CHILD MARRIAGE IN ISLAMIC LAW

By

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ABSTRACT

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This thesis examines the custom of child marriage in Islamic law and its practice in Muslim society. It also gives an overview of the history of child marriage from ancient to modern times. The focus of this research is the status of child marriage in the modern Muslim world as a continuation of ancient tradition and the role historical interpretations of Islamic law play in its perpetuation.

Child marriage was once a globally accepted and practiced phenomenon. Over the centuries its practice has diminished considerably. Today, although child marriage is viewed as an offensive act and discouraged by the majority of governments around the world, it continues to exist to a significant extent in most parts of the Muslim world. Those Muslim communities which persist in condoning and practicing child marriage are not only affected by cultural traditions but also by their form of understanding of Islamic law. This particular understanding is mostly informed by local religious leaders within their communities who base their justifications on medieval perspectives and interpretations of what constitutes divine law.

It is no coincidence, however, that child marriage is restricted to the impoverished, uneducated and rural sectors of society; people who have little choice in deciding their futures and due to harsh and straitened circumstances find it difficult to see any other alternatives.

RÉSUMÉ

Auteur : Anjum Ali

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Cette recherche tentera d'approfondir l'analyse des coutumes du mariage des mineurs dans la loi islamique et sa pratique dans la société musulmane. Le but de cette recherche est de comprendre le statut du mariage des enfants dans le monde moderne des Musulmans comme une continuation des anciennes traditions. De plus, on regardera l'histoire des interprétations dans la loi islamique et le rôle qu'elle joue dans sa perpétuation.

Autrefois, le mariage des mineurs était un phénomene pratiqué et globalement accepté. A travers les siecles, sa pratique a diminué considérablement. Aujourd'hui, malgré le fait que le mariage des enfants est vu comme un acte choquant et découragé par la majorité des gouvernements autour du monde, il continue d'exister dans une large mesure. Ces communautés musulmanes qui s'obstinent a pardonner et a pratiquer le mariage des enfants ne sont pas seulement affectées par les traditions culturelles mais aussi par leur maniere de comprendre la loi islamique. Cette compréhension particuliere vient surtout des dirigeants religieux locaux au sein des communautés qui fondent leurs justifications sur des perspectives médiévales et des interprétations de la loi divine.

Ce n'est pas un concours de coïncidence que le mariage des enfants est limité aux familles des régions rurales de la société; c'est-a-dire celles qui sont appauvries et sans instruction. Ce sont ces gens la qui ont peu de choix par rapport a leur avenir. En raison de ces réalités dures, il est difficile pour eux de trouver des solutions pour s'en sortir.

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I dedicate this work to my parents

Dr. Muhammad Ashraf Ali and Qudsia Khurshid

Who have loved and cared for me throughout all my endeavours
and in the most difficult of times.

And to my dear three olders sisters

Afshan
Kahkshan
and
Saadiah

Who have always lent their support and help to me.

System of Transliteration
from the Arabic Alphabets to the Latin
used in this work

Name of Letter	Arabic	Latin
hamzah	ء	’
bā’	ب	b
tā’	ت	t
thā’	ث	th
jīm	ج	j
ḥā’	ح	ḥ
khā’	خ	kh
dāl	د	d
dhāl	ذ	dh
rā’	ر	r
zā’	ز	z
sīn	س	s
shīn	ش	sh
ṣād	ص	ṣ
ḍad	ض	ḍ
ṭā’	ط	ṭ
ẓā’	ظ	ẓ
‘ayn	ع	‘
ghayn	غ	gh
fā’	ف	f
qāf	ق	q

Vowels, Dipthongs, etc.
Short Vowels: a, i, u.
Long Vowels: ā, ī, ū.
Long with “tashdid”: īyya...
Dipthongs: aw, ay

In the name of Allah, the Most Merciful, the Most Gracious.

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INTRODUCTION

The increasing global awareness of children's rights brings into focus an age-old practice—that of child marriage. Just as the subject of children's rights in general has been a neglected topic in the past, so too has the issue of child marriage. The paucity of any modern literature dealing with child marriage signifies a general ignorance among people everywhere that such a practice does indeed exist and has grave repercussions for those societies where it is practiced. The dearth of information and writings on the topic, especially within those societies that still practice it, may also signify, however, that there is either inadequate interest in the matter itself or that there is sufficient cognizance of the ignominy attached to those societies that allow the practice, to make any discussion of it more or less taboo. This thesis attempts to somewhat rectify the matter by broaching a much-needed discussion on the practice of child marriage in the past and present and its status within Islamic Law.

The question that poses itself is whether "child marriage" deserves all the negative connotations and implications that apparently surround it or is the modern outlook an imposed, yet unqualified, western concept that what is acceptable or unacceptable for its society must be so for any other. On the other hand, one may ask whether perhaps the persistent acceptance or tacit condonation of child marriage among most developing Muslim communities is not simply an effect of Western hegemony. It is indeed possible that in trying to defend their religious values, customs and practices, Muslims have instead unknowingly bought into the Western perception of Islamic Law

as stagnant and rigid, and therefore disallowed any attempt to reinterpret the *sharī'a* in accordance with the changes occurring globally in modern day societies?

Child marriage is a considerably complex topic because it involves several fields of research, e.g. sociology, law, anthropology and economics. The first question that arises repeatedly is: what is the definition of "child"? One finds that not only is the definition of "child" dependent on the historical context but also on the cultural context. Moreover, these definitions are not solely based on social factors but even on economic ones. Thus, one finds that imposing a single view on all societies at all levels in all time periods becomes impractical as well as insensible. However, this does not imply that injustices within various societies should go unchecked.

What complicates the matter further is the discrepancy between the actual law and the social practices, for it is difficult to remain focused on the law alone when in fact at some level the law ceases to be important. Indeed, it appears that the Islamic legal opinions formulated in the early Islamic period, which actually support or condone the practice of child marriage, are still more commonly implemented among certain sectors of Muslim communities than any of the modern legislation regarding the practice. In trying to understand why such a gap exists between modern legislation and practice it became necessary to study child marriage from a sociological perspective as well as a legal one in order to fully comprehend it.

Thesis

This thesis is concerned with uncovering the reality behind the practice of child marriage today and determining whether international standards of human rights and

customary practices can be reconciled. It is also very apparent that child marriage is clearly linked to the economic conditions of those communities which do continue to practice it. For instance, most of the impoverished sectors of society continue to view child marriage as an appealing solution to many of their financial problems. Therefore, human rights advocates must recognize the multi-factorial implications of such a social institution. As such, it cannot be viewed simply as a traditional and cultural custom but rather must be understood from all aspects; sociological, economic, cultural, religious, and political.

This thesis also examines the role Islamic law plays, by either retaining the status quo or reforming it. While reformists have attempted to reinterpret the *sharī'a* with a more modern understanding and adaptation to changing circumstances within societies, other Muslim scholars, through strictly retaining historical interpretations of Islamic law, have presented the *sharī'a* as rigid and unalterable. The insistence by such scholars that child marriage is an Islamically sanctioned practice, suitable for all times and all places, further encourages and permits individuals and Muslim communities to practice it regardless of the negative consequences.

It is precisely the negative implications of child marriage practice which has led so many nations to create legislation that will at the least discourage if not completely disallow it. Proper implementation of the law, however, is rare. Those communities that persist in practicing child marriage often find loopholes, or circumvent the law. Social institutions, such as child marriage, whether based on religious traditions or custom, cannot be relegated to a back seat position when they clearly conflict with state laws. Factors such as education and economic conditions, which play a significant role in

either effecting a decline or an increase in child marriage practice, need to be addressed at the state level. Legislation alone has had limited effects in changing peoples' perceptions. Societal conditions, on the other hand, have a great deal of influence in determining the progress of a community.

Methodology

Child marriage is a controversial topic to say the least. Although one should not impose one's own value system on societies and practices that existed in a different historical context, it is practically impossible not to do so within one's own. This thesis does not aim at passing judgement on those ancient and medieval societies that practiced child marriage. It does, however, follow the critical theorist approach and praxis regarding the modern situation. The research done in this thesis is an endeavour to create a better understanding of child marriage as exists today as well as to promote action towards improving the state of children's rights in the Muslim world.

The adverse effects of child marriage today are too obvious to ignore. The reality of those children who must endure an abuse of their individual rights is sufficient in itself to create deep-seated biases. There is an urgent need, however, to understand and recognize the circumstances and conditions that have contributed to this form of rights abuse without jumping to conclusions. What makes child marriage so different today than from previous centuries? Child marriage is undoubtedly a socially constructed phenomenon. Due to this fact, it may have positive as well as negative consequences. It is difficult to ignore that in the modern period its negative effects blatantly outweigh its benefits.

I will examine the modern situation of child marriage practice in the Muslim world as well as the dilemma that faces all Muslim communities regarding how Islamic law can serve as a conciliatory force between traditional customs and modern human rights standards. In other words, where a modern interpretation of Islamic law would essentially serve as a bridge between older, earlier accepted religious laws that continue to be implemented in many communities and the current state legislation that conforms to international standards of human rights as well as attempts to adapt to changing social factors.

Thus, this thesis will delve into a comparative study of the medieval concepts and ideas regarding the subject and the modern perceptions and practices. I will begin with a brief look at the debate among the Islamic scholars on this topic in the medieval period. This will briefly cover the opinions of the Shī'ah Ja'farī and the Sunnī schools. The debate will then move into the modern period, more specifically the 20th century, the main focus of the thesis. Here the opinions of some contemporary scholars will be examined, particularly regarding the controversy over 'Ā'isha's age at marriage to the Prophet and a more in-depth analysis of the various factors (e.g. economics and culture) involved in the practice of child marriage.

In order to illustrate the present situation of child marriage and its effect on Muslim communities around the world, the case of three countries will be examined: Iran, which represents a modern Shī'a society; Pakistan, which represents the South Asian situation; Egypt, which has an extremely variegated and stratified society within the Middle East and may be used to represent some aspect of the Arab perspective. Occasional reference will be made, however, to other various parts of the Muslim world,

which will also demonstrate the extent to which child marriage continues to be practiced in all kinds of societies and cultures.

My approach in researching and discussing child marriage is necessarily multifarious so that a broader and more complete picture may be cast when presenting the modern situation. The various factors surrounding the present status of child marriage in the world are economic, social, cultural, religious, legal, medical and, to some degree, even political. This thesis will examine not only the legal aspect of the practice of child marriage but also the related socioeconomic and religio-cultural conditions that either support it or possibly undermine it.

Division of Chapters

The thesis will consist of five parts including an introduction and a conclusion. Chapter One will examine the medieval discourse surrounding the issue of child marriage from the perspective of Sunnī and Shī'a *fiqh*. An overview of the different opinions is absolutely necessary not only from a historical point of view--since one must understand the opinions in the context of their origins--but also in terms of their serving as a precedent for the existing modern day practice. Various other cultural perspectives on child marriage, such as ancient Greek, Christian and Jewish, will also be considered in order to demonstrate the universality of the custom in human history.

Chapter Two will begin with an overview of Ottoman society and the practice of child marriage during this period of transition. The chapter will then discuss the various reforms that took place during the later part of the Ottoman period and the beginning of the codification of the law in the Muslim world. The various legal reforms that have

taken place during this century, challenging the earlier rulings, will also be examined. This chapter will also look at whether or not the legal reforms effected a change in the practice and perception of child marriage within society, and if so, then how.

Chapter Three will address child marriage as it exists today in the Muslim world. It will examine the modern debate among scholars over the traditional justifications and perceptions of child marriage as an Islamically sanctioned practice. This necessarily includes a discussion regarding the controversy over 'Ā'isha's age when she was married to the Prophet due to its being the primary cited reason for justifying the practice of child marriage. A study of some modern day cases from Iran, Egypt and Pakistan will be used to illustrate the current practices of child marriage and the modern perspectives and attitudes towards it. The practical side of the issue and whether legislative reforms are actually implemented or not, on both the state and societal level, will be examined.

Contemporary *fatwā* works will also be consulted. The chapter will also include a discussion on the recent findings regarding economic, medical, and social factors that play a role in either negatively or positively affecting the practice of child marriage in Muslim societies. For example, medical findings related to the effect on the child's health, particularly the female child, which early marriage may or may not have will be discussed. Finally, a discussion on the issue of universal human rights shall also be considered so as to understand child marriage within that particular context and the controversy surrounding it.

This will lead to the conclusion which will summarize the various arguments that were discussed in this thesis. From this study of child marriage the current status of child marriage practice in the Muslim world will be assessed. A possible solution to the

dilemma of reconciling human rights and traditional value systems will be discussed. Primarily, this study of child marriage in Islamic law is an **endeavour** to bring greater awareness to a much neglected topic which may further promote actions on the part of Muslim governmental and non-governmental organizations to improve the condition of children in the Muslim world.

As a student of Islam, my research into the social practice of child marriage among Muslim communities has been an attempt to better understand the effect social customs have on developing the *sharī'a* as well as the *sharī'a*'s effect in regulating traditional practices. Moreover, the role Islamic law has played in furthering the adherence to certain social customs, e.g. child marriage, as well as its simultaneous capacity to restrict those very customs demonstrates the inherent flexibility within the Islamic legal tradition.

Chapter One: Child Marriage: A Historical Background

In general terms, a child, i.e. a minor, or *ṣaghīr*, is one who has not yet reached puberty. "Minority ends with the onset of physical maturity, and the ability to control one's own affairs. In the absence of signs of physical maturity, fifteen was generally regarded as the age that divided between majority and minority for males and females alike" (Giladi 1995, 8:821). This is the basic understanding of what constitutes being a child. Minority, however, does not preclude marriage within the general interpretation of Islamic Law. Although different opinions existed among earlier Muslim scholars, most felt that marriage did not require mental maturity, or *rushd*, so long as there was an appropriate guardian, or *walī*, to handle the minor's affairs.

"That Islamic law allows child marriage seems to contradict its general attitude of protection towards children. The *Shar'ia* may have been following the social practice of the Islamic core countries in the 1st-4th/7th-10th centuries" (826). According to one author, Arabs have always exhorted early marriage so that the children may be born while the parents are still young and be a strength for them and can assist them against their opponents (Tarmānīnī 1984,159). Indeed, there is even a name for such children who are born of young fathers, *rabī'iyyūn*, i.e. born in the "spring" of their parents' life (159). Thus the practice of early marriage can be seen as a continuation from pre-Islamic times.

This chapter will look at the history of child marriage from a relatively general perspective by giving a brief overview of ancient and medieval Near Eastern and European perceptions regarding child marriage practice. It will then more closely

examine the Islamic perspective among medieval jurists. This survey of the historical background of child marriage is necessary in order to properly understand the various positions that different communities and societies hold today regarding its practice. The effect which the classical Islamic scholars' opinions had and still have on modern day legislative developments and perceptions among Muslim societies should not be underestimated.

An understanding of the historical context in which child marriage was considered generally acceptable among many various cultures may also assist in preventing a propensity to impose modern perceptions and ideas on ancient and medieval practices. Although it is common for those of later generations to hold preconceptions when studying customs of earlier societies, such biases prevent a more objective approach. For instance, the general perception of child marriage today is a negative one to say the least. Such a viewpoint, however, is mostly based on modern cases and concerns for child abuse and human rights issues as exist today. Indeed, it is not uncommon for matters related to mental health such as psychological trauma, to be frequently linked with issues relating to human rights abuse. However, the subject of psychology is not an exclusively modern one. On the contrary, Avner Giladi in his book, *Children of Islam,* discusses the different medieval works which actually dealt with child psychology. Certain perspectives, however, e.g. the psychodynamic (involving psychoanalysis), behavioral, cognitive and sociocultural aspects , are in fact only recent concepts and thus are restricted to the nineteenth and twentieth centuries. In addition to this, the popularity and the increasing awareness of psychology in daily human life are a very modern phenomenon. One cannot ignore the vast difference between today's

global society and the many medieval highly traditional and religious communities which were based on their own system of ethics and morals that one might, for all practical purposes, consider rather alien to most people in today's world. Thus, what one might perceive as barbaric today, may have held a great deal of moral appeal and justification to those living in a different day and age due to their particular circumstances.

Similarly, it is important to understand the context in which child marriage was considered acceptable within the Islamic legal discourse during the classical period in order to grasp the universality of such a practice. One might then realize the parallelism in the general aversion to it found today among most Muslim societies which also follows a global trend. Each of the different perceptions must be viewed and understood within a proper social and historical context.

Child Marriage in Non-Muslim Civilizations

Child marriage is not particular to the Arabs or any other culture. It is a practice that dates back to ancient times, and was part of most societies. Even in Europe, it is only until relatively recently that child marriage has become practically non-existent. In ancient and medieval societies it was not uncommon for the couple, more specifically, the girl to be betrothed at puberty or even before (Laiou 1993,87). "Greco-Roman mothers . . . could expect to lose their daughters to marriage at an early age, often while those daughters were essentially still children, and before the daughter had become a woman in her own right"(Kraemer 1993,105). Ancient "Greek culture favored early childbearing" (Demand 1994,102). One of the most common explanations for this is

that early marriage served the purpose of safeguarding family honor by ensuring the virginity of the bride (103). Marriages took place starting as young as twelve or thirteen years of age for the girl and occasionally only slightly older for the boys. Although just as in modern societies it was much more common for girls to be married so young rather than for boys.

Jewish law also indicates the commonality and permissibility of the practice of child marriage. "Arranging a match and contracting the marriage of a young girl were the undisputed prerogatives of her father in ancient Israel" (Friedman 1980,1:216). Although the Talmud recognized this exclusive right of the father over his minor daughter, around the third century, in Babylon, the rabbis strongly discouraged the practice. The validity of such marriages was never questioned, however (216). More often than not, marrying daughters at a tender age was practiced in the medieval period among European Jews. There are two socioeconomic reasons generally presented to explain this: "(a) the difficulty to save for a proper dowry and the consequent necessity to betroth a girl as soon as the money for a dowry was raised; (b) and secondly, persecutions and migration often made a suitable groom a rare commodity, and available bachelors had to be snatched up immediately"(Goitein 1978, 3:86). Among other motives for early marriages in the Middle Ages the most pronounced was probably concern for the girls' chastity, not unlike during the ancient Greco-Roman period mentioned above. For boys it was a different matter. Due to concern for the boy's ability to earn a livelihood, it was generally considered acceptable for them to marry from age sixteen onward. Still it was preferable for boys to marry before age twenty-

four and the younger the better since delaying marriage for too long was not favorable either (Lewittes 1994, 7).

In some Christian civilizations, child marriage was also not uncommon. In early medieval Byzantine society, for example, emphasis was placed on the girl reaching puberty before a marriage was contracted and consummated. Although betrothals could take place much earlier, marriage was only considered valid for boys once they were fourteen and for girls at the age of thirteen (Laiou 1993, 169). In eleventh century Byzantium, both civil and ecclesiastical law forbade the marriage of a girl before the age of puberty. Because the marriage procedure was so simple, however, the law was easily circumvented (168). In fact, the under-aged girl's family often permitted that her fiancé live with the family until the marriage took place. It was not unheard of that the considerably older fiancé would sometimes rape the child-bride-to-be creating a host of problems, not least of which was physically and mentally damaging the girl for life (168-170). In one particular case, the parents lied about their daughter's age, claiming she was ten when she was only seven. Her fiancé/husband (there is some doubt as to what his status was exactly) raped her and was punished. The judge dissolved the engagement/marriage immediately. Although there were many other reasons, the girl's age was sufficient justification to invalidate the betrothal/marriage. This was due to the understanding that a child's consent did not legally exist and as such any marriage contracted could be dissolved (123). As we shall see, ecclesiastical law was rather different from Islamic law in this regard since its approach to the validity and invalidity of child marriage was much simpler. Ecclesiastical law held that a betrothal blessed by the church would be invalidated if the girl were found to be underage (172).

"Ecclesiastical courts had also established the principle that a church betrothal or marriage would be dissolved if there was sexual intercourse before the girl reached puberty" (172). As shown in the case above, however, the practice within society was not always in accordance with the law no matter how strict or severe it might have been in punishing offenders.

In Western Europe,[1] more particularly England, child marriage was also practiced frequently. There exist well-documented cases of child marriages taking place in the Medieval period (from the 14th to the 16th centuries at least). For example, a manuscript containing the recorded depositions in trials in the Bishop's court in Chester, dating back to 1561 A.D mentions twenty-seven reports of child marriages.[2] What is interesting about these marriages is that they do not share, even for the most part, the same justifications or reasons for having been conducted. The ages of the children also vary considerably, from two to three years of age until anywhere between thirteen and fifteen. Indeed, when marrying infants who could not yet speak for themselves, the parents would take the vows of marriage in their stead (Furnivall 1978, xxii). More than most other societies the child-marriages in this case seemed to involve both a boy and girl of comparable age, and many times the girl is even older by a few years. There is a general sense of social acceptance, and the law clearly does not seem to have opposed such marriages though their reasons for being conducted may have been based on relatively random objectives. Some examples of these are: financial transactions

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[1] Research into Germanic societies (around the 8th century A.D.) also indicates that young girls were often coerced or pressured into early marriage. Interestingly enough, a number of stories depict young girls of 12-14 years of age running away from home, inventing illnesses or causing self-mutilation, to avoid such marriages (Wemple 1993, 242).

[2] See *Child-Marriages, Divorces, and Ratifications, &c. In the Diocese of Chester, A.D. 1561-6.* Ed.Frederick Furnivall. (New York: Kraus reprint Co., 1978).

between the parents, e.g. one parent is in debt and bargains his child for some money; a child is exchanged for some property between the parents; a child's need for security since the father passed away; the potential of having a large settlement made upon the young couple by a wealthy grandfather. In some instances the children are married by the compulsion of their friends or even by the whimsical desire of their parents (xv-xvi).

"These Child-Marriages took place in parish churches . . . or chapels . . . or the private chapels of rich parents or friends at their country-seats . . . or at private houses or rectories. . . ."(xvi). They took place among all levels of society, i.e. rich and poor alike. These marriages, however, were not considered to be binding until or unless the children, upon reaching the "years of Consent" (age twelve for the girl and fourteen for the boy), actually ratified them. Due to their extremely young ages, the children remained at their respective homes until they had matured and then were encouraged to start living with their spouse. If one or both of the children did not wish to ratify the marriage and therefore had not lived with or consummated the marriage, a divorce would be pronounced. If, however, the marriage had been consummated, or some form of a husband/wife relationship had been established there was no way out except that one of the two parties committed adultery (xvii).

Interestingly enough, in the case of England during the nineteenth century and later, there seems to be a general ignorance about the relatively common practice of child marriage in the sixteenth and seventeenth centuries. The author, Frederick Furnivall, who came across the original manuscript in 1893, admits his own astonishment at learning about the betrothal of middle class children in his own country

during this earlier period (xiv). Ironically, in a footnote, he places an excerpt of an article from the *Westminster Gazette* dated 1893, in which it is reported that,

> "A little Indian boy and girl have just been tried at the criminal sessions at Berhampur on a charge of bigamy. The girl and boy, aged respectively six and nine, were indicted for marrying, the former being at the time, to the knowledge of the bridegroom, already, under the *barbarous* [emphasis mine] Indian custom of child-betrothal, the wife of another. . . ." (xvi)

This kind of article demonstrates a distinct narrow-mindedness and lack of understanding about the history of child marriages. Clearly, among those societies and nations where child marriage was no longer practiced, it was seen as a remote and "uncivilized" custom, found among "barbaric" people. The universality of the practice of child marriage in previous times was not and is still not fully realized by most people. Such misconceptions prevent a more objective study of child marriage customs and the basis for its practice among certain societies.

