all over the area. They stop you while you're talking...they listen to you...they silence you...they ask questions when you are so emotional, afraid and fragile. It was a very embarrassing, a very strange feeling. I was numb...It was hard to feel anything....a sense of loss.

When her formal interview began, her discomfort grew. The abrasive and insensitive demeanor of her

interviewing officer both surprised and distressed Jana:

I really did not expect it to be that harsh. When I went to file my complaint, I was worried, but I told myself, "This is not going to be worse than the rape itself." But it was. The investigation in the police station and the fact that they kept on pushing me to verify specific details, the fact that they kept on checking details made me very afraid, and worried about saying something wrong... That it might sound like a lie... giving the testimony in the police station was like rape itself, and going over the details... while my grandfather was listening... made me more upset, worried, and angry.

It is difficult to recount and share the experience of a rape with another person, and in the course of an interview it is not uncommon for a victim to feel uncomfortable discussing the explicit details of her assault with an investigator. However, the officer Jana encountered behaved in a manner that only compounded her embarrassment and discomfort:

The investigator asked questions such as "What exactly happened? Were there sheets and pillows in the place? What about a bed? Or you mean you did it on the table?" He asked me whether he was violent towards me, whether he caused any bruises, bleeding, scars. Then he asked me if I noticed any marks on the rapist's body, if he had any tattoos in hidden areas, and when I said "I think I did," he replied: "Wow, so you were relaxed and observant during your rape."

She further detailed her interviewing officer's behavior, saying:

The police officer wanted the story fast. He screamed at me when I would stop and cry, and he urged me to continue and finish my story. "Nooo, nooooo, yalla," -- this is all I remember from there. [And] when I gave him details, the police officer would say, "Ufff, too long! My hand is hurting!" [he was writing the testimony]. It was so hard. I felt like I needed to defend myself. I was defending myself in the place where I had come to ask for protection. This is exactly what I needed [sarcastically]. He asked me where the attack had happened, and I said that it had happened when I visited him. He started laughing, "So you went to him with your own legs?"

Jana further explained how her prior relationship with her attacker, and the fact that the rapist had blackmailed her and promised to marry her, led the police to suggest that this was not a "real" case of rape:

I tried to explain, and started sharing things about our relationship, [and] showed him emails from Fuad, but he was so convinced. The fact that I wrote in my emails to Fuad "habibi Fuad" [My darling Fuad] and "ana bahibbak" [I love you] turned the police against me. It was horrible. He was interrogating me [and] it was a long and painful interrogation. I told him, "This is what happened, you are free to believe it or not." He said it is not about me. Then he told my grandfather, "Listen, no court, no judge will believe her... all those love emails, her testimony that she went to him, her silence for such a long time... every single piece of evidence is against her." I left the station so upset and frustrated.

Jana perceived the police as uncaring, lacking any sensitivity to her victimization and more interested in closing another file than being attentive to victims' well-being.

After the scarring encounter at the police station, Jana ended up joining her grandfather, who took her to his friend in the North. Jana lived close to her college with her grandfather's friends and worked for them in a family business. Jana tried to commit suicide twice, feeling that her family - especially her parents - had abandoned her and ostracized her from their community. The welfare department offered to provide her with assistance but the encounter in the police station, and the fact that she believes that her family, the welfare department, and the police conspired and planned her exile in the North, led her to refuse any further intervention. As she explains:

I hoped that the police would listen to me, and would help me...actually to this day, I am not sure whether my grandfather had a previous agreement with the police, whether he and his sulha men conspired against me, whether he talked to Fuad's (the rapist's) parents. I really don't know.

After being raped, Jana experienced the additional trauma of being ostracized from her family and community, and of being humiliated by the Israeli police whom she already feared. The failures of both the state and informal legal institutions fostered such disillusionment in Jana that she found herself speculating that they had been out to get her from the beginning.

Jana's encounters - with her own family, the welfare department, and the Israeli police - compel us to look carefully at the way in which the tensions and sometimes the harmony and collaboration (whether apparent and intentional or hidden and coincidental) between various socio-legal systems end up re-victimizing abused women. In spite of the welfare department's offer of assistance, the humiliation experienced at the police station compounded Jana's distrust of Israeli institutions and led her to refuse welfare aid. Though her grandfather attempted to support her, the gaps and constraints of the various systems proved difficult to negotiate. He was able to provide her with "refuge" in the North and her exile from her home was predicated on her protection, but it did little to address her emotional trauma and feelings of abandonment, let alone offer a sense of justice.

Additionally, Jana explained how much she, like many other victims, hesitated to share her abuse. She discussed with me her self-blame, her sense of guilt, and the shame she felt for being abused. She talked about being embarrassed and wanting to keep her rape a private matter. Seeking the assistance of others was a significant step for Jana, and the fact that she sought it via channels she did not necessarily trust speaks volumes about how constrained and conflicted her situation had been. Jana's reporting of her sexual abuse to both her parents and to the police represented her clear announcement that she needed their protection. Yet her fear of being blamed, humiliated, and not finding support was not unfounded. Her interview shows how her family and the police denied the crime, particularly when they discovered the nature of their relationship and the emails between her and the rapist. Her encounter illustrates the way both the police and her family refused to acknowledge her rape, mainly because it did not fit the rape myth, which posits rape as a violent act of force (even though it was), committed by a stranger, in a public deserted place. This classic rape scenario—which feminist scholars have criticized for being the only one that is considered "real rape"—was apparently required by both the Israeli police and the local parallel legal system.<sup>19</sup>

### **Lack of Consent and the Re-victimization of Women**

Studies of rape from around the world reveal that there is no place where legal solutions are straightforward. Studies show that physical injury doubles the likelihood of women reporting their sexual abuse and that police, prosecutors, and judges are more likely to believe raped women's allegations if they are injured, perhaps because injury may function to corroborate a victim's claim of forced rape.<sup>20</sup> Social control agents also are more likely to believe women who were physically coerced, had their clothes torn, and had been hit, slapped, kicked, or choked.<sup>21</sup> Conviction rates are higher when the assailant uses force.<sup>22</sup> Furthermore, studies show that the legal discourse engages with dimensions such as the severity of the sexual assault; the nature of sexual relations; the time and place; the degree of coercion; the extent of damage and physical ramifications; the relationship between the rapist and the victim; the age and characteristics of the victim; and the time and timing of the complaint. The psychological discourse instead focuses on the existence of anxiety, depression, fear, apprehension, PTSD, and even attempted suicide.<sup>23</sup>

Upon hearing about Jana and Layali's negative encounters with the police, one must question the ability of "modern" or "advanced" state systems to address the needs of victims of sexual abuse and to combat

the prevalence of such crimes. Their negative encounters were not only related to their distrust of and disbelief in the system's ability to assist them and the contradictions and conflicts among the various formal discourses, but also to the embeddedness of the patriarchal structure of power and the rape myths that shape the ways in which society at large reacts to rape. Rape myths and their underlying assumptions influence the construction of the stereotypical beliefs including those of professionals and representatives of criminal justice system.<sup>24</sup> A new piece of research entitled "Stop Blaming the Victim" on Rape Myth Acceptance (RMA) pointed out that men displayed higher endorsement of RMA than women, and that RMA was strongly associated with hostile attitudes and behaviors toward women.<sup>25</sup> Studies also have shown clearly that the reaction of the medical and legal systems in many cases ended up producing additional distress, alienation, and victim-blaming.<sup>26</sup> Disbelieving women and measuring the amount of "actual harm" while using patriarchal-legal yardsticks such as "clear evidence," "physical injury," "clear consent or lack thereof" and more, reveals that the existing structure and workings of power are directed by a reluctance to believe women victims of rape, particularly those whose behavior does not fit the script of how a victim of "real rape" should act.

The cases of Jana and Layali show that such general workings of power are exacerbated when the victim does not trust the police and when the police perceive the victim as a "primitive other," as is the case for Palestinian citizens of Israel. These problems are also compounded when multiple or parallel legal systems exist, interact, or are in conflict. In the context of the colonial state, understanding the workings of power and the production, reproduction and reconstruction of powers over women's wounded and violated bodies is critical. The workings of power, as Jana and Layali's cases reveal, may play into the hands of the colonizer, the patriarchal society, and the oppressor. Historians have argued that colonized women are represented as vulnerable and in need of protection from the colonized man – protection, which the colonizer man is supposedly able to provide. Spivak sums this up in her famous dictum of "white men saving brown women from brown men."<sup>27</sup> In the Israeli context, it is common for the Palestinian woman to be deemed oppressed and in need of rescue from the "violent" and "barbaric" Palestinian man. However her community believes that she should be saved from the hands and systems of the colonizer. The parallel legal system is supposed to do that. What these women's testimonies of their encounters with the Israeli police system reveals is that this triangle of the victimized colonized Palestinian woman, the dangerous colonized Palestinian man, and the civilized white Israeli protector does not always work in predictable ways. The dismissive, patronizing and dangerous attitudes of the policemen Layali and Jana encountered show that the male colonizer—in this case the male Jewish Israeli police officer—is often unwilling to "protect" or "save" the colonized woman; or, at the very least, that his understanding of protection is neither culturally or socially appropriate. Such disregard for these women's traumatic experiences demonstrates a tacit culturalization of the event of rape; the police may be assuming that "that is just what Palestinian men are like and therefore these occurrences are nothing out of the ordinary."

The recurring phrase, "It is up to her," further reflects these relations. Embedded in these words is the assumption that the virtues of the purportedly "modern" and "enlightened" Israeli legal system are accessible to the colonized woman and she may be saved if she so desires. It is "up to her" to see that justice is served and any failure to prosecute and punish the rapist is then due to a failure on the part of the victim. In this view, if the victim redresses her grievances via social or religious institutions and internal parallel legal systems, she is choosing to be subjected to the control of traditional and conservative patriarchal structures. However, the inadequacies of the Israeli legal system—and for Jana and Layali especially the crude and insensitive behavior of the police—push victims away, and towards such informal channels of crisis resolution. These communal institutions are able to provide some sort of resolution for victims when the "modern" state has failed them. So in what ways is it really "up to her?" How many women victims of abuse can negotiate and manage the multiple legal systems? As we see in Jana's case, it is not always clear whether the systems are working against each other or in full co-operation.

This paper argues that for Palestinian women who have been victims of sexual assault, filing a

complaint at the police station produces dilemmas and hardships. Second, it argues that multiple legal systems have worked together to deny rape victims the right to rights, presenting a serious dilemma to helpers who recognize that the various socio-legal systems available are unable to protect women from further abuses. The principles, advantages, and drawbacks of each socio-legal system are apparent in the two cases. The manner in which society dealt with Layali and Jana reveals a complicated situation in which state, religious, and customary law interact and sometimes coordinate. The existence of multiple channels for redressing grievances creates dilemmas for women who have been raped, and their various inconsistencies and inadequacies create gaps that leave many women without a comprehensive means either to receive support and treatment or to pursue justice against their attackers.

Analyzing the hardships facing Layali and Jana, as told in their own words, sheds light on the actual ways in which gender violence is dealt with in the case of Palestinian women in Israel. The interaction among the different legal regimes (state and other community-oriented legal systems) and the cultural and racialized constraints on utilizing the law introduce important issues worth taking seriously. Grounding our examination of the system in the experiences of the women who interact with it and viewing it through their eyes reveals the challenges and hardships abused women encounter. We are forced to move away from thinking abstractly about reforms, laws, new regulations or proposing articles and amendments, as I had first done when a lecturer at Bethlehem University. It tells us that we should also refrain from arguing about patriarchal or nonpatriarchal interpretations of Islamic law or looking to hadith, as some now argue. It suggests shortcomings in state law with its notions of consent and non-consent and its demand that we search for “proper evidence” and “real rape.” Well-intentioned though such discussions may be, they too often elide the complex experiences of abused women themselves.

When looking at real cases like those of Layali and Jana, we learn that there are no easy or clear-cut answers to be found in either state law or the parallel systems of the *sulha*, the *harakeh* or the community. Though the Israeli legal system may offer the possibility of incarcerating rapists, neither Jana nor Layali’s attackers were imprisoned and the women’s experiences with the Israeli police produced embarrassment, shame, and humiliation. Their cases were not handled discreetly and created scandal in their communities. On the other hand, though informal familial and religious institutions and networks provided a discreet avenue for “resolving” their crises, they did not produce the sort of punishment of the offender that they had sought.

The existence of multiple sets of institutions and channels for redressing grievances does not mean that victims like Jana and Layali have the ability to move creatively among the various options or to choose innovative routes they might find personally suitable. Nor does the existence of multiple legal systems seem to provide a just resolution for most victims. Rather, this multiplicity of systems and institutions is replete with constraints and gaps. For both Jana and Layali all proved less than satisfactory. Analyzing the way these various systems work with or against each other and examining the complicated realities of individual women who have been raped provides us a point of entry to challenge the claim made by social workers and agents of the modern state alike that “it is up to her.” The lack of consent experienced by the event of rape is thus followed by other modes of constraining and foreclosing consent through the multiple legal systems within which Palestinian women in Israel live their lives.

## Notes

- 1 Nadera Shalhoub-Kevorkian, “The efficacy of Israeli Law in Preventing Violence Within Palestinian Families Living in Israel,” *International Review of Victimology*, Vol. 7, No. 1-3, 2000:47-66; Nadera Shalhoub-Kevorkian, Edna Erez, & Madelaine Adelman, “Policing Violence Against Women in Multicultural Societies: ‘Community’ and the Politics of Exclusion,” *Police & Society*, No. 7, 2003:105-133.
- 2 Orit Kamir, *Israeli Honor and Dignity: Social Norms, Gender Politics and the Law*, Jerusalem: Carmel Publishing

- House, 2004 (in Hebrew); Mimi Ajzenstadt & Odeda Steinberge, "Never Mind the Law: Legal Discourse and Rape Reform in Israel," *Affilia*, Vol. 16, No. 3, 2001:337-359; Nadera Shalhoub-Kevorkian, "Law, Politics, and Violence Against Women: The Case Study of Palestinian-Israelis," *Law and Policy*, Vol. 21, No. 2, 2008:189-211; Nadera Shalhoub-Kevorkian, "The politics of disclosing female sexual abuse: A case study of Palestinian society," *Child Abuse & Neglect*, Vol. 23, No. 12, 1999:1275-1293.
- 3 Nadera Shalhoub-Kevorkian, "Racism, Militarisation and Policing: Police Reactions to Violence Against Palestinian Women in Israel," *Social Identities*, Vol. 10, No. 2, 2004:171-192. My work brought me into contact with feminist activists, legal specialists, and mental health workers (what I define as social control agents - SCA) and we carried out various studies and engaged in debates about the effectiveness of Israeli state law in assisting abused women. This research led me to conclude that the various SCAs engage with and reproduce power and steal the pains of others (as Sherene Razack calls it) to please the system and its controllers. (Sherene H. Razack, "Stealing the Pain of Others: Reflections on Canadian Humanitarian Responses," *The Review of Education, Pedagogy, and Cultural Studies*, Vol. 29, No. 4, 2007:375-94). They empower themselves while not only failing to assist abused women but in many cases further harming them (Nadera Shalhoub-Kevorkian, "Disclosure of Child Abuse in Conflict Areas," *Violence Against Women*, Vol. 11, No. 10, 2005:1263-1291).
  - 4 Nadera Shalhoub-Kevorkian, "Disclosure of child abuse in conflict areas." *Violence Against Women*, Vol. 11, No. 10, 2005:1263-1291.
  - 5 "Historical Background," Adalah: The Legal Center for Arab Minority Rights in Israel, <http://www.adalah.org/eng/backgroundhistory.php>.
  - 6 Mada al-Carmel Arab Center for Applied Social Research, "Israel and the Palestinian Minority: Political Monitoring Report" PMR, 12.
  - 7 "Second Class: Discrimination Against Palestinian Arab Children in Israel's Schools," Human Rights Watch, 2001 <http://www.hrw.org/en/reports/2001/09/30/second-class-0>.
  - 8 These include the Law of Return of 1950 and the Citizenship Law of 1952.
  - 9 See "The Inequality Report: The Palestinian Arab Minority in Israel," Adalah, March 2011.
  - 10 In July 2010, for example, the residents of the Arab Bedouin village of Al-Araqueeb were evicted and between 30 and 45 homes were demolished in spite of the villagers' Israeli citizenship and long-standing claims to the land. Thousands of olive trees and other crops were destroyed and possessions such as electricity generators, vehicles, and household appliances were confiscated. The bulldozers were accompanied by hundreds of riot police. The village was rebuilt and destroyed over twenty times between July 2010 and February 2011. See "Israel Condemned Over Bedouin Village Demolition", Amnesty International, November 25, 2010; "Arab Bedouin Leader Protesting Home Demolitions Released from Detention", Adalah, February 22, 2011; "Police destroy dozens of buildings in unrecognized Bedouin village in Negev", Haaretz, July 28, 2010.
  - 11 "Annual Report of Activities: 2010," Adalah, March 2011.
  - 12 Ronet Bachman & Raymond Paternoster, "A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?" *Journal of Criminal Law and Criminology*, Vol. 84, No. 5, 1993:554- 574; Rita Gunn & Rick Linden, "The Impact of Law Reform on the Processing of Sexual Assault Cases," *Canadian Review of Sociology*, Vol. 34, No. 2, 1997:155-174.
  - 13 Ajzenstadt & Steinberg, 2001; Rebecca Campbell, "Rape survivors experiences with the legal and medical systems," *Violence Against Women*, Vol. 12, No. 1, 2006:30-45.
  - 14 Patricia A. Frazier & Beth Haney, "Sexual assault cases in the legal system: Police, prosecutor, and victim perspectives," *Law and Human Behavior*, Vol. 20, No. 6, 1996:607-628; Wendy Larcombe, "The 'Ideal' Victim v. Successful Rape Complainants: Not What You Might Expect," *Feminist Legal Studies*, Vol. 10, No. 2, 2002:131-148; Gregory M. Matoesian. *Reproducing Rape: Domination through Talk in the Courtroom*, Chicago: University of Chicago Press, 1993; Shana L. Maier, "I Have Heard Horrible Stories: Rape Victim Advocates' Perceptions of the Revictimization of Rape Victims by the Police and Medical System," *Violence Against Women*, Vol. 14, No. 7, 2008:786-808; Andrew E. Taslitz. *Rape and the Culture of the Courtroom*, New York: New York University Press, 1999.