In knowing that child marriage was not a custom particular to one area of the world or one religion, but was rather a widespread practice that most communities did not object to regardless whether the law permitted it, as in England, or forbade it, as in Medieval Byzantine, we may hope to approach Arabia and the Muslim world in general with a more broad-minded outlook.

Medieval Islamic Civilization

The principal basis on which child marriage has been accepted among Muslims is the *ḥadīth,* or the *Sunna* of the Prophet. The marriage of the Prophet to ʻĀ'isha is used as justification for all other child marriages. The most often quoted *ḥadīth* is the reported narration by ʻĀ'isha herself, found in *Ṣaḥīḥ Bukhārī* and *Ṣaḥīḥ Muslim,* the two sources

considered, among Muslims, to be the most authentic compilations. In this narration 'Ā'isha claims that she was six years of age at the time of her marriage to the Prophet when the Muslims had not yet migrated to Medina and then she began to live with him three years later at the age of nine shortly after the *Hijra*.

> 'Ā'isha (Allah be pleased with her) reported: Allah's Messenger (May peace be upon him) married me when I was six years old, and I was admitted to his house at the age of nine. (Ṣiddīqī n.d.,2: 715)[3]

The terms used in Arabic in the various *aḥadīth* describing her marriage, are either *udkhilatnī* (when she states that her mother made her enter the Prophet's house), or *banā bihā* or *udkhilat 'alayhi* (in the versions where her narration is described in the third person). Thus there is a vacillation between translating the Arabic as her being "admitted" to the Prophet's house, she "entered" his home, or, as found in one version, that "he consummated" their marriage.

There is also one rendition of this narration in which 'Ā'isha claims her marriage to have taken place when she was seven. In fact, there has been considerable speculation and debate among more recent scholars surrounding 'Ā'isha's actual age at marriage. This will be discussed in depth in Chapter Three of this thesis. Regardless of 'Ā'isha's real age, however, it will now suffice to say that in some way or another there is a strong belief among most Muslims and most scholars, based on this particular *ḥadīth*, that the Prophet married an underage girl and therefore this must be considered an acceptable practice for Muslims in general.

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[3] Though the word used here is "zawajani", indicating marriage, it is generally understood as a kind of engagement until 'Ā'isha began to actually live with the Prophet at a later age. This was often the case where a child marriage was concerned. The *katb-al-kitāb*, although technically the signing of a marriage contract, is even considered among many Arabs today as a sort of engagement until the couple are ready to live with one another and a reception is held to formally make them husband and wife.

Indeed, this *ḥadīth* may partly explain why from the *fatāwā*, or responsa literature, it emerges "that the minors involved were predominantly girls, that marriage contracts were made up for them while their ages ranged anywhere between birth and sexual maturity, and that generally neither the wedding nor marital sexual intercourse were postponed until they had reached sexual maturity" (826). Since 'Ā'isha'a example was that of a female, it was easy to justify a female child being married.

Debate Among the Medieval Scholars

In the *al-Fatāwā al-'Ālamgīriyya,* (also known as *Fatāwā Hindiyya*) a late medieval collection of Ḥanafī rulings on matters of *fiqh*, a few different opinions on child marriage are mentioned. One opinion is that the marriage of a female child is not permitted until she is *bāligh*, or has reached puberty. Another opinion is that so long as the female child has reached the age of nine years then marriage is acceptable. The majority, however, claim that age is not an issue but rather that the validity of the marriage depends on the physical capacity of the girl. If there are no ill effects that could result from consummation then marriage is allowed even if the child is under the age of nine. If, however, the girl is sickly and thin then contracting a marriage for her is not permitted even if she were much older (1983, 1:287).

In the Shī'a Ja'farī school of thought, age is considered the main factor upon which child marriage (at least in the case of a female) is judged to be acceptable or not. In fact, all the various *madhāhib* tend to focus on the age of nine, especially in the case of females. This is due to the above-mentioned *ḥadīth* concerning 'Ā'isha's age at marriage. In the Ja'farī *madhhab* it is considered that any girl who has reached the age

of nine may be married by her guardian. Similar to the Ḥanafī school, unless her father or her paternal grandfather married her off, she retains the right to choose to keep the marriage or to have it annulled upon reaching puberty. Al-Ṭūsī, states that according to a *ḥadīth*, if a girl is married to a man who consummates the marriage before she is nine years of age, then they must be separated and she becomes unlawful to him forever, i.e. he may not marry her ever again (1991, 2:292). Another report based on Imam Hussayn (the Prophet's grandson) is that if a husband consummates his marriage with a girl who is not yet nine years of age and thereby causes her physical harm so that she cannot ever marry again and has a permanent defect then he must be fined the equivalent of *diya*, or blood money. If, however, he keeps her as his wife and does not divorce her, i.e. he assumes responsibility for her welfare, then he is not liable for any penalty (al-Ḥurr al-'Āmilī 1977, 14:380).

It is interesting to note the seemingly conflicting views within the Shī'a *madhhab*. According to some Shī'a traditions child marriage, specifically meaning the underage, pre-pubescent child, is considered in a negative light. In a section entitled, "distaste for the marriage of small children" one of the traditions mention that 'Alī b. Abī Ṭālib was approached and told by someone, "We marry our children when they are young" and he replied, "If they are married when they are small (*wa hum ṣighār*) then they will not live in harmony", i.e. they will have a problematic marriage (72). Interestingly enough, however, a number of other traditions reported discuss the benefits and advantages of parents marrying their daughters as soon as they reach puberty to qualified individuals so that their chastity is protected (39-41). It appears that the Shī'a scholars, themselves, do not sense any contradiction between the previously mentioned

tradition and others encouraging early marriage. It is clear that regardless of age, a child that has reached puberty is considered perfectly capable of handling marriage. Indeed, in the case of a female, it appears that a girl of no more than nine or ten, regardless if she has attained puberty or not, is also considered capable of handling marriage since the traditions reported that nine or ten is the minimal age requirement for consummation (70-72).

In the Ḥanbalī *madhhab* we also find the age of nine years as a period of determining what may be permissible for a female child. Some consider that in order to marry a child of nine years or more, i.e. until she is *bāligh*, obtaining her consent is necessary. Others hold that it is not a necessity and that she may be married up until she reaches puberty without her consent (al-Mardāwī 1957,8:54). It is mostly agreed upon, however, that a nine-year-old female's permission is reliable and therefore necessary to obtain regardless of her having reached puberty or not (62). What is also generally accepted is that she cannot be pressured or coerced to hasten her acceptance of a marriage proposal (57). There is no debate over the situation of a female child less than nine years of age. It is understood that her consent is not required, as is the case with all children whose words are considered unreliable (54).

In *al-Mabsūṭ*, the Hanafite, al-Sarakhsī begins by clearly stating that the proof for allowing the marriage of the minor (*ṣaghīr* and *ṣaghīra*) is in the Prophet's own marriage with 'Ā'isha (4:212). Aside from this basis for justifying child marriage, he then cites certain verses from the Qur'ān for additional support. For example, in Sūrat al-Ṭalāq (65:4) the Qur'ān mentions the *'iddat* period of those who no longer have their menstrual courses, and those who have not yet gotten them, to be a period of three

months. It is the latter group that concerns us. According to al-Sarakhsī, "those who have not gotten their menses" must clearly be pre-pubescent girls. He states therefore, that the concept of child marriage does exist in an acceptable manner in the *sharī'a* (212).[4]

Al-Sarakhsī mentions two main scholars, Ibn Shubruma and Abū Bakr al-'Āṣim, contemporaries of Abū Ḥanīfa, who disagree that the *sharī'a* allows for child marriage. They cite the verse in Sūrat al-Nisā' (4:6) which states, "Make trial of the orphans until they reach the age of marriage; if then you find sound judgement in them, release their property to them. . . ." They contend that there could be no benefit in such a stipulation if marriage were allowed before *bulūgh*, i.e. puberty (212). That is to say, when the Qur'ān states *ḥattā idhā balaghū al-nikāḥ*, it must have a particular age or period in mind as being the time that the individual will become capable of handling his or her own affairs. Clearly, the stipulation does not refer to a period of minority (212).

These two scholars also argue that there are two essential purposes behind marriage, to satisfy the sexual urge and to carry on the progeny. The marriage contract in the case of the minor, however, is a long-term contract and once they reach their majority, the children are no longer obligated to fulfill the contract. Since there is no authority (*wilāya*) over them once they are mature, there is no way to ensure that the marriage contract will actually be fulfilled. Thus, the status of minority negates the two purposes of marriage and renders any contract useless. They draw the analogy between this type of marriage and a business transaction where someone agrees to pay another

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[4] It is interesting to note that al-Sarakhsī, unlike Aḥmad Ibn Ḥanbal (al-Mardāwī 1957, 9:286), takes no consideration here of the possibility that the Qur'ān may be referring to those females who have matured intellectually and physically, perhaps up to the age of 15 or 16 even, but have not yet attained menarche (as we know is a very plausible occurrence).

but they are given no form of insurance over the period of several years that it will take place. Thus, it is argued that there is no logic behind the marriage of minors since it cannot guarantee any real benefits including the original purposes for marriage (212). As for the Prophet's own marriage to 'Ā'isha, Ibn Shubruma considers this to be among the "*khaṣṣā'iṣ li-nabī*", or special and unique privileges or duties the Prophet had that other beings did not (al-Jawharī 1993, 83-84).

Al-Sarakhsī responds by arguing that there are certain goals behind marriage such as the betterment or best interest of both the male and the female individual. This is served by *kafā'a*, or suitability (n.d., 4: 212). This cannot always be found, however. Thus, he says that this being a great priority, the guardian must have the right to marry his ward off when appropriate otherwise if he were to wait until the child's majority it is highly possible that he would lose the *kafā'a* opportunity and find no one suitable (212). This is not unlike the rationalization once used to permit child-marriage among European Jewry as mentioned earlier. Al-Sarakhsī also points out that in the case of a marriage contract dealing with minors, although it is a long-term contract, it is for an immediate need. It thus becomes necessary in terms of it's goals, i.e. *kafā'a*. According to him, this urgent need, in fact, makes the marriage effective, or operative at this point and it is therefore validated (213).

As far as the issue of whether or not the female child, once married by her father, is allowed to choose either to keep or to annul the marriage when she has matured, al-Sarakhsī states that her choice, i.e. *khiyār al-bulūgh,* is not allowed. Through *qiyās* (inferential reasoning), it was reasoned by Ibn Samā'a that because a marriage contract involves the female child surrendering herself, i.e. essentially giving up her person, then

she must be allowed to make the choice herself. Al-Sarakhsī states, however, that "We have abandoned *qiyās* on account of Sunnah" (212). His understanding is based on two ideas; that in the case of 'Ā'isha there is no proof that once a child has matured she may choose to annul a marriage contracted by her father since 'Ā'isha herself did not[5]; secondly, he argues that a father has such love for his daughter that he looks out for her more than he does even for himself, and that his is a complete guardianship of her, including her property and person. Thus, a female child has no choice (213). The father's great authority over his children's marriages is best illustrated by an example of what otherwise would be considered an invalid marriage. In the Ḥanafī *madhhab* a child marriage is generally considered invalid if it is against the child's best interests. If, however, the father or grandfather married the child off, and the match was unsuitable, i.e. the partner chosen is not the child's equal, *kufū'* or the marriage was against the child's best interests, it is still considered valid so long as the father had acted *bona fide* (Bahadur 1898, 2:92-3).

Al-Sarakhsī does go on to give the various opinions of other scholars on this issue, however. He states that Abū Ḥanīfa, Ahaybānī, Ibn 'Umar and Abū Hurayra all share the same opinion that there is *khiyār al-bulūgh*, option at puberty for those females married by someone other than their father or grandfather when they were underage (215). They base their opinion on the *ḥadīth* in which it is reported that Quddāma Ibn Maẓ'ūn married his niece, an orphan, to Ibn 'Umar and when she had reached puberty that the Prophet allowed her to choose and she chose to cancel her

[5] Justice Aftab Hussain critiques Sarakhsī's argument by stating that "the non-exercise of the right does not negate the right" (1987, 477). Regarding 'Ā'isha's non-use of the option of puberty, he further states that "it is strange that simple silence or inaction . . . is made a basis of an important injunction"(477).He also questions how the non-action of 'Ā'isha constitutes 'Sunna' for which the *qiyās* was abandoned(480).

marriage (215).[6] The understood opinion of Abū Ḥanīfa is that if the father or grandfather marry the child, male or female, to someone, then there is no option to cancel, or annul the marriage afterwards. If, however, the *qāḍī*, the child's brother, mother, or some other *walī* marry the child then the child may opt to cancel the marriage at puberty (215). As with most subjects, the Ḥanbalī *madhhab* holds at least two opinions on this issue as well. Some, such as Ibn al-Jawzī, argue that a male child may not have the *option of puberty* if he was married by his father (al-Mardāwī 1957, 8:53). Others, however, say that he has the right to choose (53). As for the female child, it is said that she has the right to choose for herself once she attains puberty (62-3).

According to the Mālikī school, however, as regards the decision of a boy who has matured and no longer wants the marriage, the marriage is automatically annulled even if it was contracted by his father. If he consummated the marriage he must pay the dowry and if he did not consummate the marriage then there is no obligation (al-Wansharīsī 1981, 3:130). In the case of the underage female, however, even if she is granted the *option of puberty*, the process of gaining her freedom is more difficult. According to the Ḥanafī school, if she was married by anyone other than her father, her marriage may be cancelled, but only with the ruling of a *qāḍī* (al-Sughdī 1984, 282).[7]

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[6] It is interesting to note that similarly in Jewish Law "a minor girl, orphaned from her father, was not strictly speaking, in the legal 'jurisdiction' of her guardian. . . .The marriage contracted for her by her relatives did not have the full legal force of a marriage contracted by her father. . . .recognized [only] as being a temporary arrangement" (Friedman 1980, 1:228).

[7] Along the same lines, in the case of England during the sixteenth century, there was some debate among nineteenth century scholars examining the early manuscript over the issue of divorce for child marriages. One scholar suggests that either child was permitted to marry another even if a divorce had not yet been pronounced because the very act of rejecting the previous marriage was sufficient to indicate a divorce and thus the pronouncement was simply a formality (Furnivall 1978, xix). Another scholar argues that the divorce proceeding was absolutely essential if either party wanted to remarry. He argues that otherwise people would not have gone to the great expense and trouble of procuring a divorce for their child if a second marriage could be considered valid without the granting and registering of a divorce (xix).

One must keep in mind, however, that *option of puberty* still remains a relatively separate issue. The essential matter here is the permission granted to relatives to marry off underage children. In the Ḥanafī *madhhab* it is permitted that any paternal relative may marry off a minor as they desire. As is stated in the *Hedaya* , "the marriage of a boy or girl under age, by the authority of their paternal kindred, is lawful, whether the girl be a virgin or not, the prophet having declared 'Marriage is committed to the paternal kindred'" (Hamilton 1989, 1:100). Mālik, on the other hand, reserves this right for the father alone, whereas Shāfi'ī states that this authority remains with the father or the grandfather (in the case that the former is not present) but no one else (101).

Interestingly enough, Mālik demonstrates, what one might perceive to be, some reluctance towards the easy acceptance of child marriage. He points out that since there is no real necessity for such guardianship, i.e. considering the fact that children are not subject to sexual desires and there is no immediate need for marriage, there is little rationale in any guardian contracting a marriage for the minor (101). However, he feels the need to acknowledge that based on "the sacred writings, contrary to what analogy would suggest" the father (alone) is still vested with this power to marry his child off (101).

An overview of the various opinions within the Ḥanbalī school also demonstrates a similar hesitance among some to accept child marriage *in toto*. One report claims that Aḥmad Ibn Ḥanbal is reported to have said that there should be no marriage of a female minor under any circumstances (*bi ḥālin*) (al-Mardāwī 1957, 8:62). Ibn Manjā states that this is the accepted position of the *madhhab*. Certain other scholars, e.g. al-Zarkashī, argue against this from within the same school and disregard its having any

significant authority (62). It is also mentioned that if a minor boy is to be married it should only be for an absolute necessity (52). Ibn 'Aqīl and others define "necessity", i.e. *al-ḥāja* as the need for sexual relations and no other (62). Clearly, this limits the acceptability of marrying a minor. The privilege of marrying off one's son or daughter, as in the Mālikī school, rests with the father. There is some opinion granting the grandfather this right as well. However, the majority accepts it as the father's alone (57).

"Shāfi'ī argues, that entrusting the power of contracting marriage to any others than the father or grandfather would be oppressive upon the child, since it is to be supposed that no others are equally interested in its welfare or happiness . . ."(101). It is precisely this latter principle which prevents the property of minors to be handled by distant relatives, something considerably less important than the minors' persons, therefore their contracting a marriage for the minor must be considered unlawful *a fortiori* (101). The Ḥanafī response to this, however, is that affinity itself is cause for affection towards a child by other relatives just as in the parents and that for any existing deficiency therein, there is a provision to guard against any evil consequence, namely, *khiyār al-bulūgh*. They argue that the child's acquiescence after puberty is necessary to validate the marriage, unlike in the case of a child's property where such an option does not exist. Thus, whereas a child may still be able to recover from a misalliance, lost property through the hands of evil-intentioned relatives is irretrievable.

Shāfi'ī also disagrees with the Ḥanafī allowance that a minor *thayyiba*, or non-virgin, may be married off before puberty (102). He maintains that once a minor girl has been married, regardless of her guardian being her father or grandfather or any other

relative, she cannot be married off again until she is *bāligh* and capable of giving her consent. This opinion is based on the *ḥadīth* which clearly states that a *thayyiba* , non-virgin female, shall not be married until she herself chooses to do so. Although the Ḥanafīs consider this only as a reference to mature non-virgin females, Shāfi'ī understands this as applying to females of any age.[8]

In his *al-Umm*, Shāfi'ī discusses certain situations in which contracting the marriage of minors is unacceptable. He discusses the matter of two adults contracting the marriage of an unborn child (not an uncommon practice in Arabia or other nearby Eastern cultures). He suggests that if a man approaches a woman and tells her that he will marry her to the unborn baby his wife still carries or the first boy that is born to him, or that he approaches a man and tells him that he will marry his unborn child, or first daughter to him, that this is unacceptable (1993, 5:36). He states that none of this can ever constitute a marriage. He points out that this type of discourse is based on no foundation whatsoever for two reasons. First of all, the parties contracted in a marriage must be clearly specified. If the child is unborn, it still has no real identity. Secondly, marriage agreements cannot be based on future prospects, e.g. the birth of a child or saying "if tomorrow comes then our children will be married", because the future is always uncertain and the conditions of fulfilling the contract may not occur (36). Additionally, in the case of a minor it is not possible to make such a stated contract effective since a child cannot consummate a marriage and neither can he or she inherit

[8] Ibn Taymiyya holds a similar opinion in the Ḥanbalī school, claiming that a female child of nine years of age, her being a non-virgin or even a virgin for that matter cannot be coerced or forced to marry (al-Mardāwī 1957, 8:55).

from his or her spouse at the time the marriage is contracted (36).[9] Shāfiʿī likens it to *muta'* marriage where the couple is married and yet not married at the same time. In fact, he says, it is worse than *muta'* because there is a period of time after the contract is made during which the couple cannot even fulfill it. Thus, he says, this kind of marriage is no marriage at all and indeed those who permit *muta' do* not even allow it so it is in fact worse than *muta'* (*hadhā afsad min nikāḥ al-muta'*) (36).

Within the subject of child marriage is the issue of orphans and whether or not they may be treated the same as children with parents or if their status should be different. Shāfiʿī is against the marriage of orphans without obtaining their consent. He argues that the Prophet stated that the orphan girl, she being a child without a father, should not be married until she is asked for her consent. He also points out, however, that once *bāligh*, the Prophet declared that a child is no longer considered an orphan (al-Sarakhsī n.d., 4:214). Al-Sarakhsī, on the other hand, feels that the case of the orphan is much like that of any other child and she or he may be married off by the guardian. That they are free to exercise the *option of puberty*, he considers to be a sufficient safeguard against any misalliance that may take place. Ibn Ḥanbal's opinion on this issue, according to Ibn Taymiyya, only permits the guardian's marriage of the orphan if the child consents. After that, however, he or she may not have the option at puberty to annul the marriage (1981, 32:43).

In one case we find that a twelve-year-old girl who has not yet reached puberty is married by her brother to someone. She has no father or *wali*. The question asked is

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[9] One must note, however, there is not a complete agreement on the issue of inheritance. For example, in the Jaʿfarī *madhab* (the main Shīʿa school of thought), if two underage children are married by their fathers then they are permitted to inherit from each other if one of them were to pass away (al-Ḥurr al-ʿĀmilī 1977, 14:220). This is also true of the Ḥanafī madhhab.

whether or not such a marriage is valid or not. According to Shāfi'ī it is not valid since she has no father and she, being underage herself, is incapable of giving her permission, in his opinion. One transmitted opinion of Aḥmad Ibn Ḥanbal agrees with this. According to the general accepted Ḥanbalī *fiqh*, however, this would be considered a valid marriage since she did give her permission (46).

In another case presented to Qāḍī al-Wansharīsī, a Mālikī jurist in the 10th century A.H., we find that a small orphaned boy is married to a girl by his in-laws and other unrelated people. When he reaches puberty he agrees to the marriage. The question posed, however, is whether the marriage is valid or not and what if he did not know about the marriage. Al-Wansharīsī states that regardless of whether he knew about the marriage or not, his acceptance of the marriage after reaching puberty does not validate the marriage. The marriage is considered invalid since the boy was an orphan and should not have been married by anyone in the first place (al-Wansharīsī 1981, 3:130).

In summary, there appear to be three opinions as regards the case of an underage orphan and the permissibility of marrying him/her to someone. One opinion, which is shared by Shāfi'ī, Mālik and one narration of Aḥmad Ibn Ḥanbal, is that such a marriage is invalid. The second opinion, which is shared by Abū Ḥanīfah and one narration of Aḥmad is that the marriage is acceptable even if the orphan child does not grant permission but s/he has the right to choose once s/he has reached puberty. Thirdly, the most commonly accepted opinion of Aḥmad is that the orphan can be married so long as s/he gives permission but if she is a female then she cannot retract her decision once she grows older (50). Finally, in the Shī'a Ja'farī school, the orphan girl can be married by

whosoever is her *walī*, (but it is preferable if it is her older brother, who is considered to be in a position close to her father) and the marriage is considered valid so long as the girl is at least nine years of age (al-Ḥurr al-'Āmilī 1977, 14:212). Also, similar to the Ḥanafī school, the orphan child has the right to choose once he or she has reached puberty or attained intellectual maturity (*rushd*).

It is important to note, however, that despite most of the scholars' acceptance of child marriage and in some cases even their encouragement for early marriages, they were well aware of the abuses that such situations might lead to. For example, it was not uncommon for underage, i.e. prepubescent females to be forced into sexual relations if married early despite any agreements made prior to the marriage or any understanding among the *fuqahā* that consummation should only occur once a child is *bāligh*. Whether the scholars themselves discussed the hypothetical possibilities or whether they were presented with actual cases, the fact remains that they only judged the result of the abuse and did not discuss any measures to prevent it in the first place.