- 15 Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Sefl, & Holly E. Barnes, "Preventing the 'second rape': Rape Survivors' Experiences with Community Service Providers," *Journal of Interpersonal Violence*, Vol. 16, No. 12, 2001:1239-1259. We must consider Layali's experience in light of studies in Western countries that question the modern state legal system's capability in addressing sexual abuses among women in general, not just minorities. For example, Amanda Konradi and Tina Burger ("Having the Last Word: An Examination of Rape Survivors' Participation in Sentencing," *Violence Against Women*, Vol. 6, No. 14, 2000:351-395) show that more than half (52%) of victims expressed concern about achieving justice through the system, and Campbell, Wasco, Ahrens, Sefl, and Barnes (2001) explain that more than half (52%) of rape victims viewed contact with the legal system as harmful. Previous studies challenge the consistency between state law and the individual beliefs of police officers (Rebecca Campbell & Camille R. Johnson, "Police Officers' Perceptions of Rape: Is there Consistency Between State Law and Individual Beliefs?," *Journal of Interpersonal Violence*, Vol. 12, No. 2, 1997:255-274) and have shown that perceptions of rape were among the factors affecting the reactions of the legal and medical systems. The historical development of rape as a crime from rape as a personal problem, and then to rape as a social problem; and from rape as sex to rape as violence; to the recognition of marital rape (Diana E.H. Russell. *Rape in Marriage*, New York: Macmillan Publishing, 1982) and date rape (Koss, 1985), caused a paradigm shift not only in perceptions and reactions to rape, but also a paradigm shift from the notion of the rapist as a stranger to rapists as men women know (Nicola Gavey. *Just sex? The Cultural Scaffolding of Rape*, New York: Routledge, 2005). The question remains, as Layali's narrative indicates, whether the use of Israeli state law and the "paradigm shift" that is offered by formal-state systems have been implemented, or are successful in combating such crimes and supporting victims of abuse.
- 16 Rebecca Campbell, "Rape Survivors' Experiences With The Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?" *Violence Against Women*, Vol. 12, No. 1, 2006:30-45; Susan Estrich. *Real Rape: How the Legal System Victimized Women Who Say No*, Cambridge: Harvard University Press, 1987.
- 17 Sherene Razack, "What Is to Be Gained by Looking White People in the Eye? Culture, Race, and Gender in Cases of Sexual Violence," *Signs*, Vol. 19, No. 4, 1994:894-923, at 899.
- 18 See Janan Abdu, "The Events of October 2000: Ten Years Later, The Wound Remains", *Jadal, Mada al-Carmel: Arab Center for Applied Social Research*, No. 8.
- 19 Estrich, 1987.
- 20 Shirley Feldman-Summers & Gayle C. Palmer, "Rape as Viewed by Judges, Prosecutors, and Police Officers," *Criminal Justice and Behavior*, Vol. 7, No. 1, 1980:19-40.
- 21 Estrich, 1987. Bachman & Paternostser; Susan Estrich, "Rape," *Yale Law Journal*, Vol. 95, No. 6, 1986:1087-1184; Rita Gunn & Rick Linden, "The Impact of Law Reform on the Processing of Sexual Assault Cases," *The Canadian Review of Sociology and Anthropology*, Vol. 34, No. 2, 1997:155-174.
- 22 Janice Du Mont & Terri L. Myhr, "So Few Convictions: The Role of Client-Related Characteristics in the Legal Processing of Sexual Assaults," *Violence Against Women*, Vol. 6, No. 10, 2000:1109-1136.
- 23 Kathleen A. Kendall-Tackett, Linda Meyer Williams, & David Finkelhor, "Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies," *Psychological Bulletin*, Vol. 113, No. 1, 2002:164-180; Lori A. Zoellner, Melanie L. Goodwin & Edna B. Foa, "PTSD Severity and Health Perceptions in Female Victims of Sexual Assault," *Journal of Traumatic Stress*, Vol. 13, No. 4, 2000:635-649.
- 24 Ellen Dye & Susan Roth, "Psychotherapists' Knowledge About and Attitudes Toward Sexual Assault Victim Clients," *Psychology of Women Quarterly*, Vol. 14, No. 2, 1990:191-212.
- 25 Russell, 1982; Eliana Suarez & Tahany M. Gadalla, "Stop Blaming the Victim: A Meta-Analysis on Rape Myths," *Journal of Interpersonal Violence*, Vol. 25, No. 11, 2010:2010-2035; Sue Lees. *Ruling Passions: Sexual Violence, Reputation, and the Law*, Buckingham: Open University Press, 1997; Zsuzsanna Adler. *Rape on Trial*, London: Routledge & Kegan Paul, 1987; Jan Jordan, "Worlds Apart? Women, Rape and the Police Reporting Process," *The British Journal of Criminology*, Vol. 41, No. 4, 2001:679-706.
- 26 Rebecca Campbell, "Rape Survivors' Experiences With the Legal and Medical Systems: Do Rape Victim Advocates

Make a Difference?" *Violence Against Women*, Vol. 12, No. 1, 2006:30-45; Lee Madigan & Nancy C. Gamble. *The Second Rape: Society's Continued Betrayal of the Victim*, New York: Lexington Books, 1991.

- 27 Gayatri Chakravorty Spivak, "Can the Subaltern Speak?" in *Marxism and the Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg, London: Macmillan, 1988, 33.

# Crime and Punishment: Laws of Seduction, Consent, and Rape in Bangladesh

Dina M. Siddiqi

## Representations of Rape and Punishment in “the Muslim World”

In February 2010, an international list-serve specializing on Muslim women carried a story with the headline Bangladesh: Court Orders Protection for Muslim Girl Punished for Being Raped.<sup>1</sup> The horror of the double victimization of the girl, who endures not only the violence of rape but then is punished for an act to which by definition she did not consent, immediately draws in the reader. Calling to mind prevailing tropes of barbarity and misogyny in Islamic law, and framed within a set of familiar binaries (human rights law versus culture/Islam; state protection versus community violence, and so on), the headline hints at the contents of the story. Without reading any further, the informed global feminist – whether or not she can locate Bangladesh on a map – can draw on available templates to construct the contours of an intelligible narrative of rape and its consequences in the Muslim world. As legal theorist Leti Volpp observes in the context of the United States, “certain narratives have traction because of already existing scripts about gender, culture [...] and Islam.”<sup>2</sup> Stumbling across this story, the casual web browser might be forgiven for assuming that girls in Bangladesh, at least those who are Muslim, are routinely issued fatwas and flogged for the “crime” of being raped.

Yet, the information laid out in the text itself suggests a qualitatively different chain of events, not as easily accommodated into globally circulating scripts for understanding Muslim women’s lives or the violence enacted on their bodies. The report notes that in April 2009, a sixteen year old girl was raped by a young man who had been stalking her for some time. The rape resulted in a pregnancy, at which point the girl’s parents hastily arranged her marriage with a man in a neighboring village. This marriage fell apart as soon as the husband’s family discovered, after a medical test, that the girl had been several months pregnant when she got married. Summarily divorced, the girl had an abortion and returned to her village. In January 2010, eight months after the sexual assault, a number of locally influential men convened an informal tribunal or shalish at which they issued a fatwa ordering the girl to be whipped 101 times, fined her father the equivalent of \$15, and issued another fatwa threatening the family with permanent ostracism if the fine was not paid. The girl was charged not with the crime of being raped but for immoral behavior. (Field investigators later discovered the girl had been in a relationship with her “rapist” that ended as soon as she became pregnant.) The girl was whipped in public until she fell unconscious. Intimidation and threats from the same powerful villagers

who convened the tribunal prevented the girl's family from lodging a formal complaint with the police. It was only newspaper reports that alerted rights activists who then took up the case.

In its account of events on the ground, the piece is fairly comprehensive. The document situates the rape case in the context of a "rash of locally issued fatwas" with similar outcomes; among other things, women faced lashing for talking to a man from a different religious community, for daring to file a rape complaint, and for refusing sexual advances made by a relative. Bangladeshi human rights advocates quoted in the document underscore the role of a dysfunctional legal system, a culture of hierarchy, and the indifference or complicity of law-enforcing agencies in allowing such extra-judicial punishments to take place. Activists point to the shalish's long-standing function in reproducing class hegemony and the manipulation of Shari'a principles to enforce existing power structures, especially in matters involving women. One person also noted that informal village arbitration can be found in non-Muslim as well as Muslim communities.

To put things in perspective, every year hundreds of disputes are mediated through tribunals and most are resolved without recourse to Shari'a.<sup>3</sup> The rise of "locally issued fatwas," corresponds with a more generalized "Islamization" of national political vocabulary.<sup>4</sup> Since the early 1990's, an average of 35-60 fatwa cases have been reported annually.<sup>5</sup> In 2009 there was a spike both in the number of reported cases and in the enactment of punishments, the nature of which appears to have changed. If in the past the object was to publicly humiliate and shame, now it seems that marking the female body with physical signs of suffering has acquired more cultural traction – at least in the more spectacular cases that make the headlines. This is a disturbing trend about which there is little research.

It bears noting, however, that when women face community punishment for "daring" to file a rape complaint and "refusing" the sexual advances of a relative, they are not being charged with sexual crimes. These are not conventional transgressions of the moral code or Shari'a prescriptions but direct challenges to social hierarchy. They are actions that defy gendered structures of inequality at their core; they are, arguably, indicative of new modes of dissent, sharpening inequalities and instabilities in the social order. For, as exercises in power, shalish encounters in rural Bangladesh rarely involve social equals; they are as much about maintaining class domination as they are about the policing of gender and sexual norms.

Such details seem to have no bearing on the overall framing of the report. The document moves seamlessly from the particular case of Bangladesh to the universal world of Muslim countries. A section entitled "Flogging, Forced Marriage and Isolation" begins with the assertion that, "[p]unishing rape victims under Shari'a (Islamic law) is not restricted to Bangladesh." Two examples, one from Saudi Arabia and the other from Pakistan, follow to support this point. As an aside, the report adds that all three countries are members of the UN Human Rights Council. The latter statement may have been intended to underline the frequently heard charge that a fatally flawed membership renders the activities of the Council meaningless.

Bangladesh is also described as "the world's third most populous Muslim-majority state, [is] an Islamic state where Shari'a has 'an influential role in civil matters pertaining to the Muslim community'."<sup>6</sup> Although Islam is the state religion, Bangladesh is not an Islamic state. To the lay reader this may not be a significant distinction but it is one that is critical for the operation of law. As in so many postcolonial states, religious law is confined to the "personal sphere." Matters such as rape are criminal offences so that, in theory at least, the applicability or not of Shari'a does not arise. For that matter, being raped is not categorized as a crime in Shari'a. Here the writer appears to be deeply influenced by the infamous Hudood Ordinances that have systematically blurred distinctions between rape and consensual sex outside of marriage in the version of Islamic law propagated in Pakistan, and generalizes from this. The distillation of the three distinct socio-political environments of Saudi Arabia, Pakistan, and Bangladesh into a singular analytic frame – of Shari'a driven and misogynist cultural practice – essentializes Muslim societies and erases historical specificity and power dynamics. It also feeds directly into an assortment of geopolitical struggles of the discursive kind that have significant material consequences.