One case, for instance, is mentioned in Ibn Taymiyya's *Majmū' Fatāwā*, where he poses a question in regard to a slave boy. Naturally, his status being that of a slave, he was not master of his own affairs. This case, however, is still very illustrative of child abuse. The small boy was used as a *muḥallil*, i.e. a hired husband used by some people to circumvent the *sharī'a* law stipulating that if a man divorces his wife irrevocably then she must first marry another man in a proper marriage before she can remarry her previous husband. Clearly any temporary and pre-arranged marriage with a "hired" husband was considered detestable by the *fuqahā* and any pious moral upright Muslim. What made the matter even more offensive, as is mentioned in this case, is that often

times small pre-pubescent boys were used for such abhorred purposes.[10] The question asked is whether or not such an individual would be considered a "husband" even though he had no understanding of sexual intercourse due to his young age. Ibn Taymiyya goes on to quote a *ḥadīth* of the Prophet cursing the *muḥallil* and expressing his disgust of such practices, clearly invalidating such marriages (1981, 32:155). He is emphatic about the abhorrent nature of such a practice. He makes no mention, however, of the consequences of abusing the child or the harm that may have been caused to the small boy.

In another example, the question is brought forth about what must be done in the case of a ten year old girl who is married to a man by her family. Her family made the condition that the man lives with them once married to their daughter and not move to another place. They also stipulated that the marriage not be consummated until one year later. No mention is made of the girl's status as pre-pubescent or otherwise. One might assume that she had not reached puberty, given this latter parental stipulation regarding consummation of the marriage. As it turns out, the husband took the girl away to his house after all and consummated the marriage. He then traveled with her to another place and he beat her very badly, as reported by some midwives. When they returned from their journey he refused to allow her family to see her and continued to beat her. The question asked was, should she be allowed to stay with him in these conditions? Understandably, Ibn Taymiyya's answer is that such a situation cannot continue and the two must be separated unless the husband ceases from abusing her once and for all

[10] A possible explanation for this use of small boys may be that the wife or ex-husband did not feel that consummation of a marriage with a child constituted "real" sexual intercourse and therefore regarded this process as less humiliating and made it more palatable.

(167). No mention is made regarding a possibility to punish the husband. Of course, once again, the judgement is simple and to the point.

When examining the scholarly opinions surrounding the issue of child marriage, one cannot help but note the lack of acknowledgment of psychological factors that may be involved in potentially abusive situations. As was mentioned previously in the case of the Ja'farī *madhhab*, reference is made to financial compensation for a girl who has been forced into sexual relations when her body is not yet capable to endure intercourse (due to lack of proper or full development) and who may suffer from irreparable damage done to her reproductive organs. Marriage serving the child's best interests is also taken into account. The Ḥanafī *madhhab* (as mentioned above) even considered the *option of puberty* as being a sufficient safety-net for those children who had been married to unsuitable partners, either suffering abuse or some form of disharmony in the relationship. There was no discussion, however, of the psychological damage the child may suffer due to such traumatic experiences, whether they are only physical or emotional, or both. From a modern perspective, however, it is difficult to speculate on why the mental and emotional welfare of children or individuals in general was not a greater concern among the scholars and intellectuals of that period.

Interestingly, the jurists did discuss topics which one might consider to hold some psychological relevance. For instance, the Ḥanafī jurists seem to have debated at some length as to when exactly a female reaches the "period of desire" (Bahadur 1898, 2:104). For instance, some said that the age is nine, as is generally accepted to be a permitted age of marriage. Others said that a girl of six or seven or even eight years, if strong and fat, (as also stated previously) will have reached the age of desire. Al-

Sarakhsī states that considering that 'Ā'isha is believed to have been sent to the Prophet's home at age nine, one may conclude that whenever a female child is "capable" of enduring intercourse, it is acceptable to marry her. Indeed, he mentions the possibility of fattening up the child to make her appearance more "healthy" and less fragile (213). Abū Yūsuf goes so far as to say that depending on her peers and what is the general trend, even if she is five years of age, she may possess sexual desire and thus there is no fixed age limit (104).[11]

Except for a few (e.g. Ibn Shubruma), most of the scholars also seemed to be more concerned with the more immediate and material benefits a child or its family would receive from early marriage and less concerned with the emotional and mental aspects involved in such a practice. Clearly, during the medieval period, the priorities of families with daughters were different. Although psychology was not an alien subject, it was nonetheless a remote one, i.e. not necessarily at the forefront of daily human existence and human problems. Concern for honour and family financial welfare loomed much larger in the minds of individuals. For instance, if a girl were to be raped, contracting a marriage with the rapist may have been seen as more feasible and considered more honourable than simply punishing the offender. Although difficult to imagine today, it is also possible that the stigma of rape was not perceived the same way as in the modern period. Families worked as whole units and as such individuals were often expected to make sacrifices for others. Often parents felt that a daughter was most safe and secure once she was married. This would also help reduce their own

[11] Some modern scholars have postulated that these jurists, dealing with the matter from a purely male perspective, appear to have been giving the age of a female, not when she begins to experience sexual desire, but rather when she may begin to hold some sexual appeal for a male counterpart? Thus, explaining their frequent concern with her appearance.

burden since daughters were often considered as such. Thus, children were often married in order to benefit the family in some way, or to help relieve the family of a burden. Although the family was not insensitive to the difficulties their child might face, it was understood as a matter of survival, and few other alternatives rendered it an acceptable choice.

As we have shown in this chapter, child marriage served a variety of purposes in all cultures and communities. It was, in fact, a universal practice. The motives were often similar, whether it was in ancient Greece or Rome, medieval Europe, Christian Byzantine, Jewish culture or the Arab and Islamic world. Family honour often depended on a daughter's chastity and as such females were the most often to be married at the earliest age. Marriage was also seen to be the exclusive career for a female, unlike males. Therefore it may have been felt that an early marriage was not harmful to her. Nomadic societies also had much to gain by securing their daughters' futures at an early age where suitable suitors seemed few and far between. Life seemed uncertain under harsh conditions and parents may have often worried about the welfare of their children if orphaned. In all these ways, child marriage helped to allay fears and certain potential problems.

Islam, although considered revolutionary in many ways, was also a religion for all times. In many aspects it has been interpreted in order to conform to particular customs and traditions among people of various cultures and backgrounds. In a community where child marriage was already practiced, the legal discourse that was fostered therein was unlikely to be negative towards it. The Prophet's own marriage to a very young 'Ā'isha was the perfect justification to support the already accepted

practice. Ironically, however, the same concern for a child's welfare that might have led to his or her marriage may have also often led to his or her maltreatment. The jurists were not unaware of the potential problems child marriage could bring about. Indeed, some scholars did speak out against the practice precisely because they believed it did more harm than good. The majority, however, seemed to have a different sense of priorities than what one might consider today. Thus, one can only conclude that child marriage, like most other social institutions, is a product of the times. In the medieval context then, child marriage was considered a positive social construct, functioning for the good of society, with more benefits than harm.

Chapter Two: Early Legal Reforms and Child Marriage

The reform movements which burst upon the Muslim world during the seventeenth, eighteenth, and nineteenth centuries exhibit this common characteristic, that they bring into the centre of attention the socio-moral reconstruction of Muslim society. . . (Rahman 1970, 2B:637)

Child marriage continued to be practiced well into the twentieth century. It remained an accepted custom among Muslim societies until a number of external factors forced Muslims to question their own customs and traditions. "The criticism of historic Muslim social institutions [such as child marriage] . . . by orientalists and Christian missionaries [specified] the objectives of social reforms for the Modernist" (Rahman 1970, 2B:643).

The movement to reform Islamic law and social practices took place on two fronts. The legislative reforms in many Muslim nations stemmed mostly from contact with Western nations and their influence on the ruling bodies. Reform in personal status laws, which took place much later, however, was not only due to western influences but also motivated by certain intellectuals, scholars and feminist movements that believed in progress and modernism and felt the need to adapt Muslim life to the realities of the modern world. The *Salafiyya* movement, initiated by Muḥammad 'Abduh, in trying to find solutions to this issue, was dealing with two realities from opposite directions; "on the one hand, the material and cultural seduction of Muslim intellectual elites and ruling classes by the West; and on the other the modernists' attempt at a systematic renewal of Muslim society so that it could face, as immediately and effectively as possible, the necessities of modern life" (Merad 1978, 4:158).

This chapter will first discuss the status of child marriage during the eighteenth and nineteenth centuries for a better understanding of the situation prior to and during the reform period. It will later lead into the twentieth century up until the 1970's prior to the Iranian Revolution. The codification of Islamic law under the Ottomans and the consequent reform legislation that took place will be examined in order to understand the superficially imposed alterations in the practice of child marriage. The chapter will more specifically trace the impact of the reforms that occurred in Palestine under Ottoman rule and later under Israel's occupation. The changes in legislation in Egypt, Iran and Pakistan will also be discussed in order to demonstrate the impact of legislative reform on the practice of child marriage and to bring us into the modern period.

The practice of child marriage did not diminish because of legislative reform alone. There was considerable resistance at two levels. Not only did the general population resist the legal reforms, which put limitations on the age of marriage, but also the disapproval of the 'Ulamā' and the *qāḍīs'* own reluctance to implement the new laws hindered the effectiveness of the new legislation.

Additionally, despite efforts by Muslim jurists, such as Muḥammad 'Abduh, to reform Islamic law and bring it into some semblance of conformity with the modern Muslim situation, the method undertaken, namely, a call for a return to the Qur'ān and *Sunna* in order to develop newer more relevant interpretations only, backfired. The *Salafiyya* movement, although a progressive concept in its inception in its desire to move away from *taqlid*, or the blind adherence to the various schools of thought, that was so pervasive among Muslims, only resulted in a literal reading of the *ḥadīth* literature and an attempt by many Muslims to strictly emulate the Islamic society of the

7th century. It was not until the first few decades of the twentieth century that child marriage practice began to dramatically decline due to the overall changes taking place in Muslim societies everywhere. Increasing education for females, increasing job opportunities for women outside the home, and greater urbanization in most nations were some of the most significant factors contributing to the decline of marriage for children.

Child Marriage Under Ottoman Rule

Child marriage remained an accepted norm under Ottoman rule up until the beginning of the twentieth century when reform in personal status law finally took place. During the seventeenth and eighteenth centuries, there was little alteration in the perception most *muftis* had of the practice of child marriage since earlier medieval times. "Many girls were married before puberty and almost all to men much older than themselves" (Goodwin 1997, 145).

Child marriages were not limited to any particular class but occurred among the nobles as well as the lower classes. In fact, one might even say that often, the nobility had an even greater preference for such marriages considering that it allowed for more control of familial and political relationships as well as the fact that they generally had more to protect in terms of property and influence. An example in point is the case of Fatma Sultan, the daughter of Ahmet III. She "was married to his Grand Vezir, Ibrahim Pasha, when she was thirteen and he was fifty-one. He was executed to save him from the mob when he was sixty-three and she was twenty-four and devoted to him. At the

age of five she had been married to her first Grand Vezir, who died when she was nine. After Ibrahim Pasha she did not marry again and died at the age of twenty-nine" (145).

In Nablus records from the eighteenth and nineteenth centuries as well, there is an indication that the "upper and more affluent middle classes of the city were the most likely to arrange early marriages" (Tucker 1991, 237-8). Similarly, although one cannot be sure whether a discrepancy in the age of the bride and groom was the rule or an occasional aspect among Nablus society, there is clear indication that it was considered acceptable just as among other areas under Ottoman rule (238).

In her book *In the House of the Law,* Judith Tucker discusses the approach of a few different *muftīs* and the various *fatwas* they issued. The two we will be mentioning were: Hamid b. 'Alī al-'Imādī, a *muftī* in eighteenth century Damascus and Khayr al-Dīn al-Ramlī, a *muftī* in Ramla in the seventeenth century. Tucker points out that "the jurists took their charge to protect the fatherless child seriously, and their defense of the rights of orphans figured among the most impassioned of their opinions" (1998,48). Their concept of what constituted the best methods to safeguard the best interests of the child, interestingly enough, included early marriage. "The guardian of an orphan had, according to al-'Imadi [*sic*], a responsibility to arrange a marriage for his charge even before the child reached puberty . . . . Indeed, [he] took the position that should a *wali* balk at what appeared to be a sound offer of marriage made to his minor charge, the qadi (judge) should step in to oversee the marriage arrangements"(41).

However contradictory this outlook may seem to most today, the *muftīs* did show concern for the welfare of the child. For instance, although they agreed that "the law allowed the father of a minor girl to marry her off to whomever he pleased, and thus

override the demands of *kafā'a*, but on this matter even the father's judgement might be questioned. Khayr al-Din argued that if a father known for his 'poor judgment and his inability to see the consequences [of his actions]' married his daughter to an unsuitable person, the qadi [*sic*] might step in and proclaim the marriage legally defective" (42). Thus, it was, in the jurists' view, that a father was not permitted to exercise his power over his daughter in an entirely arbitrary and despotic manner (42). Although a father, as *walī* might exercise control over his child's person and property, his guardianship was considered a position of trust and responsibility. "If the interests of minor children were not being well served by their father, it was up to the court to protect those interests" (138). According to Tucker, parenting in Ottoman Syria and Palestine was constructed with careful consideration of the welfare of the child. "The jurists chose to champion the welfare of the child at the risk of weakening the claims of kin. Children were not just family property . . . If their relatives failed to honor [their] rights, the *muftīs* authorized the courts to step in and make other arrangements" (145).

It is important to note that the perception of childhood in general was significantly different from more modern notions. This is the only way one can account for the genuine concern that did exist among authorities regarding child welfare and the simultaneous permissibility of the practice of child marriage. For example, childhood was not necessarily defined by number of years. "Indeed, numerical age was rarely mentioned at all in legal discussion or court sessions . . . Rather the ages of the child were based on an appreciation of developments in a child's physical and mental states and capacities as he or she grew. Generally, it was the jurists' sense of the age of a child in these terms, rather than knowledge of age in years . . ." (116). This is important in

order to comprehend why child marriage was not considered problematic but rather beneficial in so many ways. If the boy was a *murāhiq,* one capable of having sexual intercourse with a female of his age and who desires sexual intercourse and the girl was considered physically ready for intercourse as well, the marriage could be consummated despite their status as minors (118).

> At least in Hanafi jurisprudence the onset of puberty did not necessarily usher in an age of full independence. A boy or girl might, for example, reach puberty but still be subject to tutelage (*damm*) [*sic*] of a parent or other relation. This concept of formal tutelage recognized the fact that a child might reach physical maturity without necessarily having acquired the maturity of mind essential to full participation in the community as an adult. (119)

It seems, then that a child's sexual development was dealt with separately from his or her mental development. Thus, a boy was considered ready to leave the care of his mother or *ḥiḍāna* when he could care for his own basic needs; a girl usually left that stage when she was ready for marriage, that is, she became *mushtahah,* desirable in a sexual sense. "Her exit from early childhood was defined by her readiness for the role of wife, not by her ability to manage on her own without her mother" (118).

Although a boy was considered, by the *muftīs*, to develop sexual desire at the age of ten, "[t]his did not mean, of course, that prepubescent boys were married off as a rule; on the contrary, the marriage contracts registered in the Islamic courts rarely record a minor groom" (155). As Tucker points out, what is fascinating, however, is that "the muftis did not assess female readiness for sexual intercourse in light of a girl's desire or active abilities, but rather asked whether or not she could 'support intercourse'. . . Indeed, a girl's readiness was decided entirely on the basis of her impact on male desire, not on her own experience of desire. Sometimes the issue was clear, as in the

case of a six-year-old girl who was deemed too young to be an 'object of desire.' . . . The judge can ascertain her readiness simply by looking at her, because it is his desire, not hers, that determines her readiness for sexual activity" (155-6). Even if he turned over the decision to women to inspect the female child more closely, their own criteria would be based on the male perspective.

As pointed out in the previous chapter, al-Sarakhsī did delve into the matter of female desire and the earliest possible ages during which it might occur. However, aside from the fact that those speculations were hardly realistic, which is a further indication that "the muftis [*sic*] viewed sexual desire from a distinctly male vantage point" (151), female desire still remained much less than a central concern. "The muftis did not [necessarily] deny the existence of female desire. [But] they discussed desire entirely in male terms. The awakening of desire in boys found its parallel in girls in the process of becoming desirable"(156). If one considers this from the perspective of protecting female chastity and concern for family honour, one might understand the rationale behind judging whether a girl is ready for marriage by her sexual appeal to the opposite sex.

The following case which Tucker presents from Khayr al-Din al-Ramli's *Kitāb al-fatāwā al-kubrā li naf' al-biriyya* (1856-7) demonstrates the kind of bias mentioned above that often steered the *muftī* towards such a judgement:

> Question: If a husband wants to consummate a marriage with his minor wife, saying that she can endure intercourse, and her father says she is not ready yet, what is the legal ruling?
> Answer: If she is plump and buxom and ready for men, and the stipulated *mahr* has been received promptly, the father is compelled to give her to her husband, according to the soundest teaching. The qadi [*sic*] examines whether she is [ready] by [asking] whomever raised her and by her appearance; and if she is suitable for men, he orders her father to give her to her husband or not. And if

> there are none who raised her, he requests a consultation from women. And if they say that she is ready for men and can endure intercourse, he [the *qāḍī*] instructs the father to give her to her husband. If they say she is not ready, then he does not so instruct the father. And God knows best. (148)

The female's own desires and even her indication that she has an active distaste for sex, are not a part of the deliberations. Indeed, her own father has little say as her representative once he has contracted the marriage for his daughter and the matter is simply left up to the judge and the husband.

Jennings, in his work on the Sharī'a Court of Anatolian Kayseri in *Women in Early 17th Century Ottoman Judicial Records,* points out that "girls who [were] not of age [could] be married without their consent by their fathers or guardians, but minors seem to have remained with their parents until they came of age, and there was no consummation before that. [Then] when both parties came of age each had the right to decline to consummate the marriage and so to be left to be free to marry someone else"(Jennings 1975, 18:79-80). Not withstanding the possibility that matters pertaining to minors were conducted differently in various parts of the Empire, Jennings cannot overlook the possibility that despite *khiyār al-bulūgh,* minors were left in a vulnerable state. Thus, it was not impossible that a marriage would be consummated before the child was physically or even more importantly, mentally ready and willing to endure it. For example, in Khayr al-Din's *Kitāb al-Fatāwā al-khayriyya li-nafʿ al-bariyya* (1858), Motzki cites twelve cases out of fifty-six "in which a wife was handed over to the husband and the marriage was consummated prior to the occurrence of her first menstrual period. One text specifies that the wife was about nine years old at the

moment when her marriage was consummated" (1996, 137-138). For boys, only one instance is reported (138).

Although Tucker claims that no instances of *faskh*, or annulment as a coming-of-age choice were uncovered in the Damascus, Jerusalem and Nablus courts' records of the seventeenth and eighteenth centuries,[12] Jennings does bring forth some cases found in the seventeenth century Kayseri court records. Here are two examples:

> Ayşe bint Mustafa Başa: I have come of age (*baliga ve akila*). I will not accept the marriage (*nikah*) that my uncle (*'amm*) Mahmud has arranged. I terminate it (*fesh*). I make Emir Ali bn Hamdi my vekil for everything. Ali accepts. [20 41-2; 12 Cumadi I 1027]. (77)

One case is an example of the endorsement of an arranged marriage at the coming-of-age:

> Fatma bint Mustafa has as vekil for the matter Oda Başi Musa Beg bn Abdullah, who acknowledges (*ikrar*) in the presence of Ibrahim bn Ali: The aforementioned Fatma, who has made me her vekil, was married (*nikah*) to Ibrahim when she was two years old by her father Mustafa bn Ahmed. Now she is more than fifteen years old and she accepts the marriage that her father arranged. Ibrahim confirms this. [20 159-2; 13 Rabi I 1028]. (78)

It is not unrealistic to assume that child marriage was variably viewed in different regions of the Islamic world. In Anatolia, as opposed to Syria and Palestine, it appears that the *muftis* had a slightly more liberal idea of when a child might be considered ready for marriage. For example, the chief Ottoman *mufti* during the sixteenth century, Ebussuud Efendi, like most other *muftis*, considered males and

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[12] Tucker mentions that this may have been due to the fact that few minor marriages were arranged by people other than the girl's father or grandfather. "Moreover, we may assume that there was considerable social pressure on a young woman not to reject a marriage arranged by her family, to say nothing of the fact that the marriage she sought to reject would have been one she had already been . . . accommodating for some time" (Tucker 1998, 116).

females to be "of age" if their majority could be confirmed by signs of physical maturity (Pierce 1997, 173). However, one had to be at least twelve years of age. In this way he differed from the other scholars who usually made nine the lower age limit for *balāgha*. He also differed in that, he, following Imam Abū Ḥanīfa's opinion, considered that in the absence of signs, females came of age at seventeen and males at eighteen (173). Most Islamic jurists, following the opinions of Abū Yūsuf and Shaybānī on the other hand, considered fifteen to be the upper limit of physical maturity for both males and females.

There are several factors that might explain a guardian's desire to marry his ward off at an early age. As mentioned above, historically the wish to protect the daughter's chastity, i.e. her virginity and thus the family's honour was a significant inducement to marry her off early. Other times, consideration for her financial welfare in case the father was approaching death or was too ill to support his child. Motzki points out several more factors that served as incentives for early marriage in seventeenth century Palestine, which are extracted from the *responsa* literature, or *fatāwā*. "In many of the questions, financial factors played an important role" (1996, 138). The *mahr* was paid upon the concluding of the marriage contract. According to Islamic law the guardian is obliged to hold it in trust for the girl until she comes of age and can manage her own property.

"The fatwas show, however, that fathers and guardians often used the money for other purposes, for example, for their own consumption, to pay off a debt, to enable a son to marry, or for the girl's maintenance, education, and wedding. Only the last use was justified according to the view of most Hanafis, including Khayr al-Din" (138).

Overall it appears that the main purposes of a father or guardian contracting his ward or child in an early marriage was an attempt to rid himself of the burden of the girl's maintenance, usually due to financially straitened circumstances (138). [13] Often the father would insist on being compensated by the husband for supporting his daughter until she was ready to live with her husband. Although the Ḥanafī *madhhab* only requires the husband to "maintain" his wife if he is getting some "enjoyment" from her, the Shāfi'īs make him responsible even before the consummation of the marriage and thus if the father of the married daughter incurs any expenses on behalf of the daughter, the husband must consider them a debt he must pay off (Sonbol 1996, 242). One can see clearly why early marriage would appear advantageous to the guardian or father of the female child.

Aside from the fact that child marriages had a high percentage of failure (139), i.e. ending in divorce, the medical risks it posed were not unknown either. This may explain why although "the advantages of a minor bride were formally acknowledged by all, but the actual practice was not that widespread" (Tucker 1988, 13:173). The risks to mother and child proved especially high when women married early and the adolescent bodies were ill equipped to handle the physical strain (Marcus 1989, 256). In one of the cases cited by Tucker from the Nablus court records, "Ruqiyyah, the daughter of the middle-class *sayyid* Musa al-Fakhuri, was married off as a minor by her father in 1264/1847-48. Within four years, she was dead, leaving behind an infant daughter in addition to her husband and father" (173).

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[13] This is the foremost reason today why child marriages, although rare, are still conducted in the Muslim world. See Chapter Three for a more in depth discussion.

The eighteenth and nineteenth centuries showed few alterations in the perception of the scholars and jurists towards child marriage since medieval times. Just as there was hardly any attention given to the sexual desires or lack thereof of the female youth, so too was the case regarding her mental state when marriage was imposed upon her. It appears that the jurists' attention was clearly and almost solely directed towards the physical harm that could befall a child due to an early age marriage. Thus, physical harm was duly compensated for through a suitable punishment for the perpetrator. For instance, as the case in Chapter One illustrated, where the child bride who suffered physical damage from the premature consummation of her marriage was compensated with a *diya* by the husband for the damage done.

Amira Sonbol also explains the manner in which sexual crimes or injustices were perceived by the authorities in Ottoman Egypt. For instance, the 'rape' of an individual was practically equated with "a sense of personal proprietary right. Not withstanding how dishonorable or psychologically harmful rape may have been, it was not *that* [emphasis mine] which was paramount in the mind of the court as much as how the victim was to be compensated for the harm that had befallen her/him. A *diya* had to be paid . . ." (1997, 221) just as for the loss of any other body part or injury. Similarly, although people did take note of the physical consequences of early marriage, i.e. infant and maternal mortality and often a higher divorce rate, the psychological aspects continued to be ignored altogether.

Ottoman Codification of Islamic Law and Reform Legislation

The gradual realization that child marriage had less than successful results was indeed a factor in curtailing the practice. Eventual changes in legislation near the end of Ottoman rule, however, also helped to discourage the custom throughout many Middle Eastern countries. Unlike the reform in commercial, penal and land laws, family law remained untouched until 1915.

One should not discount the internal dynamic of reform (*iṣlāḥ*) and renewal (*tajdīd*) that exists within Islam itself. Historically the case of reform under Ottoman rule in the nineteenth century, however, may be seen to have begun with the impact of commercial relations with western nations. "The European states which forcefully opened foreign countries to trade . . . or gained influence in the internal administration of a country because of its chaotic financial conditions, as in the Ottoman Empire, pressed for a legal order more in keeping with their own concepts. Thus the Ottoman Empire began to modernize and codify its laws in the middle of the nineteenth century" (Liebesny 1975, 53-4). The desire to modernize the country's institutions according to the European pattern led to this era of reform, otherwise known as the *Tanẓīmāt.*

Before the Imperial Decree of 1839, proclaimed by Hatt-i Sherīf of Gulhane, there existed two different forms of codification in the Ottoman Empire; the collection of *fatāwā* and that of the laws (Mardin 1955, 282). Originally codification started under Sulaymān II (1520-1566) by the *Shaykh al-Islām,* Imādī Mehmet Ebussuud Efendī, the most eminent jurist of the time who collected the best known *qānūnnāme* of Sulaymān. He brought together some laws from the *sharī'a* and others from local and Turkish customs (282-3). The legal system as it existed then, allowed for the *sharī'a to* govern

private law or rules of civil law (except in the area of agricultural) taken from *fiqh* . Rules of *fiqh* also applied to penal law. Public law was governed by the *qānūn* (279). Until the Decree of Reform the Ottomans had maintained a rather unified judicial system that applied both the *sharī'a,* where personal status law was concerned and the *qānūn* in most other areas.

The *Tanẓīmāt,* however, marked the first split between religion and the state (Berkes 1978, 4:168). Although it did further involve the religious institution in politics, there began a trend to laicize the institutions that were traditionally under the control of the religious institution (168). "As part of the legal reform movement in the Ottoman Empire, certain comprehensive foreign statutes were selected and taken over, usually only with minor changes. At the time the Ottoman Empire embarked on this process, comprehensive legal codification had already been in progress in Europe for some time" (Liebesny 1975, 52).

Another factor that made the adoption of European law so easy was that the Europeans who lived in those countries under Ottoman rule, did so in accordance with their own laws. Once the privileged European legal position was abolished, it was done presupposing "that legal conditions in the country conformed to certain principles which to the European way of thinking were fundamental . . . ."(54). The need of the country itself to modernize and facilitate the contacts with modern culture and economics was another significant reason for the introduction of European law (54). Alongside this was the desire to strengthen the central government through codification of the laws (Mardin 1955, 284). Most of the codes, such as those concerned with commercial law and criminal law, were based upon Western legal principles. The three important codes

where Western legal principles had very little if any part at all in were the *Majalla,* or the Ottoman Civil Code, the Ottoman Land Law of 1858 and the Family Law of 1917 (Liebesny 1975, 64).

The choice to translate and adopt the French civil code was rejected and the Ottoman Council of Ministers decided instead to commission a work based on *fiqh* (Heywood 1991, 6: 971). The *Majalla* "was the first attempt to codify in modern form, rules of Islamic law" (Liebesny 1975, 66). In 1846 the Grand Vizier requested the designation of a scholar well versed in principles of *sharī'a* but able to understand the needs of modern times (285). Jewdet Pasha, as chair of the Committee of Justice, led the mission to codify the Islamic principles, which had served as the civil law of the Ottoman Empire. The *Majalla* was Islamic in content but European in form. Although it was "derived from the Ḥanafī school of law, which enjoyed official status in the Ottoman Empire, [it] did not always incorporate the dominant opinions of that school. Rather, of all the opinions ever advanced by Ḥanafī jurists, the code incorporated those deemed most suited to the conditions of the times, in accordance with the principle of *takhayyur*" (Heywood 1991, 6: 971).

Still, however, the *Majalla*'s real weakness lay in its rigidity. "Although its compilers tried to codify principles that would fit the needs of the people [in rapidly changing times], their sources were limited"(Onar 1955, 307). They restricted themselves to the Ḥanafī *madhhab* alone. In practical application, however, the *Majalla* did achieve a position as an authoritative codification similar to that of a continental European code (Liebesny 1975, 65).

The *Majalla* was applied in the *niẓāmiyya*, or secular courts as well as the *sharī'a* courts. By 1879, however, the Ottoman government replaced the procedural provisions of the *Majalla* with a Code of Civil Procedure, based on French law (Heywood 1991, 6: 972). None of the reforms had extended to family law which was still applied by the *qāḍīs* in the *sharī'a* courts. Once the Young Turks seized power, "the insufficiency of the *Majalla* as a civil code and the need for further secular legislation in the area of family law had been recognized" (Eisenman 1978, 34-5). Thus, in 1917 the Ottoman Law of Family Rights came into effect. It was "a complete and highly systematic codification of the two central areas of personal status, marriage and divorce" (37). *Talfīq*, i.e. the combining of doctrines from more than one school in one subject matter, although excessively disliked in Islamic *fiqh*, was used in order to update the Islamic law to make it more in keeping with modern needs (36). Also employed was "what Schacht characterized 'an unrestrained eclecticism' in combining not only the opinions of the four schools, but going back into the past to adopt any opinion from any time whatsoever that might suit the purposes of the modern legislator" (37).

In the matter of child marriage, restrictions through limitations on age were effected. Age of competence for marriage for a boy was 18 and for a girl, age 17. Marriage below these ages was still permissible, however, provided there was proof of sexual maturity. Minimum ages for marriage were raised from nine to between thirteen and sixteen for a girl and from twelve to fifteen or sixteen for a boy. Following the Shāfi'ī opinion, parents were forbidden to take money or goods in consideration for having given a girl in marriage (41). However, "in an attempt not to interfere directly into *sharī'a* itself, marriages performed in contravention of the law and remaining

unregistered were not considered *bāṭil* (invalid), but only *fāṣid* (i.e. irregular or voidable but carrying legal effects" (38). An amendment was also passed to the Penal Code calling for husbands, judges, and other participants who arranged any marriages in contravention of the regulations to be imprisoned for six months (37). The Explanatory Memorandum discusses the need to curb premature marriage, considering it an evil contributing to the deterioration of the Islamic nation (fn.26: 39).

Egypt, although still nominally a part of the Ottoman Empire did not follow its path of legal reform but went even further in Westernization and secularization by forming new codes taken mostly from the French Civil Code (Liebesny 1975, 71). However, "Syria, Lebanon, Trans-Jordan, Palestine and Iraq were all governed by Ottoman laws until they came under British and French mandatory control" (89). In fact, the *Majalla* remained in effect in most other Arab nations even longer than it did in modern Turkey. By 1924 the government of Kemal Attaturk decided "to abolish *sharī'a* law even in personal status matters and to put Turkish law on a completely secularized and Westernized basis" (78). Civil Law was thereafter based on the Swiss Civil Code.

Interestingly enough, however, once legislative reforms took place and Western type laws were introduced, we begin seeing where the law and social practice diverge. For example, due to the realization that few people complied with the age requirement, the minimum age for marriage put forth by the Family Law of 1926 was reduced from eighteen, for boys and seventeen for girls to seventeen and fifteen respectively (White 1978, 55). Although civil registration for marriage was made mandatory, there was much resistance to it, particularly in rural communities. Objections were made to the requirement of medical examinations to determine the bride's age, as they were

considered to violate the modesty of the bride (55). Difficulty of securing documents for proof of age and identity were also an obstacle to implementing the new laws. Most importantly, the civil marriage and registration were not "considered as important to the legitimacy of the union as the signing of a traditional marriage contract" (56).[14] In urban areas, however, where female education increased dramatically and women entering the workforce allowed them more options, early marriages increasingly became a remote problem.

Another example where practice did not immediately conform to the reform legislation, is in Palestine. Under the British, many laws were left in tact so long as they did not hinder British rule.

> The same conservative approach that characterized the British attitude towards customary and religious practices in [India and Nigeria] characterized their attitude towards the customary or Islamic aspect of the Ottoman legacy in Palestine. Simply stated, the policy was: where there was a local custom or traditional practice not detrimental to the needs of public order and good administration, it was to be left as far as possible undisturbed. (Eisenman 1978, 6)

Beyond Ottoman law, however, criminal sanctions were put in place in the Criminal Code Ordinance of 1936 and Personal Status, for the consummation of a minor marriage. (Eisenman 1978,104). However, no cases of actual prosecutions for such an offense were discovered (104). "The British had previously used this technique in India in 1860, 1891 and 1925 by the fixing of a blanket age of 'consent' both in and out of

[14] This still holds very true in all Muslim communities today where two types of marriage exist; civil and traditional.

marriage (more in the style of statutory rape), beneath which sex-relations were punishable by criminal sanctions. In 1929 this emphasis was changed to 'conclusion' of the marriage bond, rather than 'consumption'"(fn.67:104).

By 1950, the Israelis though creating more strict legislation to curtail the practice of early marriage, had little success at the practical level. They moved the minimum age of both sexes to seventeen, (the British having used fifteen previously) and granted no permission whatsoever for contracts of marriage under that age, "not even, as with the British and Ottomans, by virtue of sexual maturity or with the permission of a qualified physician" (172). The only instances where these rules were less restrictive were in the case of a female who was already pregnant or who had already given birth. This was "perhaps the first clear usurpation by the Civil Courts of a power formerly exercised by the Religious Courts, particularly the *Sharī'a* Courts; and in effect an interference into the prerogatives of the *qāḍīs*" (172). The latter showed their obvious displeasure by almost completely ignoring the provisions of the Age of Marriage Law of 1950, and conducting themselves in accordance with the Ottoman Law of Family Rights and Ḥanafī *fiqh* as it previously stood (172).

By 1960 the ban was softened owing to continued pressure from Muslims. If a good defense was brought forth a girl over sixteen could be married with the *qāḍīs* permission. "For the *qāḍīs*, sexual maturity, which in almost all cases was determined on the basis of the onset of menstruation was the only real precondition for marriage" (173-4). In the first years after the passage of the Age of Marriage Law there were hundreds of offenses in the *Sharī'a* Courts –not to mention those that were never mentioned. Some ten years later, a census taken indicates that 42.7% of all Muslims married before

the age of 17. Yet, these were only those marriages that had been registered officially (174-5). Common problems were, the overstating of age, erroneous documents and the *qāḍīs'* laxity in dealing with the cases and basing matters on physical appearance alone (as was done in previous centuries). "The main way to circumvent the provision of the new law was simply to ignore them, and either not to register the marriage at all or to cohabit as long as the prompt dower was paid until such time as the participants came of age" (176). There was little attempt to follow-up any violations.

The validity of such marriages was never called into question. At the most, small fines were the penalties anyone ever incurred. When retroactive confirmations were granted in cases contravening the law, the *qāḍīs* never raised the question of criminality to the participants nor to the Civil Authorities (177). Even after the 1960 Amendment in Civil Courts, people still did not avail themselves of retroactive confirmation, (even in cases where they had children which would have made the matter very simple] instead they preferred to settle matters within the *Sharī'a* Courts.(177) When decreases in minor marriages did occur (a continuing trend since the Mandate), it was in actuality a result of changing cultural patterns and economic forces rather than Israeli legislation (177).

Legislative Reforms in Other Muslim Nations

"Child marriage is a great evil, but it is based upon the highest authority in the Moslem world, namely the practice of the Prophet himself" (Zwemer 1915, 97). Such statements made by missionaries and orientalists only provoked Muslims in one of two directions, either to defend their faith (thus the increasing amount of apologetic works) or to be

made uncomfortable and conscience-stricken with Islamic traditions and their heritage and therefore push for greater Westernization and secularization. Thus we find that reformers often belonged to one of these two categories. Orientalists and missionaries who traveled in Muslim countries attacked the practice of child marriage as an uncivilized and immoral custom rooted in Islamic culture.

> Child marriage is a defiance of the laws of Nature, and its evils are multiform and deplorable. As Dr. Dennis states: "It is physically injurious, mentally weakening; destructive of family dignity; productive of enfeebled offspring; provokes the curse of poverty, and tends to rapid over-population. (98)

Their negative presentation of child marriage made it all the more difficult to view the advantages of this custom. Zwemer, a missionary traveling in the Middle East during the early twentieth century, reported:

> In Persia girls are often married when they are mere children. Dr. Wishard writes: 'Every doctor in Persia who has had much experience could tell most dreadful and harrowing stories of the suffering these early marriages have caused. I have seen children brought to the hospital the very mention of whose husband's names would cause outbursts of shrieks, lest they might be compelled to return to them. It is needless for me to state here that this early marriage on the part of girls means a weakened race. Many of these children are married, often at the age of twelve, to men old enough to be their grandfathers, and this means a large number of widows'. (99)

The reports, though seemingly offensive to Muslims were not exaggerations, however. Indeed, one need only visit those parts of the world where it is still practiced to see the severe consequences of child marriage. Many Muslims, however, felt such commentary to be direct attacks on their traditional way of life, while others, such as Muḥammad 'Abduh and Ameer Ali, only saw the truth in such statements and understood the need to improve the situation within Muslim society, yet within the bounds of Islamic law and tradition.

Beth Baron confirms the missionary report in her article "The Making and Breaking of Marital Bonds in Modern Egypt". She states, "by the early nineteen hundreds . . . [child marriage] unions were viewed by many as dangerous and were blamed for a range of psychological and physiological problems. Malak Hifni observed that many girls who married at a young age developed 'diseases of the nerves (hysteria).' Doctors also documented medical consequences of early marriage, showing difficult and fatal deliveries"(1992, 281). As a result of this increased awareness, reformers tried to prevent these marriages, often by appealing to religious authorities in Egypt. Zwemer again reports:

> Not many months ago a would-be reformer in Alexandria stirred the whole world of intelligent Egypt by requesting the government to raise the marriageable age of girls from twelve to sixteen. A Bill was actually drafted to this effect, when the inevitable *fetwa* of the Ulama made it clear that this was going against the law of Islam, and those that supported it would be enemies to Islam. The reform was dropped like a hot cinder. (1915, 99)

The Coptic Patriarch, on the other hand, supported the move to put a stop to child marriages and refused to issue a marital license before a girl reached the age of sixteen and a boy the age of twenty (Baron 1992, 281).

What made the matter so difficult was that Muslim authorities could find no bases in Islamic law to justify the establishment of minimum age limits. The *Sunna* of the Prophet stood as a large obstacle in their path towards reform. Legislators and administrators attempted to use various tactics. For instance, "a Muslim deputy introduced a bill into the legislative assembly in 1914 that attempted to fix the marriage age at sixteen, but it was defeated. A few years later administrators amended the penal code to treat consummation of marriage with a child under twelve as rape, though the

marriage itself was considered valid" (281). Finally in 1923, the Egyptian Code of Organization and Procedure for Shari'a Courts required that all marriages had to be registered in order to make legal claims. The Courts were ordered not to listen to claims of marriage if the bride was under sixteen and/or the groom was under eighteen at the time the marriage was contracted (281). Additionally, officials were not permitted to conclude or register a marriage contract between a couple who hadn't reached these ages. The marriage itself was not rendered void by such regulations. It was only discouraged.

It was intellectuals such as Muḥammad 'Abduh, however, who promoted a rethinking of the strict adherence Muslims had to the opinions of the earlier *fuqahā'*. Firstly, 'Abduh believed that all legal decisions should depend on the principle of *jalb al-maṣāliḥ* (promoting public good), and *dar'u al-mafāsid wa izālatiha* (eliminating evil) (Taizir 1994, 47). Secondly, he asserted that "Muslims . . . have to realize that the earlier *mujtāhid* were ordinary people and their opinions were not always valid; while the undertaking of *ijtihād* is never free of problems, *taqlīd*, which is its exact opposite, negates rational thought itself. Muslims, 'Abduh held, should go back to the original sources, i.e. al-Qur'ān and the *Ḥadīth*; true submission is solely to God, . . . not to the opinions of the previous *fuqahā*" (49). The ensuing problem whenever such "an invitation is given to Muslims to go back to the *Sunna* of the Prophet, [is that] in actual terms it is an invitation to accept the formulations of the early generations of Muslims" (Rahman 1970, 2B:636). Ironically then, the call for reformation and a move away from *taqlīd* was offset by an even greater rigidity in strict adherence to the *Sunna*. Child marriage could not be eradicated so easily. Although it may have been argued that the

opinions of the earlier scholars need not necessarily be adhered to, the *Sunna* itself, i.e. the *ḥadīth* literature which reported the Prophet's own marriage to 'Ā'isha as a child bride, was sufficient to preserve the permissibility of child marriage in general.

The Egyptian Feminists' Union, who had originally pushed for the minimum age law on marriage, had also demanded that girl's education be extended to secondary school. "Huda Sha'rawi, who had been married at the age of thirteen, called early marriage 'the first obstacle to the development of the young woman'" (Badran 1995, 127). Despite the initial sense of victory when the minimum age law was passed, "the gain proved to be more illusory than it first appeared and demonstrated the limitations of legal reform" (128). The law was not implemented as it should have been. Thus, its effectiveness was lost. The feminists objected to the lack of implementation. "*Al-Misriyah* in 1938 published an angry article entitled 'The Marriage of Girls under Age is White Slave Trade,' protesting forced marriages of young girls to old men" (128). The EFU proposed that prospective brides be required to show certificates of birth with photographs and the government should make it a criminal offense for the *ma'dhun,* registrar issuing marriage licenses, to authorize marriages of minors. Instead, however, the law was not only ignored but twice in the Chambers of Deputies in 1937 there were proposals to abolish the minimum marriage age law entirely. Thus it was that "the law was neither dropped nor effectively applied" (128).

Qāsim Amīn, a follower and friend of Muḥammad 'Abduh, noted in his book "al-Mar'a al-Jadīda", or *The New Woman,* that the average age at marriage in 1900 was generally between twenty and thirty, whereas previously it used to be before or at maturity (Amīn 1900, 98). Early marriages declined dramatically by the beginning of

the twentieth century. Again, however, we find that the reduction in child marriages was due mainly to external factors rather than changes in regulation alone. "Many young men, particularly professionals of the new middle-classes postponed marriage until they had earned degrees, found employment and saved money, and many now wanted educated wives" (Baron 1992, 282). Young women entered new state and private schools in growing numbers -- postponing marriage until they finished. "Influenced by a combination of medical, economic, and educational considerations, women and men in the early nineteen hundreds were marrying at later ages" (282). Thus, despite the relative ineffectiveness of new legislation discouraging child marriage, the custom was on its way out. Through progressive trends in society the practice of child marriage gradually abated among most Middle Eastern nations.

Similarly in Iran, it was not legislation itself which diminished child marriage but more so certain social and economic factors. Under the Pahlavi regime (1925-1979) Iran's legal codes were greatly influenced by European ones. In matters of personal status, however, the Iranian Civil Code essentially contained a simplification and codification of Ithna 'Ashari law (Mir-Hosseini 1993, 24). Under the Pahlavi's, the Iranian legislature increased the marriage age for males and females to fifteen and eighteen in 1967 under the Family Protection Law, and then later in 1975 to twenty and eighteen, respectively.

Much like in the case of Egypt and Turkey, all marriage contracts were required to be registered. "These changes, however, left many religious families at odds with the law, particularly those parents who were eager to arrange a marriage for their children as quickly as possible" (Haeri 1989, 86). The Family Protection Law was also opposed by

various factions of the clergy who denounced it as a violation of the sacred principles of the *sharī'a* (Mir-Hosseini 1993, 24). Families who opposed it were able to circumvent the legal age restriction, however, by performing *sigheh aqā'i,* or religious marriage. *Sigheh,* though usually meaning "temporary marriage", in this case is only implicative of a marriage that is less than perfectly proper (Haeri 1989, 86). Literally *sigheh aqā'i* means *sigheh* allowed by the Master. It was usually done when one or both partners to a marriage contract were under age. Because the registration of *sigheh* marriages was not as strictly enforced as that of permanent marriages, families would often use this to their advantage when desirous of marrying their young children. For all practical purposes the couple was considered husband and wife, but as the marriage was not registered, from a legal perspective the couple were considered unmarried. Once the child or children had come of age the marriage was properly registered (86).

"*Sigheh aqa'i* is apparently a response to a conflict between the civil law's requirements for a girl's minimum age of first marriage and the precepts of the *shari'a*" (86). Child marriage became more and more uncommon among most of Iranian society, particularly in urban areas. However, tribal and rural areas still held fast to their deep-rooted customs. Yet due to the greater education of women and increased urbanization, child marriage in Iran became an increasingly rare phenomenon.

> "The first reform used as an indication of decreasing restrictiveness [in the sphere of laws affecting women's rights] is the establishment of a minimum age for marriage. The first Muslim ruler to introduce such a reform was the Emperor Akbar of India (1556-1605) who required men to be sixteen and women fourteen before marriage. The reform was not enforced by his successors, however" (White 1978, 54).

In fact, it was not until the twentieth century that such a law came into

effect again. "The practice of the British courts in India was characterized by reliance upon the Islamic legal texts used authoritatively in India and a rejection of any deductions made by contemporary jurists of new rules of law from the ancient texts. The tendency was due to the combined influence of *taqlid* and the common-law doctrine of *stare decisis*" (Liebesny 1975, 118). Thus it was that Muslim law remained unchanged and was applied according to the earlier medieval rulings. Islam under the British ceased to be a "growing organism responsive to progressive forces and changing needs" (123). It was rigid, conservative and in many ways undefined.

Reformists, such as Syed Ameer Ali, attempted to create greater flexibility in the law and push for a new understanding of Islamic law in light of the modern times. It is clear that there was already a growing inclination to lean towards more lenient and different interpretations of Islamic law so far as personal status matters were concerned. In 1923 in the Lahore High Court, for instance, regarding the case of a girl who had exercised her option of puberty one year after having already attained puberty, it was judged according to the *Hedaya* that repudiation of the marriage was not allowed. It was argued that if a female wanted to repudiate her marriage upon attaining puberty, she must do so immediately after seeing the signs of menstruation and not any time later than that (Carroll 1981, 23:153). Interestingly enough, however, one year later, the same court ruled in favour of the girl's repudiation. Indeed the judge himself stated the obvious, which was that Islamic law had been promulgated to people living under very different conditions from the present time. Therefore the law had to be interpreted with regard to the change in public sentiment and taste on matters of decency (153). It was thereafter argued that the issue at hand must be decided based on whether or not the

plaintiff had acquiesced or not. If she had acquiesced to the marriage then she would lose her right to repudiate the marriage. If, however, she did not acquiesce then she retained the option to repudiate her marriage.