It is worth examining the articulations of global and local in the telling and re-telling of stories of Bangladeshi women's sexual oppression. Fatwas are entrenched in the secular nationalist imaginary as a lurking threat to the nation and its women and Bangladeshi national readings map onto transnational narratives in most respects. The list-serve, for instance, draws directly on an item published in Bangladesh's leading English language newspaper, the Daily Star, headlined "Rapist Spared, Victim Lashed."<sup>7</sup> Although it reproduces the rape-fatwa narrative, the Daily Star news story repeatedly highlights the inequality between those who convened and presided over the shalish, and those who were its victims. The correspondent reports that the girl's (presumably indigent) neighbors did not agree with the ruling but "did not dare say anything against the so-called village arbitration." However, even though activists quickly discovered that the girl had not been raped, this and other details failed to dent popular representations of cause and effect.

Naturalized into the rape-punishment narrative, the specter of the fatwa re-emerges in numerous other cases around this time. For instance, in 2009, Piyara Begum's story was widely reported in the print and electronic media, complete with photos of a scowling bearded imam, who had sentenced her to 202 lashes for the crime of being raped.<sup>8</sup> Field investigations by human rights workers reveal a more complex, if predictable, reality.<sup>9</sup> The 40 year old widow had been in a long-term relationship with a much younger man whom she later charged with rape. It is probable that a relationship of this duration was not entirely hidden from public gaze. According to her testimony, late one night, the man enticed her – with the promise of marriage – to leave her sleeping children behind and go with him. At his residence, after he had forced her into having sex, the couple was discovered. At her behest, a hearing was convened. It is not clear if the young man's family objected but an initial ruling that the two should marry was overruled in favor of a sentence of lashing for both and a monetary fine for the man. After her sentence was carried out, the widow was so badly hurt she had to be hospitalized for several days.

Given the nature of Peyara Begum's injuries, it is no surprise that feminist narratives also focused on the "barbarity" of the whipping sentence and the "fundamentalist fervor" responsible for the fatwa. For the media, the routine policing of female sexuality is only newsworthy when fatwas and/or corresponding "barbaric" punishments are involved. Without question, it is urgent to ensure that such acts do not go unchallenged and are not repeated. However, I would argue that focusing exclusively on the fatwa is counterproductive and limited. Fear of fatwas displaces attention from an unequal social structure in which indigent female bodies are subjected to the moral authority of more powerful others, who invoke religion only when it is convenient. Further, it is the elision of the widow's sexual agency in her depiction as a duped woman that allows the rape-fatwa narrative to succeed on its own. When Islam as a thing-in-itself becomes the villain of the story, rather than unequal and gendered social structures, then questions of power are displaced or erased. Removing the danger of fatwas will not remove the dangers of class-inflected policing of women's bodies that are critical for reproducing relations of domination and subordination.

I end this section with one more example from 2009, one that foregrounds the kinds of social arrangements that shape the traditional shalish. In June, the leading Bengali language newspaper carried a story entitled "Raped Girl Lashed 100 Times." Apparently, the victim had been whipped so brutally that she had to be hospitalized.<sup>10</sup> Human rights monitors found that the lashing (associated with fatwas) had not taken place and that Rokeya, the "victim," had been advised by local authorities to check into a hospital for her own protection, since she had apparently challenged the authority of some powerful men in her community. The 35 year old Rokeya was divorced; she eked out a living in government sponsored earth-digging projects (an extremely low status occupation). Her relationship with Malek, a "locally influential" married man, was common knowledge. When he ended the relationship, Rokeya sought out a public hearing rather than bury a stigmatizing past. She demanded accountability from her erstwhile lover, who had promised to marry her. Despite numerous promises, local leaders put her off. Not to be stymied, Rokeya lodged a rape case against her former lover, Malek. It was then, faced with a case against "one of their own" that community leaders found the impetus to call a hearing. Their verdict was that in exchange for dropping the case Rokeya would

receive a sum of money from Malek. Rokeya was also sentenced to a beating with a shoe, which those present insisted should be carried out by her much younger brother. The intent appears to have been to maximize humiliation, not inflict serious physical harm. Rokeya was tenacious; with the help of the local administration, she then lodged an assault case against those who had sentenced her to the beating with a shoe. Four days after the hearing, the Union Council Chair advised her to check into a hospital until things calmed down. Presumably, retribution could be forthcoming for a poor woman who had dared to challenge the gendered social order of things.

Seen through the template of “rape/fatwa followed by 100 lashes,” the gendered and sexual circuits of power at work here are completely lost. However, the anxiety over fatwas, even when fatwas are absent, is revealing. In their testimonies, the defendants repeatedly emphasized that they had not issued any fatwas nor sanctioned whipping at the shalish they had convened. Rather, they presented themselves as following long-established modes of dispute resolution and punishment. They also suggested that political rivals had manipulated Rokeya into lodging the second case in order to get national level publicity – which it did, precisely because the story appeared to fit the rape/fatwa/whipping narrative. At one level, we can read this as an unsuccessful attempt by a subaltern woman to play off community against the state, and who got caught in local politics. At another, it is worth noting that while these community leaders have learned that issuing fatwas can lead to trouble and undesirable publicity, this has had little bearing on their sense of entitlement and privilege as arbiters of morality and sexuality. In short, the routine policing of female sexuality continues – with or without a fatwa. Shalish rulings become much more newsworthy when rapes/fatwas and their corresponding punishments can be accommodated into the frame.

## Troubling Consent

In the rest of this paper, I take a closer look at the blurring of boundaries between rape and consent in everyday social practices and their common sense understandings, and explore their consequences in the legal realm in rural Bangladesh. As I show, and as the examples of Peyara Begum, Rokeya and others suggest, slippages between rape and consent are legally institutionalized and culturally sanctioned. While it may be tempting to attribute this state of affairs to Muslim laws of adultery (zina), this would be wholly inadequate. Local understandings of consent/rape are complicated by legal provisions drawn from colonial law that allow women to charge men with seduction through deception or false promises to marry. The law itself is infused with culturally specific meanings of female sexuality and agency, the unsaid assumption being that no woman would willingly have sex with a man unless she believed it was sanctioned by marriage. Section 493 of the Penal Code, unchanged since 1860, states that:

Any man who by deceit causes any woman who is not lawfully married to him to believe she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief shall be punished with imprisonment [of either description] for a term which may extend to 10 years and shall also be liable to a fine.

The Suppression of Violence against Women and Girls Act of 2000 Section 9:1(3) contains a similar but watered-down provision.

In its narrowest legal understanding, consent refers to a physical state, with the body signifying consent. Deriving from the Age of Consent debates in colonial India, and continuing today, consent in Bangladesh is rigidly pegged to a linear notion of physical growth.<sup>11</sup> Below the magical Age of Consent, female sexual agency cannot be recognized legally. Above this age, even by a day, the person is radically transformed. Tanika Sarkar argues that however strategically limited to a physical state, female consent is coded as consent to community discipline as well as to new laws.<sup>12</sup> Herein lies a contradiction in the making, for consent has to be given within the parameters of community discipline as well as of new laws for it to

be considered legitimate. In a related vein, Nivedita Menon observes that sexual acts not sanctioned by prevailing codes of conduct are illegitimate regardless of whether consent was given (for instance in non-heterosexual intercourse) while conversely consent of both parties is assumed in sexual acts sanctioned by the social order, such as sex within marriage.<sup>13</sup> In one sense then, what is at issue is not consent at all.

This becomes clear when we look at cases filed under Section 493 and 9:1(3). Categorized broadly under the rubric of rape, a close reading of the material indicates that such cases invariably involve clandestine but mutually consensual sexual relations outside of marriage. It is only when the relationship ruptures the public-private divide, often as a result of pregnancy, and the male partner refuses either to acknowledge or act on the promise of marriage, that seemingly contradictory understandings of rape and consent emerge. The woman/girl testifies that she has given consent on the understanding that marriage will follow or that it has taken place informally. Here consent is not only gendered, it is a conditional and temporal experience; its mark on the body is fluid rather than fixed. Only when the promise of marriage is violated does the gendered body experience violation. Within the logic of the law and the logic of community norms, what was consent at one point in time becomes rape at another. Law and culture are mutually constitutive of sexed subjectivity.<sup>14</sup>

However legal common-sense can also be leveraged, and there is a long tradition of this in Bengal. The law is a resource for women, who (threaten to) turn to legal mechanisms, much as others do in their everyday material struggles. Recourse to the law is selective, however. The construction of female subjectivity as sexually innocent excludes all those who fall outside the norm. Victim testimony in First Information Report (FIR) appears to be carefully crafted by lawyers wishing to maximize the chance of winning the case, pitting villainous predatory males against naïve, readily duped women/girls. The exercise of female agency is erased in the narrative; luring, enticing and duping are the most frequently used verbs. In numerous FIRs, the charge is entered as: “x was lured/enticed/deceived into having sex” [...] “then she was raped.” The slide between rape and consensual sex is embedded in the narrative structure.

Witness testimonies and First Information Reports (FIR) all sound numbingly similar, variations of Peyara Begum’s and Rokeya’s story of seduction, deception and rape discussed earlier. If we define rape – minimally – as forced or non-consensual sex, there appears to be a serious slippage between consensual sex and rape at work here. This categorical confusion, I would argue, is not accidental. The seduction/rape narrative functions to give individual women and their families a degree of social respectability and protection not afforded those who openly admit to exercising sexual agency in relationships outside marriage. Those who can represent themselves as sexual “victims” (rape survivors) rather than sexual agents tend to be the ones culturally entitled to a “fair” hearing. While recourse to a seduction/rape narrative may offer women and their families the possibility of recouping some respectability, we cannot assume that all women simply manipulate the legal system after the fact. Given the ideological hegemony of marriage as the only legitimate site for sex, young girls in particular may very well subscribe to the notion that sex and marriage are interchangeable in some respects.