Lucy Carroll points out in her article "Muslim Family Law in South Asia", that Ameer Ali's *Muhammadan Law* served as a reference for the Allahabad High Court's judgement despite its believed misinterpretation of the original text. In 1922 in the case of *Bismillah Begum v. Nuremuhammad,* the court decided that the delay in exercising the option of puberty should not be based upon when the girl had attained puberty but upon the time that she became aware that she had the right to exercise this option.[15] This judgement was supposedly based on the opinion of Muḥammad al-Shaybānī as found in *Radd al-Muḥtār* which is cited by Ameer Ali. What is particularly interesting, which Carroll points out, is that Ameer Ali's rendering of the great scholar's opinion is decidedly opposite that of what has been cited in the *Hedaya.* Instead of excusing the female for ignorance regarding the option of puberty, Shaybānī asserts that there is no excuse for ignorance of the law and therefore a female must be held liable for not exercising her option at the appropriate time, i.e. immediately when she reaches puberty (154). Carroll states that Ameer Ali seems to have misread Shabybānī's position on this matter. Although Carroll seems to assume that this was accidental and not intentional (something difficult to determine anyhow) she does go on to mention that there was a two-fold advantage to this supposed "misreading" or misinterpretation of Shaybānī's opinion. Firstly, "this interpretation was attractive to judges disinclined to endorse the

[15] It was frequently the case that a girl was not even aware that she had the right to repudiate her marriage upon attaining puberty. In these instances she often lost the opportunity to exercise her option because it was argued that she had continued to live with her husband after having attained puberty thereby indicating some form of acquiescence.

practice of child marriage any more that was absolutely necessary and inclined to favour the limited rights of Muslim women in matrimonial disputes. It also had the advantage of at least appearing to be respectfully founded in recognized traditions of Muslim law, rather than constituting an unbecoming and blatant innovation in that law" (155).

The majority Act of 1875 changed the law to make the age of majority at eighteen years. For marriage purposes one could contract a marriage if they had attained puberty and were sixteen years or older. In keeping with concern for the best interests of the child, the Guardians and Wards Act of 1890 stipulated that "in appointing or declaring the guardian of a minor, the court shall, subject to the provisions of this section, be guided by what . . . appears in the circumstances to be for the welfare of the minor." (CRC Progress Report 1997, 31). Indeed, it was even added that if the child were old enough to form an intelligent preference, the Court might consider that preference (31).

By 1929, the Child Marriage Restraint Act was brought into effect in India. "Child" was defined to mean any male under the age of eighteen and any female under the age of sixteen. However, "minor" was defined as either of the sexes under the age of eighteen. It was made clear in the beginning, however, that the Act aimed at restraining the solemnization of child marriages and it does not affect the validity or invalidity of the marriage after they have already been performed. Thus the purpose of the Act was to impose certain penalties on the persons involved in bringing about such a marriage (Mahmood 1982, 58).

There were various other acts and amendments made in addition to that of 1929. In 1939 the Dissolution of Muslim Marriages Act, clause seven, stated that ... (Hussain

1987, 480). Then again the 1961 Ordinance of.... Finally required that all marriages be registered (481). The laws only became more precise with regards to violations of the previous Act. In the Punjab Ordinance of 1971 it was stipulated that any male above the age of eighteen who contracted a marriage with a minor was subject to imprisonment up to one month and/or would be fined up to one thousand rupees. In spite of the understanding that the validity of the marriage was not at issue, it was made clear that any participants who were party to the contracting of a child marriage would be punished.

In 1965 the case of *Khurshid Jan v. Fazal Dad* was brought to the Pakistan courts. Khurshid Jan, the appellant, was married before reaching puberty. Upon reaching puberty she exercised her option to repudiate her marriage. After she filed the civil suit she went to her husband's house and "cohabitation" took place. She claimed that she had been forced to come to his house with the aid of the police. She denied having "cohabited" with him. The trial judge ruled in her favour so that the repudiation took effect in spite of the "cohabitation". The decision, however, was reversed on appeal by the district judge who held that according to an authoritative Ḥanafī text, the court cannot make a declaration on the repudiation of the marriage if the wife after exercising her option cohabits with her husband. Khurshid Jan appealed against this decision to the High Court (Liebesny 1975, 123). This is a clear example of how the ancient Islamic texts interfered directly in modern predicaments faced by Muslim.

Basic questions were raised on both sides and a re-examination took place regarding the methodology and interpretation of the law in light of the more current situation in the country. Here are a list of some of the questions and answers posed:

1)What are the sources of Muslim law; 2)What are the rules of interpretation of Muslim Law and can courts differ from the views of the *imāms* and other juris-consults of Muslim law on grounds of public policy, justice, equity, and good conscience?; 3) How are the courts to be guided in case of conflict of view among the founders of different schools of Muslim law and their disciples, other *imams* and *faqīhs* [Muslim jurists]? (124-5). Out of the five judges' responses only one judge's response differed. The overall opinion may be summed up by what one of the judges stated:

> The courts must be given the right to interpret for themselves the Qur'an and *Sunna*, and . . . they may also differ from the views of the earlier juris-consults of Muslim law on grounds of *istihsan* or *istislah* in matters not governed by a Qur'anic injunction or traditional text or *ijma'* or binding *qiyas* . . . . The right to differ from [the earlier jurists and *imams*] must not be denied to the present-day courts functioning in Pakistan, as such a denial will not only be a negation of the true spirit of Islam, but also of the constitutional and legal obligation resting on all courts to interpret the law they are called upon to administer and apply in cases coming before them. (125)

Pakistan's case seemed to progress similarly to the other Middle Eastern nations in so far as reform legislation was effected regarding child marriage. However, at the social level, the practice of child marriage did not diminish as rapidly among the population of the subcontinent as it did in the Middle Eastern nations. One might speculate on several possible reasons for this difference. Firstly, Pakistani society, in spite of British colonization, was not as westernized as much as the Arab and Persian nations were. Secondly, the literacy rate among women as well as females moving into the workforce did not increase as dramatically in the South Asian context as it did in the Middle East. The lacuna between the law as it was promulgated and even implemented and the actual reality among the society continued to constitute a problem up until the modern day.

Reform took place at the legislative level but it was apparently slow coming at the practical level.

For the first time, however, the reform movement allowed for the possibility of viewing child marriage from another perspective rather than solely that which had been generally propagated through the opinions of medieval scholars in the different *madhāhib*. It allowed the less accepted opinions of those *other* earlier jurists and scholars, which had previously been relegated to practical oblivion to be brought to the surface.

> The basis for the major reforms on child marriage which took place in most of the Middle Eastern Nations, e.g. Jordan, Syria, and Egypt, was the opinion of three early jurists, namely, Ibn Shabrama, 'Uthmān al-Battī and Abū Bakr al-Aṣamm. Contrary to the general view of the four Sunni schools of thought, they denied the validity of any guardianship in marriage over those who had not reached puberty, on the grounds that the basis of guardianship is the benefit of the ward and that there is no benefit in marriage before puberty. (Anderson 1970, 3)

The changes in the law relating to age of marriage also reflected a greater flexibility in the understanding of Islamic law. For example, Imam Abū Ḥanīfa's opinion that the age of majority for boys should be eighteen and seventeen for girls was extended as the age of marriage instead, was seen as maintaining compliance with traditional Islamic law.

It is important to understand, however, that despite all the techniques, e.g. *takhayyur, talfīq, istiḥsān and istiṣlaḥ* etc. that were utilized by reformists to bring Islamic law into conformity with the needs of modern times, the success of the reform movement in regards to child marriage was severely limited. As we have seen, legislation itself was not sufficient to eradicate child marriage practices from among the

general population. Neither, however, were the efforts of the modernists, who attempted to direct the masses away from Westernization on the one hand and blind adherence to the schools of thought on the other, successful in leading the Muslim world towards a new method of interpreting Islamic law. Their failing lay in their move away from *taqlīd* as they knew it towards a blind following and almost extreme adherence to the *Sunna* and *ḥadīth.*[16]

For this reason, although all these movements unanimously proclaimed the right of *ijtihād,* and denied final authority to all but the Prophet, they were yet able to make but little headway in the reformulation of the content of Islam. The historical belief that the *Ḥadīth* literature genuinely contains the *Sunna* of the Prophet, combined with the further belief that the *Sunna* of the Prophet and the Qur'ānic rulings on social behavior have to be more or less *literally* implemented in all ages, stood like a rock in the way of any substantial rethinking of the social content of Islam. When, therefore, the leaders of these movements issued the call back to the Qur'ān and the *Sunna*, they literally meant that history should move backwards for the ideal had already been enacted at a given time in the past, viz. in seventh-century Arabia (Rahman 1970, 2B:640).

In conclusion, one must realize that child marriage was not an institution that could be abolished in totality, rooted as it was in the Islamic tradition dating back to the time of the Prophet and even before. Yet the reform period is a clear demonstration of the struggle Muslims were beginning to face in the modern period due to the lack of proper development in the area of Islamic law.

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[16] One must note, however, that the *Salafiyya* movement as known today with its strict and rigid adherence to the *Ḥadīth* and *Sunna* is more the creation of Rashīd Riḍā' than his teacher, Muḥammad Abduh.

Sayyid Qutb, an important scholar and the chief spokesman for the Muslim Brotherhood in Egypt in the 1950's and 1960's, also noted the problem among Muslims in mistaking what men had interpreted centuries ago to be the unchanging laws of God Hismself.

> While maintaining the eternality of the *shariah* as God-given and relevant for every time and place, Qutb affirmed during this period that the *fiqh* (law as it developed from man's application of the *shariah*) is the arena of change, the means through which Muslims can reinterpret the eternal prescripts in order to have them become relevant to modern life, its needs and problems. While the *shariah* is legislated by God, is eternal and unchanging, *fiqh* is made by man to deal with specific situations. (Haddad 1983, 71)

It was precisely this *fiqh,* developed as it had been since the medieval era, which the Muslims had practically relegated to the level of the unchanging Qur'ān itself, which prevented (and to a great extent still prevents) a positive and progressive development of Islamic law. Instead, the Muslim world seemed more at ease in adopting Western secular ideas and practices rather than touching the sacred law as it had been formulated centuries ago for people living in different times and contexts.

Chapter Three: Child Marriage Laws and Practice in the 20th Century

> Some years ago in the northern part of Nigeria, a little girl of nine was hacked to death by her ninety year old husband. She had been married to him in the name of tradition, but she refused to have the marriage consummated. She ran away to her family of orientation for protection but little did she know that no protection awaited her there. Twice she ran to her home for help and twice she was returned to her "husband" by her parents. The incensed husband then promised to do something to her that would ever prevent her from running away . With an axe, he crudely amputated both upper and lower limbs. Of course, she did not ever run away; she never lived to try. Two days later she died. (Inter Africa Committee 1997, 19)

This story appeared in the May 3rd 1987 edition of the *Washington Post.* Supposedly the child was married by her parents to a man to whom her father owed money which he could not repay (Carroll 1987, 7:292). There is no denying that the cultural practice of child marriage has been and is on the decline. However, one must admit that it is still practiced to a noticeable degree in many parts (especially more impoverished regions) of the world. Children's rights advocates feel that the helplessness and innocence of children who cannot speak out for themselves is one of the greatest reasons to emphasize the abuse, neglect or oppression they suffer. One cannot ignore the great many cases of child marriage that still come out of the developing world today. Muslim societies, in their "failure to appreciate the richness of the Islamic legal tradition" (281) and due to their rigid hold on medieval interpretations of Islamic law, still maintain a forefront position in permitting and sanctioning child marriages among the nations of the world. The Muslim societies most involved in continuing the practice of this custom are among the African and South Asian nations. It is no coincidence that the practice predominantly occurs where desperate poverty-

stricken communities feel they have little alternatives to promote a better standard of living for themselves.

Research has revealed the extent of abuse of girls in child marriage [and] its connection with child trafficking is apparent from the fact that girls are taken across national borders for . . . marriage" (Goonesekere 1994, 131). In a more recent case, which took place in 1991 on a flight between Hyderabad and New Delhi, a flight attendant noticed a young girl crying. As it turned out the small girl (between 10-13 years of age) had been married by her father, a poor auto-rickshaw driver, to the much older man (reported to be sixty years old) whom she was accompanying to his home in Saudi Arabia. The flight attendant reported the case to the appropriate authorities and the man was arrested upon arrival at New Delhi airport on charges for marrying a minor. The man, however, was eventually released on bail. As for Amina, the child-bride, although she was taken into protective custody at the time, she somehow disappeared and never made it home (Focal Point 2000, 1).

Indeed, child marriage remains a moot point and continues to attract the attention of lawyers, doctors, human rights activists, educators, social workers and women who have campaigned against it and are witnesses of the negative effects of this custom. One conference that made child marriage one of its central topics of discussion was the International Conference on Islamic Laws and Women in the Modern World held in 1996. Various Muslim nations came together to discuss the problems besetting the Muslim world and how each represented country attempted to resolve its respective issues. In this manner, ideas were exchanged to try and improve Muslim societies at large. The discussion on child marriage touched on various aspects of the problem, such

as the historical, religious, legal, social, economic and moral consequences involved. This chapter will give a brief overview of the conference's discussion in a following section.

Additionally, this chapter will discuss the present-day controversy over the tradition regarding 'Ā'isha's age at marriage to the Prophet which lies at the core of this thesis' topic. It will then examine the current laws in place in Iran, Egypt and Pakistan. Social, economic and cultural factors will be considered in each of the cases. Although a country's legislation may play a significant role in restricting and undermining the importance of a customary practice, if it is not implemented or adhered to then it becomes relatively futile in its mission. Thus, we shall also look at the *fatāwā* of a few modern scholars on child marriage (due to the considerable influence they wield on the thought and practice of the Muslim populations) in relation to the governmental legislation.

Furthermore, the magnitude of the problem of child marriage will be considered through a brief look at the medical aspects involved in such a practice. Finally, the chapter will consider the dimension of child marriage as a human rights abuse. Whether or not child marriage can or should be eliminated completely will be considered. The dilemma over the reconciliation of Islamic personal status law, through the example of child marriage, and international human rights will be broached.

This chapter aims to inform the reader of the various social, economic, religious, and cultural aspects that play significant roles in the custom of child marriage in the modern period. The chapter attempts to bring about a greater understanding of the contributing factors which permit child marriage to continue to be practiced. It also tries

to demonstrate the need for a balance between international human rights standards and indigenous value systems which would permit the formulation of more suitable solutions for children's rights abuses, such as child marriage, to be effected.

The Controversy over 'Ā'isha's Age

This paper would not be complete without an examination into the controversy over the Prophet's marriage to 'Ā'isha. This is due to the fact that the majority of scholars in the past and in current times have based their advocacy or sanctioning of child marriage almost entirely on the example of the Prophet having married a reportedly very young 'Ā'isha. Thus this topic lies at the heart of the continuing practice of child marriages in Muslim societies around the world today and therefore must be addressed as a fundamental issue related to child marriage before any further discussion of the subject can take place.

'Ā'isha's marriage to the Prophet has created a great deal of controversy within the Muslim world in modern times due to the general belief that she was a child at the time. Although there have been scholars in the past who wrote against child marriage they did not seem to have considered the authenticity of the particular *aḥadīth* dealing with the Prophet's own marriage an issue. On the contrary, they were apparently content in leaving the concept of the Prophet's marriage to a young 'Ā'isha untouched but simply justifying it on the grounds of *khaṣṣā'iṣ li-nabī,* or special privileges granted to the Prophet which other Muslims are not permitted.

In the modern era, however, a significant debate erupted in the twentieth century regarding whether or not 'Ā'isha really was a child or had already reached adolescence

and maturity at the time of her marriage to the Prophet. In an era where child marriage has become essentially taboo and severely looked down upon, it is no wonder that such a concern to find the "truth" or at least to deconstruct the previous assumptions and beliefs has become a fervent endeavor of many intellectuals and scholars.

The tradition which the medieval writers accepted regarding 'Ā'isha's age, has been criticized by modern historians and scholars in the light of "careful research" (Moin 1979, 7).[17] Niyāz Aḥmad in his book, *Taḥqiq-i-'umar 'Ā'isha Siddīqa* (An Investigation into the Age of 'Ā'isha Ṣiddīqa) states that most of the versions about 'Ā'isha's minority came from Ḥishām b. 'Urwa who related it on the authority of his father. He was a resident of Medina and the compilers of the *aḥadīth* apparently considered him to be reliable. Although Imam Mālik reproduced his tradition in his *Muwaṭṭa'* he later started doubting him and did not rely upon the traditions related by him on account of his falsehood (Aḥmad 1983, 5). Ḥishām was known to have traveled to Iraq three times, and the particular tradition stating 'Ā'isha's youth during her marriage was not related by him except until the course of his third trip in 145 A.H. (6). Those who had passed away before that time either did not accept that report or they did not have any knowledge of it (7). Aḥmad goes on to say it is after that when the names of other relators were added to the *isnād* (7).[18]

Aside from this recent finding, the differing versions regarding the chronology of events during the Prophet's life have also created greater skepticism. There are some differences as to the date of 'Ā'isha's birth. Although these variations may seem slight,

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[17] See Chapter One for the *ḥadīth* as found in Ṣaḥīḥ Bukhārī and Ṣaḥīḥ Muslim.
[18] On the matter of *ḥadīth* authenticity see Wael Hallaq's "The Authenticity of Prophetic Ḥadīth: A Pseudo Problem", (1999):75-90.

they have a significant impact in the matter of child marriage. After all, whether a girl is nine years old or fifteen years old makes a considerable difference in regards to her suitability for marriage. Some say that 'Ā'isha was born in 612 A.D, while others argue for a later date, such as 613 or 614 A.D. Amar Dhine in his book *Femmes Illustres en Islam,* states that it would be more realistic to date her birth at 609 or 610 A.D (1991, 25). He states that although 'Ā'isha was relatively young she was not *as* young as some authors have claimed her to be (26).

In order to better understand the dates of 'Ā'isha's birth and marriage in relation to the events at that time, however, it is best to discuss the various assertions in terms of the number of years before or after *hijra.* Although Muslims unanimously accept the *Hijra* to have taken place in 622 A.D. there is no agreement on an *exact* date when it occurred, nor is there complete agreement on when the *Hijrī* calendar was first proclaimed. For our purposes we will accept the dates that claim the Prophet's mission as beginning in 609 A.D and his death in 632 A.D.

Due to the fact that historians have tried to fix 'Ā'isha's birth date on the basis of calculation in reverse from the year of her marriage, there are considerable variations (Moin 1979, 1). Differences range from twelve and eight years before *hijra* (1). If it is assumed that she was born twelve years before *hijra* and her marriage was approximately three years before *hijra* then she would have been nine years of age at the time of her marriage. Furthermore, she would have been approximately thirteen or fourteen when the marriage was completed, considering the marriage was finalized in either four or five years later. This would be in congruence with the tradition given in

Ibn Sa'd's *Al-Ṭabaqāt al-Kubrā* which differs from that in Bukhārī and Muslim (1958, 8:58).

Several Pakistani authors have argued against the general "misconceptions" regarding the authenticity of the tradition in Bukhārī and Muslim, and undermined its validity in relation to other existing *aḥādīth.* For instance, a *ḥadīth* in Bukhārī concerns the revelation of *āyāt,* or verse 46 from Sūrat al-Qamar. The *ḥadīth* relates that 'Ā'isha herself stated that she was a girl playing about at the time certain verses from that *sūra* were revealed (Khan 1979, 6:370). It is widely accepted that these verses were revealed nine years before *hijra.* If, as generally believed, 'Ā'isha was born in that year or only one year before it, it would seem extraordinary that she should describe herself as playing about.

Fida Hussain Malik states that at the least her age must have been four years in order for her to describe herself as such. Meaning that she must have been born at the latest, twelve years before *hijra* (1961, 153). Muḥammad Sa'īd in his *Ḥayāt-i-Umm al-Mu'minīn Sayyida A'isha Siddiqa,* goes even further by arguing that one can easily assume that a child who plays about and reads or memorizes verses of the Qur'ān must be at least eight to ten years of age (1979, 58). Even if we consider the former estimation of four years of age as too young and the latter estimation of eight or ten years as much too old, generally most would agree that somewhere within this range a child is capable of reading and memorizing and undoubtedly playing about. Sa'īd argues that the *ḥadīth* indicates that 'Ā'isha must have been at least four or five years of age when the verses were revealed. In this way he asserts that at the least, she was fourteen or fifteen years of age when her marriage was finalized and possibly even eighteen or

older as other authors, such as Maulana 'Umar Aḥmad Usmānī[19] and Niyāz Aḥmad (who even goes so far as to claim that she was twenty eight years old) have tried to argue. Sa'īd states that because this particular *ḥadīth* is directly related to the revelation of a part of the Qur'ān, it must be considered more reliable and given greater preference over any of the other *aḥadīth* or traditions which contain relatively miscellaneous information (58).

Sa'īd also expresses the opinion of other researchers who greatly suspect that 'Ā'isha's age at the time of her marriage was sixteen and that later scholars, while copying the transmitted reports left out the word *'ashar,* or ten as part of the Arabic *sitat'ashar,* or sixteen. Thereby leaving the word *sitta,* or six on its own (1979, 58). Therefore the more generally accepted and well-known tradition which asserts that 'Ā'isha was six years of age when married and nine at its conclusion is considered to stand on shaky ground.

In Sayyid Sulaimān Nadvī's book, *'Āisha Ṣiddīqa kī 'umar par aik taḥqīqī naẓar* (An Investigative Look at 'Ā'isha's Age), Muḥammad Lāhorī's argument is presented as stating that regardless whether 'Ā'isha was a child or not at the time of her marriage to the Prophet, it cannot in any circumstances be used as a precedent for later times. He points out that because the marriage took place in Makkah before the revelation of any legal injunctions upon the Muslim community, it remains outside the realm of accepted *sharī'at* law. His argument is that only after Divine law began to be revealed to the Prophet in Medina can we determine what among the customs and practices of that particular society were *ḥalāl,* or permitted and *ḥarām* , or forbidden (1978, 12-13). As

[19] In *Fiqh al-Qur'ān* 2:72-73

Zeenat Ali states as well, "There is no case on record showing that a marriage of a minor through a guardian was permitted by the Prophet after the details of the law were revealed to him at Medina" (1987, 70). Additionally, she also believes that insofar as his own marriage is concerned a thorough examination of the details of such an invent should be conducted before making any real conclusion (70).

Muḥammad Sa'īd also refutes some of the other suppositions which have led to the belief that 'Ā'isha was a minor when she was married. For instance, one of the arguments put forth consistently by certain authors and *'ulamā'* is that because of the hot desert climate, female children are prone to reach puberty at an earlier age than the average child in cooler climates. This has played a significant role in defending the custom of child marriage. Sa'īd argues that aside from the fact that there is no statistical data to prove such a hypothesis, one can easily observe from those same desert societies today that the female children do not physically mature at an earlier age than those in other cooler regions (1979, 56). He asserts that it is an exaggeration to claim that girls reach puberty by the age of nine or ten in hotter climates and therefore are more capable of enduring early childhood marriage than other females (56).

In light of verse 6 from Sūrat al-Nisā', where it states to try orphans until they reach the age of marriage, or *nikāḥ* before allowing them to manage their own property, Sa'īd also argues that the exegetes have understood this to mean that a *nikāḥ* is only truly fulfilled when the parties are past the ages of puberty (56). Therefore he states that it is practically improbable to accept that the Prophet would have himself married an innocent six year old child while being so much older himself and then actually consummated the marriage at age fifty or so (56). He then goes on to invite the *'ulamā'*

of today to avoid biases and one-sided decisions and to put an end to the blind-following which is of no use in the modern age and to reexamine the evidence and make a better, more correct conclusion (54).

He also argues against other existing *aḥadīth* which imply that 'Ā'isha was a child when she was married. For instance, the *ḥadīth* which describes her as playing with dolls after she had already become, as Sa'īd says, the Mother of the Faithful, or *'umm al-mu'minīn,* (thereby implying her dignified status) are not credible (58). He argues that since 'Ā'isha's childhood was exemplary, those reports which demonstrate her perspicacity and intelligence are undoubtedly true, but they are reports of her life prior to her marriage and not afterwards (58).

Several other reasons have been presented to demonstrate the greater likelihood that 'Ā'isha was considerably older than six years of age at her marriage. In Ibn Ishāq's version of the life of the Prophet, he points out that 'Ā'isha became Muslim soon after the Prophet's mission began. It was during the period when his mission was still "secret" (around the first year of the "call", or thirteen years before hijra) that 'Ā'isha, among the first few other people, accepted Islam. From this one must assume that in order to consciously accept another religion a child would at the very least have to be five or six years old. Again, considering that the period of revelation in Makkah was approximately thirteen years long, by the time 'Ā'isha was married to the Prophet she was at the least seventeen or eighteen years of age according to this particular piece of information.

Finally, it is argued that one of the greatest overlooked facts is that the tradition at issue here, which reports 'Ā'isha as saying she was six and then nine when her marriage was finalized, is exactly that—a tradition and not a report of what the Prophet

said but rather what 'Ā'isha supposedly stated. For that matter, regardless of its *ṣaḥīḥ* status, it lacks any potential of infallibility by the very fact that it was a report of the saying of someone other than the Prophet himself. In this way, the likelihood of mistaken estimates regarding age is quite probable.

All in all, it is reasonable to assert that it is practically impossible to know the "truth" about when and at what age 'Ā'isha's marriage did transpire. It is doubtful that even the *ḥadīth* can have the final say in this matter. If scholars find such a tradition to serve as sufficient justification for sanctioning child marriage, one would have to also argue that scholars have equally sufficient justification to discourage and even prohibit the practice.

The Status of Child Marriage in Iran

Prior to the revolution, i.e., during the Shah's regime, the minimum age of marriage for males was twenty and eighteen for females. During the revolution this changed to eighteen for men and fifteen for women (Kar 1996, 1:10). Both regimes did permit child engagements, however. Currently "article 1041 of the Civil Code does state that men and women may not marry before puberty". However, article 1210 was introduced by parliament in 1982 stipulating that the age of puberty is fifteen *hijrī* years for males (essentially meaning fourteen and a half or less than fifteen years according to the Gregorian calendar) and nine *hijrī* years for females (10). The rationale behind this change in regulation, put forth by the religious leaders, was that early marriage played an important role in reducing immorality (10).

Before the Iranian Revolution, under article 23 of the Shah's Family Protection Law, the marriage of minor females "required the agreement of court and the doctor that

the woman was physically and psychologically ready for marriage" (10). After the revolution took place the father or grandfather were once again given the absolute right to marry the child at any age claiming that this is to the child's advantage (10). "These powers are so vast that there is a cautionary provision in article 1041 of the Civil Code warning that these powers may be used by opportunist fathers" (fn.6:10).

What is interesting to note is that "the encouragement of early marriage led to a rapid increase in population" (fn.5:10). This is in accordance with the finding that early marriages tend to result in a higher number of births per family since the number of possible childbearing years for the female is increased. Thus after 1987 the regime altered its policy and introduced family planning programs. "Since then the state's position on the beneficial moral effect of early marriage has been less prominent, and there are many publicity campaigns and public education programs which promote smaller families and delayed childbearing" (fn.5:10).

One such work intended to promote later marriages is *Pizhūhishī-i ḥuqūqī, fiqhī va ijtimā'ī dar bāreh-'i Nikāḥ va zinā bā ṣaghireh* (A Legal, Jurisprudential and Social Inquiry Regarding Marriage and Fornication with a Minor) written by a retired Judge of the Supreme Court, 'Abbās 'Alī Maḥmūdī. In it he clearly expresses a dislike for marriage of young children and more specifically of young girls. Apart from being an apologetic work, one might also argue that it is a piece of propaganda considering the government's agenda at the time. Maḥmūdī does not give any information regarding the current status of child marriage in Iran but rather focuses solely on presenting all the Islamically based arguments possible in order to discourage the practice itself.

Maḥmūdī uses several Qur'ānic verses and certain *aḥadīth* to support his argument. He begins by discussing the "philosophy of marriage" where he states the importance of procreation, something that a minor who has not attained puberty is incapable of (1989, 8). He also discusses the Qur'ān's emphasis on "love and mercy" (*mawaddatan wa raḥma*) between the spouses in Sūrat al-Rūm, verse 21. At the end of the verse it is stated that "this is a sign for those people who think, or reflect". He argues that this verse clearly applies to marriage between adults or those mentally mature who are capable of "reflecting" upon the signs of God through an understanding of the miracle of marriage (8).

He also reiterates the arguments of Abū Bakr al-'Āṣim and Ibn Shubrama[20] regarding Sūrat al-Nisā', verse 6, which states "Make trial of orphans until the reach the age of marriage; if then you find sound judgement (*rushdan*) in them then release their property to them". Through this he explains that the Qur'ān has a clear message that the age of marriage necessarily calls for mental maturity and the capacity to handle one's own affairs (36ff.). Throughout his use of the various verses he continues to point out that the pertinent verses of the Qur'ān relating to marriage use the term *nisā'*, or women and never girls except in the case of orphans when simply the female form of the word is used when the Qur'ān addresses the injustices done to them.

He also discusses the *ḥadīth* in which the Prophet states that the best quality a man may look for in a wife is her piety, or faith as opposed to her wealth or beauty. He poses the question of whether a child can be judged by his or her piety (8). His own conclusion is that a child's faith or piety, he or she being an innocent and lacking mental

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[20] Cf. Chapter One.

maturity, cannot be judged (8). The prerequisite for being a faithful follower would have to be maturity of mind and a clear understanding of the choices one has in matters of faith (8). He also gives the example of the Prophet's own daughter, Fatima, who was not married until she was mature from all aspects (71-2). He states that this decision of the Prophet as a father for his own daughter is the best indicator of his stance on the matter of child marriage (72). In other words, he requests that parents should look at the Prophet's example as a parent with his children, not as a husband only, before they make the choice of marrying off their own offspring as minors.

Maḥmūdī's work is an indication in itself that even until recent times the matter of child marriage has been a sufficiently significant dilemma which the government felt had to be addressed. Like most other Muslim countries, in Iran the custom was mainly practiced in rural areas among various tribes who held fast to their traditions. In 1974, for instance, a study of four villages near Shiraz revealed that the average age of women's marriage was between thirteen and fifteen. It was also found that eighty per cent of working-class wives of Isfahan were married between the ages of nine and sixteen (Gulick 1974, 9:865).

Although these figures do not necessarily hold true for today in light of the decline in child marriage practice, one must realize that circumstances often dictate the terms. Females who have little or no opportunity for education or for employment will naturally feel dependent "on motherhood performance for status and prestige" (Moghadam 1993, 198). Furthermore, if a girl's future role entails motherhood alone, then it is often felt that delaying marriage is of no benefit. This is even more true when families feel that the daughter's chastity may be at risk due to particular social

circumstances. Child marriages thus serve to make female children "productive" members of the community at an early age which helps relieve the burden often felt by families with daughters among the poorer classes of society. Early marriage is thus seen as a multi-purpose solution to many potential problems which a family or even the community may incur if marriage were to be delayed. Additionally, so long as culture and tradition continues to hold a great deal of sway among the people dwelling in rural areas, child marriage will continue to exist at some level in Iranian society.

The Status of Child Marriage in Egypt

As mentioned previously, despite the overall decline in early marriage practices rural areas in many Muslim countries, such as Egypt, continue to foster them. For instance, a Ministry of Health field study in the 1980's in Upper (southern) Egypt showed that 44% of rural women had been married under the legal age of sixteen (El-Hamamsy 1994, 2). The following results of a case study of two villages in rural Egypt not only demonstrate the persistence of under-age marriages in rural areas but also the significant influence of socioeconomic and socio-cultural factors on such a custom.

Between 1991 and 1993 a survey/field study was conducted in the villages of Aswan and Sharkiya in order to explore the socio-cultural factors that influence age at marriage. The field study done by Laila El-Hamamsy[21] includes quantitative as well as qualitative data (the latter being based on personal interviews with the subjects). "While other studies suggest that overall marriage ages are rising, regional 'pockets' of under age marriage remain and need to be better understood" (2). El-Hamamsy states that

[21] Laila El-Hamamsy is Professor Emeritus at the American University of Cairo.

because the study focuses on only two of five thousand Egyptian villages its results cannot be used to generalize facts about the rest of the population. However, they may be considered as "suggestive of what might be found in other villages within the same general cultural setting" (3).

One of the most significant aspects of this study's results was that the Sharkiya village, which was closer in proximity to a city and major roads (thereby exposing it to more external and urban influences than the Aswan village), not surprisingly, showed a lesser percentage of females married below the age of fifteen. In the Aswan village 60% of females were married before the age of sixteen (4). Whereas in the Sharkiya village only 30% had done so. The illiteracy rate in both villages showed similar differences. The percentage of household heads who had never been to school, were illiterate or could barely read and write was 84% in the Aswan village and 52% in the Sharkiya village (4-5). In fact the females showed consistently higher rates of illiteracy than the males (5). Such a factor has direct implications on the rate of underage marriages.

El-Hamamsy does mention that "with the widespread awareness of the government's commitment to reduce illegal early marriages some married adolescents may have inflated their own ages" (6). However, consistent with the overall populations trend of increasing ages for marriage, it was found that in the last five years in the Sharkiya village only 8% of females were married below the age of sixteen (8). In Aswan village, on the other hand, less improvement was shown in that 39% had been married below the age of sixteen (8).

El-Hamamsy also goes on to discuss the methods used by the villagers to circumvent the law for conducting underage marriages. "Birth registration in Egypt is

generally very good; families want to vaccinate and educate their children, and they cannot do so without registering the child and obtaining a birth certificate" (8). Thus it is interesting to find that 30% of those married within the last ten years and an even greater percentage of those married for longer, had obtained their marriage licenses on the basis of a physician's age estimation as opposed to the use of a birth certificate (8). This would mostly be done, by declaring that the female does not have a birth certificate and thereby needs a physician's approval.

The government, being aware of this loophole in the system has tried to make some changes. In some governorates, the use of age estimation has been discontinued (8). "There is evidence, however, that some people are getting around this new obstacle by contracting what is called an 'Islamic marriage'" (8) which merely requires that there be two witnesses and that the marriage be publicized. Thus "in this type of marriage, the marriage contract is not officially registered until the girl has reached the legal age" (8). This has, of course, led to other abuses. Some of the village women mentioned the complications involved in these marriages where registration has not taken place. For instance, in one of the cases, the husband denied being married to the woman and that he was the father of her children, thereby leaving the woman with a serious financial problem, not to mention the stigma and dishonour of being a single mother with no marriage (9).

Another part of the study involved a survey to find how many of the women in the two villages were satisfied with the age at which they were married or if they would have preferred to have been married at an older age. Overall it was shown that the women were consistently satisfied with the age at which they were married the older

their marriage age was (9). This was more true in the Sharkiya case than in the Aswan village, however. Most likely what accounts for this is the difference in mentality and understanding of what constitutes an appropriate marriage age. For instance, two thirds of all the women interviewed in the Aswan village believed that spinsterhood was a terrible thing and early marriage was best to avoid it (11). Except for three of the women all had married in their teens and felt any later would make them too old (11). Many women explained that they had social pressure to marry early otherwise they would have been considered too old, while others explained that since they were not to go to school or having finished her education if she had been to school, there was nothing more for them to wait for (10). Some simply stated that their parents had decided the matter and they did not contest it (10). Some said that marriage was important to protect the girl from wrongdoing (10) and others stated that " 'it was the right marriage age according to village custom'"(10).

What is very fascinating, however, is that once women were asked the more objective question (i.e. regardless of their own circumstances) of what the ideal age for marriage is, the overall response was age twenty or more. Among those females married in the last five years or so, 70% believed twenty years of age or more was ideal (13). Among those married in the last ten years, 65% preferred this age and for those married more than ten years it was 52% (13). Several women also differentiated between educated and non-educated girls stating that a girl who was educated could get married at age twenty-two or twenty-three. If she were uneducated, however, then she should not wait but marry earlier (14). "The most frequently mentioned reason for choice of an

ideal age is that a girl at that age is mature enough, more enlightened about the world and able to cope with the demands of marriage" (14).

When the reason mentioned was that the girl would be physically able to endure pregnancy or childbirth, 82% of those married in the last ten years and 63% of those married longer than that said the best age was twenty years or older (15). From these results one can clearly establish that most of the women in the villages, regardless of whether they were educated or not, were aware that young brides would have greater difficulty in bearing children. Indeed, the older more experienced women showed greater awareness of this fact (17). In fact, seventy percent of the women said that a girl should wait to start having children once she is married instead of succumbing to social pressures to do so immediately (35). The first most common reason for this was to allow the bride to adjust herself to her new life and enjoy her time with her husband (36). However, "concern about health is the second most frequently given reason for delaying pregnancy [especially in reference to young brides]" (36).

Out of one hundred and seventy-one women interviewed, 16% admitted to having had problems in their marriage because they were so young (17). Problems ranged from reproductive issues, physical hardship (including being abused by their husbands and in-laws) as well as psychological problems, such as having to endure physical relationships with their husbands when they were unwilling or consummation of the marriage before they had reached puberty (18).

One of the stereotypes that was not borne out by *this* study was the usual assumption that females given in early marriages were often married to much older men. The wide discrepancy in age was not found to be the norm in most of these marriages.

Seven percent of the women were unwilling or did not know the ages of their husbands. For those whose information was available, it appears that most husbands, (52%) were married between the ages of eighteen and twenty-four. Twelve percent were married between the ages of thirty and thirty-nine and 7% were even married below the legal age of eighteen. "Many of the young brides married men close to their own ages and 79% married men less than thirty years old (90% in Sharkiya-V and 73% in Aswan-V)" (19).

So far as education is concerned, similar to the general trend of an increase in marriage age, there is an increase in the overall education of women. Studies, including this one, suggest that early marriage is less likely with increased education (20). "All but two of the women who married at less than 16 are illiterate or school dropouts with primary education only. Marriage age rises with higher educational attainment, and thus over 70% of the women with secondary or university education were married at age 20 or above (20).

Interestingly enough, findings also showed that there was a significant correlation between the husband's education and the wife's age. Overall, the higher the education of the man the older his wife was at marriage. Sixty nine percent of the men who had secondary education married women twenty years of age or more (21). One hundred percent of the men who had university degrees married women twenty years of age or more (21). There are several reasons for these findings. One explanation may be that it is often the case that men who have a higher education themselves are more interested in having wives that are educated as well because it enhances their social status overall. Another reason may be that some educated men also prefer to marry older girls closer to their own age so that they may feel a sense of companionship as opposed

to the more unequal relationship that is usually the case where the wife is still very immature and young.

"As education is such a significant factor in discouraging early marriage, it is important to understand the reasons why so many women among those married within the last 10 years had not been sent to school"(21-22). It appears that traditional conceptions of the female role have been the greatest obstacles in the way of girl's education (22). About 49% of the women explained that their families feared for their honour because the boys would harass the girls when they went out of the home (22). It was generally considered that it was a shameful thing for a girl to go out and seek an education. Most often it was the father who made the decision not to send the daughter to school (22).[22]

Another 20% of the women explained that they stayed home because they had to help or serve other family members (22). Often girls are required to look after other younger siblings or help their mothers out at home. Poverty, however, was the second most significant reason for women having been denied an education (23). Some 25% of women stated that the family had a difficult financial situation (often because of the sheer size of the family) and there was not sufficient funds to send the girls to school (23). Similar reasons to those listed above were also responsible for many women dropping out of school early on in their education (23). Among those women from the Aswan village the perception that females should not go to school because it was

[22] Indeed, it is important to recognize this particular problem of family honour and protecting the daughter's chastity. According to Sonbol in her article "Rape and Law in Ottoman and Modern Egypt", "rape in general [in Egypt] has increased to reach 'epidemic' proportions today" (1997, 224).

shameful or that only males were to be educated was much greater than in the Sharkiya village (24).

It is important to note, however, that females themselves when asked their opinion if a girl should stay at home or be educated, mostly opted for the latter. In fact "an overwhelming majority (81%) said she should go to school (25). Those women who felt it was better for a female to stay at home argued that since a girl would most likely sit at home after obtaining her degree anyhow, due to the lack of job availability or other obstacles to her working outside the home, there was no point in getting an education (25). Many women, however, believed it was important to have an education so that a female would have greater self-esteem and would have her independence by obtaining good employment or having a career in case she were divorced. Some said that she would enjoy more respect from her husband as well and "be heard" (27).

El-Hamamsy draws several conclusions from her study. We will touch on a few here. Firstly, she points out that it is important to accept the fact that teenage and pre-legal age marriage as well as the conditions and social pressures that foster it still persist in rural areas (45). She also mentions that the best way to discourage early marriage is to convince people of its disadvantages and that it has few benefits (46). For instance, education is one of the most important factors discouraging early marriage. "The benefits of education include the prospects of a better marriage, enhanced status and role of the woman, financial rewards, and a better standard of living for the family" (46). Although majority of the women believe in education, obstacles to female education still persist in the form of rural traditions and rural poverty (46). El-Hamamsy also points out that although a change in attitude among women can effect behavioural

changes they are not sufficient. She states that "it is important that the socioeconomic circumstances that encourage early marriage be removed. These arise primarily from economically depressed conditions in some rural communities, especially in Upper Egypt" (48).

In discussing the necessary actions that must be taken to help eliminate the problem of early marriage, El-Hamamsy states that "a more stringent application of the existing law. . . can discourage very early teenage marriage. However, it is unlikely to resolve the problem completely. . . . Action programs must focus on the *conditions* [emphasis mine] that need to be changed in order to bring about a gradual rise in the age of marriage to the late teens or twenties for all Egyptian women" (50-51). Aside from advocating universal education for females she mentions that "long-term development efforts aimed at relieving rural poverty are needed to create basic conditions for encouraging rural girls' education and higher life aspirations, as well as delayed marriage and smaller families" (52).

Overall, this study emphasizes the need to discourage early marriages not only because of the demographic and health consequences involved but for the more general implications of the status of rural women and the well-being of their families (48). As El-Hamamsy states,

> Early marriage cuts short education and normal adolescence; it burdens the girl with pregnancy, children and excessive work responsibilities at an immature age; and it gives her little opportunity for self expression or fulfillment. These women are less able to raise healthy children and less likely to be able to achieve progress for their daughters, thus perpetuating a cycle of underdevelopment. (48)

Changes in Egypt during the last century, similar to many other parts of the developing world, have caused massive urbanization, urban growth, a high birth rate and

increasing poverty (Sonbol 1997, 230). As has been mentioned by El-Hamamsy, the problem of poverty is a serious factor in contributing to the abuse of children's rights, whether in the form of underage marriages or in the form of infanticide. In her article, "Rape and Law in Ottoman and Modern Egypt", Sonbol states that one can assume that in general there has been a deterioration in morals considering the great proliferation in the number of foundlings (1997, 224). "Crimes against children in particular [have] become a daily event. These included child-stealing, abandoning children, and odd accidents involving violence against children by parents or strangers. Most seriously was infanticide, with weekly and often daily reports of discarded bodies . . ." (224). Stronger prison terms for rape of minors by family members and 'men of authority over a child' were established in Egypt's penal code" (224) as well, indicating the magnitude of such crimes.

It must also be realized that although parents and family members often have the best of intentions towards their own children, poverty has the potential to mar even those naturally benevolent instincts. Thus it is no surprise that past and modern Islamic scholars made reference to the importance of marriages conducted for the *child's* best interests and not the parents'. The problem of infanticide is even addressed in the Qur'ān. What must be understood from this reality of our modern era is that one cannot assume, that in such a context, when religious ethics and morals no longer reign supreme in daily human life, parents and guardians of children can necessarily be trusted to do the best thing for a child (including in the matter of marriage).

The Status of Child Marriage in Pakistan

Generally today child marriage is much more problematic in the case of the South Asian subcontinent than in the Middle East. One of the possible reasons for this as mentioned in chapter two, may be due to the fact that unlike most Middle Eastern nations, the subcontinent was not as heavily influenced in changing its customs to conform with western concepts at the indigenous level. Another reason may be that because child marriage has a deep-rooted history in Hindu culture and custom, it, like many other rituals and customs in South Asian nations, has been difficult to do away with completely. Hindu law, "unlike Islamic law, . . . [is] marked by an all-encompassing concept of male-protection over females that encouraged a perception that a woman had no rights and belonged to her father or husband" (Goonesekere 1994,121). Additionally, the concept of a father gifting the daughter to a husband without receiving a dowry was pervasive (122). It was also permitted to give the daughter in marriage before she had attained puberty (122). Thus "the practices of child marriage and dowry that are current in India, and expose young girls to physical violence and abuse, are legitimized by the [Hindu] scriptural sources on age of marriage, and the concept of a parental right to gift a bride" (122). Pakistani culture, despite its overall Islamic appearance, is clearly influenced by Hindu culture and tradition. This can be seen through the many rituals of Hindu origin that continue to be practiced under the guise of Muslim religious beliefs.

In his book *Status of Women in Islam,* Aftab Hussain explains the history of child marriage practices in the Indian subcontinent. He states that "whatever be the benefits of child marriage in the view of religious scholars, the concession, if any, of marriage of minors by their guardians, was always misused in India long before

Independence" (1987, 474). Child marriage served as an instrument of exchange marriages also known as *nikāḥ al-shighār* where no *mahr* is given, which is clearly prohibited in Islam (474). Child marriage also assisted the parents financially since they practically sold their daughters. "In fact the poor people in the villages and also in the urban areas treated their womenfolk little better than chattels. While marrying the daughters in their minority they seldom acted for the advancement of the interest of the girls; they served their own interest" (474).

Although Pakistan is representative of the South Asian case, it is also less severe in its situation so far as the number of cases of child marriage that still take place today; Bangladesh having the most number of cases and India following close behind. In comparison, however, Pakistan has the largest majority of Muslims (97%) which allows for an examination of the issue of child marriage in a relatively less culturally compromised setting.

In the 1997 *Progress Report on The Implementation of Convention on the Rights of the Child,* Article 1 states that the definition of the word "child" for the purposes of the present Convention shall mean "every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier (13). There is an acknowledgement, however, that the meaning of "child" in Pakistan is still undecided due to the conflicting influences of both British and Islamic precepts (13). However, "a slight reinterpretation of the meaning of 'puberty' is expected to resolve the issues of incompatibility" (13). So far as regards marriage, however, the meaning of a "child" is governed by the Child Marriage Restraint Act of 1929. Thus a girl under the age of sixteen and a boy under the age of eighteen are considered to be minors (17).