Dominant discourses of sexuality and respectability not only limit options for redress for individual women but also shape NGO/activist interventions in the legal realm. The conscious staging or re-presentation of seduction as rape is routine legal strategy. It is the only available way in which to assist women and girls who have been cheated and exploited by men. Unfortunately, such a strategy effectively reinforces “a discourse that constitutes ‘non-promiscuous/good women’ as those who would not agree to sex outside of marriage.”<sup>15</sup> The strategies available to young women in a universe of limited options are few and far between. Srimati Basu’s recent observation on the “marriage promise” scenario in the Indian context is useful here. She writes:

[...] the marriage promise scenario is culturally specific to these Indian (and Taiwanese) cases rather than an expression of an universal deep structure. It manifests particularities of the sex-gender system: kinship structures, labor patterns, religious and caste endogamy and property regimes reflect and

reinforce women's reliance on compulsory heterosexual marriage, and on sexuality as a commodity that secures its acquisition.<sup>16</sup>

Public prosecutors readily acknowledge the contradictions of their legal strategies but see no other option, given the significance of marriage and the material realities of most women's lives in contemporary Bangladesh. How should feminists proceed in this situation? There are no easy answers to such questions but it is worth remembering that like custom (informal tribunals), the law itself is an enormously powerful and not necessarily liberatory regime that requires skillful negotiation, rather than a counter to custom.

### **Conclusion: Foregrounding the 'Discursively Illegible'<sup>17</sup>**

Lara Deeb has asked, "How do we responsibly counter stereotypes without giving them importance and how do we quell liberal desires to save the world without denying social problems where they exist?"<sup>18</sup> Conventional feminist or legal understandings of consent and coercion, as abstract categories, are not adequate to the task of tracing the configurations of power that produce culturally specific notions of consent or rape in rural Bangladesh. Indeed, the binary logic of the law leaves no room in legal discourse for sexual experience except in terms of consenting/not consenting to male pressure.<sup>19</sup> This binary cannot capture the complexity, ambiguity or the cultural specificity of sexual experience, especially when this falls outside the normative ideal. At the same time, the slippage between rape and consent in legal/judicial discourses plays right into national and transnational stereotypes, inadvertently reproducing narratives of raped Muslim women further victimized by misogynist Shari'a provisions. Fear of Islam becomes an analytical blind spot, allowing questions of sexuality and women's sexual agency to be perpetually elided.

Navigating such complexity is a challenge for feminists, activists, and scholars. It may be that for a transnational network, a universalizing framework is indispensable for moving forward with its work. Calls for contextual specificity may appear ineffective and/or paralyzing. Unintended articulations with other people's political agendas may be considered undesirable but also unavoidable, perhaps even the lesser of two evils. Yet framing the exploitation of women's bodies as problems of Islam or Shari'a not only feeds into existing stereotypes about Islam and patriarchal barbarity but also forecloses a closer attention to other dynamics and dimensions of power, thereby undermining the possibility of effective activist intervention. My analysis shows how both the formal legal system and community codes of conduct are informed by normative expectations of women's sexual agency (or lack thereof), regardless of Shari'a and Islamic injunctions. The slippage between law and culture takes place precisely at the point where legal codes and community codes intersect. Thus, viewing violence "against women" through an Islamic lens makes visible some circuits of power while occluding others entirely. In particular, the place of institutional politics -- imagined as modern and standing outside of or in opposition to the realm of the "traditional" -- disappears. With respect to institutional and media representations of honor crimes in Turkey, Dicle Kogacioglu calls the resulting lack of attention to power and material effect the "tradition effect."<sup>20</sup> In Bangladesh, one might call this the "Islam effect," a line of reasoning that obscures or is actively hostile to analyses that stand at "the intersectional of multiple political and social dynamics."<sup>21</sup>

The call for attention to context, then, is not simply about greater accuracy or detail. Nor is it to refuse political or moral judgment. It is to attend to, as Lila Abu-Lughod in her unpacking of "honor crimes" shows, what the easy deployment of categories such as Shari'a or honor crimes "prevents us from seeing about the social and political world in which violence against women is occurring."<sup>22</sup> Context, as Mary John points out, is constitutive of meaning. The "occlusions of governmentality and erasure of history" that Abu-Lughod so masterfully traces in relation to "honor crimes" produce highly selective (mis)readings of women's experiences. They also do violence to the desires and the subjectivities of the very women they are meant to serve.

## Notes

- 1 (<http://www.wluml.org/node/5903>, last accessed September 13, 2011). WLUML is a large, heterogeneous organization that has carried out excellent research and advocacy over the years. My use of this example should not be read as a general critique of the organization's work or politics. Rather, I use it to illustrate a broader set of limitations on which I elaborate in the rest of the paper.
- 2 Leti Volpp "Framing Cultural Difference: Immigrant Women and Discourses of Traditions." *differences: A Journal of Feminist Cultural Studies* 22:1, 2011. p. 91.
- 3 See Dina M. Siddiqi. *Shalish and the Quest for Gender Justice: An Assessment of Strategic Interventions in Bangladesh*, Dhaka: Research Initiatives Bangladesh, 2005.
- 4 Dina M. Siddiqi, "Gender, Nation, Islam: The Social Life of Bangladeshi Fatwas," in *Communalism and Globalization in South Asia and its Diaspora*, edited by Deanna Heath and Chandana Mathur, London: Routledge, 2011.
- 5 Ain o Salish Kendra. *Human Rights in Bangladesh*, Dhaka: ASK, 2001-2010.
- 6 WLUML took the quotation from the US State Department Report of 2009.
- 7 "Rapist Spared, Victim Lashed," *The Daily Star*, 24 January 2010.
- 8 See for instance, *Bengali Language Daily*, "Jugantor: Piyara Begum of Debidar," Comilla, July 1, 2009.
- 9 Ain o Salish Kendra, "Report of the Investigations Unit on Case # 12/9," Debidar Thana, June 28, 2009 (on file with author).
- 10 "Raped Girl Lashed 100 Times," *The Daily Prothom Alo* 8 June 2009. <http://eprothomalo.com/index.php?opt=view&page=1&date=2009-06-08#> All translations from the Bengali are mine.
- 11 Nivedita Menon. *Recovering Subversion: Feminist Politics Beyond the Law*, New Delhi: Permanent Black, 2004; Tanika Sarker. *Hindu Wife, Hindu Nation: Community, Religion, and Cultural Nationalism*, Indiana: Indiana University Press, 2002. See also Flavia Agnes, "Interrogating 'Consent' and 'Agency' Across the Complex Terrain of Family Laws in India," this volume.
- 12 Sarker *ibid*; p. 245, italics added.
- 13 Menon *op. cit.* p. 126.
- 14 Of course, given the centrality of marriage in the larger social realm, in some instances the girl may very well construct a correspondence between sex and marriage.
- 15 Menon *op. cit.*, p. 124.
- 16 Srimati Basu, "Sexual Property: Staging Rape and Marriage in Indian Law and Feminist Theory," *Feminist Studies*, Spring 2011.
- 17 Leti Volpp *op. cit.* p. 98.
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# Indian Secularism and Muslim Personal Law: The Story of Model Nikahnama

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This paper brings into focus the recent initiatives to address Muslim women's disadvantaged position in marriage through the formulation of a "model nikahnama" or an equitable marriage contract. Debates about Muslim personal law have become central to framing the contentious relationship between Indian secularism and "religious communities" in the post-independence period. In this context, these initiatives emerging from the "religious communities" assume significance. For the first time after the Shah Bano controversy (1984), which pitted the Muslim community against the Hindu majority as well as a range of Indian feminists, and reminiscent of debates preceding the Shari'a Act of 1937, efforts to frame a model nikahnama drew a large number of "religious" and "non-religious" Muslim groups into conversation, and set off a consensus building process within the (Muslim) community on the issue of Muslim women's "entitlements."

While the debates on the Uniform Civil Code (UCC hereafter) in the 1990s centered on the state's recognition of the rights of women as equal citizens in negotiating with family and community, the debate on the nikahnama foregrounds Muslim woman's entitlements in an "Islamic" marriage, to be arrived at through negotiation with the family and community, including the "religious" leadership. While the efficacy of such a model nikahnama continues to be debated, what needs to be underscored is not merely its role in fostering consensus around Muslim women's entitlements and rights in post-independent India, but more importantly, its potential to disrupt normative (feminist) notions of women's agency as "secular."

This essay locates a detailed exploration of the nikahnama initiative within the longer history of Indian secularism, with specific focus on two important moments in the history of Muslim personal law in the India: the Shari'a Act of 1937, and the Shah Bano judgment of 1984. I examine the complex interrelations between the ulema [Islamic scholars], political leaders, and Muslim women's organizations over competing visions of "Muslim" women's entitlements in Shari'a that arose at those moments, in an effort to complicate the relationship between "secularism" and "religious communities" in postcolonial India.