Presently, the Act seeks to ban child marriages by punishing the parties responsible or participating in it with a fine and/or imprisonment. Imprisonment may be up to one month and the fine up to Rs. 1000 (17). The *Report* acknowledges, however, that "the penalties provided . . . are not sufficient to deter such acts and need to be enhanced" (31). Another problem which the CRC report highlights is that because the Hudood Ordinances repealed the earlier law, sexual intercourse with a minor wife is no longer considered as rape (159). This is felt to mitigate the seriousness of such a practice and the severe repercussions of marrying pre-pubescent or underage girls who are inadequately prepared for marriage.

The CRC report also states in Article 3 that "in all actions concerning children . . . the best interest of the child shall be a primary consideration" (30). It asserts that among the legal community and the society in general the laws relating to the best interests of the child are gaining more prominence (34). Additionally, in a section called "Respect for the Views of the Child", Article 12 states that "State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child" (34). It further states that the child will be provided the opportunity to be heard in any judicial or administrative proceedings which affect him or her. The CRC report also had a section dealing with the physical and psychological recovery and treatment of children that have suffered abuse—a far cry from earlier times where even such an acknowledgement was difficult to find. What is significant in this section is the statement in Article 19 that "State Parties shall take all appropriate legislative, social and educational measure to protect the child from all

forms of physical or mental violence, injury or other abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse" (66).

The concept of prevention through the protection of the child is critical to the issue of child marriage as well as to the notion of Islamic justice. Islamic law is inherently about the prevention of evil in society. Its emphasis on prevention as opposed to cures is based on the rationale that prevention is in fact the best cure. It is for this matter that the *ḥadd* punishments, understandably so severe are yet often difficult to administer due to the strict requirements of evidence and witnesses. This is not always realized or remembered by most Muslims. The purpose behind such harsh punishments is more to deter individuals from mischief and criminal behaviour rather than to simply and easily eliminate criminals from society every time a crime is committed. The Qur'ān is understood as a moral guide and the *sharī'a,* a formula to a lifestyle that avoids and prevents evil and advocates good and promotes justice (*'amr bil ma'rūf wa nahī 'an al-munkar*).

In the present era, the benefits or advantages of child marriage can no longer be argued to outweigh the negative aspects. Although families may genuinely have concerns for the well-being of their children and are thus motivated to marry them early, this is more often than not a rare case. Particularly in the South Asian context, girls are often married due to reasons other than for their own benefits. From an Islamic perspective then, the argument could well be made that in order to prevent social ills and evil consequences, namely the abuse and trauma that a child, an individual in society, suffers, child marriage must be for all practical purposes done away with in Muslim societies. Justice Aftab Hussain, in defense of the Child Marriage Restraint Act

as an Islamically acceptable law, reports from his own experience of the injustice he witnessed:

> For the last several years that the law of Qissas [*sic*] has been on the anvil and more particularly since the Shariat Bench of the Peshawar High Court and later the Federal Shariat Court ordered the Government of Pakistan to amend the Penal Code to give effect to the principle of *afw* [*sic*] (pardon عفو) on payment of compensation in cases of murder punishable with death, a number of cases of reconciliation and compromise came to my notice in which one of the conditions of agreement between the heirs of the deceased victim and the friends or relatives of the convict was that a girl from the family of the convict shall be married to some male in the family of the deceased victim.. This is because the people in the villages generally have no regard for the benefit or consent of their girls in matters of the marriage. (1987, 474)

Hussain also mentions another important point, that even during what is considered to have been a much more virtuous society, as is believed to have existed during the time of Imam Abū Ḥanīfa or his disciples, it was considered necessary to lay down some rules in order to spare harm to minors (479) not to mention the present era where the situation is far worse and motives are rarely based on the child's best interest. Hussain also uses this argument to justify the need to abolish any restrictions placed on the option of puberty in the case of a girl married by her father or grandfather (479).

Furthermore, in the case of Pakistan where "illiteracy is the rule and not the exception, widespread awareness of the law does not exist" (*Report of the Commission* 1997, 24). Thus, it is often the case that not only the victims of abuse are ignorant of their rights but even those violating the law are incognizant of their misdemeanour. The *Report of the Commission of Inquiry for Women* states that "it has been noticed time and again that no proper record of registration has been maintained . . . . The superior courts have time and again pointed out the lack of unquestionable probity of the nikah [*sic*] registrars. Nevertheless, the licenses of nikah registrars are hardly ever revoked and

prosecution against them is virtually non-existent" (24). [23] Because of this inefficiency in the system false marriages have been conducted to the grave detriment of young girls. One purpose such false marriages serve is that they "keep young people tied to the wishes of their parents, sometimes to the extent where young girls are bartered, sold, or exchanged in marriages by their own kith and kin for money or for the lust of an old male member of the family who wishes to marry a younger girl" (25).[24] Sometimes a girl might be exchanged in return for peace between two clans or married to a man much older than herself for money or for another young girl (25). The previous Commission/Committee and other reports indicate that the sale of daughters in marriage is a widespread practice. Under the Pakistan Penal Code, 1860 this is considered an offense. However, "this law is hardly ever applied to parents or guardians who accept some form of gratification in exchange for marrying their daughters or female wards" (26).

In Pakistan, like many other poor countries, the female child is considered a burden. Her primary role is producing and rearing children. Thus whenever the first suitable proposal comes for her, regardless of her age, the parents seize the opportunity to alleviate themselves of their "burden". For this reason, understandably child marriage is practically non-existent among the upper and middle-classes of society, i.e. among the more educated and financially stable communities, yet continues to plague the lowest levels of society. "The child is thus punished first because of the failure of

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[23] "In one instance as reported in the press, in 1996, 250 *nikahnamas* (marriage certificates) were produced before Lahore's civil courts more than half of which were fake. The forms were privately produced, the witnesses listed did not exist, and the *nikahs* (marriages) existed only on those fictitious forms, not in the official record books" (*Report* 1997, 24).

[24] Unlike the finding in El-Hamamsy's survey which showed little indication of great age disparities between the spouses, in most of the cases in South Asian countries the husbands are, in fact, much older.

society to give her the rights and protection that are her due, and second because of an obsolescent view of her role and capacities" (43). Among the lower classes, it is an absolute fact that where a girl is seen as a potential bread-winner for the family she will be less likely given in marriage at a young age as opposed to her sister who is left uneducated and has no other way of contributing to the family aside from producing more children.

The irony in Pakistan's case is that its own founder and first leader Muḥammad 'Alī Jinnāḥ spoke out against child marriage vehemently. In 1927 the Bill to prohibit child marriage was introduced in the Indian Legislative Assembly. There was strong opposition to this Bill by religious scholars and the *'ulamā'* (43). Jinnāḥ, however, supported the legislation by stating:

> I am not convinced that this Bill in any way militates against the rule of civil laws applicable to marriages amongst Mussulmans. . . . I cannot believe that there can be a divine sanction for such evil practices as are prevailing, and that we should not for a single minute, give out sanction to the continuance of these evil practices any longer. How can there be such a divine sanction to this cruel, horrible, disgraceful, inhuman practice that is prevailing in India? [If] my constituency is so backward as to disapprove of a measure like this then I say, 'You had better ask somebody else to represent you.' (43).

One might argue that Jinnāḥ's Western education was responsible for his zealous protest against child marriage. The reality which must be acknowledged, however, is that child marriage in the twentieth and twenty-first century in the South Asian context has less to do with the best-interests of the child and more to do with the impoverished circumstances so many parents are faced with.

The Commission of Inquiry for Women proposes the need to have strict enforcement of the law and harsher penalties for those violating the law pertaining to underage marriages (43-4). What is critical to understand, however, is that in all the

country cases presented so far, changes will occur, as Fazlur Rahman stated, "with general development and not merely through legislation, although legislation can hasten social change, provided it does not completely disregard social realities and live suspended in an ethereal and impatient idealism" (1980, 2:455).

Fatāwā from Modern Scholars

It is not insignificant that child marriage has received little attention from the *fuqahā'* today. This may be due to several reasons. Firstly, the practice has gradually diminished among most communities and more specifically among the educated and well off strata of societies thus making it appear to be a less urgent issue. Secondly, its controversial nature may be another reason why it is often not broached. This may be especially so because it tends to bring up the dilemma of modern interpretations of Islamic law versus the adherence to older rulings. Finally, the fact that so many of the modern scholars continue to maintain and uphold the interpretations and rulings of previous jurists of the Medieval period may have made it appear redundant to reiterate those opinions. This is perhaps particularly the case regarding a topic that is often times considered a marginal issue among Muslims today.

In the present time it is specially pertinent to know what some of the more well-known scholars have opined regarding the practice of child marriage today among all of its controversy. This is so due to the fact that Islamic scholars continue to exert a considerable amount of influence over the general populations of most Muslim countries. Indeed, it is often the case that Muslims will turn to either their local leaders or if possible to more exalted (and usually better qualified) sources of knowledge in order to determine whether something is religiously permissible or perhaps for a solution

to any dilemma they may encounter. In this way, the role of Islamic scholars remains significant in the daily lives of Muslims around the world.

For instance, Imam Muḥammad al-Sha'rāwī from Egypt was asked how a girl should demonstrate her preference or choice in marriage to her father (1983, 210). After responding to that question he additionally discussed the necessity to ask the girl's permission in marriage (210). However, he concludes his answer by mentioning the marriage of 'Ā'isha to the Prophet (211). He states that her father married her before she had attained puberty and that once she had "matured" the Prophet did not ask her whether she ratified the marriage or not (211). Thus, he clearly establishes the permissibility of marrying a minor daughter. There is no further discussion on the matter.

Similarly, Sheikh Muḥammad Ṣāliḥ al-Munajjid[25] also responded to a more recent question posed via the internet regarding the permissibility of child marriage and some denigrating allegations against the Prophet regarding pedophilia (Islam-QA 2000, 1). He simply stated the various well-known *aḥadīth* from Ṣaḥīḥ Bukhārī about the Prophet's marriage to 'Ā'isha as a small child and the scholars' opinions which agree that it is permissible to marry the minor child even before she is *bāligh* (4). This is under the assumption that there is no intercourse until she has reached puberty. He himself poses the rhetorical question, "Do you see anything wrong with a man living with his young wife in one house, bringing her up and teaching her, but delaying consummation until she is ready for it?" (4)

[25] Sheikh al-Munajjid is of Syrian origin and works in Saudi Arabia. He was the student of the late *muftī* Ibn Bāz and Sheikh Ibn 'Uthaymīn.

A slightly different response was received from Ayatullah Faḍl Allah through e-mail correspondence.[26] He defined a child, or *qāṣir* as one who is not *bāligh* and cannot depend on him or herself without the help of his or her parents and requires their care. He states that a boy is understood to become *bāligh* once he becomes sexually mature or otherwise when he achieves fifteen years of age. As for the girl, she becomes *bāligh* once she is approximately nine years of age, otherwise regardless of her physical maturity she is considered *bāligh* once she is fourteen years of age. This would mean that the parents are not permitted to marry her without her permission once she is fourteen. Interestingly enough, he does go on further to state the difference between an individual who is mature in so far as being responsible and yet may not necessarily be mature sexually, or physically. Along with this, the individual may lack *al-rushd,* mental maturity so that he or she is incapable of protecting themselves from harm nor be able to benefit themselves. Thus in this case such an individual would require a *walī.*

What is significantly different in Imam Faḍl Allah's *fatwā* from the previous two scholars is that his response also addresses the negative aspects of marrying a minor. He clearly states the marriage at an early age has its benefits and harms. He says that the negative effects may be due to the lack of readiness on the girl's part from a practical point of view. He asserts that this may be due to factors related to her upbringing in Muslim societies where sexual matters are not discussed and therefore she may be unaware of what marriage entails. He also points out the real possibility that the man may not understand how to treat a young wife. Imam Faḍl Allah does, however, express the general sentiment that early marriage prevents young people from committing

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[26] See Appendix A

fornication. His final advice is that one must take care in this situation to provide the various factors which will ensure the marriage's success otherwise it will most definitely have negative consequences. Thus although the Ayatollah admits the permissibility of minor marriages he expresses the grave concern that special care be taken in such cases in order to prevent any more social ills.

Finally, in a an answer to a question on the same topic, Sheikh Muḥammad al-Ḥānūtī, whose own training is from al-Azhar but is stationed in North America, responded by citing Sūrat al-Nisā',verse 6 from the Qur'ān dealing with the maturity of an individual.[27] He explains that although it is preferable to marry young in order to prevent one from succumbing to temptation, this does not necessarily mean the marriage of those who are so young as to lack maturity of intellect. Indeed, he goes on to state that puberty or a marriageable age are not sufficient qualifications for marriage but rather the ability to handle responsibilities and be mentally, psychologically and financially stable.

One should not eliminate the likelihood of Sheikh Ḥānūti's presence in North America as a possible reason for his rather different response to the question. There is no doubt that the type of audience one addresses has an affect on the speaker himself. None of the scholars, however, broached the matter of abuse of the child's rights. Although Imam Faḍl Allah did mention the potential negative effects a minor marriage may have if the female child is unprepared from a physical stand point, what exactly these "negative effects" constitute is left up to the assumption of the recipient of the answer. For instance, one of the ironies of early marriages is that although they are

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[27] See Appendix B

often performed for the sake of marriage itself, they are in fact "associated with a higher risk of divorce and in cases where the young brides are married to older men, young age at marriage also creates a greater risk of widowhood" (Heaton 1996, 41). Clearly these constitute "negative effects". Such statistical findings are rarely addressed by Muslim leaders.

The overall sanctioning and condoning of child marriage by scholars and the lack of or minimal attention drawn towards the negative aspects only lends further encouragement to those who feel that such a practice is the only real option in their lives. It is highly likely that if religious leaders took a more strict position regarding the modern problems associated with underage or early marriages, their stance would have a greater affect in changing the belief structure of those populations whose cultural beliefs have the force of divine sanction. There are significant dilemmas involved, however, in banning child marriage among Muslim communities today, especially considering the underdeveloped conditions of most Muslim countries. As stated previously, changes in judgements and rulings *must* be accompanied by changes in the social and economic conditions within a society in order for positive results to take place. Otherwise, the imposed legislation may only lead to greater injustices as can be seen by the many cases of individuals circumventing the law today in a sense of desperation.

Medical Consequences of Child Marriage

Modern Medicine shows that childbirth for females below the age of seventeen and above forty leads to greater maternal mortality as well as infant mortality (London

1992, 501). It must be made clear that although conditions commonly associated with poverty, e.g. malnutrition, poor physical health and other negative circumstances may contribute to difficult births and bad health for young mothers, consistent findings indicate that the age factor plays a significant role by itself. "Even under the best of modern conditions, women who give birth before the age of seventeen have a higher mortality rate than older women. The closer a woman is to menarche, the greater the risk to both mother and child, as well as to the mother's future childbearing capabilities, for the reproductive system has not completely matured when ovulation begins" (Demand 1994, 102).

Another problem seen more often among underprivileged women is that they develop fistulae which is often due to the pelvis not having fully formed. This can be caused by a complicated pregnancy or having intercourse at a very young age.[28] This leads the girl or woman to have permanent damage and often she is shunned by her family and community (4). Although such a condition is preventable it requires a good health service and communications systems (5). Unfortunately, these are often not available in impoverished areas of the developing world.

Knowledge of medical complications involved with early marriage cannot be considered "new" findings. Ancient and medieval medicine texts indicate that doctors were well aware of the physical harm posed to young girls by early marriages and pregnancies. The ancient Roman gynecologist, Soranus of Ephesus (98- 138 A.D) "advised that intercourse should not take place before the menarche" (Philipp & O'Dowd

[28] For more information regarding this affliction and current statistics, go to the Internet site, http://www.monde-diplomatique.fr/en/1997/07/african. Accessed 20 August, 2000.

1994, 50). In fact, not only doctors of medicine but other scholars in most societies had a clear understanding that intercourse should not take place before the menarche.

> Hesiod suggested marriage in the fifth year after puberty, or age nineteen, and Plato in the *Laws* mandated from sixteen to twenty years of age, and in the *Republic* he gave the age as twenty. Aristotle specifically warned against early childbearing for women as a cause of small and weak infants and difficult and dangerous labor for the mother, and the Spartans avoided it for just those reasons. (Demand 1994, 102)

Nevertheless, Greek culture in general, like so many others, disregarded such realities and continued to favour early childbearing (102). Rabbis too were aware that pregnancy in such young females was undesirable because the birth could result in the mother's death. "They could not, however, outrightly prohibit such marriages, which were common practice in the Orient . . . therefore [they] recommended the use of a contraceptive" (Preuss 1978, 381).

Soranus even discussed the premature arousal of sexual desire among young females. He agreed with the recommendation that females should remain virgins so long as they do not have any sexual urges. He said that "since virgins who have not been brought up wisely and lack education arouse in themselves premature desires, one must, therefore, not trust the appetites" (Temkin 1956, 31).

This poses an interesting question regarding modern problems among pre-teens and teenage girls in developed countries who seem to engage in sexual activity at increasingly early ages. Sexualizing children, i.e. the early initiation of children into sexual activity and the robbing of their innocence comes in more than one form. [29]

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[29] Although the subject at hand is specifically concerning child marriage, the real issue at stake is the sexualizing of children and early pregnancies for young females. Although developed nations reject child marriage *per se*, the children in those societies still engage in sexual activity (indeed even more so than in conservative Islamic societies) and teenage pregnancies outside of wedlock continue to rise among the youth. Thus, the issue remains essentially the same for those nations as well. For an interesting article on

Child marriage may be considered as one culprit of this crime but pre-mature exposure to sexual matters and unwarranted sex education, as exists in certain Western nations, is equally liable for the demoralization of young males and females. In the former case the child is practically forced into having sexual relations at an early age, in the latter instance the child is psychologically pressurized and coerced into voluntarily having sexual relations through pre-mature stimulation, arousal and various societal pressures. In both cases, the child is robbed of its "innocence" and "childhood".[30] The latter situation prevalent in developed countries clearly has the greater potential to lead to the ultimate corruption and degeneration of society. However, child marriages, as expressed before by El-Hamamsy, also contribute to the perpetuation of other social ills.

The Human Rights Element

Muslims, like many people living in the developing world today, often feel that their customs are scrutinized and then criticized by western countries unnecessarily in order to enhance their own (i.e. the West's) sense of superiority. For this reason, it is not uncommon for some of the *'ulamā'* to defend certain customs and practices which they consider "Islamic" by claiming that Western based international organizations such as the United Nations, (and its branches, e.g. UNICEF) criticize and attack Muslim customs as inhumane and uncivilized simply for the purpose of enhancing their own

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the problem of early sexuality and demoralization of youth in the United States, see Charles Morse, "Fallout from Sex Education: 1965-2000," *Enter Stage Right*, 19 June 2000 [Journal on-line]; available from http://www.enterstageright.com/0600sexed.htm; Internet; accessed 16 July 2000.

[30] It is acknowledged that these are relative terms. However, the "innocence" spoken of in this case is specifically regarding sexuality and "childhood" is understood to mean life until the age of 15.

superiority as a hegemonic and imperialistic culture. Indeed, one must admit that UNICEF's and other international organizations' lack of sufficient attention to the sexual problems of children in developed nations such as the United States and Canada, despite the fact that statistics show an increase in Sexually Transmitted Diseases and teenage pregnancies among the youth of all economic backgrounds, social classes and different races in these countries, does appear to support the *'ulamā*'s postulate.

However, it is precisely such responses by Muslims, towards what is perceived to be culturally imperialistic tendencies, which may be considered partly responsible for preventing Muslims from reexamining previous juristic interpretations and implementing adequate reform. It is only "natural and indeed inevitable that Muslim jurists would understand the Qur'an [*sic*] and Sunna as confirming rather than repudiating the realities of the day" (An-Na'im 1990, 3:47). Thus, imposing interpretations which are more fitted for a different historical and social context or restricting necessary reforms will naturally lead to greater injustices. The matter at stake is not whether child marriage was suitable within Medieval Muslim society, but rather, is it suitable within the world we live in today.

> Article 3 (1) of the United Nations Convention on the Rights of the Child states:
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> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

What exactly constitutes the "best interests" of the child, however, is still not fully defined. Diverse interpretations may be given to the principle in different settings (Alston 1994, 5). For example, in discussing the reconciliation of culture and human rights, Philip Alston states,

> it might be argued that, in some highly industrialized countries, the child's best interest are 'obviously' best served by policies that emphasize autonomy and individuality to the greatest possible extent. In more traditional societies, the links to family and the local community might be considered to be of paramount importance and the principle that 'the best interests of the child" shall prevail will therefore be interpreted as requiring the sublimation of the individual child's preferences to the interests of the family or even the extended family. (5)

In fact, he, as much as Abdullahi An-Na'im, acknowledges that "at a certain level, the debate over the nature of the relationship between human rights standards and different cultural perspectives and contexts can never be resolved" (16). Contrary to the relativist position, however, he also points out the limits of culture. Alston states, "Just as culture is not a factor which should be excluded from the human rights equation, so too must it not be accorded the status of a metanorm which trumps rights" (20). One then may argue that value judgements regarding child marriage should not be made in so far as social and economic circumstances set the standards. However, according to Alston and An-Na'im, where there are clear violations of the rights of children, i.e. physical and psychological abuse it needs to be acknowledged that limits need to be set. Alston mentions practices such as foot-binding in China, child slavery or bondage, and female infanticide (which incidentally is clearly opposed by the Qur'ān), as "examples of practices in relation to which culture-based arguments have already had to yield (in theory, if not always in practice) in favour of human rights norms"(20).

Along the same lines, distinctions must be drawn between standards based on Western views and those based on the actual cases of children's rights abuse in Muslim nations. An-Na'im mentions the proposals of Ismail Sabri Abdalla who rejects "the assumption that prevailing norms of 'under-developed' or poor societies are necessarily archaic and obstacles to development" (1994a,72). This, he feels, is only valid "if

development is completely identified with Westernization" (72), something which he opposes. An-Na'im expresses the need for Muslim countries to develop services which address the various "needs" of children and prevent their exploitation through indirect methods which take into consideration the difficult circumstances particular to those communities rather than simply directly opposing the problem through legislation (75).

An-Na'im makes it very clear, however, "that human rights advocates in the Muslim world must work within the framework of Islam to be effective" (1990, 3:15). He gives the example of the achievements of certain Islamist groups in several Islamic countries today in promoting "change through the transformation of *existing folk models* rather than seeking to challenge and replace them immediately" (1994a, 69). The liberal intellectuals within Islamic societies, on the other hand, appear to challenge the folk models of their societies and seek "to replace them with alien concepts and norms" (69). He points out that this perception may be due in part to the intellectuals' own lives often being removed from the daily existence of the general population or simply because the "abstract verbal articulation employed by those intellectuals" remains inaccessible to or distant from the realities faced by those in the lower levels of society. He also expresses the need for an adequate reform methodology.[31] "This new understanding would be informed by contemporary social, economic, and political circumstances in the same way that the 'old' understanding on which Shari'a [*sic*] jurists acted was informed by the then prevailing circumstances" (1990, 3:47).

[31] See Wael Hallaq's *A History of Islamic Legal Theories* for a discussion on modern initiatives by various scholars on Islamic legal reform in the Muslim world.

Furthermore, An-Na'im explains that the potential of Muslim societies to conform to certain universal children's rights exists due to the very fact that there is inherent in every culture a certain amount of flexibility. "Cultures also change and evolve over time in response to external influence as well as internal demands" (1994a, 67). He does state, however, that the initiatives should take place within the framework of each culture through "internal discourse" (An-Na'im 1994b, 174). This would allow for internal validation of the current international human rights system and would further lead to a parallel process of "cross-cultural dialogue" (174). In the latter scenario, "all participants in their respective internal discourses can draw on each other's experiences and achievements" (174).

Efforts to Resolve the Problem

Much like An-Na'im's notion of cross-cultural dialogue, various Muslim nations did gather together for a conference in order to address the various problems regarding women's and children's rights which Muslim communities are facing today. The International Conference on Islamic Laws and Women in the Modern World was held in 1996, inviting representatives from all the various Muslim nations to conjoin their efforts to develop solutions or at least achieve a greater understanding of some of the critical societal problems faced by Muslim communities.

The conference is significant in that it shows a real awareness within Muslim societies of the problems besetting their communities today. It also demonstrates the inherent difficulties that face activist groups and community leaders in grappling with these issues. In addition to this, however, this particular conference lends some hope,

through the coming together of Muslim nations, for the future resolutions of the complex social issues facing the Muslim world today.

One of the issues addressed by the conference was the matter of early marriage in Muslim countries today. Certain representatives illustrated through their own nations' experiences the rationale behind their governments' positions on child marriage. Others discussed the need for further reform and social work and a better understanding of the negative aspects inherent in adopting one-sided views or ineffective or partially effective strategies to deal with the problem.

The Pakistani representative, Khalid Ishaque restated the modern argument against the belief in the Prophet's marriage to a very young 'Ā'isha. He asserted that since this finding was gaining more acceptability amongst the *'ulamā'* that the time was ripe for making changes in the law (1996, 61). He also admitted that the "arm of the law does not reach the villages as effectively as it reaches the cities" (61) pointing out that the social structure of the village makes it difficult to protect children against the advances of the more wealthy landholders in the locality (61). Parents feel the need to arrange marriages early to protect their daughters' chastity.

The representative for Egypt, Nagla Nassar explained that matter was based on "how we define childhood" (62). Because of the fact that Islam requires one to perform one's religious obligations after reaching puberty, puberty becomes associated with adulthood. As such then, marriage is understood as a natural step in the process of coming of age. Thus not only is there "the entrenched belief that puberty is the age required by God to qualify for marriage" (241) but also that "adulthood starts with

puberty and child marriage is therefore defined rather differently from the legal definition" (241).

Rashida Patel, a lawyer from Bangladesh, explained how acute the situation was in her country. She saw many nine, ten and eleven year olds whose parents had married or betrothed them (66). For example, in one case a woman came with her thirteen year old daughter. She had married her daughter to a man on the condition that he could take her when she was fifteen (66). Now that her daughter was thirteen the man was harassing them everyday to let him take her to his home (66). Patel stated that she asked how much money the man had paid and the family returned it to obtain a divorce for their daughter (66). She clearly stated that when you allow these marriages the parents take the money, intended for the *mahr* and marry the girls. She questioned the acceptability of this stating "A twelve or thirteen year old boy or girl is major because he or she has attained puberty. But is he or she ready for marriage mentally, socially and economically?" (66). She also questioned what the marriage was about, denying that it was simply a matter of a physical relationship if one wanted a "meaningful" marriage (67).

She also addressed the concerns voiced by Ishaque and Nassar regarding the problem of young girls who have nothing else to occupy them int he villages and the fear on the parents' part that they might go astray. She stated that one should not allow marriage "due to the fear that [the girl] will become wayward" (67) but rather it is the duty of those in responsible positions to find occupations for these youth.

The representative of Tunisia, Rafaa Ben Achour explained Tunisia's law regarding child marriage. Tunisia requires the consent of both parties in order to have a

valid marriage. Since only competent persons are capable of expressing their consent, any male or female below the minimum age of twenty and seventeen respectively would not be considered competent and neither would he or she be permitted to have a representative, e.g. a *wali* (68). Only highly exceptional cases would be reconsidered (68). This was considered to be in accordance with Islamic principles. Along the same lines, Patel also quoted Justice Aftab Hussain in stating that "what is not forbidden in the Quran and *Sunnah* is allowed" (79).

Several important points were raised near the end of the discussion. One of these was the understanding that moral issues, such as child marriage, cannot be solved through simply changing laws but rather through other social measures such as education and providing jobs. It was pointed out that marriage age is one of those issues where legal rules are greatly undermined because of prevailing religious, socio-cultural, and economic norms (243). Thus, "a marriage age which reflects internationally recognized standards protecting minors and prohibiting child marriage is practically set aside to the benefit of more influential social needs" (243). It was recognized that child marriage must be dealt with at the local and religious levels as opposed to the purely legislative or externally imposed through NGO's in order to see any real progress among Muslim communities in preventing the existing abuse of children's rights.

Conclusion

There is no doubt that the practice of child marriage, although greatly on the decline nowadays, is still prevalent in many Muslim countries and communities and was even more so earlier in this century. In order to understand such a custom it is important to examine the Islamic legal position regarding child marriage as well as its origins. This critical analysis of child marriage is an attempt to create greater awareness of the modern situation which confronts many Muslim countries and the various perceptions regarding its permissibility.

Child marriage is a practice that dates back to ancient times. It is a custom that has existed in almost every culture in every continent throughout history. Indeed, it is only recently, i.e. approximately the eighteenth century, that child marriage practices began to diminish in many European societies. Like Islam, Christianity and Judaism did not unequivocally forbid child marriages. Thus, one finds it was a frequent practice among most Medieval societies. Most cultures and religions, however, did acknowledge the associated disadvantages posed by child marriage and some even mandated minimum age requirements.

The majority of Islamic scholars in the early and late Medieval period felt that a child might be married by his or her guardian provided that the marriage was consummated after the child reached puberty. They based their decisions on their interpretation of the Qur'ān and on the Sunna. In the first case they often cited Sūrat al-Ṭalāq, verse 4 which concerns the *'iddat*, or waiting period for divorced or widowed women. The verse mentions "those who no longer have their menstrual courses, and those who have not yet gotten them". Most scholars seemed to accept that the latter

category was specifically in reference to pre-pubescent female children. That the Qur'ān may have been referring to those females who have matured physically and mentally but have not yet attained menarche was given little consideration as an alternative interpretation. Majority was considered, however, to start at the age of fifteen for males and females alike in absence of any physical signs.

It is the *Sunna*, however, which the majority of the scholars used as their main justification in supporting the marriage of minors. They based their opinions on the tradition of the Prophet having married a minor 'Ā'isha which in turn is based on her reported narration found among the *ḥadīth* literature that she was a child of approximately six years when her marriage was contracted and approximately nine years when it was assumedly consummated. Thus, the scholars indicated that there was no room for doubt as to the permissibility of this custom since the Prophet had himself contracted such a marriage.

There were few scholars who disagreed with the majority. Among them were two contemporaries of Abū Ḥanīfa, Ibn Shubruma and Abū Bakr al-'Āṣim. They argued that the marriage of minors was not permissible based on the Qur'ān's Surat al-Nisā', verse 6. This particular verse describes the age at which an orphan should be allowed to manage his or her own property. It does not specify a numerical age but rather describes it as "the age of marriage" where sound judgement, or *rushd* is expected. Thus, the few scholars expressing their dissenting opinion claimed the Qur'ān as having clearly given a guideline for when marriage was appropriate and therefore contracting it any earlier was neither acceptable nor suitable. It was argued that an individual was ready for marriage when he or she had reached mental maturity, not often attained by children. In so far as

regards the Sunna, they considered it an exceptional case where the Prophet, just as in the case of his marriage to more than the maximum allowance of four wives, was granted special permission to marry a minor.

The opinions of Ibn Shubruma and other scholars who disagreed from the majority did not prevail, however. This is understandably so considering the particular historical context in which they lived where child marriage, although not the rule where marriage was concerned, was relatively common enough not to be considered a complete exception. The benefits were considered significant enough to outweigh the harms. Thus, although the scholars often warned against guardians and parents abusing the rights of their children, the perceived advantages for the children and the families involved were sufficient inducement to officially justify and validate the practice.

Like most social institutions, child marriage is undoubtedly a product of human circumstances. Where a custom serves the peoples' interests it is rarely abandoned. Historically, the marriage of pre-pubescent or adolescent boys and girls was based on several intelligible factors. Firstly, human life span has always played an important role in determining the chronology of social events which take place in an individual's life. It is understandable that if one's life expectancy is age thirty-five or forty, and if humans often tend to spend the larger part of their lives producing and rearing offspring then marriage at an early age would appear only normal. Secondly, most cultures in the world in the past and even in the present consider their daughters' virginity and chastity to reflect their family or tribal honour. The apprehension that a girl's virginity might be lost either through her own wayward behaviour or even more likely, through rape, was sufficient reason for many families to marry their children, and because of this fact,

more particularly their daughters, at very young ages. Furthermore, where a female's primary role was to produce and rear children, many parents felt there was no need to delay their daughter's marriage especially when there was a risk of losing an alliance with an eligible bachelor.

Another concern for many families was financial. For instance, fathers who were required to travel to great distances were aware of the risks involved and the real possibility that they would not return or some harm may befall them thereby leaving their wives widows and their children fatherless with no income to depend on. In this way, many perceived that the marriage of their young children, even if it were contractual only and not yet consummated, would permit the parents to hand over their child to a "caretaker" of sorts, whether it was the child's spouse or in-laws, thereby relieving some of the consternation felt regarding the financial support one's children required.

Other seemingly less benevolent reasons why parents preferred to marry their children at very young ages include strengthening ties between families or creating business and political alliances. Thus it was a custom often found among the more elite classes as well as the lower classes. In some cases, among Muslims, it was even noted that a father would often benefit by keeping the daughter's *mahr*, or dowry after her marriage, thereby not only relieving himself of a "burden" but also simultaneously improving his and his family's own financial situation. Historically then, unlike the modern era, the custom of child marriage was neither limited to certain cultures nor to particular economic classes.

Although child marriage is much less frequent today than it once was, it has become a matter of considerable contention wherever it continues to be practiced. Its rarity, in fact, makes it all the more controversial as it is no longer generally considered acceptable. Today, child marriage is still practiced by people in developing countries and impoverished backgrounds. It is distinctly limited to those groups of people who find little alternative for enhancing the future prospects of their offspring. Educated and financially stable families no longer see a need to marry off their offspring at such young ages. For those who can afford proper education for their children, it is clear what is the priority. Among the middle and upper classes female children are increasingly viewed as potential financial contributors to their families through the attainment of jobs and careers and less as burdens. Additionally, if the families are financially well-off they have little concern for the "burden" of an unwed or jobless daughter and the daughter may marry at her leisure affected only by societal pressures regarding spinisterhood.

Such changes in social and economic conditions have played a significant role in mitigating the number of child marriages which take place. One cannot ignore, however, the various legal reforms that occurred during the nineteenth and early twentieth centuries which attempted to amend the personal status law in place in various Muslim countries. Minimum age requirements were effected to prevent minor marriages. Many of the legislative reforms were undoubtedly western influenced. The colonizers imposed their value-judgement on the societies and peoples they had colonized. The leaders within Muslim communities and of Muslim nations did, in fact, often adopt the outlook of the western colonialists.

On the other hand, it may well be argued that Muslim societies like most others were indeed undergoing a transformation. No longer were people living in the "religious age" where mores and values were undisputed and upheld. The post-colonization period saw grave alterations in economic and social conditions. Increasing poverty and illiteracy fostered only greater injustices. As is often the case, the weakest members of society are the ones whose rights are most abused. It did not escape the attention of many Muslim leaders and various activist groups that the negative effects of child marriages only seemed to contribute to the existing social ills that plagued their society. Times had changed and the benefits and advantages of child marriage no longer outweighed its negative aspects.

Muslim modernists had also attempted religious reform by calling for a return to the Qur'ān and Sunna, i.e. a reinterpretation of the texts and *ijtihād* in order to properly address the problems they faced in the modern period. They desired that Muslims move away from blindly following previous interpretations of medieval scholars and begin to realize the potential for adaptability and fluidity within the Islamic legal tradition. This movement, however, appeared only to backfire. The call for a return to the Qur'ān and Sunna ironically led to even greater rigidity as many students and scholars felt that this meant a return to the Islam of the 7th century A.D. This entailed an acceptance of the *ḥadīth* literature in an almost entirely literal sense. In light of the universal changes in women and children's status in the modern period, involving many new found rights, such a situation could only appear as regressive. Islamic law began to be viewed as at odds with secular law; the former misrepresented as rigid and regressive and the latter as flexible and progressive.

Although governmental legislation has attempted to address these issues and modify personal status law, the effects are practically undetected by the masses in nations where illiteracy or inadequate education is a norm. Furthermore, governmental legislation seems to play a minor role in affecting the lifestyle and customs of the people when proper implementation and punitive measures are lacking. This is illustrated in the case of Pakistan where there is admittedly a need for greater penalties involving the abuse of children's rights, such as in the case of child marriages. On the other hand the case study presented in this thesis involving two Egyptian villages and the gradual reduction in child or underage marriages is a clear indication that government initiatives can help provided that they include practical measures addressing the needs of the people, such as education and economic stability.

It is important not to underestimate the role religious authority figures play in affecting the lifestyles and practices of Muslim communities around the world. The majority of Muslims in the developing world, especially among the lower uneducated classes are still easily swayed by those who, for them, stand as local religious figures of authority. Unfortunately, the latter are rarely even qualified to be called teachers of any kind, let alone scholars. The Islam propagated at these levels is purely based on cultural norms and social and economic expedients. Among the more elite and qualified scholars, however, there is a sincere regard for what is acceptable under the *sharī'a* . However, it is interesting to note that many contemporary Islamic scholars, although regularly performing *ijtihād* for a plethora of current issues and problems surfacing daily which beset the Muslim world, remain hesitant or unwilling to reexamine matters regarding

women's and children's rights, as if to suggest that this is an area where *ijtihād* cannot or should not be conducted.

Various groups and individuals advocating the rights of women and children, however, have themselves begun to reevaluate the existing justifications for child marriage. They understand the relevance of the formulated opinions of earlier Islamic scholars because Muslim societies continue to base themselves on it. They argue, however, that the abuse and suffering of children witnessed in the modern era no longer permits the defense of such a social institution. Their concern is with the prevention of abuses and other social ills within society and especially among those who cannot help themselves. They advance the opinions of past Islamic scholars, such as Ibn Shubruma, in order to gain credibility among Muslims who often argue that those who criticize and denounce child marriage as an abuse-ridden institution have based their ideas and perceptions on western precepts. In order to disabuse Muslims of the belief that child marriage is a religiously justifiable custom, many of these scholars have reexamined the *ḥadīth* literature concerning the matter of the Prophet's own marriage to 'Ā'isha. They have brought forth evidence which at the very least creates doubts as to the veracity of the reported marriage of the Prophet to a minor. Contradictions and inconsistency among the traditions have been illustrated, thereby undermining the principal justification (i.e. the reported narration of 'Ā'isha) used by most Islamic scholars and Muslims themselves to permit child marriage. It appears, however, that such arguments have not yet prevailed or become public knowledge within most Muslim societies.

Child marriage is clearly a multi-faceted issue in the Muslim world. It has been justified in the past and present by Islamic scholars. It has also been rejected as

impermissible by others; more so in the present than in the past. Today, in spite of modern legislation which attempts to reduce underage marriages, through the registration of marriages and minimum age requirements, child marriage is still practiced in many rural areas. It is a practice limited to the poorest levels of society and for this reason it often entails a great many abuses of the rights of children. Poor physical health, malnourishment, poor health care facilities etc., all contribute to the suffering of those female children who are married off at vulnerable and small ages. The facts are difficult to ignore. Early age pregnancies and the pre-mature consummation of marriages cause a great deal of psychological and physical damage to the children involved.

Muslims nations, and even more importantly Islamic activist groups, often feel they must persist in defending this custom. Western based organizations, such as UNICEF, are viewed as attacking the value system of Muslim societies. The lack of sufficient attention given to the rampant visible degeneration of Western societies where children have gradually been demoralized and pre-maturely coerced into becoming sexual beings, resulting in the spread of Sexually Transmitted Diseases among some of the youngest members of their society, only enhances the outrage and defensiveness on the part of most Muslims. In such a state it becomes difficult for these groups to hear the suffering of those abused children within their own Muslim communities who have no voice.

Currently, studies show that child marriage mostly serves to benefit the parents or guardians contracting the marriage and rarely the child. Although it may well be argued that innocence is a socially constructed term, one must consider the child who

leads a difficult but sheltered existence as relatively innocent regarding the physical and emotional responsibilities and hardships entailed in married life. There is no doubt that cases do exist where poor parents, given little alternative, consider marriage the most propitious option for their daughters' well-being. Unfortunately, these cases are rare since many families are more likely motivated by their financial circumstances then any altruistic feelings for their daughters. In a day and age where material gain governs most decisions at all levels of society and morality has become hostage to avarice, one should not underestimate the persistent belief among the less fortunate that a daughter remains a burden to her family unless she is married or generates an income.

Additionally, those who have received some suitable level of education among the lower classes are more capable of understanding the necessary problems that often accompany pre-mature marriages. As was pointed out by Rashida Patel in the Conference on Islamic Laws and Women in the Modern Period , parents who contract early age marriages for their children often end up regretting it later on. Child marriage in the modern context cannot be justified simply in order to defend the values and practices of those who practiced it in another historical context.

It is clear through recent experience that child marriage cannot be eradicated through legislative channels alone. On the other hand, because the practice of child marriage persists due to the social and economic structures that are in place today, changes need to be made at a grass roots level. There is little possibility of transforming the economic conditions of the lower classes in many Muslim countries immediately, therefore education is the second best alternative. Studies have shown that increased education among both sexes has led to a noticeable reduction in the contracting of child

marriages. Furthermore, Muslim leaders and Islamic scholars need to be convinced to take the initiative in informing the masses about the ill effects of child marriage and educating Muslims about modern interpretations regarding the justification of child marriage through Islamic law.

It is not imperative that Muslim nations completely abandon their own value systems and adopt those proposed by non-governmental organizations or human rights advocacy groups. For instance, according to the Convention on the Rights of the Child, one is considered a minor if one is below the age of eighteen. Because Islamic law considers those who have attained puberty to be held liable for their actions, many Muslim countries have put their own minimum age requirements in place concerning criminal and personal status laws. Many Muslims consider fifteen or sixteen as appropriate ages indicating majority. This need not be altered to accommodate related western concepts just as western nations have not attempted to accommodate Muslim values or morals. Rather Muslim nations should remain focused on what promotes the best interests of their own societies, taking into consideration the views of women and children as well, according to their own value system. Abdullahi An-Na'im purports that in order to be effective Muslim human rights advocates must work within the framework of Islam. This does not mean, however, that they must necessarily be restricted to historical interpretations but rather they should promote new interpretations which hold greater relevance in the contemporary world.

Appendix A

بسم الله الرحمن الرحيم

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المؤمن الفاضل / انجم علي / السلام عليكم ورحمة الله وبركاته

س ١ :أ – أود أن أعرف رأيكم في ما إذا كان يحق للوالد أو الولي تزويج ابنه/ابنته من دون إذن الأخير؟ كذلك أود أن أعرف ماذا يعني الطفل (القاصر)؟ وهل الطفل أو الطفلة في عمر التسع أو العشر سنوات يعتبر قاصراً إن لم يكونوا بالغين؟ وماذا عن الطفلة ذات الـ ١٤ ربيعاً التي لم تبلغ بعد؟ ب – سمعت عن مشاكل كثيرة للفتيات اللاتي يتزوجن باكراً ، لذلك يقول الناس بعدم استحسان الزواج المبكر ، وهو أمر لا يحدث كثيراً في أيامنا هذه ، إلا أن هناك قلة لا تزال تمارس ذلك ، فما هو رأيكم؟

ج ١ :أ – يجوز للولي (الأب أو الجد للأب) تزويج الولد أو البنت إذا كانا قاصرين ، ولكن لا بد في ذلك من تحقق الزواج فعلاً أعني (العقد ومضمونه) ، ويكون ذلك صحيحاً من الناحية الشرعية ولكن إذا بلغ الشاب أو الفتاة كانا بالخيار بين إمضاء الزواج أو فسخه وأما البالغ فلا ولاية للأب أو الجد للأب في هذا المجال عليه ، سواء كان شاباً أم فتاة ولكن يشترط أن يكونا راشدين.. والمراد بالقاصر هو الطفل الذي لم يبلغ والذي لا يستطيع الإستقلال بأمور نفسه بعيداً عن الأهل وهو يحتاج إلى رعايتهما ، ويعرف بلوغ الشاب بالإحتلام أو بلوغه خمسة عشر عاماً ، والفتاة على الأحوط ببلوغها ٩ سنوات ، والفتاة البالغة من العمر ١٤ عاماً هي فتاة بالغة من الناحية الشرعية ولكن ليس من الضروري دائماً بحسب الشائع أن يكون ذلك ملازماً للبلوغ الجنسي الكامل ، ومن هنا فقد يكون الشخص – ذكراً أو أنثى – بالغاً من هذه الناحية التكليفية من دون أن يكون بالغاً من الناحية الجنسية ، وقد يصاحب ذلك أيضاً عدم الرشد ، وهو الذي لا يمكن أن يدفع عن نفسه ضرّاً ولا يجلب لها نفعاً ، وهو الذي يقال له عادة بأن الولي هو الذي يتولى أمره. ب – الزواج في سن مبكرة ، له إيجابيات وله سلبيات وقد تكون السلبيات ناتجة عن عدم أهلية الفتاة الصغيرة للزواج من الناحية الواقعية وقد يعود ذلك إلى عوامل تربوية ولا سيّما في مجتمعاتنا التي أهملت الجانب الثقافي الجنسي عند الطرفين وقد يكون ذلك

معيباً ، وقد يكون ذلك أعني السلبيات ناتجاً عن عدم خبرة الرجل في التعاطي مع الزوجة الصغيرة ، ولعل الإيجابية للزواج المبكر هي أنه يعصم الطرفين عن الوقوع في الحرام ، ولذلك فإن هذا الأمر لا بد وأن تراعى فيه الأمور التي تؤكد نجاحه وخلوه من السلبيات حتى يتحقق النجاح المذكور ، وإلا فإن النتائج تكون سلبية.

والسلام عليكم ورحمة الله وبركاته

مكتب الاستفتاءات
لسماحة آية الله العظمى
السيد محمد حسين فضل الله

Appendix B

Fatwa Question Details

Name Ahlaam - Pakistan

Title **Early Marriage**

Question Is early marriage allowed in Islam?

Date 11/Apr/2000

Mufti Muhammad Al-Hanuti

Answer

Early marriages are originally recommended for Muslims, it is healthy and helps for chastity. Delay of marriages is very helpful for the Shaytan.
Early marriage doesn't mean that the spouses could be not mature and responsible, the Qur'an hints in Surah 4 saying:"If you find them of sound judgement." That means puberty or marriageable age is not enough to be qualified for marriage. If a son is capable to run a household life and he is able to maitain mentally, psychologically and financially and everything of his wife, then early marriage is the only way to keep our children away from Haram.

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