"Muslim" Law and Muslim "Community:" A Tenuous Consensus

It is well-known that Muslim women began litigating for their entitlements in family property in the colonial courts from the beginning of the 19<sup>th</sup> century, but courts increasingly disregarded their conventionally guaranteed “entitlements” as the century progressed.<sup>1</sup> This process was commensurate with the growth and establishment of the colonial system of courts that brought in new norms, rules, and legal culture, making it increasingly difficult for Muslim women to negotiate their rights.<sup>2</sup> Though the colonial regime relied heavily on traditional religious groups such as the qazis and muftis as native authorities<sup>3</sup> in the process of compiling law for the Indian population—this was also the period when the association between “religion” and “family law” was being established—colonial courts would discontinue the use of these legal authorities by the latter half of the nineteenth century.<sup>4</sup> By the end of the century, the dismal fate of Muslim law in British India had become an established theme in the discourse of Muslim social reform. Two clear perspectives emerged about the corrective course of action. By working within Anglo-Indian legal system (and thus taking the coexistence of different personal laws for granted), modernist Islamic jurists such as Ameer Ali directed his efforts at rectifying the “imperfect knowledge of Mussalman Jurisprudence, of Mussalman customs and usages,” which resulted “in cases decided by the highest Law Court against every principle of Mohammedan Law.”<sup>5</sup> He thought it was both possible and desirable to reconcile the inconsistencies and discrepancies in the existing system of Islamic law through the compilation of learned commentaries so that Islamic law could be aligned with modern principles of jurisprudence such as equity, and the progress of society. On the other hand the ulema, largely dominated by the Deoband school, sharing in a broader critique—by Muslim jurists and lawyers—of the inability of British courts to adjudicate cases involving Muslims through recourse to the tenets of Islamic Law, also opened Darul Ifta [fatwa giving offices], and invited and answered the queries of ordinary people about a wide range of issues.<sup>6</sup>

By the turn of the century, the arrival of explicitly political questions regarding universal adult franchise, equal citizenship rights, and representative government in the discourse of anti-colonialism reshaped the women’s question in new ways but gave it a new urgency.<sup>7</sup> Like Hindu women, Muslim women also demanded legal redress for polygamy, child marriage, purdah and denial of property rights. However, the consolidation of “communal” identities predicated on the radical difference between Hindus and Muslims, and their politicization in the context of Indians’ investment in questions of franchise and self-government<sup>8</sup>, meant that it was Muslim political leadership and the ulema who assumed an active role in bringing legislative reforms for women. Though nationalist feminism was predicated on demands for universal citizenship, the association of “gender” with “community” meant that Muslim women activists and organizations actively worked for legal change by aligning with (Muslim) community leaders.<sup>9</sup>

Both the Shari’a Act 1937 and its successor, the Muslim Marriage Dissolution Act 1939 [MMDA], were preceded by a long process of consensus building. Borne of complex negotiations between the landowning Muslim elite, religious political organizations and the ulema, the crucial issue at stake in the Shari’a Act 1937 concerned the property rights of Muslim women. Should the Muslims follow customary (Hindu) practices that denied Muslim women co-parcenary property, or follow Shari’a which guaranteed entitlements to property, albeit unequally? The question was first taken up in the Provincial Assembly of North West Frontier Provinces, and later, by the Central Legislative Assembly. National Muslim women’s organizations and activists supported it though it ultimately passed with the caveat that certain Muslim communities would be exempted from the purview of this law.<sup>10</sup>

However, the passage of the Muslim Marriage Dissolution Act [MMDA] saw the breakdown of this tenuous consensus. The proposed draft was put forward by social reformers, women’s organizations, traditionalist ulema and nationalist Muslims, to stem the widespread use of courts by Muslim women for divorce on the grounds of apostasy, on the ground that statutory law lagged behind the Shari’a in guaranteeing Muslim women’s rights. What clinched the deal, as Rohit De<sup>11</sup> argues, is the support of the prominent Deobandi scholar, Maulana Ashraf Ali Thanawi who threw his weight behind the Act. He helped create consensus among the ulema about the correctness of the provisions. This was especially noteworthy since

Thanawi, an acknowledged expert in the Maliki school of jurisprudence, borrowed from that school to provide Muslim women with many reasons to sever the bond of marriage, thereby extending the few provisions admitted by the Hanafi school of Islamic fiqh [jurisprudence], which is predominant on the subcontinent. Backed by such authority, Muslim legislators performed the delicate task of explaining to their colleagues from other communities—many were proposing amendments in their own personal laws—that the MMDA did not correct “defects” in prevailing Islamic law but rather, redesigned the framework of those rights already present in Quran. However, when the demand for Muslim judges was rejected by the legislature, the fragile consensus over this issue dissipated. Rejecting the Anglo Mohammedan system, practitioners of traditional fiqh moved to the truly private realm of community, family, and local politics. De notes that these divisions continue to animate the debates on Shari’a in the subcontinent even later.

### **Indian Nation and its Muslims: Shah Bano Crisis in the Post-independence Period**

The Constituent Assembly debate on proposed Article 35 reflected and anticipated the fissures that developed between the “secularizing” nation-state and “religious” Muslim communities. In an effort to counteract differentiated personal status laws for India’s religious communities, this article proposed, “the State shall endeavour to secure for its citizens a uniform civil code through out the territory of India.” Expressing their apprehensions about the proposed Uniform Civil Code, Muslim members argued that obliterating personal laws would not only harm the community but that it was an impossible project given the diverse customary practices related to marriage and inheritance prevalent in the country. Moreover, since the Assembly was not a fully elected body, it had to achieve consensus on the matter through an election campaign, or consequently, through legal reform. Such objections were overruled by other members of the Assembly who argued that all modern nations required uniform laws. This group maintained that because a civil code had already been put in place, it would be incorrect to claim that extending it to laws governing divorce, marriage and maintenance would lead to large scale unrest among Hindu and Muslim communities. They went further to note that codification itself should not be seen as a problem when the Shari’ a Application Act of 1937 had already brought different Muslim communities within the ambit of a single law despite the opposition of different Muslim communities. The article was finally included as article 44 in the non-justiciable Directive Principles of state policy on the ground of non-discrimination against women.<sup>12</sup>

The debate on the UCC (and other issues related to “minorities”) in the Constituent Assembly reflects the changed political status of Muslims in post-independence India. From being a significant political constituency in British India, constituting a quarter of the population of undivided British India, Muslims were re-constituted as a “religious minority” in the new Indian nation-state whose “political safeguards” were withdrawn at the last minute on the grounds that they would promote “religious” and “separatist” identities inimical to the growth of a secular, democratic nation.<sup>13</sup> Further, as a “minority” they were advised by Nehru to depend on the goodwill of the “majority” community, rather than demanding their due.<sup>14</sup> Given the importance of the women’s question to anticolonial discourse, as well as the fraught nature of the issue of political representation and their altered political status, it is not surprising that the Muslim members in the Constituent Assembly articulated Muslim women’s rights as an issue of Muslim identity.

In the post-independence period, it was the Hindu “religion” that was the subject of reform, the most notable being the abolition of untouchability in public life and the passage of the Hindu Code Bill.<sup>15</sup> Meanwhile modernist Muslim legal scholars such as Fyzee consistently argued for the reform of Muslim personal law, often citing the changes in other Muslim countries, but to little avail.<sup>16</sup> The debate on the reform of Muslim personal law gained momentum with the Supreme Court judgment in the Mohammad Khan v. Shah Bano case, 1985. In this judgment, the court upheld the right of divorced Muslim women to maintenance under the common criminal provision of 125 Criminal Procedure Code [CrPC] and strongly suggested the formulation of a UCC on the ground that Muslim personal law as it stands does not address the immiseration of women after

divorce. It also cited passages from Quran as supportive of its suggestion for granting maintenance to divorced Muslim women. In the course of its judgement India's Supreme Court asserted the primacy of secular law over religious personal laws. The Supreme Court went further and noted the necessity of the court assuming the role of a reformer in the absence of initiatives to reform Muslim personal law. In so doing, the court drew on the work of pro-reform Muslim legal scholars like Tahir Mahmood and set aside objections raised by the All India Muslim Personal Law Board, a self-constituted body of the Indian ulema.<sup>17</sup>

The Shah Bano judgment threw open certain faultlines in the already troubled relationship between secularism and democracy in India. The events that followed also posed major challenges to the "secularism" of Indian feminism. The Shah Bano judgement led to a massive mobilization of "conservative" Muslim opinion led by the representatives of the All India Muslim Personal Law Board,<sup>18</sup> and led to the passage of the Muslim Women (Protection of Rights on Divorce) Act 1986 [hereafter MWPA] by the Congress government, to address the issue of the Muslim women's maintenance after divorce. Feminist groups, who had strongly critiqued state and non-state violence against women—and having brought in a series of legal changes—criticized the continued placement of women's rights under religious personal laws and advocated the formulation of a common civil code.<sup>19</sup> There emerged a consensus among the women's groups that such legislation would put an end to the legal inequalities and the resulting injustice that women in different religious groups continued to suffer.<sup>20</sup>

However the resemblance of feminist demands with those of the Hindu majoritarian Bharatiya Janata Party, which used the bogey of Muslim women's rights to whip up hatred against the Muslim minority, compromised the feminist consensus. Especially so because the decade following the Shah Bano judgment not only witnessed the demolition of Babri Masjid, but a massive loss of Muslim lives and property in the riots preceding the destruction of the mosque. Women's groups began to re-assess their position since "consent" for UCC was being sought when Muslim communities were under such duress. The politics of Hindu majoritarianism has meant that issues of sexuality, sexual orientation, and violence yet again became feminist issues, with a slow and steady retreat of the issue of passage of UCC from feminist agenda. Meanwhile, embracing reform within religious personal laws has been and continues to be viewed by feminists as politically regressive.<sup>21</sup>

The key challenge that the Shah Bano controversy posed to feminism concerned the manner in which separate personal laws were embedded in "religion." More precisely, it arose from the understanding that neither "religious" nor other forms of "ascriptive" community were amenable to democratic negotiation with regard to women's rights. The formative tension at the heart of nationalist feminism in the early twentieth century over universal citizenship versus particularistic communities could here be seen in its full-blown form, playing out as the struggle between "secular feminism" versus "religious patriarchy." It is in the context of such an (enduring) impasse that the subsequent story of the model nikahnama gains significance.

Following the passage of MWPA 1986 the Muslim Personal Law Board came under increasing pressure to initiate reforms in the community to stem the trend towards unilateral talaq [repudiation], permanent deferment of mehr [marriage gift], and the resulting immiseration of Muslim women. As there was a standoff regarding the state-directed reform for Muslim women, a few women activists from Mumbai, including Uzma Naheed and Flavia Agnes sought to initiate such a reform through a new model nikahnama. This model nikahnama contained a nikahnama, the Hidayatnama [guidelines for marriage under Shari' a law], and the Qarar [declaration to abide by Shari' a law], which provided specific guidelines for a couple on how they should behave in the event of a dispute between them, and how the issue should be resolved within Shari'a. The Hidayatnama and Qarar are used creatively to produce a more equitable contract.<sup>22</sup> Since almost all marriages are solemnized through the nikahnamas prepared and administered by local qazis [Islamic judicial personnel who are ineligible for appointments in formal courts] and ulema, it was hoped that the model nikahnama would ensure women's rights of mehr and talaq by outlining a set of un-Islamic (and thus also anti-women) practices as a way of ushering change within the community. As Uzma Naheed noted,

“We wanted to involve the ulema in the work and wanted a solution within the framework of Shari’ a.”<sup>23</sup> This initiative led to a vibrant discussion of desirable “conditions of marriage contract” in the latter part of the last decade, and brought some of the most contentious issues of Muslim marriage under debate: under-age marriages, non-payment of mehr, arbitrary talaq, cruelty in marriage, maintenance after talaq, multiple marriages of men, women’s employment, and others. [Some featured in discussions around the UCC.]

### **Framing the “Gender-just” Nikahnama, Reworking the Norm of Muslim Marriage**

The debate on nikahnama began in earnest after the All India Muslim Personal Law Board released the approved copy of the nikahnama in 2005, which was submitted by the above-mentioned team of women activists in 1995, together with minor changes.<sup>24</sup> The women’s group’s nikahnama stipulated the following: that the husband should not inflict physical harm or wrongfully confine the wife; that he should not indulge in any other inhuman behaviour; leave the wife in her natal home for extended period of time; use abusive language in instances of marital tiff; accept dowry, and that the husband should not utter triple talaq or talaq in isolation. It was suggested that differences between the couple should be resolved through arbitration. It also stipulated that a husband contracting a second nikah should obtain permission from his first wife. The Shari’ a guidelines in the nikahnamas were simple. The “additional conditions” (to abide by the Shari’a law) became controversial: the immediate payment of mehr on marriage, doubling the amount of mehr in case of divorce or second marriage as a measure of penalty, the right of the wife to a share in the husband’s property to the extent of her dues, the wife’s exclusive rights over gifts received in cash or kind from her parents and relatives, her right to reside in the matrimonial home with full Shari’ a rights in case the husband took another wife, and the husband’s obligation to bear the expenses of the children after divorce even if they stayed with the wife, especially the girl children.

Disputes were to be settled with the help of the arbitrators, while debates about the interpretation of clauses were to be referred to a reputed Darul Qaza [Shari’ a court].<sup>25</sup> Before the Board released a copy, the draft was put forward for discussion among the nation-wide ulema by the Islamic Fiqha Academy which suggested that the tafweez-e-talaq (delegated right of divorce) should be linked to the conditions of marriage, such as cases where the husband refused to treat the wife well and maintain her, or if he beat her, and that the Darul Qaza<sup>26</sup> should mediate disputes. However when the AIMPLB came out with its approved nikahnama in 2005, it deleted the mandatory clauses regarding triple talaq, and replaced them with a simple caution against it. Clauses regarding mehr in kind, and the prohibition on dowry and against violence were retained, but new stipulations were now introduced, especially a conservative code of conduct for women mandating that they should not step out nor take up employment without the permission of the husband.

Disagreeing with the Board on the tone, tenor, and the content of the nikahnama, two new Boards, the Muslim Women’s Personal Law Board and the Shia Personal Law Board, were formed. They framed two new nikahnama, which were released in 2006, and 2008 respectively. The Shia Board’s nikahnama was introduced after approval from the Ayatollah Sistani of Iran. Claiming to stress the well-being of women, it incorporated the provision of khula [women-initiated divorce], strictures against preventing the wife’s progress in education and employment, and the provision of alimony to the divorced wife on the ground of “humanitarianism.”<sup>27</sup>

The Women’s Board’s nikahnama (in Hindi and Urdu) takes the pedagogic intent of the nikahnama quite seriously and includes an elaborated code of conduct (Shari’a guidelines) for the couple: that the Qazi should be well-versed in Shari’ a; explain the nikahnama to them; that marriage should not be forced; that the marriage of under-age men and women should be avoided as they lack the knowledge about rights and obligations in marriage, and that the pardoning of mehr should be done willingly by women, not by deception or wrong interpretation of Quran. It also details proper conduct for a modern husband including ways in which he could help with housework. It stipulates proper procedures of giving and avoiding talaq and khula.<sup>28</sup>

While releasing the nikahnama, almost all the Boards asserted that the contract would safeguard the interests of Muslim women, and that it was not obligatory but voluntary on the community. The differences in the positions come through in the Hidayatnama and Qarar sections. Except the Muslim Personal Law Board's nikahnama, the rest clearly stipulate against the triple talaq and spell out the desirable manner of giving talaq. Nearly all of them encourage Muslim men and women to resolve their disputes through arbitrators and Darul Qaza.

## **Nikahnama in Practice**

Reasonable skepticism about the utility and efficacy of a re-designed or gender-just nikahnama exists. Studies on marriage practices among North Indian Muslims<sup>29</sup> have pointed out that nikahnama is either absent in many marriages or is rarely taken seriously, making the issue irrelevant. Sabiha Hussain's study<sup>30</sup> of Darul Qaza also came up with a dismal picture of their willingness or ability to help Muslim women obtain their rights in Shari' a. However, Muslim activists in Hyderabad, South India suggest that that nikahnama has a presence and has been used in the resolutions of disputes by Muslim women, especially to re-claim dowry and gifts after separation or talaq.<sup>31</sup> As such, both the use of nikahnama during the marriage, and the implementation of its provisions in marriage and in the cases concerning breakdown of marriage appear to be context-specific. They depend on the historical, political and social factors determining marriage practices of Muslim communities, as well as the cultural and moral economy in which nikahnama operates in specific instances.

Given such a complex scenario, it is difficult to simply interpret the inclusion or non-inclusion of the provisions in the different nikahnamas as the affirmation or resistance, or as an indication of either the progressive or retrogressive attitude of ulama and Muslim communities in general to the question of Muslim women's "rights" in marriage. The actual use and efficacy of such a nikahnama would invariably depend on the prevailing practices, the presence and work of the women's organizations, or the prior histories of such reformist discourse in each location. For instance, reports suggest that the Darul Qaza in urban areas of Gujarat such as Ahmedabad, started by the Personal Law Board, are active in popularizing nikahnamas among the trading Bohra community, who have responded well. A bridegroom interviewed for the report said that by signing this nikahnama he would be ensuring his wife's safety in the marital home.<sup>32</sup> More important is the experience of Bharatiya Muslim Mahila Andolan, a Muslim women's organization that consistently advocated reforms of personal laws. Within the framework of the Shari' a it has also prepared and used "gender-just" nikahnamas in the marriages that it officiated. It performed 40 marriages in Mumbai and nearly 200 group marriages in various locations in Gujarat, including Juhapura district. The mehr amounts in these marriages ranged from the usual Rs. 5000 [\$110] to a high of Rs. 1 lakh [\$2, 200]. Instead of the usual "forgiving of mehr," or small amounts of cash, many women got property and jewelry in the form of mehr. They claim that, "while a codified Muslim law is the long term goal, this nikahnama has already helped Muslim women in ensuring her legal rights."<sup>33</sup>

## **Conclusion**

While BMMA's experience suggests how useful the nikahnama can be, the real significance of the nikahnama debate comes alive only when it is placed in the longer history of Indian secularism and Muslim personal law. After the passage of the Muslim Shari'a Act 1937 and Marriage Dissolution Act [MMDA] in 1939, where a wide array of Muslim formations (political, religious and women's groups) worked together, this is another rare instance where a democratic discussion about desirable marriage practices and women's entitlements took place among Indian Muslim communities. Even though such discussions took place during the debate

on Uniform Civil Code in the 1990s, its interlocutor was largely the feminist community and the state, rather than the community itself. Nikahnama as an instrument also occupies a socio-legal terrain, distinguishing it from these earlier state-directed initiatives. The MMDA became a law and UCC was to become so. Nikahnama, posited instead as “community reform,” prevented the consolidation of conservative Muslim opinion against the state, and resumed the (contested) conversation among “religious” and “secular” domains on marriage practices, even as it intervened in “secular” feminists’ concerns with dowry and the immiseration of married women due to desertion. Islamic and secular idioms got inextricably mixed up, and dowry got redefined as un-Islamic, rather than an illegal practice, while mehr was increasingly viewed as the “right” of Muslim women. Perhaps its significance lay here.

## Notes

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# 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 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 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.

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 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 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 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 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 neighbor 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 woman, so long as 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 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 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>

The OLFR 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 OLFR 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 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 1990s 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>

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**

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 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 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’ah 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 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 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 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 neighbor 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); 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 biker 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 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 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 colored 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 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, "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."

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>72</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 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>73</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>74</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 spouses (or would-be spouses) could "insist on concluding" their marriage after two years have passed.<sup>75</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>76</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>77</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>78</sup> It is this model described by Zubaida 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>79</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 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>80</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>81</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>82</sup> For her part, Nadera Shalhoub-Kevorkian includes such a marriage as a “forced marriage” within her definition of femicide.<sup>83</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 volume, 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 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>84</sup> These days, Agnes finds that the provisions of the Child Marriage Restraint Act “are 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>85</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>86</sup>

How much of this can and should be done through the law? In the situations she examines in rural Bangladesh in her working paper in this volume, 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 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>87</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>88</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>89</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, 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>90</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>91</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.

## Notes

- 1 Australia, Canada, England and Wales, Scotland and South Africa.
- 2 Rosemary Hunter and Sharon Cowan, “Introduction,” in *Choice and Consent: Feminist Engagements with Law and Subjectivity*, eds. Hunter and Cowan, Abingdon: Routledge-Cavendish, 2007, 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 genderless, raceless being; this notion of the free self is predicated on the normative experience of a white man.” Sundari Anitha and Aisha Gill, “Coercion, Consent and the Forced Marriage Debate in the UK,” *Feminist Legal Studies*, Vol.

- 17, 2009:165-184, at p.171.
- 3 “Women’s Rights, Muslim Family Law and the Politics of Consent,” convened by the Center for the Critical Analysis of Social Difference (CCASD) of Columbia University, at Columbia’s Middle East Research Center in Amman, April 9-10, 2011.
  - 4 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 *Progressive Muslims on Justice, Gender and Pluralism*, ed. Omid Safi, Oxford: OneWorld, 2003, 167.
  - 5 My sense of a need for this clarification comes from Dina Siddiqi’s working paper, “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).
  - 6 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,” in *Choice and Consent: Feminist Engagements with Law and Subjectivity*, eds. Hunter and Cowan, Abingdon: Routledge-Cavendish, 2007, 11-38, at 13-14 (footnote 4).
  - 7 The following discussion is of necessity a truncated explanation of an extremely intricate area of law with differences between the schools.
  - 8 Amira Sonbol, “Adults and Minors in Ottoman Shari`a Courts and Modern Law,” in *Women, the Family, and Divorce Laws in Islamic History*, ed. Amira Sonbol, Syracuse: Syracuse University Press, 1996, 236-256.
  - 9 Annelies Moors, “Debating Islamic family law: legal texts and social practices,” in *A Social History of Gender in the Modern Muslim Middle East*, eds. Margaret C. Meriwether and Judith E. Tucker, Boulder: Westview Press, 1999, 141-175, at p.142.
  - 10 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: University of California Press, 1998, 50-51.
  - 11 Ziba Mir-Hosseini, “Towards Gender Equality: Muslim Family Laws and the Shari`ah,” in *Wanted: Equality and Justice in the Muslim Family*, ed. Zainah Anwar, Kuala Lumpur: Sisters in Islam and Musawah, 2009, 28.
  - 12 Ibid, 31.
  - 13 Lama Abu-Odeh, “Modern Family Law, 1800 – Present Arab States,” in *Encyclopedia of Women in Islamic Cultures* Vol. II, ed. Suad Joseph, The Hague: Brill, 2005, 459-462, at 459. See also Ali, 2003:165.
  - 14 Ali, 2003:170.
  - 15 Mona Siddiqui, “The Concept of Wilaya in Hanafi Law: Authority versus Consent in al-Fatawa al-`Alamgiri,” *Yearbook of Middle Eastern Law*, Vol. 5, 1998-1999:171-185, at 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.
  - 16 “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, 94. Siddiqui, 1998-1999:180.

- 17 Siddiqui, 1998-1999:180.
- 18 Or: "it is most likely" (ghalabat al-zhann)
- 19 Muhammad Samara. *Sharh Muqarin li-Qanun al-Ahwal al-Shakhsiyya*. Jerusalem: Matba`a jama`iyya `amal al-matabi` al-ta`awaniyya, 1987, 109-110.
- 20 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."
- 21 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.
- 22 Brinkley Messick, "Interpreting Tears: A Marriage Case from Imamic Yemen," in *The Islamic Marriage Contract: Case Studies in Islamic Family Law*, eds. Asifa Quraishi and Frank e. Vogel, Cambridge, Mass.: Harvard University Press, 2008, 156-179, respectively at 160, 177.
- 23 Messick, 2008:177.
- 24 Messick, 2008:163.
- 25 Ibid, 163-64.
- 26 Ibid, 164. The Zaydi commentator to whom he refers is Al-`Ansi.
- 27 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 *Islamic Legal Interpretation – Muftis and their Fatwas*, eds. Khaled Masud, Brinkley Messick and David Powers, Cambridge, Mass.: Harvard University Press, 1996, 129-140, at 139. See also Tucker, 1998:46-47.
- 28 Anna Wurth, "Stalled Reform: Family Law in Post-Unification Yemen," *Islamic Law and Society*, Vol. 10, No. 1, 2003:12-33, at 21. The 1992 law did not stipulate penal or other sanctions for violation of the minimum age requirement, and set no registration requirements for marriage. Later amendments in 1998 reintroduced specific reference to dissolution at puberty.
- 29 Judith Tucker. *Women, Family and Gender in Islamic Law*, Cambridge: Cambridge University Press, 2008, 36-7.
- 30 OLFAR arts. 47 and 48.
- 31 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.
- 32 OLFAR (1917) art. 57. In the Arabic text "duress" is *karh*, although later Arab statutes use *ikrah*.
- 33 A.W. El-Hassan, "The Doctrine of Duress (Ikrah) in Shari`a, Sudan and English Law," *Arab Law Quarterly*, Vol. 1, No. 2, 1985:231-236, at 231.
- 34 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, 386.
- 35 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, 2011:218-226, at 219.

- 36 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.”
- 37 See Lynn Welchman. *Beyond the Code. Muslim Family Law and the Shar`i Judiciary in the Palestinian West Bank*, The Hague: Kluwer, 2000, 316-318; Dawud Vol. 1, 1999:388-399.
- 38 Samara, 1987:111.
- 39 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.
- 40 Dawud, 1999:388.
- 41 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 as ten years in prison. If consummation has occurred, the law provides for judicial divorce on grounds of coercion (art. 40[4]).
- 42 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.”
- 43 See Lynn Welchman, “Jordan: Capacity, Consent and Under-age Marriage in Muslim Family Law,” *International Survey of Family Law*, 2001:243-265, at 256.
- 44 Siddiqui, 1998-1999:182-3.
- 45 This presumption – possibly constructed as irrebuttable - has of course been common to different legal systems.
- 46 Assuming of course that the contract otherwise fulfilled the lawful (shar`i) requirements under the law.
- 47 It should be noted here that such a case is not the same as those considered by Dina 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, “Interrogating ‘Consent’ and ‘Agency’ Across the Complex Terrain of Family Laws in India,” 2011, this volume.
- 48 See Hasso’s interesting discussion of “The Marriage Contract as a Technology of Governance” – focusing on Egypt—in Frances Hasso. *Consuming Desires: Family Crisis and the State in the Middle East*, Stanford: Stanford University Press, 2011, 45-48.
- 49 Jordanian Law of Family Rights 1951 art.6.
- 50 Jordanian Law of Personal Status 1976 art.7.
- 51 Jordanian Law of Personal Status 2010 (Official Gazette no. 5061 of 17 October 2010 p. 5809), art.11.
- 52 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).
- 53 Al-Ghabri, “Early Marriage among Girls on the Rise”, *Yemen Times*, 4 May 2006.
- 54 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, 58-78, at 59.

- 55 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, 2010:121-137. A Muslim woman's choice is also of course constrained by the prohibition on her marrying a non-Muslim man.
- 56 Jordanian Law of Personal Status 2010, art. 19.
- 57 JLPS 2010 art. 325.
- 58 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.
- 59 Welchman, 2000:131.
- 60 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).
- 61 Article 28.
- 62 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.
- 63 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.
- 64 Moroccan Law of the Family (Mudawwana) 2004 art.67.
- 65 Except in certain particular situations that have to be authorized by the judge and are hedged around with rules of the procedure for the authorization of the third party who will undertake the contract (art.17).
- 66 Practical Guide 2004, 31.
- 67 El Mekkaoui, 2010:93.
- 68 El Mekkaoui, 2010:92.
- 69 El Mekkaoui, 2010:94.
- 70 El Mekkaoui, 2010:97.
- 71 Zuhur Rashiq (project coordinator) et al, "Qadi al-'usra: Huquqi wa Wajibati fi 'usrati," Department for Informal Education and Literacy, Rabat: 2005.
- 72 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>
- 73 Rema Hammami, "Attitudes Towards Legal Reform of Personal Status Law in Palestine," in *Women's Rights and Islamic Family Law. Perspectives on Reform*, ed. Lynn Welchman, London: Zed Books, 2004, 125-143, at 137.
- 74 Hammami, 2004:138. Both sexes overwhelmingly supported a minimum age of marriage of 18 for males and females.
- 75 Asma Khadr. *Al-Qanun wa Mustaqbil al-Mar'a al-Filastiniya*, Jerusalem: WCLAC, 1998, 134-135.
- 76 Hasso, 2011:61.

- 77 Hasso, 2011:82. See her discussion at 80-98.
- 78 Sami Zubaida. *Law and Power in the Islamic World*, London: I.B.Tauris, 2003, 180.
- 79 Hasso, 2011:84.
- 80 Hasso, 2011:85.
- 81 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," in *'Honour': Crimes, Paradigms and Violence Against Women*, eds. Lynn Welchman and Sara Hossain, London: Zed Books, 2005, 1-21, at 17. On the provision's origins in French law, and the repeal of its descendent in Egyptian law, see Baudouin Dupret, "Normality, Responsibility, Morality: Virginity and Rape in a Egyptian Legal Context," in *Muslim Traditions and Modern Techniques of Power*, Yearbook of the Sociology of Islam Vol. 3, ed. Armando Salvatore, 2001.
- 82 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.
- 83 Shalhoub-Kervorkian, 2002.
- 84 Agnes, 2011.
- 85 Agnes, 2011.
- 86 Drakapoulou, 2007:12.
- 87 Judith Tucker, "Revisiting Reform: Women and the Ottoman Law of Family Rights, 1917," *Arab Studies Journal*, Vol. 1, 1996:4-17, at 3.
- 88 Ghada Jamshir, ed. *Al-jallad wa al-Dahiya fi al-Mahakim al-Shar`iyya*, Beirut, 2005, 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, 22-26.
- 89 Anitha and Gill, 2009:166.
- 90 Ibid, 165.
- 91 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, 2010:1-45, at 34.

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